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Recognition of inadmissibility of evidence obtained in the course of monitoring the commission of an offence in criminal proceeding in the field of official activities

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Abstract

The purpose of the study is to consider the problems of ensuring the admissibility of evidence obtained in the course of monitoring the commission of an offence in criminal proceedings concerning crimes in the sphere of official activities. Attention is focused on the fact that the institute of secret investigative (search) actions has a double operational-search and criminal procedural content, since operational-search measures were the basis of secret (investigative) search measures by transforming the procedure for their implementation, which differs in the subjects and directions of further use of the information obtained. It is noted that the complex and underinvestigated procedural essence of control over the commission of crimes causes problems in ensuring the admissibility of evidence obtained during its conduct. It was found out that the Criminal Procedure Code of Ukraine defines a special criterion for the inadmissibility of evidence obtained during the control over the commission of a crime as a result of provoking a person to commit this crime by law enforcement agencies. Based on the analysis of materials of criminal proceedings, it is established that provocation of a crime is often a circumstance that excludes the admissibility of evidence, and becomes the basis for passing acquittals. It is proved that, according to the practice of the European Court of Human Rights, provocation of a crime exists when law enforcement officers do not limit themselves to passively establishing the circumstances of a person's possible commission of a crime in order to collect relevant evidence and, if there are grounds for it, bring a person to justice, but incite that person to commit a crime, undermining the principle of fairness of proceedings. The study argues for the need to apply criteria for distinguishing permissible interference and provocation in the course of monitoring the commission of a crime, which are formed according to the practice of the European Court of Human Rights. Typical violations of the requirements of the Criminal Procedure Law during control over the commission of a crime are considered, which entails, in particular, an insufficient level of regulation by departmental bylaws of the procedure for conducting and recording secret investigative (search) actions. Such violations based on the results of the analysis of investigative and judicial practice include: 1) provocation of a crime – cases when officials involved, who are either employees of security agencies, or persons acting on their behalf, do not limit their actions only to the investigation of criminal proceedings in essence in an implicit way, but influence the subject to commit a crime that would otherwise not have been committed, in order to make it possible to detect a crime, that is, to obtain evidence and open criminal proceedings (in accordance with the practice of the European Court of Human Rights); 2) lack of proper procedural documents in the materials of criminal proceedings certifying the right of operational employees to exercise control over the commission of a crime; 3) violations in the choice of methods and procedures for recording the progress and information obtained during the control over the commission of a crime. It is summed up that the imperfection of normative regulation of control over the commission of a crime in the provisions of the Criminal Procedure Code of Ukraine and subordinate acts leads to procedural and tactical errors on the part of the prosecution in the process of conducting them. In turn, this leads to the inadmissibility of using the information obtained in court proceedings when proving it. As a result, the efforts and resources of the law enforcement system are nullified, and the constitutional rights of a person not to be subjected to criminal punishment are violated until the guilt is legally proven.

Keywords:

control over the commission of a crime; special investigative experiment; provocation of a crime; admissibility of evidence; proof

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Introduction

The current Criminal Procedure Code of Ukraine has provided for a new institution for the doctrine of domestic criminal procedure of secret investigative (search) actions (SISAs), which has a double operational-search and criminal procedural essence, since operational-search measures that are outside the current criminal procedural form, was the basis of the SISAs by transforming the procedure for their conduct, which differs in the subjects and directions of further use of the information obtained.

As a result of this approach, SISAs can be conducted both for the purpose of investigating crimes, and for the purpose of searching for and recording information about preparing crimes or persons preparing to commit a crime. Among such procedural actions, control over the commission of a crime should also be singled out.

The purpose of the study is to investigate the common law regulation and identify procedural errors typical of investigative and judicial practice in conducting control over the commission of a crime as SISAs in criminal proceedings in Ukraine.

The theoretical and legal foundations and certain problems of SISAs, including control over the commission of a crime, were the focus of research of a number of scientists, including: Yu. P. Alenin, [1] O.A. Bilichak, [2] Motsnyi [3], O.B. Sibal [4], M.E. Shumylov [5], et al.

Presentation of Main Material

The scientific community is reserved about assessing the quality of procedural regulation of SISAs. The current level of regulation of the relevant provisions in the Criminal Procedure Code of Ukraine does not meet the needs of the investigative practice. At the same time, Yu.M. Chornous suggests that the legal regulation of control over the commission of a crime in criminal proceedings will not fully eliminate the problems of its practical implementation. For the successful implementation of criminal procedure by pre-trial investigation bodies and operative units, it is necessary to develop scientifically based methodological guidelines, since crime control actions are introduced in criminal proceedings, the above task should be assigned to forensics, one of the directions of which is to provide investigative (search) actions [6].

The complex and insufficiently developed procedural nature of control over the commission of crimes cause a number of problems related to ensuring the admissibility of evidence obtained during its conduct. According to Article 86 of the Criminal Procedure Code of Ukraine, evidence is considered admissible if it is obtained in accordance with the procedure established by the Criminal Procedure Code of Ukraine. At the same time, Article 87 of the Criminal Procedure Code of Ukraine stipulates that "inadmissible is evidence obtained as a result of a significant violation of human

rights and freedoms guaranteed by the Constitution and laws of Ukraine, international treaties, the consent to be bound by which was provided by the Verkhovna Rada of Ukraine, as well as any other evidence obtained through information obtained as a result of a significant violation of human rights and freedoms". In addition, according to Part 3 of Article 271 of the Criminal Procedure Code of Ukraine, "during the preparation and implementation of measures to control the commission of a crime, it is prohibited to provoke (incite) a person to commit this crime with the aim of further exposing it, helping a person to commit a crime that he or she would not have committed if the investigator had not contributed to this, or for the same purpose to influence his behaviour by violence, threats, blackmail. Items and documents obtained in such a way cannot be used in criminal proceedings" [7]. That is, this provision also defines a special criterion for the inadmissibility of evidence obtained as a result of monitoring the commission of a crime.

The analysis of investigative and judicial practice gives grounds to identify typical and common violations in the course of monitoring the commission of a crime, which at the stage of judicial proceedings exclude the possibility of using the information obtained in the process of conducting them when making a reasoned and reasoned court decision. Among them, a prominent place is occupied by the provocation of a crime by law enforcement agencies, which is referred to in Article 271 of the Criminal Procedure Code of Ukraine. Law enforcement agencies of Ukraine, as noted by M.A. Pogoretskyi, systemically use provocations to commit crimes, primarily related to corruption and drug trafficking. Basically, this happens within the framework of control over the commission of a crime (Article 271 of the Criminal Procedure Code of Ukraine). The researcher expresses concern that 56% of the surveyed prosecutors, 65% of investigators, and 72% of operational employees consider it appropriate to expand the possibilities of using provocation in law enforcement activities [8]. Analysis of the studied materials of criminal proceedings shows that provocation of a crime is often a circumstance that excludes the admissibility of evidence, as a result – this becomes the basis for passing acquittals.

Provocation in the context of our research and within the framework of the practice of the ECHR should be considered cases when officials involved, who are either employees of security agencies or persons acting on their behalf, do not limit their actions only to the investigation of criminal proceedings in an implicit way, but influence the subject in order to provoke him or her to commit a crime that would otherwise not have been committed, in order to make it possible to detect a crime, that is, to obtain evidence and open criminal proceedings. The ECHR notes that secret operations should be carried out passively in the absence of pressure on the applicant to commit a crime. Assessing the actions

of law enforcement officers in committing a crime, the ECHR examines the moment when they began to carry out the relevant measure in order to determine whether they “joined” a crime that the person has already begun to commit without any participation on their part, or by their deliberate actions provoked the person to commit such a crime [9].

Provocation basically occurs when law enforcement officials go beyond passive identification of the circumstances in which a person may have committed an offence with a view to gathering relevant evidence and, if warranted, prosecuting that person, to inciting that person to commit an offence which undermines the principle of a fair trial. The ECHR emphasises that a situation where a person is pushed by law enforcement agents, who are supposed to prevent him or her from committing a crime, and then held criminally responsible for doing so, is not consistent with a fair trial.

In order to correctly distinguish between permissible interference and provocation in each case, the ECHR offers a verification algorithm that provides an answer to two questions: a) whether representatives of the law enforcement agency have limited themselves “predominantly passive conduct”, whether such boundaries were breached; b) the question of whether the applicant had had a real opportunity to report provocation by law enforcement authorities during the domestic proceedings and how the domestic courts had reacted to that statement (paragraphs 67-79 of the ECHR judgment in “Bannikov v. Russia”) [9].

Consequently, in its decisions, the ECHR has developed criteria to distinguish provoking the commission of a crime contrary to Article 6 of the Convention from permitted behaviour during legitimate secret methods in criminal investigations. In particular, if the allegation of incitement is found to be implicitly without merit, the court needs to ascertain whether the investigation was “essentially passive”, whether the crime would have been committed without the intervention of the authorities, and whether there was any inducement from the authorities of the person before the crime was committed, such as showing initiative in contacting the person, repeated offers despite the person's initial refusal, persistent reminders, a higher than average price; the significance of the reasons for the operational procurement, whether law enforcement had objective evidence that the person was involved in criminal activity and the likelihood of him or her committing an offence was substantial. The burden of proving that there was no incitement is placed on the prosecution [10].

For example, in the materials of Case No. 626/407/17 of the Krasnohrad district court, it was established that “the witness PERSON_10 and PERSON_6 themselves were the initiators of telephone conversations, meetings, transfer of funds to the accused PERSON_4, which indicates that it was the law enforcement agencies who clearly persuaded the accused to illegal actions through PERSON_10 and PERSON_6, although

there was no objective evidence for the assumption that PERSON_4 or PERSON_3 were engaged in illegal activities. It is also established that the only source of information about the corruption activities of PERSON_4 and PERSON_3 was the statements of PERSON_10 and PERSON_6. There is no evidence in the case file that would confirm that the accused had previously committed acts related to corruption.

In connection with the above, having analysed the testimony of PERSON_6 and PERSON_10 provided at the court session, as well as their statements to law enforcement agencies, the court considers that they were provocative in nature, which was planned by law enforcement agencies. In this case, the actions of witnesses PERSON_10 and PERSON_6 were aimed at inciting a crime, and therefore the court considers that such criminal proceedings would not have been opened if not for the actions of the witnesses. That is, there was a provocation that violated paragraph 1 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. This consisted in the fact that PERSON_6 was not going to write a statement to law enforcement agencies at all, since no one demanded money from them, but wrote it only after communicating with the SSU officers who came to their home, there were also certain disagreements about the date of its writing, the corresponding registration and the terms of entering it in the unified state register of legal entities.

Regarding the application of PERSON_10 on the basis of their testimony, it can be argued that they also wrote it a few days after the official appeal to the SSU, at first such a statement was not accepted from them, instead they were given two voice recorders to record the conversation, and only a few days after listening to it, they were called to write a written statement, which also did not pass any official registration procedure [11].

Another common violation is related to the lack of proper procedural documents certifying the right of employees of operational units to exercise control over the commission of a crime in the form provided for by the Criminal Procedure Code of Ukraine. The dual nature of the SISAs already mentioned above in some cases also leads to incorrect interpretation and, as a result, exceeding by operational units of their powers provided for specifically by the Criminal Procedure Code of Ukraine, and not by the Law of Ukraine “On Operational Search Activities”, either on their own initiative or on behalf of an investigator or prosecutor. According to Article 41 of the Criminal Procedure Code of Ukraine, the SISAs in criminal proceedings are conducted by operational employees only on the written instructions of the investigator, prosecutor, and the division of detectives, operational and technical division and internal control unit of the NABU – on the written instructions of the detective or prosecutor of the Specialised Anti-Corruption Prosecutor's Office [12]. In addition, judicial practice contains examples of going beyond the limits of authority in matters related to the SISAs, the investigator, and the prosecutor.

According to the verdict of the Sloviansk city district court of November 1, 2019, in case No. 243/6086/18, "according to the court, the prosecutor violated the mandatory order of Article 275 of the Criminal Procedure Code of Ukraine, which defines the powers exclusively of an investigator in criminal proceedings to involve persons in confidential cooperation. The court notes that the involvement of PERSON_3 in confidential cooperation, which was carried out by the prosecutor's decision of January 16, 2018, occurred through the prosecutor's exercise of powers not provided for by the Criminal Procedure Code of Ukraine.

According to the legal position set out in the decision of the Grand Chamber of the Supreme Court in case No 640/6847/15-k of 16 October 2019, if the prosecution has taken all necessary and dependent measures aimed at declassifying the procedural documents which were the basis for the SISAs, but they were not declassified before the case was brought to court for reasons beyond the control of the will or the procedural conduct of the prosecutor, in such case, there is no violation of Article 290 of the Ukrainian CCP by the prosecution. The court should evaluate the evidence obtained as a result of the SISAs in conjunction with declassified procedural documents that became the basis for their conduct, and should not automatically recognise such evidence as inadmissible" [13].

In addition, a significant number of acquittals issued based on the results of judicial review of materials of criminal proceedings in which control over the commission of a crime was carried out are associated with violations of the methods and procedure for recording the course and the results obtained during control.

For example, in the acquittal of the Bolhrad district court of November 27, 2019, in case No. 497/1260/18, "... during these procedural actions: SISAs-audio-video monitoring of a person both on March 26, 2018, and on March 30, 2018, all the requirements of the Criminal Procedure Code of Ukraine were not met, taking into account the following. The senior operational commissioner drew up these protocols on the results of secret investigative (search) actions, but the progress of this procedural action was not recorded in the SISA protocol. That is, the entire course of the procedural action was not systematically reflected, and the senior operational commissioner limited himself to reflecting only the results obtained during the SISA".

During the conduct of such SISAs as monitoring the commission of a crime, it was not specified:

- the date and time when the person involved in confidential cooperation arrived at the premises of the relevant operational unit to participate in the SISA – control over the commission of a crime;
- who exactly among the operational employees or specialists involved installed special audio and video surveillance equipment on this person;
- what specific audio or video surveillance equipment was installed on the person (the name and technical characteristics of this equipment are not specified);

- the time when that person left the premises of the operational unit, and the route of their movement to meet with the person in respect of whom the SISAs are being conducted,

- control over the commission of a crime;
- the route of returning a person to the operational unit after monitoring the commission of a crime is not specified;

- an employee of the operational unit who directly removed video surveillance equipment from a person involved in confidential cooperation is not specified;

- no persons present during these actions are indicated [14].

As audio and video recording, in particular, SISAs, are required under the provisions of the Criminal Procedure Code of Ukraine, there is also a violation of the rules regarding these forms of recording of the progress and results of crime control. In particular, "during the appeal review, the panel of judges examined the letter attached by the prosecutor of the deputy head of the main department for combating corruption and organised crime of the Security Service of Ukraine dated August 15, 2019, from which it can be seen that in the process of conducting audio and video monitoring activities in criminal proceedings No. 42016000000002150, technical means were used that are on the material register in the Department of operational and technical measures of the Security Service of Ukraine and were camouflaged accordingly.

Disclosure of information about the technical means that were used to conduct the SISAs may lead to the decoding of the forms and methods of work of the Security Service of Ukraine. That is why data on their use is not specified in the protocols. Thus, during the appeal review, the panel of judges found that the technical media available in the materials of criminal proceedings on which the course and results of the SISAs that were recorded in relation to PERSON_2 and PERSON_1 in criminal proceedings No. 42016000000002150 are copies. The original materials on audio and video monitoring of these persons have not been attached to the materials of criminal proceedings and the prosecution has not opened them to the defence in accordance with Article 290 of the Criminal Procedure Code of Ukraine.

Considering the provisions of Part 3 of Article 99, Part 3 of Article 107 and Part 4 of Article 254 of the Criminal Procedure Code of Ukraine (as amended on April 13, 2012 No 4651-VI), according to which the production of copies of the protocols on conducting the SISAs and their appendices is not allowed, the panel of judges concludes that copies of technical media available in the materials of criminal proceedings within the meaning of Article 86 of the Criminal Procedure Code of Ukraine cannot be recognised as admissible evidence" [15].

The study suggests that typical violations during the SISAs are also associated with an insufficient level of regulation by departmental bylaws of the procedure for conducting SISAs. For example, currently there are

no regulations on the procedure and legal issues of the procedure and tactics for conducting such a form of control over the commission of a crime as a special investigative experiment. The instruction on the organisation of secret investigative (search) actions and the use of their results in criminal proceedings dated November 16, 2012, defines only the concept of certain forms of control over the commission of a crime. In particular, a special investigative experiment is defined as the creation by an investigative and operational unit of appropriate conditions in an environment as close as possible to the real one, in order to verify the true intentions of a certain person, in whose actions signs of a serious or particularly serious crime are seen, to monitor his or her behaviour and make decisions regarding the commission of a crime. In the future, the text of the instruction sets out general provisions on the authorisation, and procedure for conducting and fixing the SISAs, attention is not focused on the specifics of implementing each one separately [12].

The study defines that, according to the practice of the European Court of Human Rights, provocation of a crime exists when law enforcement officers do not limit themselves to passively establishing the circumstances of a person's possible commission of a crime in order to collect relevant evidence and, if there are grounds for it, bring a person to justice, but incite that person to commit a crime, undermining the principle of fairness of proceedings. The study argues for the need to apply criteria for distinguishing permissible interference and provocation in the course of monitoring the commission of a crime, which are formed according to the practice of the ECHR. Typical violations of the requirements of the Criminal Procedure Law during control over the commission of a crime are considered, which entails, in particular, an insufficient level of regulation by departmental bylaws of the procedure for conducting and recording secret investigative (search) actions.

Conclusions

The imperfection of the regulatory regulation of control over the commission of a crime in the provisions of the Criminal Procedure Code of Ukraine and subordinate acts leads to procedural and tactical errors on the part of the prosecution in the process of conducting them.

Such violations based on the results of the analysis of investigative and judicial practice include:

1) provocation of a crime as cases when officials involved, who are either employees of security agencies or persons acting on their behalf, do not limit their actions only to the investigation of criminal proceedings in essence in an implicit way, but influence the subject in order to provoke him or her to commit a crime that otherwise would not have been committed, in order to identify the crime, that is, to obtain evidence and open criminal proceedings (in accordance with the practice of the ECHR);

2) lack of proper procedural documents in the materials of criminal proceedings certifying the right of operational employees to exercise control over the commission of a crime;

3) violations in the choice of methods and procedures for recording the course and information obtained during the control over the commission of a crime. Such violations, in turn, lead to the inadmissibility of using the information obtained in court proceedings when proving it. Therefore, the efforts and resources of the law enforcement system are nullified, and there is also a violation of the constitutional rights of a person not to be subjected to criminal punishment until the guilt is legally proven.

Therefore, a promising area of further research is the scientific development of issues related to improving the regulatory support for monitoring the commission of a crime, in particular, considering the current practice of the ECHR.

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Визнання недопустимими доказів, отриманих у ході контролю за вчиненням злочину, у кримінальних провадженнях щодо злочинів у сфері службової діяльності

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Анотація

Мета статті – розглянути проблеми забезпечення допустимості доказів, отриманих у ході здійснення контролю за вчиненням злочину під час кримінальних проваджень щодо злочинів у сфері службової діяльності. Увагу акцентовано на тому, що інститут негласних слідчих (розшукових) дій має подвійний оперативно-розшуковий та кримінальний процесуальний зміст, оскільки оперативно-розшукові заходи було покладено в основу негласних (слідчих) розшукових заходів шляхом трансформації порядку їх проведення, що різняться суб'єктами та напрямками подальшого використання отриманих відомостей. Зазначено, що складна й недостатньо вивчена процесуальна сутність контролю за вчиненням злочинів спричиняє проблеми в забезпеченні допустимості доказів, отриманих під час його проведення. З'ясовано, що Кримінальний процесуальний кодекс України визначає спеціальний критерій недопустимості доказів, отриманих під час контролю за вчиненням злочину внаслідок провокування особи на вчинення цього злочину з боку правоохоронних органів. На підставі аналізу матеріалів кримінальних проваджень встановлено, що провокація злочину часто є обставиною, що виключає допустимість доказів, і стає підставою для винесення виправдувальних вироків. Доведено, що, відповідно до практики Європейського суду з прав людини, провокація злочину наявна тоді, коли працівники правоохоронних органів не обмежуються пасивним встановленням обставин можливого вчинення особою злочину з метою збирання відповідних доказів і, за наявності на те підстав, притягнення її до відповідальності, а підбурюють цю особу до вчинення злочину, підриваючи принцип справедливості судового розгляду. Аргументовано потребу застосування критеріїв розмежування допустимого втручання та провокації в ході контролю за вчиненням злочину, які сформовано за практикою Європейського суду з прав людини. Розглянуто типові порушення вимог кримінального процесуального закону під час проведення контролю за вчиненням злочину, що спричиняє, зокрема, недостатній рівень урегульованості відомчими підзаконними актами порядку проведення та фіксації негласних слідчих (розшукових) дій. До таких порушень за результатами аналізу слідчої та судової практики належать: 1) провокація злочину – випадки, коли задіяні посадові особи, що є або працівниками органів безпеки, або особами, що діють за їх дорученням, не обмежують свої дії лише розслідуванням кримінального провадження по суті неявним способом, а впливають на суб'єкт з метою спровокувати його на вчинення злочину, який в іншому випадку не було б учинено, задля того, щоб уможливити виявлення злочину, тобто отримати докази й відкрити кримінальне провадження (відповідно до практики Європейського суду з прав людини); 2) відсутність у матеріалах кримінального провадження належних процесуальних документів, які засвідчують право оперативних працівників здійснювати контроль за вчиненням злочину; 3) порушення в обранні способів і порядку фіксації ходу та отриманих під час контролю за вчиненням злочину відомостей. Підсумовано, що недосконалість нормативного регулювання контролю за вчиненням злочину в положеннях Кримінального процесуального кодексу України й підвідомчих актах призводить до процесуальних і тактичних помилок зі сторони обвинувачення в процесі їх проведення. Своєю чергою це призводить до недопустимості використання в судовому провадженні під час доказування отриманих відомостей. Унаслідок цього зводяться нанівець зусилля та ресурси правоохоронної системи, відбувається порушення конституційних прав особи не бути підданою кримінальному покаранню, доки вину не буде доведено в законному порядку.

Ключові слова:

контроль за вчиненням злочину; спеціальний слідчий експеримент; провокація злочину; допустимість доказів; доказування