

THE LEGAL FRAMEWORK OF THE NORMATIVE REGULATION OF SPECIAL INVESTIGATIVE MEASURES

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Abstract

Effective prevention of criminality is impossible without the use by the competent authorities of a complex of special measures, means and methods outside the limits of the criminal proceeding.

The special investigative activity, by the use of its methods, means and forces, contributes directly to the prevention and detection of the offences, to the ensuring of the return of the damage caused as a result of the offense, the search for the persons that are hiding from the criminal investigation authorities, from the court or are evading the criminal sanction and of the missing persons.

The practice accumulated in the domain of the prevention and control of criminality and assurance of the legal norms proves that namely by means of the implementation of special investigative measures it is possible the timely identification of criminal intentions, of the actions of the preparation of the offence as well as of the attempted crimes.

The special investigative activity consists in the realization of a wide range of measures oriented inclusively to the detection of the indices of criminal activity.

Keywords: *legal rules, special investigative activity, operative actions, special measures, rule of law*

JEL Classification: [K 14]

1. Introduction

The special investigative activity constitutes a variety of the activity of the state, since only the state in the person of the higher legislative, executive and judicial authorities, within the limits of their competence, may assign the right to exercise this activity, to impose some obligations and to carry out the control of the realization and the fulfillment of the legal norms within the special investigative activity.

Special investigative measures represent the structural element of the special investigative activity, which consists of a totality of the interconnected activities aimed at the settlement of some concrete objectives.

Special investigative measures are of the operative nature of search and are directed to the disclosure and accumulation of the information about the

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persons that prepare or commit the offenses, the presence of the material traces of criminal activity, the place of finding of the persons that escape from the criminal prosecution and the trial, of the missing persons.

Special investigative measures mean a whole range of socially useful, intentional and confidential activities, stipulated by the Law on special investigative activity, through which the theoreticians and practitioners carry out the objectives and the purpose of the activity. On the basis of the rules of conduct that govern this activity there were elaborated the principles and categories of the classification of special investigative measures.

The importance of the classification of special investigative measures for the purpose of the determination of the grounds and conditions of their implementation is due to the fact that knowledge of the categories of special measures allows establishing easier which is the legal status of the measures to be realized as well as what are the conditions necessary for their accomplishment.

2. Methodological and theoretical-scientific support of the work

The methodological basis of the study is constituted by the fundamental ideas of the special investigative activity. The complex nature of the concerned work is determined by the diversity of the used methods, procedures and techniques.

According to the proposed objectives, the given research focuses on the general scientific methods, such as: logical analysis, legal analysis, historical analysis, system analysis, dynamic analysis and synthesis. Also, the performed researches are based on the study of doctrines, legislation and judicial practice existing in the given domain.

3. The used methods of scientific research

The methodological basis of the researches is constituted by a totality of methods, theoretical and practical procedures determined strictly by the knowledge of the researched domain, of the legal relations.

According to the proposed objectives, the research focuses on the general scientific methods: logical analysis, legal analysis, historical analysis, systemic analysis, dynamic analysis and synthesis.

4. Basic content

The special investigative activity is carried out in two forms that complement each other: public and secret.

The public officials of the state authorities that exercise the special investigative activity can represent officially, publicly the interests of a state authority. In addition, the operative employee or the person that contributes to

the conduct of the special investigative activity may exercise his/her granted powers, in a secret form¹.

The practice accumulated in the domain of the prevention and control of criminality and assurance of the legal norms proves that namely through the realization of the special investigative measures it is possible the timely detection of the criminal intentions, of the actions of the preparation of the offense, as well as of the attempted offenses.

At the same time, through the special investigative activity, becomes possible the full statement of the circumstances of the offense, the reasons that led to its commission, as well as the obtainment of certain data of probative value that would ensure the proving of the guilt of the perpetrators according to the participation in the commission of the act (Cusnir, 2012, p. 76).

On the basis of the mentioned we state that the special investigative activity is initially an offensive activity, because it is aimed at the detection, prevention and control of criminality, i.e. consists of a set of active measures directed to the annihilation of criminality. We note this fact even in the situation in which the Law on special investigative activity stipulates among the principles of the special investigative activity – the principle of inoffensiveness².

We consider that the assignment to the special investigative activity of inoffensive character, if we look at it from the point of view of the essence of the concerned activity, is an error. Even in case in which we admit that the authors of the Law on special investigative activity, by the inclusion of the principle of inoffensiveness, were guided by the necessity of the non-admission of the unjustified violation of the fundamental human rights and freedoms, we consider that this fact does not reflect the specificity of the special investigative activity performed by the authorized subjects of state.

Moreover, the observance of the human rights and freedoms is guaranteed by the institution of the procedure of the authorization of special investigative measures, through the control of the lawfulness of their exercise and through the inclusion in the Law of the articles 4 and 5, within which are regulated the peculiarities of the protection of human rights and of the protection of data with personal character.

Although, according to the peculiarities, the special investigative activity consists in the realization of a wide range of the measures oriented inclusively to

¹ International Covenant on Economic, Social and Cultural Rights no. 1966 of 16.12.1966. Published in international treaties no. 1 of 30.12.1998, Chişinău, can be accessed at: <http://lex.justice.md/md/356369/>, viewed on 09.01.2019.

² Law No. 59 of March 29th, 2012 on special investigative activity // Monitorul Oficial No. 113-118 of June 08th, Chişinău, 2012, in force of December 08th, 2012, can be accessed at <http://lex.justice.md/md/343452/>, viewed on 08.01.2019.

the detection of the indices of criminal activity, the Law on special investigative activity makes the main emphasis on the execution of special investigative measures within the criminal trial. Thus, out of 20 special investigative measures, stipulated in the art. 18 of the Law on special investigative activity, 11 can be carried out only within a criminal trial, 6 - both within a criminal trial and outside it and only 3 – outside the criminal trial.

Out of those 11 special investigative measures carried out only within a criminal trial, 8 measures can be carried out only with the authorization of the court investigator, on request of the prosecutor, and 3 measures – with the authorization of the prosecutor.

The measures carried out with the authorization of the court investigator, on request of the prosecutor are:

- a) research of domicile and/or installation in it of the devices that ensure the audio and video supervision and recording, of the recording and filming devices;
- b) supervision of domicile through the use of the technical means that ensure the recording;
- c) interception and recording of communications and images;
- d) retention, research, transfer, search or seizure of the postal items;
- e) monitoring of the connections of the telegraph and electronic communications;
- f) monitoring or control of the financial transactions and the access to the financial information;
- g) documentation with the help of the technical methods and means as well as the localization and following by the global positioning system (GPS) or by other technical means;
- h) collection of the information from the providers of the electronic communications services.

With the authorization of the prosecutor, within the criminal trial, may be carried out the following special investigative measures:

- 1) control of the transmission of money or of other extorted material values;
- 2) cross-border supervision;
- 3) controlled delivery.

At the same time, with the authorization of the prosecutor, but both within the criminal trial and outside it, the following special investigative measures may be carried out:

- I. identification of the subscriber, owner or user of an electronic communications system or of an access point to a computer system;
- II. visual tracking;
- III. undercover investigation;

- IV. collection of the samples for comparative research;
- V. research of objects and documents;
- VI. control purchase.

The law limits the circle of the subjects competent to carry out certain specific investigative measures. Thus, the control of the transfer of money or other extorted material values can be carried out only by the specialized subdivisions of the Ministry of Internal Affairs and of the National Anticorruption Centre³.

Only outside the criminal trial, with the authorization of the head of the specialized subdivision, the following special investigative measures may be carried out:

- 1) interrogation;
- 2) collection of the information about persons and facts;
- 3) identification of person.

As we can observe, the number of special investigative measures that can be performed with the authorization of the head of the specialized subdivision was limited essentially.

We consider that this fact can complicate the activity of the detection and prevention of the criminality, especially by the authorities that do not have the criminal prosecution body. In the context, we note that it would become very complicated the execution of the objective provided in the letter d) of the article 2 of the Law on special investigative activity⁴, and namely – collection of information about the possible events and/or actions that could endanger the security of the state. Moreover, among the reasons for the execution of the special investigative measures are not mentioned directly the events, the circumstances that could endanger the security of the state.

For this reason, we consider that it would be welcomed the extension of the possibilities of the head of the specialized subdivision. Thus, since the special investigative measures authorized by the prosecutor are carried out both within a criminal trial and outside it, it is possible their delimitation depending on the stage at which they are authorized.

In such a case, if the special investigative measure is to be carried out within a criminal proceeding, then it should be authorized by the prosecutor, and if it is carried out until the commencement of the criminal trial, then it should be authorized by the head of the specialized subdivision, especially

³ Law on the National Anticorruption Centre No. 1104 of June 06th, 2002. Monitorul Oficial No. 209-211 of October 05th, Chişinău, 2012, can be accessed at <http://lex.justice.md/md/344902/>, viewed on 12.01.2019.

⁴ Law No. 59 of March 29th, 2012 on special investigative activity. Monitorul Oficial No. 113-118 of June 08th, Chişinău, 2012, in force of December 08th, 2012, can be accessed at <http://lex.justice.md/md/343452/>, viewed on 08.01.2019.

since is responsible for the entire activity of the authority that leads it and the legality of the fulfilled measures.

According to the art. 19 of the Law on special investigative activity, the grounds for the execution of the special investigative measures are:

- a) unclear circumstances in connection with the commencement of the criminal prosecution;
 - b) information that became known, regarding:
 - c) the detrimental action in the course of preparation, of commission or committed, as well as the persons that prepare it, committing it or committed it;
 - d) the persons hiding from the criminal investigation authorities or from the court or escape the execution of the criminal punishment;
 - e) the missing persons and the necessity of the establishment of the identity of the unidentified cadavers;
 - f) the circumstances that endanger the public order, the military, economic, ecological security or the security of other nature of the state;
 - g) the circumstances that endanger the security of the undercover investigator or of the members of his/her family (Botnari, 2018, p. 174);
- 1) the procedural documents of the criminal prosecution officer, of the prosecutor or of the investigating judge in the criminal cases that are under their proceeding;
 - 2) interrogations of the international organizations and of the law enforcement authorities of other states in accordance with the international treaties to which the Republic of Moldova is a party;
 - 3) the report of the investigative officer on the circumstances that endanger his/her own security, of his/her family and of his/her close ones.

According to the par. (2), of the same article, the special investigative measures shall be authorized and carried out in case in which the following conditions are met cumulatively:

- the realization of the purpose of the criminal proceeding is impossible by other means or there is a danger to the security of the state;
- the special investigative measure is proportionate to the restraint of the and fundamental human rights and freedoms.

The Law on special investigative activity⁵ regulates the special investigative measures, the modality of their arrangement and execution, as well as of the execution of the control over their legality. In fact, the special investigative measures can be carried out only within the framework of special

⁵ Law No. 59 of March 29th, 2012 on special investigative activity. Monitorul Oficial No. 113-118 of June 08th, Chişinău, 2012, in force of December 08th, 2012, can be accessed at <http://lex.justice.md/md/343452/>, viewed on 08.01.2019.

investigative activities, by the law enforcement authorities and in compliance with the requirements expressly stated in the law.

The special investigative measures are component part of the special investigative activity that consists of the totality of the actions oriented to the settlement of certain concrete tactical objectives. Special investigative measures have the investigational character of search being directed to the obtainment of information about the persons that conceive, prepare or commit an offense, about the detection of the indices of criminal activity, about the place of finding of the people that are hiding from the criminal prosecution and from the court, as well as of the missing persons (Gherman & Botnari, 2018, p. 248).

In the majority of the states of the European Union, the institution of the special investigative measures is catalogued as the special investigative techniques. Thus, in accordance with the provisions of the Recommendation number 10 of 2005 of the Committee of Ministers of the Council of Europe, by the special investigative techniques are understood the special means, inclusively the interception of communications and the access to communications traffic and localization data, the clandestine surveillance and electronic audio and video surveillance of the public places and private premises, clandestine research of the private premises, controlled delivery, infiltration of the undercover agents and the use of informers, clandestine surveillance of the financial transactions and other clandestine measures applied by the law enforcement authorities within the criminal prosecution, for the purpose of the detection or investigation of some serious criminal offenses⁶.

Special investigative measures, on the one hand, constitute the vital and effective means of the control of serious offenses, and on the other hand presuppose through the operation manner, the interferences in the rights of the person protected by law. An essential feature of the special investigative techniques resides in the institution of more stringent normative conditions for their application, since according to the essence the concerned investigative techniques affect the rights of the person protected by law (Șumilov, 2000:178).

Proceeding from the provisions of the Law on special investigative activity⁷, the features specific to the special investigative measures can be deduced, and namely:

- a) the special investigative measures are determined strictly by law. The list of the special investigative measures is stipulated expressly in the

⁶ Recommendation No. 10 of 2005 of the Committee of Ministers of the Council of Europe, can be accessed at <http://www.mfa.gov.md/consiliul-europei/rm-representation-in-coe-ro/>, viewed on 14.01.2019.

⁷ Law No. 59 of March 29th, 2012 on special investigative activity // Monitorul Oficial No. 113-118 of June 08th, Chișinău, 2012, in force of December 08th, 2012, can be accessed at <http://lex.justice.md/md/343452/>, viewed on 08.01.2019.

article 18 of the nominated law, in the paragraph 2 of the same article, being noted that this list is the exhaustive one and may be amended or supplemented only by law;

- b) the special investigative measures may be carried out only by the subjects stipulated directly in the art. 6 of the law;
- c) the special investigative measures shall be carried out only in order to achieve the purpose and objectives of the special investigative activity;
- d) the special investigative measures shall be carried out only in accordance with the legislation and only in case in which it is impossible otherwise to ensure the fulfillment of the objectives stipulated in the art. 2 of the Law;
- e) the confidentiality and conspiracy of organization, tactics and methods of the conduct of the special investigative measures (Cusnir, 2012, p. 77).

In order to comply with the legal provisions the special investigative measures are to be authorized under the conditions of the established procedure. Thus, the special investigative measures that can be authorized by the investigating judge on request of the prosecutor are authorized under the conditions of the Criminal procedure code of the Republic of Moldova⁸.

The special investigative measures that may be authorized by the prosecutor shall be authorized by the prosecutor ex officio or on request of the criminal prosecution officer, of the investigative officer or of the head of the specialized subdivision within a specially formed and registered file.

In the order of the prosecutor should be indicated:

1. the authorized concrete measure;
2. the period for which the measure was authorized;
3. the identity assigned to the undercover investigator, as well as the activities that he she will carry out;
4. the surname, name, identification number of the person subject to the special investigative measure or his/her identification data, if are known;
5. the reason of the execution of the special investigative measure;
6. information on the technical devices necessary for the execution of the special investigative measure (Cusnir, 2012, p. 78).

The special investigative measures that may be authorized by the head of the specialized subdivision shall be ordered by the resolution of the head of the specialized subdivision ex officio, as well as on request of the investigative officer, criminal prosecution officer or prosecutor.

⁸ The Criminal Procedure Code of the Republic of Moldova No. 122 of March 14th, 2003. Monitorul Oficial No. 104-110 of June 07th, 2003, in force since June 12th, Chişinău, 2003, can be accessed at <http://lex.justice.md/md/326970/>, viewed on 06.01.2019.

A particular attention the legislator paid to the term of the conduct of the special investigative measures. Thus, according to the paragraph 7 of the article 20 of the Law on special investigative activity⁹, the special investigative measure is ordered for a period of 30 days, with the possibility of the founded prolongation up to 6 months. Any prolongation of the duration of the special investigative measure may not exceed the term of 30 days.

In case in which the term of the authorization of the execution of the special investigative measure was prolonged up to 6 months, it is prohibited the repeated authorization of the special investigative measure on the same grounds and on the same subject, except for the cases of the use of the undercover investigators or the emergence of new circumstances, as well as of the cases of the investigation of the facts related to the investigation of the organized crimes and of the financing of terrorism.

The special investigative measures shall be initiated on the date indicated in the administrative document or at the latest on the expiry date of the term for which it was authorized.

In case in which the grounds and reasons that justified the authorization of the special investigative measure disappeared before the expiry of the term for which it was authorized, the prosecutor or, as the case may be, the head of the specialized subdivision shall order its immediate cessation.

However, if there are no longer the grounds for the execution of special investigative measures, the investigative officer shall request the prosecutor or, as the case may be, the head of the specialized subdivision the immediate cessation of such measures.

In order to ensure the control of the conduct of the special investigative measure, the investigative officer that performs the special investigative measures, within the term of one month since the date of the ordering of the measures or within the term stipulated in the administrative document, shall inform through a report the prosecutor or, as the case may be, the head of the specialized subdivision that authorized the special investigative measure on the results obtained in the implementation of the special investigative measures. If, within the examination of the report, the prosecutor or the head of the specialized subdivision states that the conditions of the execution of the special investigative measure are not met or that by the ordered measure it is infringed in the disproportionate manner or evidently the legitimate rights and interests of the persons, he/she orders its cessation.

The results obtained as a result of the execution of the special investigative measures shall be recorded by the investigative officer that

⁹ Law No. 59 of March 29th, 2012 on special investigative activity. Monitorul Oficial No. 113-118 of June 08th, Chişinău, 2012, in force of December 08th, 2012, can be accessed at <http://lex.justice.md/md/343452/>, viewed on 08.01.2019.

performs the special investigative measure through the formulation of a report for each measure authorized by the investigating judge or prosecutor, and in case of the special investigative measures authorized by the head of the specialized subdivision – through a report that is presented to him/her.

The results of the special investigative measures may serve as the basis for the execution of other special investigative measures for the purpose of the prevention of criminality and assurance of the security of the state, public order, as well as the evidence if they were carried out within a criminal case.

Conclusions

The legislator does not establish any limitations or criteria for the occurrence of such data or information. The grounds of the execution of the special investigative measures are closely related to the purposes and objectives of the special investigative activity. Having examined the grounds in connection with the purposes and objectives of the special investigative activity, it can be concluded that for the execution of the special investigative measures are enough only the assumptions regarding the preparation or the commission of the offenses on the basis of the presence of some specific indices that indicate to such activities or persons that prepare, commit or committed them, even if that such assumption has the nature of the version, based on certain facts.

In case in which the act already contains the constituent elements of the offense, it is about the solving of the problems regarding the revelation of the offense, detection of the persons that committed it, and if such a person is detected, but hides from the criminal prosecution, then of his/her search.

Proceeding from the mentioned, we reiterate that in order to solve the objectives of the special activity, the results of a special investigative measure may serve as the grounds for the implementation of another measure. In the process of the execution of the special investigative measures regarding a specific case, special information can be obtained regarding the events or cases that are not the part of the initial purposes of the implementation of the special measures.

In the process of the execution of special investigative activity there is the revelation and accumulation of the information that at the initial stage is not related to the verified events. But in the process of its apposition it is possible the obtainment of new data, founded assumptions, conclusions, presentation of versions that require the verification and correspondingly the implementation of the additional special measures. In such cases, the implementation of special investigative measures is always grounded.

The obtainment of the initial information is possible from any source, inclusively from the sources that are not related to the special investigative

activity. This information can be obtained from the observations of the citizens, documents attached to them, acknowledgement of guilt, press releases, materials of the verifications on the administrative offenses, in cases of the detection of the indications of the offense by the public functionaries that are not the subjects of the special investigative activity or from the confidants.

In each case of the execution of the special investigative measures, or for the detection of a concrete offense, or for the revelation and accumulation of the information of operative interest, the grounds for their execution shall be present.

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