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STANDARDS FOR ENSURING THE LEGALITY OF COVERT ACTIVITIES IN CRIMINAL PROCEEDINGS THROUGH THE PRISM OF EUROPEAN COURT OF HUMAN RIGHTS

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The subject of research is the implementation of covert activities in criminal proceedings through the prism of international acts, decisions of the European Court of Human Rights.
The purpose of the work is to formulate common standards for ensuring the legality of implementing covert activities in criminal process through the prism of legal positions of the European Court Of Human Rights.
The methodological basis or research is the totality of general and special scientific methods of scientific cognition. The formal-legal (legal-technical) method was used to study the rules of law, to analyze the features of legal technique; and the hermeneutical method revealed the legal content of the norms, legislative proposals and defects in legal regulation. The statistical method helped to generalize judicial practice of ECHR. While building up the system of the standards for the ensuring the legality of implementing covert activities in criminal process we used the system-structural method.
The main results and conclusions. The analysis of the legal positions of the ECHR made it possible to conditionally single out the following standards for ensuring the legality of the implementation of covert activity in criminal proceedings:
– predictability. Its essence lies in the fact that the grounds, procedural order, conditions, timing, the circle of persons and crimes in relation to which it is allowed to carry out covert activities should be as detailed, clear and accurate as possible in the criminal procedural legislation. Moreover, any person had the opportunity to familiarize himself with the relevant regulatory prescriptions and foresee the actions that can be carried out in relation to him;
– warranty against abuse. The content of this standard can be disclosed by more detailed highlighting of clarifying provisions ("substandards"). These include: control of interference in human rights and freedoms; the certainty of the circle of persons in relation to whom it is possible to carry out secret activities; limited corpus delicti, for the purpose of investigation or prevention of which covert activity is allowed; the existence in national legislation of procedures that facilitate the law of the implementation of covert activity in criminal proceedings; the temporary nature of the implementation of secret activities in the criminal process;
– verifiability. The essence of this standard can be disclosed through the establishment of judicial control over the decision of the issue regarding the possible destruction of information obtained in the course of conducting covert activities, which is not relevant to criminal proceedings, as well as the requirement for the mandatory opening of decisions that were the basis for conducting covert investigative actions;
– exclusivity. The main content of this standard is that covert activity in criminal proceedings can be carried out only in cases where the disclosure or prevention of a crime in another way is impossible or is too complicated;
– proportionality of the intervention and its expediency. The essence of this standard is that the implementation of certain covert coercive actions that are associated with the restriction of human rights and freedoms must be proportionate to the goals for which such actions are directed. Moreover, these goals and the applied coercion must be necessary in a democratic society;
– inadmissibility of tacit interference in the communication of some subjects. First of all, this requirement concerns the need to legislatively guarantee non-interference in communication between a lawyer and his client, a priest and an accused, etc., which means a ban on targeted control over the communication of certain subjects, as well as the obligation to destroy information obtained in the course of an accidental, situational interfering with their communication.

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1. Introduction

1.1. Problem statement and its relevance. Maintaining a balance between conducting an effective pre-trial investigation and achieving the goals of the criminal process at the same time as ensuring human rights and freedoms requires the legislator to constantly improve the legal regulation of criminal procedural activities, overcome regulatory uncertainty in this aspect, as well as strive for uniformity in law enforcement practice. A necessary condition for this is the identification of uniform requirements, standards for such activities based on the analysis of the legal positions of the European Court of Human Rights (hereinafter – the ECHR or the Court), whose jurisdiction is recognized by most European states, as well as comparative legal research of the experience of various countries. It is especially important to define such standards in the aspect of carrying out covert activities in criminal proceedings, given the increased degree of interference with human rights and freedoms in the process of its implementation.

1.2. Analysis of the main publications. A significant number of scientists, in particular: K. A. Bakhtijan [1], A. K. Bekishev [2], V.D. Bernaz [3], R. I. Blaguta, were engaged in the study of various aspects related to the conduct of covert, as well as operational investigative activities (given the lack of regulatory regulation of covert investigative actions in the legislation of individual states).4], N. O. Goldberg [5], E. A. Dolya [6], E. S. Dubonosov [7], V. I. Kapkanov [8], N. E. Orumbayev [9], N. A. Pogoretsky [10], D. B. Sergeeva [11], V.Y. Stelmakh [12], S. R. Tagiev [13], V. G. Uvarov [14] and others. In addition to scientists from the post-Soviet states, the issues of implementing secret measures aimed at obtaining evidentiary information in criminal proceedings have also become the subject of research by representatives of Western states, for example: M. Boskovich, I. Goran [15], N. Zbigniew [16], B. Loftus, B. Goode, S. Mac Giolabhui [17], J. E. Ross [18], K. Harfield [19] and many others. As part of our research, we note that some scientific works are also devoted directly to the problems of covert activity in the context of the legal positions of the ECHR, (however, for the most part, concerning the issues of distinguishing provocation and lawful procedural ways of obtaining evidence). In particular, we are talking about the publications of such researchers: S. O. Grinenko, A.M. Drozdov, S. S. Kudinov, R. M. Shekhavtsov [20], Yu.A. Kavkayeva, T.A. Kalentyeva [21], S. I. Zhaldak [22], D. V. Koltsov [23], M. V. Lapatnikov [24], J. McBride [25], L. V. Mayorova [26], T. A. Tabunkina [27], etc. Taking into account the presence of a comparative aspect in our work, it is also worth paying attention to the publications of scientists, which in one way or another highlight the issues of the settlement of covert investigative actions in the legislation of different states, namely: M. V. Bagri, V. V. Lutsik [28], M. S. Kolosovich [29], A. N. Akhpanov, A. L. Khan [30], V. A. Savchenko [31] and some others. Without in any way downplaying the importance of these works in the study of the implementation of covert activities in criminal proceedings, we note that at the moment there is no separate comprehensive study devoted to the identification and characterization of standards for ensuring the legality of the implementation of covert activities in criminal proceedings on the basis of legal positions formed in the decisions of the ECHR, as well as their implementation in the legislation of individual states.

1.3. The purpose and objectives of the study. The purpose of this article is a scientific understanding of the legal positions of the ECHR, which will make it possible to identify standards for ensuring the legality of covert activities in criminal proceedings, formulate the essence of such standards, as well as analyze the features of their implementation in the legislation of various countries.

2. Standards for conducting secret investigative actions.

A systematic analysis of criminal procedural legislation, as well as legal approaches formulated in the decisions of the ECHR, gives grounds to identify the following standards for conducting covert investigative actions: (1) predictability; (2) guarantee against abuse; (3) verifiability; (4) exclusivity; (5)

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proportionality of intervention and its expediency; (6) the inadmissibility of tacit interference in the communication of some subjects. Let's move on to the consideration of specific standards.

2.1. Foresight.

The highlighted standard primarily concerns the quality of the law, and its essence lies in the fact that the grounds, procedural procedure, conditions, terms of conduct, the circle of persons and crimes concerning which covert activities are allowed should be as detailed, clear and precise as possible in the criminal procedural legislation so that any person has the opportunity to get acquainted with the relevant regulatory requirements and anticipate the actions that can be carried out with respect to it. In view of this, it is necessary to agree with the opinion that in the field of criminal procedural legal relations, the main task of both the legislator and the law enforcement officer is the development, implementation and impeccable compliance with legal norms that ensure, on the one hand, the performance of state functions to ensure national and public security, protection of the rights of individuals and legal entities from illegal encroachments, and on the other hand, excluding unjustified violation or restriction of constitutional human rights and freedoms [32, p. 133].

In its legal positions, the ECHR has repeatedly pointed out the requirements concerning the quality of the law, which, among other things, regulates the implementation of covert activities in criminal proceedings. Thus, explaining the meaning of the expression "in accordance with the law", the Court emphasizes the importance of compliance with the following requirements: (1) the contested interference must have a certain basis in national legislation; (2) the legislation itself must be accessible to the relevant person against whom such measures can be applied; (3) the consequences of the application of the relevant law should be predictable and foreseeable for the person against whom covert activities may be carried out (paragraph 25 of the decision in the case "Mikhailyuk and Petrov v. Ukraine" dated 10.12.2009, paragraph 91 of the decision in the case "Dudchenko v. Russia" dated 07.11.2017, paragraph 123 of the decision in the case "Zubkov and Petrov v. Ukraine" dated 10.12.2009, paragraph 91 of the decision in the case "Dudchenko v. Russia" dated 07.11.2017, paragraph 123 of the decision in the case "Zubkov and Petrov v. Ukraine". others against Russia" dated 07.11.2017).

In addition, it is recalled in some decisions ("Class and Others against Germany" dated 06.09.1978, "People against Switzerland" dated 15.06.1992, "Khudobin v. the Russian Federation" dated 26.10.2006, and others) that it is necessary to establish a clear and predictable procedure for the implementation of investigative measures, as well as special control, in order to ensure good faith on the part of public authorities and compliance with proper goals on the part of law enforcement agencies.

In the context of a comparative legal analysis of foreign experience, it should be noted that the systematization of existing models for fixing the procedural procedure for carrying out covert investigative actions in criminal proceedings in the normative legal acts of some states allows us to conditionally identify several options for the legislative settlement of these issues:

1) simultaneous determination of the general provisions for conducting secret investigative actions (such as conditions, grounds, procedure for authorization, documentation, etc.), as well as detailing the procedure for carrying out certain secret investigative measures (Criminal Procedure Code of the Republic of Kazakhstan (hereinafter referred to as the CPC of Kazakhstan), Criminal Procedure Law of Latvia (hereinafter referred to as the CPC of Latvia), The Criminal Procedure Code of the Republic of Moldova (hereinafter – the CPC of Moldova), the Criminal Procedure Code of Ukraine (hereinafter – the CPC of Ukraine), the Criminal Procedure Code of the Republic of Estonia (hereinafter – The Criminal Procedure Code of Estonia) ;

2) detailing the procedure for carrying out specific covert investigative measures without defining the general provisions of their implementation (Criminal Procedure Code of the Federal Republic of Germany (hereinafter referred to as the Criminal Procedure Code of Germany) ;

3) regulation of the procedure for carrying out certain covert investigative actions without

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separating them into a separate group of investigative measures (Criminal Procedure Code of the Republic of Belarus (hereinafter referred to as the CPC of Belarus), Criminal Procedure Code of the Republic of Lithuania (hereinafter referred to as the CPC of Lithuania), Criminal Procedure Code of the Russian Federation (hereinafter referred to as the CPC of the Russian Federation), Criminal Procedure Code The Code of the French Republic (hereinafter referred to as the Code of Criminal Procedure of France).

2.2. Guarantee against abuse.

Turning to the legal positions of the ECHR in the context of the analysis of this standard, we note that, in the opinion of the Court, the requirement "in accordance with the law" means, among other things, that granting legal discretion to executive authorities in the form of unlimited powers would be incompatible with the principle of the rule of law. (p 49, 51 of the decision in the case "The Volokhs v. the Ukraine" dated 02.11.2006) . In addition, the ECHR also points out the importance of the existence of adequate and effective guarantees capable of leveling possible abuses. In particular, in the decision in the case "Uzun v. the Federal Republic of Germany" dated 02.09.2010 the Court noted that, firstly, GPS tracking could only be used in relation to crimes of significant gravity if other methods were less promising or more complex; secondly, the absence of statutory restrictions on the duration of surveillance was eliminated by checking the compliance of measures by national courts; Thirdly, it was not legally necessary to establish a requirement to grant prior permission for surveillance by an independent body, since the powers of criminal courts to conduct ex post facto verification of the legality of such surveillance (and exclude evidence obtained illegally) provided sufficient protection against arbitrariness. And in the decision in the case "Kruslin v. France", the ECHR stated the absence of guarantees of the minimum degree of protection that citizens have the right to expect under the rule of law in a democratic society, based on the fact that the legislation did not define the categories of persons whose phones can be tapped by a court decision, as well as the nature of offenses was not defined in which listening is possible. Moreover, nothing obliged the judge to determine the duration of this event.

Thus, the content of this standard can be disclosed by more detailed allocation of clarifying provisions ("substandards"):

controllability of interference with human rights and freedoms;

the certainty of the circle of persons with respect to whom it is possible to carry out covert activities;

the limitation of a number of crimes, for the purpose of investigating or preventing which it is allowed to carry out covert activities;

the existence of procedures in national legislation that can guarantee the legality of the implementation of covert activities in criminal proceedings;

the temporary nature of the implementation of covert activities in criminal proceedings.

Considering the requirement regarding the controllability of interference with human rights and freedoms, it should be noted, first of all, the preference of the judicial procedure for sanctioning covert activities simultaneously with the establishment of permissible exceptions to this requirement. In this context, it is also worth agreeing with the thesis that the restriction of the constitutional rights of citizens in the implementation of covert (or operational-investigative) activities is an integral part of the investigation. At the same time, while agreeing with the need to restrict the constitutional rights of citizens involved in the sphere of such activities, in order to achieve the goals and solve its tasks, it is important to determine to what extent these rights can be restricted, on what grounds and conditions, in what order to appeal the actions and decisions of officials of bodies engaged in such activities [33, p. 187].

The approach regarding the prevailing role of the court in granting permission to conduct secret investigative actions can be traced in many legal positions of the ECHR. Thus, according to the Court, the rule of law, inter alia, provides that the interference of executive authorities in the rights of persons should be subject to effective control, which is usually carried out by a judicial body, no less than as a last resort, since it is judicial control that provides the greatest guarantees of

independence, impartiality and the implementation of proper proceedings (para. 52 decisions in the case "The Volokhs v. the Ukraine" dated 02.11.2006). At the same time, it is worth noting that the ECHR allows for the possibility of not only preliminary, but also subsequent control by the court. Thus, in the decision in the case "Khudobin v. the Russian Federation" dated 26.10.2006. The Court pointed out that in the absence of a complete verification system during the operation, the role of later control by the court of first instance becomes decisive (paragraph 135 of the said decision). In addition, the ECHR noted that judicial control is the most appropriate means in cases involving clandestine operations, while the lack of procedural guarantees when authorizing a clandestine operation creates a risk of arbitrariness and provocation by the police (paragraph 124 of the decision in the case "Matanovic v. Croatia" dated 04.04.2017).

A comparative study of this requirement indicates that in the criminal procedural legislation of many states, the majority of covert investigative actions are carried out with the permission of the court (for example, § 100b of the Code of Criminal Procedure of Germany, Article 232 of the Code of Criminal Procedure of Kazakhstan, Article 212 of the Code of Criminal Procedure of Latvia, Article 132-2 of the Code of Criminal Procedure of Moldova, Article 185-186 of the Code of Criminal Procedure of the Russian Federation, Article 246-247 of the Code of Criminal Procedure of Ukraine, Article 126-4 At the same time, in some states, in particular, we are talking about England (Regulation of Investigative Powers Act 2000) (hereinafter – RIPA), Belarus (Art. 213-214) the conduct of covert activities in criminal proceedings does not provide for a judicial authorization procedure. Thus, in England, decisions on carrying out secret investigative measures are made by the Minister of Internal Affairs, and in Belarus – by the Chairman of the Investigative Committee of the Republic of Belarus, the Chairman of the State Security Committee of the Republic of Belarus or a person acting as their duties, or by an investigator, an inquiry body with the sanction of the prosecutor or his deputy.

At the same time, in most States, criminal procedural legislation allows the implementation of covert activities under certain circumstances before obtaining a court permit, but with subsequent judicial control. In particular, according to Part 4 of Article 212 of the Criminal Procedure Code of Latvia, "urgent cases" are indicated without any clarifications, Part 1 of Article 235 of the Criminal Procedure Code of Kazakhstan, Article 237 of the Criminal Procedure Code of Poland, Part 1 § 100d of the Criminal Procedure Code of Germany are formulated in a similar way. At the same time, part 3 of Art . 132-4 of the Criminal Procedure Code of Moldova provides that "in the case of obvious crimes, as well as in the case of the existence of circumstances that cannot be delayed, and the judge's determination cannot be obtained without the risk of a significant delay, which may lead to the loss of evidence or put the safety of persons at immediate risk", some special investigative measures may be allowed for based on a reasoned decision of the prosecutor . It further restricts the possibility of conducting secret investigative actions before obtaining a court permit . 250 of the Code of Criminal Procedure of Ukraine, which indicates exceptional urgent cases related to saving people's lives and (in addition, we emphasize the use of the connective union "and", which assumes the presence of both conditions) preventing the commission of a grave or especially grave crime provided for in sections I, II, VI, VII (Articles 201 and 209), IX, XIII, XIV, XV, XVII of the Special Part of the Criminal Code of Ukraine. Separately , it is worth noting part 3 of art . 126-4 of the Criminal Procedure Code of Estonia, according to which, in urgent cases, a procedure is provided for obtaining a simplified, oral court permission followed by its written registration.

At the same time, the criminal procedural legislation of the listed states provides for the need to obtain a court sanction after the start of an unspoken investigative action: within 24 hours (Kazakhstan, Moldova) no later than the next working day (Latvia), within 3 days (Germany, Lithuania, Poland). The Criminal Procedure Code of Ukraine does not provide for a specific time limit for applying to the investigating judge for subsequent judicial control, but uses the evaluative concept of "immediately".

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Regarding the limitations of a number of crimes, for the purpose of investigating or preventing which it is allowed to carry out covert activities, it is worth noting that our analysis of the criminal procedural legislation of a number of countries allows us to identify several settlement options:

(1) depending on the severity of the crime, including the punishment for it, as well as due to a special public danger, for example, when it comes to organized crime. At the same time, we draw attention to the fact that most often it is allowed to carry out covert activities for crimes for which the restriction of freedom is provided for from 1 year (Austria, Latvia, Kazakhstan), from 2 years (France), from 3 years (Russia). At the same time, in the Criminal Procedure Code of Ukraine, most of the covert investigative (search) actions, with the exception of establishing the location of an electronic means, as well as removing information from electronic information systems or its parts, access to which is not limited to its owner, owner or holder or is not associated with overcoming the logical protection system, can be carried out only in criminal in the production of relatively serious (from 5 years of imprisonment) and especially serious (from 10 years of imprisonment) crimes. In the context of the above, it is worth noting that such a restriction is negatively assessed by many Ukrainian law enforcement officers, since it sometimes forces law enforcement officers to resort to artificial "overestimation" of qualifications. For example, acceptance of an offer, promise or receipt by an official of an unlawful benefit (Part 1 of Article 368 of the Criminal Code of Ukraine) refers to crimes of moderate severity, at the same time documenting this crime without carrying out covert activities may be too complicated or practically impossible.

Regarding the consolidation in national legislation of procedures capable of guaranteeing the legality of the implementation of covert activities in criminal proceedings, it should be noted that such procedures, in particular, may include: (a) the possibility of appealing decisions on the conduct of covert investigative actions or their results (Part 2 of Article 126-14 of the Criminal Procedure Code of Estonia, Part 5 of Article 240 of the Criminal Procedure Code of Kazakhstan); (b) the established requirements for periodic reporting on secret investigative actions carried out (§ 100e of the German Criminal Procedure Code); (c) the need for proper documentation of the secret activities carried out, which would make it possible to subsequently verify their legality (Part 5 of Article 132-5 of the Criminal Procedure Code of Moldova), etc.

Turning to the legal positions of the ECHR on this aspect, we note, for example, that in the decision in the case "Matanovic v. Croatia" dated 04.04.2017 (paragraph 124), the Court focused on the fact that the implementation of a simulated purchase carried out by an undercover agent or informant should, in particular, be documented in a way that would allow conduct further independent verification of the actions of the participants .

The requirement regarding the temporary nature of the implementation of covert activities in criminal proceedings, first of all, concerns the fact that any covert investigative actions, regardless of their type and purpose, cannot be carried out indefinitely and must be limited in time in some way; at the same time, the possibility of their extension is also allowed for a limited period in cases where this reasonably necessary for the purposes of criminal proceedings.

Thus, in accordance with the legal position of the ECHR, formulated in the decision in the case "Volokhi v. Ukraine" dated 02.11.2006, the Court stressed that if the law does not contain instructions, in particular, regarding the terms of restriction of the rights of a person, it should be stated that the improper "quality" of such legal provisions.

A comparative legal analysis of the criminal procedural legislation of some states indicates that most regulatory legal acts contain prescriptions regarding the maximum duration of secret investigative actions, as well as extension periods: 15 days (French Criminal Procedure Code), 4 weeks (events without the knowledge of the affected person under the German Criminal Procedure Code), 30 days (Kazakhstan Criminal Procedure Code, The Criminal Procedure Code of Latvia, the Criminal Procedure Code of Moldova), 2 months (the Criminal Procedure Code of Ukraine), 3 months (control over the means of communication under

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the Criminal Procedure Code of Germany), 6 months (control and recording of negotiations under the Criminal Procedure Code of the Russian Federation). At the same time, for example, art. 213-214 of the Code of Criminal Procedure of Belarus do not provide for specific dates for secret events, but only contain an indication that they cannot be carried out beyond the period of preliminary investigation in a criminal case.

2.3. Verifiability.

The essence of this standard, in our opinion, can be disclosed through the establishment of judicial control over the resolution of the issue regarding the possible destruction of information obtained during the conduct of covert activities that do not matter for criminal proceedings, as well as the requirement of the mandatory discovery of decisions that were the basis for conducting covert investigative actions. The point is that not only the results of the secret investigative actions carried out should be open to the defense, but also those decisions that were the basis and sanction for their conduct, since in the opposite case, the accused person and his defender will not have the opportunity to check and, if necessary, appeal the legality and validity of the secret activity, the admissibility of evidence obtained in the course of its conduct.

The legal position of the ECHR, which makes it possible to single out this standard, is formulated in the decision in the case "Matanovic v. Croatia" dated 04.04.2017. In particular, the Court noted that in systems where the prosecution authorities are required by law to take into account both the facts against the accused and those in his favor, the procedure according to which the prosecution authorities themselves try to assess what may or may not be relevant to the case, without anyor further procedural guarantees of protection of rights, cannot meet the requirements of paragraph 1 of Article 6 of the Convention (paragraph 182 of this decision). A similar argument is also given by the ECHR in the decision in the case "Natunen v. Finland" – paragraphs 47-49).

As part of a comparative study of this standard, we note that the criminal procedural legislation of many countries contains an order that materials obtained as a result of covert activities are preserved until the end of the trial and the decision is made in fact, while it is the court that has the authority to assess the significance of specific materials for the interests of the case and decide on their destruction if necessary (Article 240 of the Code of Criminal Procedure of Kazakhstan, Article 231-232 of the Code of Criminal Procedure of Latvia, Part 12 of Article 132-9 of the Code of Criminal Procedure of Moldova, Article 237 of the Code of Criminal Procedure of Poland, Article 126-12 of the Code of Criminal Procedure of Estonia). However, in a negative way, it should be noted the procedure for resolving this issue in the Criminal Procedure Code of Ukraine, since Part 1 of Article 255 prescribes that it is the prosecutor who decides that certain materials obtained as a result of secret investigative (search) actions are not necessary for further pre-trial investigation and therefore can be destroyed [10].

Considering the second aspect, i.e. the obligation to open decisions that were the basis for conducting secret investigative actions, through the prism of the practice of the ECHR, we also turn to the already mentioned decision "Matanovic v. Croatia". Thus, according to its paragraph 151, the Court notes that the main aspect of the right to a fair trial is that criminal proceedings, including elements of such proceedings related to the procedure, should be competitive and there should be equality of the parties between the prosecution and the defense. The right to be adversarial means that in a criminal case both the prosecution and the defense should be given the opportunity to be notified, as well as to comment on the submitted observations and evidence presented by the other party. At the same time, the ECHR stressed that the right to open relevant evidence is not an absolute right. In any criminal proceeding, there may be competing interests, such as national security, the need to protect witnesses under threat of pressure, or the secrecy of methods of investigating crimes by the police, which must be carefully balanced with the rights of the accused (paragraph 152). At the same time, the refusal to disclose to the defense materials containing such details that could allow the accused to release him or her, or to commute the sentence, would be a denial of the opportunities necessary for the preparation of the defense, and therefore would

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constitute a violation of the right guaranteed by article 6 of the Convention (paragraph 157).

In addition, in the decision in the case "Zubkov and others v. Russia" dated 07.11.2017 the ECHR further specified that the information contained in the decisions that granted permission for covert surveillance may be critical to a person's ability to open proceedings to appeal against the legal and factual grounds for the appointment of covert surveillance. At the same time, the refusal to disclose surveillance permits without any valid reasons, according to the ECHR, deprives a person of any opportunity to ensure the legality of the event and its "necessity in a democratic society", to be considered by an independent court in the light of the relevant principles of article 8 of the Convention (paragraphs 129-132).

2.4. Exclusivity.

The main content of this standard is that covert activity in the criminal process can be carried out only in cases where the disclosure or prevention of a crime in another way is impossible or too complicated. At the same time, in most of its legal positions, the ECHR justifies the need not only to formally indicate the impossibility of establishing certain information in another way, but also to confirm this with proper arguments. In particular, in the decision in the case "Matanovic v. Croatia" dated 04.04.2017, the court noted that in this case, as in the Dragojevic case, the decision of the investigating judge on the use of secret surveillance measures contained the expression established by law "the investigation could not be carried out by other means or it would be extremely difficult." However, there was no appropriate justification for the special circumstances of the case, and also, in particular, it was not indicated why the investigation could not be carried out with the help of other less serious (intrusive) means. Thus, as in the case concerning Dragoevich, the absence of justification in the decision of the investigating judge, simultaneously with the circumvention by the national courts of this lack of justification by means of a retrospective justification for the use of secret surveillance, contradicted the relevant national legislation and therefore did not provide in practice adequate guarantees against various possible abuses.

A similar position was formulated by the ECHR in the decision in the case "Dudchenko v. Russia" dated 07.11.2017, according to paragraph 98 of which the only reason for monitoring put forward by the national court was "the impossibility of obtaining information about the illegal activities of [the applicant] during a public investigation." At the same time, the court did not explain how it came to this conclusion. At the same time, the Court considers that such vague and unreasonable wording is not sufficient to grant permission for covert surveillance for such a long period (180 days), which led to a serious violation of the applicant's right to respect for privacy and correspondence.

Carrying out the systematization of regulatory prescriptions concerning this requirement in the criminal procedural legislation of some States, we note that most of them contain such a condition (or basis) for conducting secret investigative actions as the inability to otherwise realize the goals of criminal proceedings or the risk of significantly complicating the investigation of a crime (§ 100c of the German Criminal Procedure Code, paragraph 1, part 2 of art. 132-1 of the Criminal Procedure Code of Moldova, Part 2 of Article 246 of the Criminal Procedure Code of Ukraine, part 2 of Article 126-1 of the Criminal Procedure Code of Estonia, etc.).

2.5. Proportionality of intervention and its expediency

The essence of this standard is that the implementation of certain covert coercive actions that are associated with the restriction of human rights and freedoms should be proportionate to the goals for which such actions are directed. Moreover, these goals and the applied coercion should be necessary in a democratic society.

For example, according to the ECHR, legitimate and appropriate goals can be considered: protection of national security, public order, victims' rights and crime prevention (decision in the case "Uzun v. Federal Republic of Germany" dated 02.09.2010) [18]; prevention of riots or crimes or protection of public health, as well as a large-scale trafficking operation drugs (the decision in the case "Ben Faiza v. France" dated 08.02.2018); the fight against organized crime and corruption (the decision in the case "Ramanauskas v. Lithuania" dated 05.02.2008).

Using the example of the decision in the case

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"Uzun v. the Federal Republic of Germany" it can be pointed out that, according to the ECHR, adequate proportionality of covert interference in human rights and freedoms takes place in cases where, in particular, GPS surveillance was carried out for a relatively short period of time (about three months), and concerned the applicant only when he was in the car of his accomplice. Thus, it could not be argued that the applicant was subjected to general and comprehensive supervision.

In the context of the analysis of this standard, it should also be clarified what exactly the ECHR understands by the phrase "necessary in a democratic society": "intervention is considered "necessary in a democratic society" to achieve a legitimate goal if it meets an "urgent social need" and, in particular, is proportionate to the legitimate goal pursued and if the grounds, which the national authorities refer to are "appropriate and sufficient" (see, for example, the decisions in the cases of Dudchenko v. the Russian Federation, Zubkov and others v. the Russian Federation dated 07.11.2017). At the same time, the criteria for assessing the proportionality of intervention in the context of covert surveillance are the nature, scope and duration of surveillance, grounds for permitting surveillance, competent authorities authorized to authorize, carry out and control surveillance, as well as the type of remedies provided for by domestic legislation.

In the context of considering this standard through the prism of comparative legal analysis, we note that, for example, that paragraph 3 of Part 2 of Article 132-1 of the Criminal Procedure Code of Moldova, as a condition for conducting special investigative measures, provides that such an action is necessary and proportionate to the restriction of fundamental human rights and freedoms. Article 211 of the Criminal Procedure Code of Latvia considers as the purposes of conducting special investigative actions their necessity for clarifying the circumstances to be proved in criminal proceedings, as well as for the immediate prevention of a significant threat to public safety. To illustrate cases where the damage caused by the failure to carry out a certain covert investigative action is disproportionate to the harm that may be caused if it is carried out, we will give a regulatory prescription fixed in Part 2 of Article 271 of the Criminal Procedure Code of Ukraine, according to which "control over the commission of a crime is not carried out if as a result of such actions it is impossible to completely prevent: (1) encroachment on life or causing serious bodily injury to a person (persons); (2) distribution of substances dangerous to the lives of many people; (3) the escape of persons who have committed grave or especially grave crimes; (4) an environmental or man-made disaster."

2.6. The inadmissibility of tacit interference in the communication of certain subjects.

First of all, this requirement concerns the need for legislative guarantees of non-interference in communication between a lawyer and his client, a priest and the accused, etc., which means a ban on purposeful control over the communication of certain subjects, as well as the mandatory destruction of information obtained during accidental, situational interference in their communication.

Revealing the essence of this standard, we will cite the legal position formulated in the ECHR decision in the case "Dudchenko v. the Russian Federation" dated 07.11.2017: "The Court repeats that, while Article 8 protects the confidentiality of any "correspondence" between persons, it provides for enhanced protection of the exchange of information between lawyers and clients, because in in the absence of guarantees of confidentiality of negotiations, lawyers would be deprived of the opportunity to defend their principals" (paragraph 104 of the said decision). Moreover, the Court also pointed to the minimum guarantees that should be provided at the legislative level, highlighted by it in its case law. In particular, we are talking about the fact that the legislation, firstly, should accurately determine the scope of the privilege to preserve attorney-client privilege, as well as determine how, under what conditions and by whom a distinction should be made between information constituting attorney-client secrecy and information that does not constitute it. Secondly, the legislative provisions regarding the procedure for studying, using and storing the information received, precautions when transferring information to third parties,

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circumstances in which records may or should be erased and materials destroyed, should provide adequate guarantees for the protection of information constituting attorney–client privilege and obtained as a result of covert surveillance (paragraphs 105-107 of the specified decision) .

Demonstrating the implementation of this standard in the criminal procedural legislation of some states, we will pay attention to the following aspects. Firstly, monitoring the lawyer's conversations is usually allowed only in cases when he himself is a suspect in the case (the Criminal Procedure Code of France, the Criminal Procedure Code of the Netherlands) or the transmitted information may relate to planned or committed criminal acts (the Criminal Procedure Code of Germany, the Criminal Procedure Code of Kazakhstan); secondly, immunity from covert interference covers not only communication between a defense lawyer and a suspect, accused, etc., but also between a lawyer and any subject, regardless of his procedural status. At the same time, it should be noted that the second aspect is not provided for, for example, in the Criminal Procedure Code of Ukraine, since according to Part 5 of Article 258 of this normative act, interference is prohibited only in the private communication of a defender, a clergyman with a suspect, accused, convicted, acquitted.

3. Conclusions. The analysis of the legal positions of the ECHR in the aspect of the subject of the article under consideration allowed us to conditionally identify such standards for ensuring the legality of covert activities in criminal proceedings: (1) predictability; (2) guarantee against abuse; (3) verifiability; (4) exclusivity; (5) proportionality of intervention and its expediency; (6) inadmissibility of covert interference in the communication of some subjects, as well as to find out and disclose the regulatory content of these requirements. In addition, the comparative legal analysis of the criminal procedural legislation of individual states made it possible to identify some features of legal regulation, as well as to identify promising areas for improving domestic legislation on this aspect.

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