DREPT PENAL ŞI DREPT PROCESUAL PENAL

CZU 343.1

THEORETICAL AND PRACTICAL IMPLICATIONS ON THE SUBJECTS CHARGED WITH DUTIES OF CONDUCTING SPECIAL INVESTIGATION ACTIVITY



Dumitru OBADĂ,
Prosecutor, Trainer at NIJ
Doctorate School of Law,
State University of Moldova

SUMMARY

This paper is an endeavor to analyze Moldova's legal framework aimed at regulating Special investigative activity (SIA) in terms of subjects or, in other words, of procedural exponents, invested by a legislator with duties of carrying out SIM. It is also an attempt to reveal the normative inconsistencies specified in the regulatory content of the Criminal Procedural Law, including a verifiable analysis of the legal norms stipulated in the Code of Criminal Procedure, as well as other regulations related to this specific area of state activity specified in the related legislation. Moreover, the author sought to highlight the adverse legal effects that may be generated by the misinterpretation and misapplication of the legal norms related to SIA. While carrying out this study, we have taken into account the practice of law enforcement by state bodies in conducting criminal investigations, as well as the attempt to clarify and define the concept of "carrying out special investigative activity".

The research is also an attempt to clarify the competences of procedural subjects in charge of conducting SIA, as well as their functional interdependence in this activity. Furthermore, the study reasons upon some author's assertions regarding the legal nature of SIM results from the perspective of the theory of evidence, particularly the admissibility of evidence obtained through SIM, the procedural stage at which the SIM can be performed, the impact of the current normative inadvertences regarding the possibility of taking evidence by means of SIM. The research has also been focused on identifying the prosecutor's functional characteristics in conducting special investigative activity.

Key-words: *special investigative activity, special investigative measures, special investigative body, criminal investigation, criminal prosecution activity, criminal in-*

IMPLICAȚII TEORETICO-PRACTICE ASUPRA SUBIECȚILOR ÎNVESTIȚI CU ATRIBUȚII DE DESFĂȘURARE A ACTIVITĂȚII SPECIALE DE INVESTIGAȚIE

SUMAR

În lucrarea de faţă s-a încercat analizarea cadrului legal al Republicii Moldova, care vizează reglementarea activităţii speciale de investigaţie (ASI) din perspectiva subiecţilor sau, altfel spus, exponenţilor procesuali, învestiţi de legiuitor cu atribuţii de desfăşurare a măsurilor speciale de investigaţie (MSI). Deasemenea, s-a încercat de a evidenţia incoerenţele normative specificate în conţinutul regulatoriu al legii procesual penale, inclusiv analiza coroborată a normelor juridice care se conţin în Codul de procedură penală, precum şi alte reglementări ce vizează acest domeniu specific de activitate statală stabilite în legislaţia conexă. Mai mult, autorul a urmărit scopul de a reliefa efectele juridice nefaste ce pot fi generate de interpretarea şi aplicarea eronată a normelor juridice aferente ASI. Pe durata realizării prezentului studiu s-a ţinut cont de aplicarea legii de către organele statului la desfăşurarea investigaţiilor penale, inclusiv s-a încercat clarificarea şi definitivarea conceptului de „desfăşurare a activităţii speciale de investigaţie".

Cercetarea reprezintă o încercare de clarificare a competenţelor subiecţilor procesuali responsabili de desfăşurarea ASI, precum şi interdependenţa funcţională a acestora în cadrul acestei activităţi. Mai mult, studiul reflectă unele aserţiuni ale autorului privind caracterul juridic al rezultatelor MSI din perspectiva teoriei probelor, în special admisibilitatea probelor obţinute în rezultatul MSI, faza procesuală la care pot fi efectuate MSI, impactul inadvertenţelor normative actuale sub aspectul posibilităţii de administrare a probelor prin intermediul MSI. De asemenea, cercetarea a fost focalizată inclusiv asupra identificării caracteristicilor funcţionale ale procurorului în cadrul desfăşurării activităţii speciale de investigaţie.

Cuvinte-cheie: *activitate specială de investigaţie, măsuri speciale de investigaţie, organ special de investigaţie, activitate de urmărire penală, acţiuni de urmărire penală, organ de urmărire penală, procuror, judecător, investigator, exponent procesual, control, coordonare, conducere, legalitate, admisibilitate.*

Motto:

"…To hang up the laws, as did Dionysius the Tyrant, so high that no citizen could read them, is a wrong. To bury them in a cumbrous apparatus of learned books, collections of decisions and opinions of judges, who have deviated from the rule, and, to make matters worse, to write them in a foreign tongue, so that no one can attain a knowledge of them, unless he has made them a special subject of study, is the same wrong in another form. – The rulers, who have given their people a definite and systematized book of common law, or even an unshapely collection such as that of Justinian, should be thanked and lauded as public benefactors. Moreover, they have done a decisive act of justice".

(Hegel Georg Wilhelm, Principles of Philosophy of Right or Elements of Natural Right and State Science)

vestigation body, prosecutor, attorney, judge, investigating magistrate, investigator, procedural exponent, control, coordination, management, legality, admissibility.

The special investigative activity (SIA) carried out by investigative officers under the prosecutor's control through special and exhaustive investigative measures (SIM) provided by the law features the means provided by the legislator at the disposal of the law enforcement bodies through which the prevention and control of crime activity may be and is being carried out.

Given that the special investigative activity carried out by state agents usually targets the privacy of an individual undermining their fundamental human rights, creating a clear, accessible and predictable legislative framework in this regard is a *sine qua non* condition to ensure an admissible interference in accordance with the stipulations of Article 8 of the European Convention for the Protection of Human Rights (ECPHR) and the European Court of Human Rights (ECtHR) case-law on this matter.

Moreover, on the basis of the international commitments on the reform of the justice sector assumed by the Republic of Moldova, which have also been objectified in the Strategy of Justice Sector Reform for 2011-2016, approved on 25 November 2011 by the Parliament's Law no.231, this study aims at identifying and suggesting solutions in order to streamline the pre-trial investigation process, thus ensuring the observance of human rights, the security provision of each individual and diminishing the level of delinquency.

Hence, the topicality and importance of the initiated research derives from the necessity to carry out an in-depth study of the prosecutor's status and procedural criminal competences within their special investigative activity, it is a scientific approach, resulting in highlighting the existing legal norms, which are doubtful in terms of the meaning of art. 7, ECPHR, suggesting improvement solutions to the national legal framework and ways of its harmonization to the international community standards. At the same time, the topic addressed in the present study will foster the achievement of the specific objectives outlined in Pillar II of the Strategy of Criminal Justice, particularly the revision of the prejudicial concept and procedure, strengthening the prosecutor's professionalism and independence as well as the individual and institutional investigative capacities of demeanors.

The Code of Criminal Procedure of the Republic of Moldova (CCP), adopted on March 14, 2003, published on 07 June 2003 in the Monitorul Oficial No. 104-110, with the subsequent amendments and addenda, contains a legal concept of the special investigative activity in paragraph 132^1 stipulating that "*special investigative activity is the total of criminal investigation actions performed in public and / or secretly carried out by investigative officers within the framework of criminal prosecution only under the conditions and in the manner provided by the Code*" [1, art.132^1].

Making a logically doctrinal interpretation of the pre-cited norm, taking into account that the general rule imposes restrictive interpretation of the norms of material and formal penal law, we can single out the following normative assertions: 1) a special investigative activity represents a total of criminal investigation actions, 2) it may be of a public and / or secret nature, 3) performed only by investigative officers, 4) only within the framework of criminal prosecution, and 5) only under the conditions and in the manner provided by the Code of Criminal Procedure.

Therefore, because of the amendments and addenda made by the legislator, inserting *Section 5 into Chapter III of the Code of Criminal Procedure,* the special investigative measures got under the category of the probative procedures through which the evidence can be administered in a given criminal case.

Moreover, investigative officers were granted the competence to carry out criminal investigations in case of SIM. This conclusion derives also from the provisions of art.93 paragraph (2) of the Code of Criminal Procedure, where item 8) provides that factual knowledge established through the procedural documents in which it is stipulated that the elements proved through procedural documents showing the results of special investigative measures and their annexes, including the transcript, pictures, records and more, may be admitted as evidence in a criminal proceeding.

By introducing the addenda according to the Law on Amending and Complementing the Code of Criminal Procedure no.66 of 05 April 2012, a number of aspects have been clarified, including:

1.The terms of conducting SIM
2. The reasons of conducting SIM
3. An exhaustive and limited list of SIM
4. The subjects responsible for conducting SIA
5. The procedure of disposing SIM
6. Recording the SIM
7. Managing, controlling and coordinating SIM

Previously, the Code of Criminal Procedure did not contain explicit and detailed regulations on SIA, only rudimentary rules were stipulated regarding the interception and recording of communications and images. The question of the insecure normative framework in the field of operative investigative activity (OIA) was also invoked before the European Court for the Protection of Human Rights and Fundamental Freedoms.

Thus, by the Decision of February 10, 2009, the ECtHR considered that Moldova's legislation, particularly the Code of Criminal Procedure (including the Act on Operative Investigative Activity No. 45 – XIII of 12 April 1994) [2], does not provide adequate protection against abuses by the authorities in phone calls intercepting. The interference with the applicants' rights under Article 8 of the ECPHR was therefore inconsistent with the notion "prescribed by law". In this case, the Court was alarmed by the absence of clear rules on the consequences of intercepting, e.g., a discussion between the client and his lawyer. The clear definition at first glance of the categories of offenses for which authorization to intercept telephone conversations may be requested does not constitute a guarantee of compliance with art. 8 of the ECPHR, because in the Republic of Moldova more than half of the crimes provided by the Criminal Code belong to the category of facts that require the interception of the phone conversations.

The ECPHR has been concerned that the relevant legislation does not sufficiently define the categories of individuals whose telephone conversations are liable to be intercepted and recorded. The Court also noted the apparent lack of regulations with a high degree of precision which would regulate the way of filtering of secret data obtained by intercepting telephone conversations, or procedures of maintaining their integrity and confidentiality, or rules of their removal. Another aspect that came to the forefront of the Court was that the investigating magistrates in the period described in the case *Iordachi and Others versus Moldova* authorized the interception of a very large number of telephone conversations, in the context of which the Moldovan legislation does not define the criteria of reasonableness of suspicions against the individual as the basis for the interception authorization, and the investigating magistrates do not always fall into the essence of the requests to authorize such measures. For these reasons, the Court concluded that it was necessary to amend the national legal framework (particularly the Act on Operative Investigative Activity and the CCP provisions governing both the procedure of authorizing the interception of telephone conversations and the interception itself) [5, §46-53].

As a result of the adoption of this Decision by the High Court of Justice in Strasbourg, the Moldovan legislator revised the criminal procedural framework, including the special law; substantial amendments and addenda being made.

Referring to the category of procedural subjects, we note that, besides the direct *execution* of SIM by investigative officers, as required under the Criminal Procedural Law, this activity involves a complex legal procedure in which many more exponents charged with procedural duties are concurring. The responsibility of the above-mentioned exponents is to carry out the investigative measures initiated in a specific criminal case.

However, if at first glance the legal rules of the SIA, which were introduced in the Code of Criminal Procedure on April 5, 2012 appear to be clear, during a more detailed and corroborated analysis of the legal framework, several legislative inconsistencies can be pointed out, which can cause bad repercussions in their practical application. Below we will try to outline on these issues as well.

By generalizing the above statements, taking into account the spectrum of actions specific for the implementation of special investigative measures, we believe that the notion of "carrying out special investigative activity" should be understood as – successive procedural actions directed towards a single objective – the achievement of the purpose of the criminal proceeding, manifested through *the disposition, authorization, performance, recording, management, coordination, and control* of special investigative measures initiated in criminal investigations.

Ab initio, referring to the procedural exponents charged with duties of special investigative measures, we would like to remind that art.132[4], paragraph (1) of the Criminal Procedural Law stipulates that the prosecutor who conducts or carries out the criminal investigation sets, by reasoned ordinance, the task of executing some special measure of investigation on specialized subdivisions of the authorities indicated in the Act on Special Investigation Activity No. 59 of March 29, 2016.

As Article 6, paragraph (1) in *Law On Special Investigative Activity* no. 59 of March 29, 2012 states: the special investigative activity is carried out by the investigative officers of specialized subdivisions within, or subordinated to, the Ministry of Home Affairs, the Ministry of Defense, the National Anti-Corruption Center, the Intelligence and Security Service, the State Protection and Guard Service, the Customs Service and the Department of Penitentiary Institutions of the Ministry of Justice [3, art.6].

By Article 132[1] paragraph (2) of the CCP, disposing a SIM, the prosecutor has the obligation to verify that the following conditions has been cumulatively fulfilled:

1) it is impossible to achieve the purpose of the criminal proceeding otherwise and / or the evidence management activity may be seriously prejudiced;

2) there is a reasonable suspicion regarding the premeditation or commission of a grave, particularly serious or exceptionally serious offense, except as provided by law;

3) the action is necessary and proportionate to the restraint of human rights and fundamental freedoms.

Accordingly, before issuing an ordinance to carry out a special investigative measure, the prosecutor is instructed to carry out a preliminary check of the rationality and necessity of performing one or the other special investigative measure. Alternatively, these probative procedures are likely to seriously affect the human rights and fundamental freedoms outlined in the Constitution of the Republic of Moldova, as well as by the international legal bodies (e.g. the European Convention for the Protection of Human Rights and Fundamental Freedoms of 04 November 2016 - ECPHR), as having a pronounced intrusive character. Furthermore, due to the confidential nature of the SIM, the individual subject to such an interference in human beings' rights does not have the real possibility of defending him/herself at a given moment of immediate action against possible abuses the legal body may commit.

From the content of the Code of Criminal Procedure we can conclude that the Prosecutor is in charge of the whole process of *carrying out* SIA, this circumstance being stipulated in Law On Special Investigative Activity no.59 of March 29, 2012, as well as in Art.5 letter c) of the new Law on the Prosecutor's Office No. 03 of February 25, 2016, according to which, by law, the Prosecutor's Office carries out, including *ex officio*, the control over the observance of the legislation regarding special investigative activity [4, art.5].

In the context of the above-mentioned allegations, the doctrinal position of Professor Tushev Alexandr, who, in his paper Prosecutor in the Criminal Procedure of the Russian Federation, states that the whole history of the appearance and formation of the Prosecutor's Office in different countries demonstrates its indissoluble link with the function of conducting and carrying out criminal prosecution in criminal cases. The level of this link is determined by various factors including the geopolitical location of the state, the degree of the economic development of the country, the national specificity of the population, the level of the development of the law institutions, the domination of one or another legal school, the conscience and the legal culture of the society. In criminal proceedings, increased attention has recently been paid to the substantiation of the principle of legality in general and, particularly, to its observance during the criminal prosecution. This is obvious, since in this sphere of activity the fundamental human rights and freedoms are mostly affected, such as the right to liberty and the individual's safety, his/her intangibility and their privacy intangibility, the right to freedom of movement, honor and dignity, etc [11, p.9].

From the analysis of the provisions of the Law on SIA no.59 of March 29, 2012, we can identify another procedural subject with the potential of disposing certain special investigative measures. *Per* Article 8 paragraph (1) - (2) of the Law, the head of the specialized subdivision of the authority performing special investigative activity, assigns the acts requiring to carry out special investigative measures, coordinates the work of the subordinated investigative officers and exercises departmental control over them. The head of the specialized subdivision authorizes the measures provided for in Article 18 (1) (3) (questioning, collecting information about individuals and facts, identifying the person) and exercises control over their execution. Paragraph (4) of the same norm stipulates that, in the case when the head of the specialized subdivision is carrying out the special investigation activity, he/she acquires the rights and obligations of an investigative officer.

Thus, the head of the specialized subdivision can comprehend in two hypostases: the first one is acting as a procedural exponent charged with the right to determine the appropriateness of starting SIM, the second one is acting as an investigative officer, who directly executes the measure, being opposed, in this case, against the rights and obligations assigned to SIO by Law No.59 of March 29, 2016.

Returning to the CCP, it is important to analyze the regulatory prescriptions of art.132[3], which show the bases for carrying out a SIM, in conjunction with art.132[4], which describes the procedure of a SIM disposition.

Pursuant to art.132[3] of the CCP, the grounds for carrying out special investigative measures are:

1) the disposal procedural acts of the criminal prosecution officer, of the prosecutor, or of the investigating magistrate in the criminal cases under their procedure;

2) interpellation of the international organizations and law enforcement authorities of other states in accordance with the international treaties the Republic of Moldova is a party to;

3) commissions rogatory letters of the law enforcement bodies of other states in accordance with the international treaties the Republic of Moldova is a party to.

This rule may be misinterpreted as being a legal instrument to the acts issued by the CIO or by the criminal investigating magistrate. Moreover, the interpellations of international organizations and the law enforcement authorities of other states, as well as the

rogatory letters from the law enforcement bodies of other states, are not stand-alone disposal acts that may have legal effects in the national criminal proceedings. However, as it is pointed out in art.132[4], paragraph (1) of the CCP, the prosecutor conducting or carrying out criminal prosecution investigation sets, by reasoned ordinance, the task of executing some special measure of investigation on specialized subdivisions of the authorities indicated in the Law on Special Investigative Activity.

Concluding on the combined interpretation of these two legal norms, we induce that whenever there is a procedural act of the nature specified in Art.132[3] paragraph (1) of the CCP, the prosecutor will examine, in each given case, the fairness of his/her disposal ordinance of a special investigative measure at the request of the above-mentioned procedural exponents.

Per paragraph (2) of the same article, the prosecutor coordinates, conducts and controls the execution of the special investigative measure or assigns a criminal prosecution officer to carry out these actions.

To ensure the observance of the principle of legality at the prejudicial stage, besides the control exercised by the prosecutor, the legislator provided for other forms of supervision such as the control carried out by the head of the criminal investigating body, the head of the special investigative body (SIB), as well as the judicial control, and the one carried out by other participants in the criminal proceedings. So, it is natural to ask the question: how necessary and important is to have the prosecutor's control if there are so many other forms of surveillance?

On this issue, I subscribe to the opinion of Professor Tushev A.A., *per* which the control exercised by the heads of the Prosecution and special investigative bo-dies has an institutional and procedural character, being shown that the strictly institutional control is less effective than the extra-institutional one. Defending institutional interests, the administration can hide the shortcomings of the prosecution and special investigative body's work, including the violations committed. The usual do-not-wash-your-dirty-linen-in-public rule still operates and will continue to function for a long time in the sphere of law enforcement. Judicial control, by its coverage, intensity, operability and forms of reaction, cannot compete with the prosecutor's control either [11, p.11].

Unlike the court, which has control functions over the observance of lawfulness in the prejudicial phase and has an episodic character, the prosecutor's supervision ensures the control of the lawfulness of the criminal investigations during the whole activity of the special investigation bodies, starting with receiving the information about the commission of the offense up to sending the criminal case to the court [6, p.43]. The scope of the prosecutor's control powers is much broader than the judicial one. This control is distinguished by operability, initiative, coverage, tenacity, its possibility to carry out verification actions [9, p.12]. The control of the special investigative activity by the prosecutor is carried out by means of specific methods, those being determined by the fact whether the special investigative measures are carried out to reveal the offense, to search for the missing people or individuals hiding from the criminal prosecution body or the court [7, p.211].

According to the provisions of Article 132[2] paragraph (1) of the Code of Criminal Procedure, the following special investigative measures are carried out in order to reveal and investigate the offenses:

1) *with the investigating magistrate's authorization:*
a) home research and / or installation of devices for surveillance and recording audio and video material of those who are supposed to be recorded and taken in a video;
b) supervision of the place of residence by using technical means of recording;
c) intercepting and recording communications or images;
d) arresting, investigating, delivering, going throu-gh or seizing the correspondence;
e) monitoring the connections of telegraphic and electronic communications;
f) monitoring or controlling the financial transactions and accessing financial information;
g) founding through the usage of technical means and techniques, as well as locating or tracking through the Global Positioning System (GPS) or other technical means;
h) collecting information from the providers of electronic communication services;

2*) with the prosecutor's authorization*:
a) identifying the subscriber, owner or user of an electronic communication system or an access point to a computer system;
b) chasing;
c) control of the transmission or receipt of money, services or other alleged, accepted, extorted or offered material or non-material values;
d) undercover investigation;
e) cross-border supervision;
f) controlled delivery;
g) purchase control.

Hence, Art.132[3] of the CCP stipulates all SIM that may be ordered and conducted in the framework of a criminal prosecution. They may be authorized: 1) by the investigating magistrate, in case the SIMs refer to section 1, and 2) by the prosecutor, if the SIMs refer to section 2.

Conducting SIM means their practical execution by the subject provided by the law using special technical

equipment, IT technologies and programs, electronic communication networks, etc., applying special investigative methods and tactics.

Per provisions of Art. 9 par. (1) of the Law on Special Investigative Activity no.59 of March 29, 2012, the investigative officer is the authorized person who, in the name of the state, carries out special investigative measures according to the legislation in force. Paragraph (2) of the same article stipulates that, when carrying out special investigative measures in a criminal proceeding, the investigative officer is subject to the written instructions of the prosecutor or of the criminal prosecution officer.

In the academic literature, especially in the Russian doctrinaire works, special attention is paid to the analysis of the status and competencies of the special investigative officer in the direct conduct of the SIM, without, however, achieving a wider approach showing up the prosecutor's interference; the investigating magistrate's interference on the one hand, and the SIO's on the other hand.

Per the opinion of Professor Vasiliev N.N. - the subject of the operative investigative process is a natural person, bearing the rights and obligations, stipulated by the Law on the Operative Investigative Activity and by institutional normative acts for internal use regarding the organization and the tactic of the operative investigative measures, including a person possessing certain characteristics determined by the specificity of that activity [10, p.224]. We cannot agree with this definition, because speaking of the category of *operative investigative process*, we mean a wider interpretation of the word, *a process* includes a wide range of activities, namely, the disposition, authorization, performance, assignment, management, coordination and control of SIM. Thus, as it has been shown, diminishing the meaning of the category of *operative investigative process* to just the process of carrying out SIM can lead to a narrow interpretation of the analyzed category, excluding in the end the SIA subjects and other participants with the exception of the special investigation officer (SIO). However, Article 9 of the Operative Investigation Act [13], as well as art. 186 of the Code of Criminal Procedure of the Russian Federation [12] stipulate that in the process of the investigative activity, along with the operative officer, both the investigator and the judge (the investigating magistrate) are involved; the first one requests the authorization of a SIM, the other authorizes the required measure verifying the rationality and legalism of the request.

We agree with the opinion of Professor Shumilov A.Iu. *per* which the OIA subjects are the investigative bodies, the responsible persons within them, as well as other natural and legal persons vested with attributions to carry out state and public competences for making decisions with a legal impact in the sphere of OIA; or when participating or conducting a OIM. The system of OIA subjects can be presented starting with three basic criteria: 1) the functional criterion, 2) the state-related one, and 3) after splitting the subjects into natural or legal persons. From the point of view of their functions, OIA subjects can be classified in subjects who: 1) directly perform OIM (operative officers, undercover agents); 2) supervise and control the performance of OIM (the prosecutor, the judge (the investigating magistrate)) [8, p.186].

Thus, in the content of the Criminal Procedural Law, the first rule that stands out is that the special investigative measures are carried out by an investigative officer from a specialized subdivision of the bodies indicated in the Law on SIA No. 59 of March 29, 2012.

Pursuant to the provisions of Article 132^4 paragraph (4) of the CCP, upon the completion of the special investigative measure or within the deadline set out in the Act of Disposition, the investigative officer conducting special investigative measures reports to the prosecutor about the results obtained while carrying out the special investigative measure.

Such normative provisions place the investigative officer under the operational control of the prosecutor who is responsible for conducting or executing the prosecution in a certain criminal case. This functional subordination derives also from Article 132^5, par. (5) - (6) of the CCP, according to which, if it is found that the measure has been carried out with an obvious violation of human rights and freedoms, or that the investigative officer has exceeded the provisions of the authorization ordinance / completion, the prosecutor or the investigating magistrate shall declare the minutes blank and order by ordinance / completion the immediate destruction of the information carrier and the materials accumulated during the execution of the special investigative measure. If it is found that the actions taken by the investigating officer clearly violated the human rights and freedoms, the prosecutor or the investigating magistrate shall void the measures taken and notify the appropriate authorities. The prosecutor's ordinance may be appealed against to the hierarchically superior prosecutor. The termination of the investigating magistrate's powers is irrevocable. When examining the lawfulness of carrying out a special investigative measure, the prosecutor or the investigating magistrate shall look at the way the measure was taken, the conditions and the grounds on which the special investigative measure was ordered.

On the other hand, *per* Article 12 paragraph (2) and (3) of the Law on SIA No. 59 of March 29, 2016, the investigative officer is independent in naming the applied techniques, the way and the tactics of performing a special investigation measure. The investigative officer has the right to refuse to execute the written instructions of the prosecutor, or of the criminal prosecu-

tion officer, if they are illegal or if there are real circumstances that endanger the life and health of the officer. The refusal to execute written instructions is addressed up the chain of command.

Unfortunately, the Code of Criminal Procedure does not include legal rules that would give the investigative officer the right to question the directions of the prosecutor or of the criminal prosecution officer issued by them during the criminal prosecution. Furthermore, the question how effective the competence prescribed by CCP for managing and coordinating the SIM by the prosecutor is susceptible to judgement, since the SIO is independent in the choice of tactics and methods of conducting a special investigative measure. However, these officers are especially trained on the most effective tactics of performing, e.g., filling out the operative file, but the prosecutor has no knowledge or special skills in this area and the indications he could give may affect the success of the measures at issue.

At the same time, the law prescribes the investigative officer's obligation to submit to the prosecutor's written instructions. However, the operative situation while conducting a special investigative measure (e.g. chasing, control acquisition) may change rapidly and the officer is obliged to operate based on the given situation at a certain moment of carrying out the measure, and the prosecutor cannot intervene in this case with written indications, which again puts the capacity of the prosecutor to conduct and effectively coordinate the execution of a specific investigative measure under question.

Moreover, a tangible omission of the legislator is that the status of the investigative officer is not currently regulated in the Code of Criminal Procedure, but by virtue of Article 132^1, paragraph (1) of the CCP, the SIO carries out evidential procedures similar to those of criminal prosecution officers, that is to say, they must also be subject to the same restrictions and prohibitions, such as the right of an individual to challenge the SIO.

However, the case of carrying out such a special investigative measure as intercepting and recording of telephone conversations is different. *Per* Article 132^9, par.1 of the CCP, the interception and recording of communications is carried out by a criminal investigative body or by an investigative officer. The technical assurance of the interception of communications shall be carried out by the authority empowered by law with such attributions, using special technical means. The staff of the subdivision within the institution authorized by law, who ensure the technical aspect of the interception and recording of communications, as well as people who directly listen to the records, the prosecuting officers and the prosecutor are obligated to keep the communications secrets and bear the responsibility for the breach of this obligation.

From the analysis of this legal rule we can conclude that the direct listening of telephone conversations can be done by:

1) the criminal prosecution body;
2) the investigative officer;
3) the prosecutor / attorney.

Per paragraphs (5) – (8) of the same article, the technical subdivision of the body authorized by law to perform the interception and recording of communications sends the audio signal of the communications to be intercepted in real-time without recording them, and other information indicated in the extract from the investigating magistrate's conclusion, to the criminal prosecution body. The information obtained in the process of intercepting and recording communications can be listened to and viewed on-line by the criminal prosecution body and the prosecutor. The information obtained in the process of intercepting and recording communications shall be transmitted by the technical subdivision that carried out the interception of communications to the criminal investigating officer or to the prosecutor on an information carrier wrapped and sealed with the stamp of the technical subdivision, indicating the serial number of the carrier. Within 24 hours of the expiry of the interception authorization period, the criminal investigative body or (as the case may be) the prosecutor compiles a report on the interception and recording of communications at the end of each authorization period.

From the literal interpretation of this article, it could be concluded that the assignment of a special investigative measure of intercepting and recording the communications can only be done by a criminal investigation officer (CIO) or the prosecutor. The investigative officer is only empowered to listen in real time or, retrospectively, to listen to the telephone conversations or recordings of conversations on an optical data carrier.

Thus, only the CIO or the prosecutor is competent to serve the minutes on the assignment of this special investigative measure. Accordingly, analyzing the results obtained in the interception and recording of communications from the point of view of the admissibility of the administered evidence, we conclude that the norm of art. 132^9 of the Code of Criminal Procedure is a special one compared to the norm provided for by Art. 132^4 of the CCP, which stipulates the obligation of the investigative officer to perform and record special investigative measures.

This remark is important, because, *per* Article 94 parag.(1) - (4) of the CCP, in the criminal proceedings the data that has been obtained by a person who is not entitled to carry out procedural actions in the criminal case cannot serve as evidence and, therefore, are to be excluded from the file. They cannot be submitted to the court and cannot be the basis of the sentence or other court decisions.

Thus, if the investigative officer has taken minutes of the results of the interception and recording of communications, the defence could eventually raise the issue of the inadmissibility of the case administered by a subject to whom criminal law did not confer such powers. The situation is similar when recording videos. This special investigative measure is subject to the legal regime and is carried out under the same conditions as the interception and recording of communications.

Art.133 and 134 of the Code of Criminal Procedure provides for arresting, investigating, delivering, going through or seizing the correspondence. These rules again contain the normative specification that only the criminal investigative body has the authority to carry out this investigative measure.

A special issue, from the perspective of the procedural exponents involved in the activity of conducting SIM, is the realization of the special investigative measure provided by art.136 of the Code of Criminal Procedure - the undercover investigation.

In accordance with the cited procedural rule, the undercover investigation is authorized for the period necessary to discover the existence of an offense.

The undercover investigation is ordered through an ordinance, indicating:

1) the authorized special investigative measure;

2) the period for which the special investigative measure has been authorized;

3) the specifications of duties assigned to the undercover investigator and the activities he / she will carry out;

4) the individual or individuals who are subject to the special investigative measure or their identification data, if known.

If it is considered reasonable for the undercover investigator to use special investigative measures provided by art. 132^2 par. (1) (1) (let. a) -h), the prosecutor shall notify the investigating magistrate about the decision to conduct a special investigative measure. Undercover investigators are employees specifically designated for this purpose within the Ministry of Internal Affairs, the Intelligence and Security Service, the National Anticorruption Center, the Department of Penitentiary Institutions of the Ministry of Justice, or they are people trained to carry out a certain special investigative measure. The undercover investigator carries out the special investigative measure for the period specified in the prosecutor's ordinance. The undercover investigator collects data and information, which he/she fully puts at the disposal of the prosecutor who has authorized the special investigative measure. The undercover investigator must not cause anybody to commit offenses. Public authorities may make use of, or make available, any documents or objects necessary to the undercover investigator to carry out the special investigative measure. The undercover investigator may be heard as a witness in criminal proceedings. For well-founded reasons, the undercover investigator may be heard under the Law on the Protection of Witnesses and Other Participants in Criminal Proceedings.

This rule gives the prosecutor the right to transfer the investigating officer's procedural powers to the undercover investigator, who may also be a private person trained by the state authorities to carry out a specific investigative measure. The undercover investigation itself is not a single-handed probative proof by which evidence is administered in a criminal case. To achieve the finality of the criminal prosecution, the undercover investigator must carry out one of the SIM specified by article 132^2 of the Code of Criminal Procedure. Thus, based on the prosecutor's ordinance, the person who is not a public agent of the state, being charged with the duty to gather the necessary evidence regarding the existence of the offense, and to determine whether it is necessary to transmit the criminal case into the court, intervenes in the criminal proceeding identifying the perpetrator.

A practical problem is that in Article 137 parag.(3) of the CCP the legislator provided for the rule *per* which the identity of the undercover investigator is known only to the prosecutor and may be disclosed only with the written consent of the investigator and in accordance with the Law on State Classified Information. The undercover investigator is placed under the sole control of the prosecutor, who may use the right of disclosure only if he/she has access to state classified information under special law.

Articles 138^1 and 138^2 of the Code of Criminal Procedure regulate the procedure for carrying out such special investigative measures as cross-border surveillance and controlled delivery.

According to Art.138^1paragraph (1) of the CCP, except in cases where there is a contradicting provision in the international treaty applicable to the relationship with a foreign State, *the representatives of a criminal investigative body of a state* who, in the framework of a criminal prosecution, supervise on the territory of another state a person suspected of having participated in the commission of an offense which allows his/her extradition, or a person who, on good grounds, is believed to be able to help with the identification or location of the suspected participant in the commission of the offense, are authorized, on the basis of a prior request for legal assistance, to continue this surveillance on the territory of the Republic of Moldova. Upon request, supervision may be exercised by the competent authorities of the Republic of Moldova.

Similarly, Article 138^2 of the CCP stipulates that controlled delivery means supervised movement of objects, goods or other values (including substances, means of payment or other financial instruments), which are the outcome of the commission of a crime

or utilized to commit an offense on the territory of the Republic of Moldova or outside its borders. The purpose of controlled delivery is to investigate a crime or identify the individuals involved in its commission if there is a reasonable suspicion of the illicit possession or procurance.

Paragraph 3 of the same article stipulates that controlled delivery means that all States through which illegal or suspected shipments are transited shall expressly: 1) agree to the entry of illegal or suspected transport onto the territory of the state and its exit; 2) ensure that the illegal or suspected transport is permanently supervised by the competent authorities; 3) ensure that the prosecutor, the criminal investigating authorities or other competent state authorities are notified of the outcome of criminal proceedings against the individuals accused of offenses subject to the special investigative measure.

Thus, the Criminal Procedural Law assigns powers to carry out special investigative measures in a case investigated by the authorities of a State to the competent third party authorities, in compliance with the legal terms and those provided for in treaties or agreements on granting international legal assistance in criminal matters.

Starting from the stated premises, taking into account the doctrinaire interpretations made above, we conclude that the process of carrying out special investigative measures is a complex one, involving procedural exponents with different attributions, some having extensive competences, e.g. the prosecutor (who disposes, authorizes, conducts, coordinates and controls the execution of the SIM), the investigating magistrate (who authorizes and controls the legality of SIM), the criminal investigation officer (who conducts, records the SIM, and, at the prosecutor's prescript, coordinates and controls the actions of the SIO), the investigative officer (who carries out and records SIM), the undercover investigator, and the representatives of competent bodies of foreign states (who perform the SIM).

Next, we will summarize the issue discussed in both the practical and the academic environment – i.e. what the procedural stage at which special investigative measures can be carried out is.

Thus, Articles 41 and 300 of the CCP prescribe the scope of the judicial control exercised by the investigating magistrate. From the analysis of these normative provisions we can conclude that the competences of the investigating magistrate are circumscribed exclusively to the criminal prosecution, having no competences, outside the criminal trial, within the criminal trial and after the suspension of the criminal prosecution.

Also, by the provisions of Article 471, par. (1) of the CCP, the investigating magistrate has certain competences specific to the enforcement phase of the conviction sentence. Respectively, considering the procedural stage the investigating magistrate attends, we can conclude that special investigative measures, which require the authorization of the investigating magistrate, can only be carried out in the framework of the criminal prosecution.

The question is due to be asked whether special investigative measures, the disposition of which is the competence of the prosecutor may be carried out after the suspension of the criminal proceedings, once the criminal law obliges the prosecutor to supervise the initiated investigations in pursuit of the accused individual. Here we would like to compare the legal provisions defining the categories of *the purpose of the prosecution, the purpose of the criminal trial,* and *what serves as an evidence in a criminal trial.* In this regard, the assertions shown below are relevant.

From the normative content of art.252 of the Criminal Procedure Code we can state that the purpose (the objective) of the criminal investigation is:

1) collecting evidence to establish the existence of the offense;

2) collecting evidence to identify the perpetrator;

3) collecting evidence supporting the need to hand over the criminal case to the court.

On the other hand, the purpose of a criminal trial is wider and it also seeks to ensure the inevitability of pro-secution of individuals guilty of committing a harmful deed (art. 1, par. 2, CCP "…any person who has committed an offense shall be punished according to his/her guilt ..."). In this context, we recall the provisions of art.93 par. (1) of the CCP, *per* which, the evidence serves to:

1) establish the existence or non-existence of the offense;
2) identify the perpetrator;
3) ascertain somebody's guilt;
4) as well as discover other important circumstances for a fair settlement of the case.

If we estimate the notion of "cause" in the sense of the provisions of art.6 (5) of the CCP, then we conclude that the evidence represents the elements that can be administered during the entire criminal process, from the moment when the criminal prosecution body has been notified of the commission of the offense until the identification of the convicted person wanted and the enforcement of the conviction sentence. Respectively, if the investigations in terms of searching for the accused individual may be carried out after having suspended the criminal proceedings, then the question is - may the prosecutor order that special investigative measures to be taken after the suspension as well to ensure that the purpose of the criminal proceeding has been compassed?

The Code of Criminal Procedure does not contain a viable legislative solution that provides a clear answer to this question, however, we believe that, considering

the legal interpretations of the procedural rules shown above, the prosecutor could make use of SIM, including the period after the prosecution criminal investigations had been suspended, disposing other investigative measures than those authorized by the investigating magistrate.

The research carried out in the present study resulted in some aspects of the normative inadequacies contained in the Code of Criminal Procedure. It has also defined and highlighted some legal concepts, particularly addressing the following issues:

➢ Clarifying the concept of *carrying out special investigative activity*, which in author's opinion presupposes: all the successive procedural actions directed towards a single objective – to compass the purpose of the criminal process displayed through disposition, authorization, conducting, recording, management, coordination and control of special investigative measures initiated in criminal investigations.

➢ Identifying the procedural exponents involved in the process of carrying out special investigative activity, from the perspective of the area of functional competences invested on each of them by law.

➢ Emphasizing the issue of conducting and recording the special investigative measure of intercepting and recording the communications and images. As stated in the present study, the rule described in Article 132^9 of the CCP acts as an exception with regard to the provisions of Articles 132^4 and $132^5$of the CCP, the SIM recording being assigned to the Criminal Investigation Body or to the prosecutor.

➢ Addressing the problem of the phase in which SIM can be conducted, showing the procedural rules of equivocal interpretation which create an insecure normative framework in the field of SIA deployment.

➢ Highlighting the prosecutor's practical vulnerabilities to effectively carry out the management and coordination of the investigative officer's performance of special measures, in the situation where, in accordance with Law no.59 of 29 March 2016 the officer is independent in choosing the tactics and methods of conducting SIM.

At the end of this research, we recommend:

1. Review the Code of Criminal Procedure and complete it with additional articles indicating the status of the investigative officer.

2. Illustrate the concept of conducting a special investigative activity, including completing Article 6 of the CCP, where an appropriate definition would be given.

3. Initiate discussions in the academic environment and among practitioners in order to identify a general conclusion on the question whether the special investigative activity is a criminal investigation activity, because, for the time being, the norm stipulated by art. 132^1 of the CCP has set a sign of equality between these two legal categories.

Bibliographic references:

1. Codul de procedură penală al Republicii Moldova. Nr.122-XV din 14.03.2003. În: *Monitorul Oficial al Republicii Moldova*, 2003, nr.104-110/447. În vigoare din 12.06.2003. Republicat în: *Monitorul Oficial al Republicii Moldova*. Nr.248-251/699 din 05.11.2013.
2. Legea privind activitatea operativă de investigații. Nr.45-XIII din 12.04.1994. În: *Monitorul Parlamentului Republicii Moldova*, 1994, nr.5/133. Republicat în: *Monitorul Oficial al Republicii Moldova*, 2003, nr.11-13/38.
3. Legea privind activitatea specială de investigații. Nr.59 din 29.03.2016. În: *Monitorul Oficial al Republicii Moldova*, 2012, nr.113-118/373. În vigoare din 08.12.2012.
4. Legea cu privire la procuratură. Nr.3 din 25.02.2016. În: *Monitorul Oficial al Republicii Moldova*, 2016, nr.69-77/113. În vigoare din 01.08.2016.
5. *Speța Iordachi și alții c. Moldovei*, hotărîrea din 10.02.2009, definitivă din 14.09.2009. https://hudoc.echr.coe.int/eng#{„display”:[„0”],”languageisocode”:[„RUM”],”appno”:[„25198/02”],”documentcollectionid2”:[„CHAMBER”],”itemid”:[„001-112676”]} (vizitat la 20.08.2017).
6. Бойков А.Д. Скворцов К.Ф., Рябцев В.П. *Проблемы развития правового статуса Российской прокуратуры (в условиях переходного периода)*. Москва, 1998. 92 с.
7. Винокуров Ю.Е. и др. *Прокурорский надзор: Учебник*. Москва: «Юрайт-Издат», 2008. 464 с.
8. Горяинов К.К., Овчинский В.С., Шумилов А.Ю. *Оперативно-розыскная деятелъностъ: Учебник.* Москва: ИНФРА-М., 2001. 876 с.
9. Кехлеров С.Г. Некоторые итоги и потенциал правозащитной деятельности прокуратуры. В: *Права человека в России и правозащитная деятельность государства: Сборник материалов Всероссийской научно-практической конференции*, под ред. В.Н. Лопашина. Санкт-Петербург, 2003, с.45-53. *Citat de:* Тушев А.А. *Прокурор в уголовном процессе Российской Федерации.* Санкт-Петербург: Юридический центр Пресс, 2005. 325 с.
10. Рушайло В.Б. *Основы оперативно-розыскной деятельности: Учебник.* Санкт-Петербург: Ланъ, 2000. 717 с.
11. Тушев А.А. *Прокурор в уголовном процессе Российской Федерации* Санкт-Петербург: Юридический центр Пресс, 2005. 325 с.
12. Уголовно-процессуальный кодекс Российской Федерации от 18.12.2001, №174-ФЗ http://www.consultant.ru/document/cons_doc_LAW_34481/ (vizitat la 20.08.2017)
13. Федеральный закон Российской Федерации „Об оперативно-розыскной деятельности от 12.08.1995, №144-ФЗ. http://www.consultant.ru/document/cons_doc_LAW_7519/ (vizitat la 20.08.2017).