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5.2 Problematic aspects of proving the receipt of unlawful benefit by judges during pre-trial investigation

Corruption as a social phenomenon is a significant problem in any society. Corruption penetrates into vital areas of society, provides an opportunity to establish control over financial and industrial groups and even sectors of the economy, and to favor one’s interests in legislative bodies and public administration and local self-government bodies.

Among the crimes directly aimed at seizing other people’s property or obtaining other illegal benefits, money laundering is quite common.

We should agree with the opinion of scientists who emphasize that an increase in the money laundering level leads to the following consequences: capital in the country is not optimally placed; illegal funds are used to finance criminal activities and implement corruption schemes; cash receipts in the state budget are reduced; funding for social spheres of society is reduced; and the living standards of the country’s population decline. Constant updating of money laundering methods and identification of economic activity areas that are not subject to financial monitoring and control by the state requires more effective legal regulation of money laundering. The possible ways to improve an anti-money laundering system in Ukraine are as follows: continuous training of specialists in the field of financial audit; creating special working teams to investigate money laundering crimes, which will involve IT specialists, law enforcement officers and financial specialists; regular audit of performance of financial institutions activities and ensuring the preservation of customers’ confidence; enshrining at the statutory level of money laundering crime classification and criminal liability for their commission; conducting anti-corruption policy in the state [51, p. 361].

In addition, it is worth noting that corruption, which is a social phenomenon, also penetrates the law enforcement system. Therefore, one of the most pressing legal and social problems is the fight against corruption in the judiciary. Unlawful benefit, being a criminalized corruption phenomenon in the judicial system of Ukraine, is the subject of special attention of the international community. Corrupt relations among the representatives of the judiciary of Ukraine lead to their dependence on criminal structures, which results in negative consequences of making unjust decisions in direct violation of moral and ethical standards and domestic legislation.

It is the receipt of unlawful benefits, which contributes to the spread of practical experience in the judiciary regarding unfair trial of cases, that is the most dangerous type of corruption in Ukraine. Such criminal offenses are characterized by a high level of latency, as well as the fact that their investigation is accompanied by corresponding difficulties in detection and documentation, and criminals and other interested parties use appropriate countermeasures to conceal the criminal offense and attempt to avoid responsibility.

In addition, it should be noted that the receipt of unlawful benefits by judges is accompanied by a number of difficulties in the pre-trial investigation. An important means of establishing the circumstances of a criminal offense in such circumstances is to conduct covert investigative (detective) actions. At the same time, those procedural actions that are carried out immediately after the detention of a person in accordance with Article 208 of the CPC of Ukraine (in case of open recording of the fact of obtaining an unlawful benefit) are of particular importance.

In particular, we are talking about inspection of the scene, search, obtaining of palm swabs from the hands of detained persons for further forensic chemical examination, the conclusions of which should confirm the fact that the person was holding banknotes that were marked with a special means in advance.

Meanwhile, in the practice of pre-trial investigation, several approaches have been developed to address the issue of procedural formalization of taking the washings from the hands of persons. Thus, this activity is carried out in three directions: 1) examination of the detained person; 2) search of the person; 3) collection of biological samples [52, p. 326].

We believe that ensuring a prompt, complete and impartial pre-trial investigation of obtaining an unlawful benefit by judges can be carried out by taking biological samples from a person who has committed this type of criminal offense. Therefore, we consider it necessary to analyze the peculiarities of the relevant procedural action.

This approach to obtaining the washings from the hands of a detained person is that these objects are regarded as biological samples and are taken in accordance with Part 3 of Article 245 of the CPC of Ukraine. This legal provision stipulates that biological samples are taken from a person in accordance with the rules provided for in Article 241 of the CPC of Ukraine (i.e., in the course of his or her examination). If a person refuses to voluntarily provide biological samples, the investigating judge or court, at the request of a party to the criminal proceedings considered in accordance with the procedure provided for in Articles 160-166 of the CPC of Ukraine (i.e., in the manner prescribed for temporary access to things and documents), has the right to allow the investigating prosecutor (or oblige them, if the request was filed by the defense) to take biological samples forcibly.

At the same time, V. V. Rogalska emphasizes some peculiarities of biological sampling:

1) As long as no changes are made to the legislation, the biological samples of a person are considered to be all samples related to the vital activity of a person as a biological being, and their obtaining must be carried out in accordance with Part 3 of Art. 245 of the Criminal Procedure Code;

2) Refusal to provide voluntarily biological samples for expertise (examination), except for voice and handwriting samples, should not be considered as an exercise of the right not to testify against oneself;

3) Biological samples can be taken from persons, regardless of their procedural status and being a party to the criminal proceedings;

4) Obtaining of biological samples for examination is an investigative action which is prohibited until the data are submitted to the Unified Register of Pre-trial Investigations [53, p. 297-298].

Thus, obtaining swabs in accordance with Art. 245 of the CPC of Ukraine provides for the existence of two procedures: 1) voluntary – when a person provides his/her hands for the relevant investigations; 2) compulsory – when a person refuses to perform these actions. The legal basis for the voluntary procedure, based on the requirements of Articles 241 and 245 of the CPC of Ukraine, is the prosecutor’s decision. At the same time, if the detainee refuses to provide his hands for examination, Article 245 of the CPC of Ukraine requires the investigator to apply to the investigating judge with a relevant petition, agreed by the prosecutor, to issue a ruling that would authorize the forced collection of swabs [52, p. 327-328].

The Criminal Procedure Code of Ukraine of 2012 introduced many innovations, including a type of investigative (detective) actions that is already familiar today – covert investigative (detective) actions [54]. The proposed institute has changed the established concept and the procedure for conducting relevant investigative (detective) actions in criminal proceedings. Despite the long period of application of this institute, the current problem is to determine the peculiarities of organization and procedure of covert investigative (detective) actions, as well as to determine the legislative shortcomings and advantages of its legal regulation in criminal proceedings [55].

The study of empirical sources has made it possible to emphasize that the procedure for conducting covert investigative (detective) actions to investigate unlawful gain is characterized by a certain number of features. Therefore, their further clarification is the main purpose of our scientific research.

The issue of detecting, documenting, suppressing and investigating the facts of obtaining undue advantage, in other words, bribery, by judges is not very common among scholars. However, only some aspects of this issue were raised in their scientific research by D. I. Bagaliy, M. P. Vasylenko, O. O. Kvasha, O. F. Kistiakivskyi, O. Lazarevskyi, O. Malinowski, M. Muzychenko, I. Telichenko, M. Yasynskyi and others.

The works of these scholars constitute the scientific and theoretical part of the study, however, given their importance, there is a need to separately address the issue of peculiarities of conducting covert investigative (detective) actions during the pre-trial investigation of obtaining undue advantage by judges.

The relevant reforms have been implemented at almost all stages of criminal proceedings, including the pre-trial investigation. Therefore, the implementation of the system of covert investigative (detective) actions, as well as the update of theoretical approaches to operational and investigative measures, greatly contributes to the fulfillment of the tasks of criminal proceedings at this stage. In this regard, the regulatory regulation of the institute of covert investigative (detective) actions and certain changes in the national legislation regulating the issues of operational and detective activities are of considerable practical and purely scientific interest [56].

Along with the issues that have opened up new opportunities for pre-trial investigation bodies, the provisions of the Criminal Procedure Code of Ukraine, as well as a large number of regulations adopted for its direct implementation, have raised some questions regarding their interpretation and appropriate application. At the same time, it is worth noting that pre-trial investigation bodies and operational units are now in a rather difficult situation, as they have to master this legal matter through their own mistakes, as well as through new attempts to form a certain law enforcement practice [57, p.5].

Covert investigative (detective) actions are an effective lever in the fight against crime and are also used by law enforcement agencies to collect information about circumstances and facts relevant to criminal proceedings and subject to appropriate proof.

As we have previously noted, the receipt of undue advantage by judges is characterized by a rather high level of latency. Some difficulties arise in the course of direct activities related to the detection and documentation of criminal activity under appropriate conditions. Therefore, as a result, there are problems with proving the circumstances of the criminal offense, which in turn affects the effectiveness of the pre-trial investigation. In such circumstances, it is necessary to apply all measures provided for by law to achieve the objectives of criminal proceedings. One of these measures is covert investigative (detective) actions.

WE agree with the opinion of Y. Chornous who notes that the peculiarity of covert investigative (detective) actions is that their content is closer to operational and search measures, but despite the existence of many years of practice, they are regulated by the Criminal Procedure Code of Ukraine. This is a progressive step, which determines its focus on ensuring the rights and freedoms of the person in respect of whom such actions are carried out [58, p.292].

That is, if there is a need to collect evidence of a corruption criminal offense – obtaining undue benefit by judges that cannot be obtained in any other way, it is advisable to conduct covert investigative (detective) actions in compliance with the requirements of Chapter 21 of the CPC of Ukraine.

It is worth noting that criminal proceedings related to the receipt of undue advantage by a judge shall be initiated by the investigator, coroner, or prosecutor immediately, but not later than 24 hours after the filing of a statement or report of a criminal offense or after the independent discovery of circumstances that may indicate the commission of a criminal offense from any source. The relevant information is entered into the Unified Register of Pre-trial Investigations and a pre-trial investigation is initiated (Article 214(1) of the CPC of Ukraine).

Pursuant to Article 216(5) of the CPC of Ukraine, if a crime under Article 368 of the Criminal Code of Ukraine is committed by a judge, its pre-trial investigation is carried out only by detectives of the National Anti-Corruption Bureau of Ukraine.

From the point of view of practice, the most effective reason for conducting covert investigative (detective) actions is the presence of a person’s application for extortion of an object of unlawful benefit [59, p.103].

Therefore, in our opinion, it is advisable to consider certain covert investigative (detective) actions carried out during the direct investigation of undue advantage by judges.

In particular, we mean audio and video monitoring of a person (Article 260 of the CPC of Ukraine). With the help of this covert investigative (detective) action, we can record actual negotiations related to extortion, as well as the receipt of illegal benefits.

Audio and video control of a person is a type of interference with private communication, which is carried out without his/her knowledge on the basis of a decision of the investigating judge, if there are sufficient grounds to believe that the person’s conversation or other actions, movements, sounds related to his/her direct activities or place of residence, etc. may contain certain information that is essential for the pre-trial investigation.

Significant information in criminal proceedings can also be obtained by conducting a special investigative experiment, which involves the creation by the investigator, as well as the operational unit, of certain conditions in an environment that is as close to real as possible in order to verify the real intentions of a person whose actions provide signs of a serious or especially serious crime, to monitor his or her behavior and make certain decisions regarding the commission of a crime [60]. An important role in the course of a special investigative experiment is played by such covert investigative (detective) actions as audio and video monitoring of a person and a place, which are conducted in conjunction with a special investigative experiment.

In addition, it is necessary to emphasize that such covert investigative (detective) action as inspection of publicly inaccessible places, housing or other property of a person plays a rather important role in the relevant investigation (Article 267 of the CPC of Ukraine). This covert investigative (detective) action consists in secretly entering the premises and other possessions of a person without the knowledge of the owner or possessor, covertly, under an alias or with the use of technical means, to properly install technical means of audio or video monitoring of a person or to detect and record traces of a crime, to identify documents, things that are essential for pre-trial investigation, to conduct an inspection, make copies or samples thereof, to identify wanted persons, or for other purposes.

Given that a number of other covert investigative (detective) actions are expected to be carried out before the inspection of publicly inaccessible places, housing or other property of a person, it is advisable to prepare thoroughly before the inspection. It is worth noting that the preparation includes several components: selection of forces and means to be used in the course of the inspection; determination of the purpose and objectives of the inspection; setting the time of the inspection of publicly inaccessible places, housing or other property of a person; distribution of tasks of persons involved in the inspection; taking measures to prevent decryption of the inspection; conducting the inspection, and, if necessary, installing technical means for further conducting other covert investigative (detective) actions.

It is impossible to ignore such a covert investigative (detective) action as direct removal of information from transport telecommunication networks (Article 263 of the CPC of Ukraine). It is differentiated into: appropriate control over telephone conversations, which consists in covertly conducting, with the use of appropriate technical means, including those installed on transport telecommunication networks, selection, monitoring and recording of the content of certain telephone conversations, other signals and information (SMS, MMS, modem communication, facsimile communication, etc.) transmitted through the telephone channel that is controlled removal of information from the communication channel, which consists in covertly receiving, converting and recording, using appropriate technical means, in particular those installed on transport telecommunication networks, in a certain form of various types of signals transmitted via Internet communication channels, as well as other controlled data transmission networks.

As for the practical value of conducting the relevant covert investigative (detective) action, it is determined by the content of the recorded actions and conversations during which criminal intentions are exposed. At the same time, it is possible to obtain new information regarding the place, time, circumstances and forums for the transfer of the object of the unlawful benefit, confirmation or clarification of the obligation to assist the person providing the unlawful benefit for the remuneration received, in other words, the failure to perform or perform specific actions. The possibility of threats against the rights and interests of the applicant in case of failure to receive the remuneration; demands to keep their relationship secret; advice from the official regarding the applicant's behavior, etc. cannot be ruled out.

The relevant covert investigative (detective) action, such as surveillance of a person, thing or place (Article 269 of the CPC of Ukraine), means visual observation of a person to record his or her contacts, pursuit, stay in any place, behavior, etc. or the use of special technical means of surveillance for this purpose.

Summarizing the above, it should be noted that covert investigative (detective) actions involving the use of technical means are very effective during the pre-trial investigation of obtaining an unlawful benefit by a judge in criminal proceedings. These include: audio and video control of a person, removal of information from transport telecommunication networks, inspection of publicly inaccessible places, housing or other property of a person, observation of a person, thing or place, etc.

After analyzing a number of professional sources, we can note that the results of covert investigative (detective) actions during the pre-trial investigation of obtaining undue advantage by judges in criminal proceedings are essential evidence to directly prove the judge's guilt in committing a criminal offense related to corruption.

In addition, we have determined that the results of a special investigative experiment on the transfer of the object of undue advantage with the subsequent detention of the suspect are significant evidence in criminal proceedings. At the same time, the practical value of the relevant investigative search action is determined by the content of the recorded conversations during which the criminal intentions of the subject of the analyzed criminal offense are exposed.