

## **THE SECRECY OF PHONE CALLS IN THE CRIMINAL PROCEEDINGS AND THE LEGISLATION OF UKRAINE ON OPERATIVE INVESTIGATION ACTIVITY**



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*There is researched the scientific and regulatory model of protection of secrecy of phone calls in the criminal proceedings and the legislation of Ukraine on operative and investigative activities in the article. There are also revealed the problems of legal regulation in this area, researched the experience of foreign countries, and developed scientifically grounded proposals for improving the current legislation of Ukraine.*

*It is substantiated that the secrecy of phone calls covers not only the content of information transmitted by transport telecommunication networks, but also information about incoming and outgoing connections of a particular subscriber (information about subscriber's numbers (IP-addresses) with which the connection was made, date, time, total call duration in seconds/minutes/hours, call type, total number of connections recorded during the specific time period, International Mobile Equipment Identity (IMEI) etc.*

*It is argued it is not necessary to be limited by conducting such procedural action as collecting information from transport telecommunications networks only by investigations of grave crimes or crimes of special gravity. The need for it may appear during the investigation of crimes of medium gravity.*

*There are identified some shortcomings of the current legislation of Ukraine in determining the executor of collection of information from transport telecommunications networks. The ways to eliminate these shortcomings are proposed.*

*There are developed the amendments and additions to the current legislation of Ukraine, according to which the possibility of extrajudicial restriction of the right to secrecy of phone calls should be excluded. In return, the time for immediate consideration by the judge of a permission request for conducting covert investigative (detective) action should be as short as possible. In particular, it can be reduced from six to two hours.*

*It is proposed to provide a procedure for mandatory informing a person about the temporary restriction of his/her constitutional rights in the law of Ukraine "On Operative Investigation Activity".*

**Key words:** *secrecy of phone calls, right to respect for private life, communication channels, transport telecommunication networks, collecting information, secrecy of correspondence, restriction of constitutional rights.*

### **Рудей Владислав. Таємниця телефонних розмов у кримінальному процесі та законодавстві України про оперативно-розшукову діяльність**

*У статті досліджуються наукова і нормативна модель охорони таємниці телефонних розмов у кримінальному процесі та законодавстві України про оперативно-розшукову діяльність, розкрито проблеми правового регулювання у цій сфері, вивчено досвід зарубіжних країн, розроблено науково обґрунтовані пропозиції для вдосконалення чинного законодавства України.*

*Обґрунтовано, що таємниця телефонних розмов охоплює не лише зміст інформації, що передається транспортними телекомунікаційними мережами, а також інформацію про вхідні та вихідні з'єднання конкретного абонента (відомості про абонентські номери (номери теле-*

фонів (IP-адреси), з якими відбувалось з'єднання, дату, час, загальну тривалість переговорів у секундах/хвилинах/годинах, тип дзвінка, загальну кількість зафіксованих за вказаний проміжок часу з'єднань, міжнародний ідентифікатор мобільного обладнання (IMEI) тощо.

Аргументовано, що не варто обмежуватися проведенням такої процесуальної дії як зняття інформації з транспортних телекомунікаційних мереж лише під час розслідування тяжких і особливо тяжких злочинів. Необхідність у її проведенні може виникнути і в ході розслідування злочинів середньої тяжкості.

Виявлено недоліки чинного законодавства України в частині визначення виконавця зняття інформації з транспортних телекомунікаційних мереж. Запропоновано шляхи усунення вказаних недоліків.

Розроблено зміни і доповнення до чинного законодавства України відповідно до яких можливість позасудового порядку обмеження права на таємницю телефонних розмов має бути виключена, натомість час для невідкладного розгляду слідчим суддею клопотання про надання дозволу на проведення негласних слідчих розшукових дій має бути максимально коротким. Зокрема, нормативно його можна скоротити з шести до двох годин.

Запропоновано передбачити процедуру обов'язкового інформування особи про тимчасове обмеження її конституційних прав у законі України «Про оперативно-розшукову діяльність».

**Ключові слова:** таємниця телефонних розмов, право на повагу до приватного життя, канали зв'язку, транспортні телекомунікаційні мережі, зняття інформації, таємниця кореспонденції, обмеження конституційних прав.

The Article 31 of the Constitution of Ukraine says: "Everyone shall be guaranteed privacy of his correspondence, telephone conversations, telegraph, and other communications. Exceptions shall be established only by court in cases stipulated by law for the purposes of preventing crime or ascertaining the truth during the investigation of a criminal case, if it is not possible to obtain information by other means" [1].

The importance of a person's right to secrecy of phone calls determines the constant attention to it by scientists and practitioners. It was paid attention by both Ukrainian and foreign researchers to some aspects of the restriction of a person's right to privacy during the covert investigative (detective) actions and operative investigation measures. However, despite scientific developments on this topic, the issue of restricting a person's right to secrecy of phone calls has not been sufficiently researched.

Scientific processing of scientific sources and current norms of legislation which determine the procedure and organization of information collection from transport telecommunication networks indicates a number of shortcomings. In particular:

- the normative definition of the concept of "information" that is collected from transport telecommunication networks is deliberative;
- the legality of the extrajudicial procedure for restricting a person's right to secrecy of phone calls is doubtful;

- the limitation of the scope of crimes during the investigation of which or where the restriction of this constitutional right is allowed, is considered as controversial;

- there are the legislative inconsistencies on determining the executor of such covert investigative (detective) action as collecting information from transport telecommunication networks;

- it is not determined the mechanism of informing the person against whom the restrictive measures were carried out during an operative investigative measures.

The purpose of the article is a comprehensive theoretical analysis of the legislation of Ukraine that determines the procedure for restricting the rights of a person to secret of phone calls; identifying shortcomings of legal regulation taking into account the Constitution of Ukraine, the practice of the European Court of Human Rights, the experience of foreign countries and the formation of scientific proposals for improving provisions of current legislation of Ukraine.

The analysis of content of the provisions of the Criminal Procedural Code of Ukraine (hereinafter – CPC of Ukraine) [2] and of Instruction on the organization of covert investigative (detective) actions and use of their results in criminal proceedings are approved by order of the Prosecutor General's Office of Ukraine, Ministry of Internal Affairs of Ukraine, Security Service of Ukraine, the Administration of the State Border Guard Service of Ukraine,

the Ministry of Finance of Ukraine, the Ministry of Justice of Ukraine dated 16.11.2012 № 114/1042/516/1199/936/1687/5 [3] (hereinafter – the Instruction) allows us to conclude that under the information collected from the transport telecommunications networks we should understand the content of telephone calls and various types of signals transmitted by telephone communication, channels, Internet communication channels, other data networks.

The Instruction explains that different types of signals are signs, written text, images, sounds, messages of different types, which are transmitted via SMS, MMS, facsimile and modem communication, etc. That means that a signal is an information storage used to transmit messages in a communication system.

From the content of provisions of the CPC of Ukraine and the Instruction it follows that the “information” transmitted by the communication channel covers only the content of phone conversations. However, the data about the fact of subscriber’s connection are still out of consideration of legal regulation.

This raises the question of whether obtaining information about the fact of connection of the subscriber, taking into account the date, time and duration, as an “interference” in a person’s privacy.

P.F. Scott argues that obtaining personal data using IMSI (International Mobile Subscriber Identity) is not “interference” in his/her private life, because the use of IMSI is aimed at collecting metadata of the subscriber, but not his/her identity [4, p. 364–368].

It seems to us that any information entered into the telephone is transmitted by telephone connection, and the subscriber’s metadata must be protected by Article 8 of the European Convention on Human Rights.

Such position corresponds to the position of the Plenum of the Supreme Court of Ukraine, which in the resolution “On some issues of using by courts of Ukraine in getting permits for temporary restriction of certain constitutional rights and freedoms of human beings and citizen during operative investigation activities, inquiry, pre-trial investigation” dated of 28 March 2008 № 2 clarified that the information taken from the communication channels includes data both

on the interconnection of telecommunication networks and on the content of the information transmitted by the communication channel.

The legal provisions of Ukraine determining the procedure for restricting a person’s right to secrecy of phone calls should be agreed with the practice cases of the European Court of Human Rights. In particular, the position of the European Court of Human Rights, which in 1984 in the case of “Malone v. the United Kingdom,” (see paragraph 56, paragraph 83, paragraph 84) noted that information on dialed numbers, taking into account the time and duration of each call, is an integral part of telephone calls. Paragraph 84 of this resolution states: “...The records of metering contain information, in particular the numbers dialed, which is an integral element in the communications made by telephone. Consequently, the release of that information to the police without the consent of the subscriber also amounts, in the opinion of the Court, to an interference with a right guaranteed by Article 8” [5].

In our opinion, the secrecy of phone calls covers not only the content of information transmitted by transport telecommunications networks, but also information about incoming and outgoing calls of a particular subscriber (information about subscriber numbers (phone numbers (IP – addresses) the connection made by, date, time, total call duration in seconds / minutes / hours, call type, total number of connections recorded during the specified time period, International Mobile Equipment Identity (IMEI), etc.

Criminal procedural legislation of Ukraine, as well as the legislation of other countries such as Poland [6, p. 14], Kazakhstan [7] and others provide in urgent cases out-of-court procedure for restricting a person’s right to secrecy of phone calls, with subsequent obtaining a court sanction.

Thus, Part 1 of Article 250 of the CPC of Ukraine stipulates that in urgent cases related to saving lives and preventing of a serious or especially serious crime, collecting information from transport telecommunications networks may be initiated before judge’s decision by order of an investigator agreed upon with a prosecutor. In such case, the prosecutor is obliged immediately to apply to the investigating judge after the beginning of such covert investigative (detective) action.

However, the provisions of the CPC of Ukraine on the out-of-court procedure for conducting this covert (investigative) detective action do not correspond to the Fundamental Law of Ukraine. Article 31 of the Constitution of Ukraine provides only the judicial procedure for restricting the right to secrecy of phone conversations, and Article 64 of the Constitution of Ukraine states: "Constitutional human and civil rights and freedoms shall not be restricted, unless a restriction is stipulated by the Constitution of Ukraine".

In addition, the European Court of Human Rights in paragraphs 55 and 56 of the resolution "Klass and Others v Germany" determined that the law must provide reliable and effective guarantees against abuses, which include permission to restrict the right to secrecy of phone conversations after receiving a judge's decision. In particular, paragraph 55 of this judgment states: "One of the fundamental principles of a democratic society is the rule of law, which is expressly referred to in the Preamble to the Convention (see the Golder judgment of 21 February 1975, Series A no. 18, pp. 16-17, paragraph 34). The rule of law implies, inter alia, that an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by the judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and a proper procedure". At the same time, paragraph 56 states: "The Court considers that, in a field where abuse is potentially so easy in individual cases and could have such harmful consequences for democratic society as a whole, it is in principle desirable to entrust supervisory control to a judge" [8].

We believe that the limits of acquaintance with personal life through wiretapping should be as restrictive as possible, and the procedure for restricting the right to privacy should be clearly regulated by law. Therefore, the possibility of extrajudicial restriction of the right to secrecy of phone calls should be excluded; instead the time for immediate consideration by the investigating judge of the request for permission to conduct a covert investigative (detective) action should be as short as possible. In particular, it can be reduced from six to two hours.

The position of the domestic legislator, and also well-known Ukrainian and foreign researchers (B.T. Bezliepkin, E.A. Dolya, V.M. Zhukovskiy, Ie.Iu. Zakharov, I.L. Petrukhin, D.B. Sergeieva) is correct that the restriction of the right to secrecy of phone calls is allowed in criminal proceedings for grave crimes or crimes of special gravity.

At the same time, in our opinion, such procedural actions should not be limited to the investigation of grave crimes or crimes of special gravity. The need for them may arise during the investigation of crimes of medium gravity. For example, crimes against National Security of Ukraine, which are provided in Parts 2 and 3 of Article 109 of the Criminal Code of Ukraine "Actions aimed at forceful change or overthrow of the constitutional order or takeover of government" and Part 1 of Article 110 of the Criminal Code of Ukraine "Trespass against territorial integrity and inviolability of Ukraine" are referred by the legislator to the category of medium gravity.

It is also worth drawing attention to the inconsistencies in the current legislation of Ukraine in the part of determining the executor of the specified covert investigative (detective) action.

Thus, in accordance to the Part 4 of Article 263 of the CPC of Ukraine, the collecting information from transport telecommunications networks is entrusted to authorized units of the National Police, the National Anti-Corruption Bureau of Ukraine, the State Bureau of Investigations of Ukraine and the Security Service of Ukraine.

However, the Paragraph 3.5 of the Instruction on the organization of covert investigative (detective) actions and the use of their results in the criminal proceedings approved by the Order dated 16 of November 2012 № 114/1042/516/1199/936/1687/5 stated that the above covert investigative (detective) action is entrusted only to the relevant units of the internal affairs bodies and the Security Service of Ukraine.

The reason of such inconsistencies is that there was reworded the Article 263 of the CPC of Ukraine by the Law of Ukraine № 187-IX dated 4th of October 2019. At the same time, the content of the provisions of Instruction remained unchanged.

The Criminal Procedural legislation of Ukraine provides the informing persons against

whom the covert investigative (detective) actions have been carried out. The provision of Paragraph § 101 of the German Code of Criminal Procedure (Strafprozeßordnung) and Article 135 of the Criminal Procedure Code of the Republic of Moldova also provide such a possibility.

At the same time, the Law of Ukraine "On Operative Investigation Activity" [9] does not contain provisions that provide the possibility of notifying persons whose constitutional rights were temporarily restricted during the "collecting information from transport telecommunications networks" as part of an operational investigation.

The Principal Delegate of the European Commission of Human Rights expressed his view that the right of everyone to be informed within a reasonable time period of any secret measure taken against him by public authorities interfered with his rights and freedoms was guaranteed by the Convention. He considers that this right is not contained in the clear provision of the Convention, but the conclusion that it exists inevitably follows from it.

In particular, paragraph 31 of the judgment of the European Court of Human Rights "Klass and Others v Germany" states: "... In his view, the alleged violation related to a single right which, although not expressly enounced in the Convention, was to be derived by necessary implication; this implied right was the right of every individual to be informed within a reasonable time of any secret measure taken in his respect by the public authorities and amounting to an interference with his rights and freedoms under the Convention". [8].

The analysis of scientific works of A.V. Burylova, Ye.Yu. Zakharova, M.I. Kostina, D.B. Sergeieva and A.K. Utarbaeva testified that there is the need to inform persons that their right to secrecy of correspondence, phone calls, telegraph and other communication was restricted.

In our opinion, the Law of Ukraine "On Operative Investigation Activity" should be expected the procedure of mandatory informing a person about the temporary restriction of his/her constitutional rights. During a collection of information from transport telecommunication networks, it is restricted the right to secrecy of phone calls not only of the person specified in the court decision, but

also of a third person whose name is absent in the court decision and whose right to privacy is also restricted. An uninvolved and uninformed third person is without protection because he/she cannot know that his/her constitutional rights have been restricted. In such case, this person would have a real opportunity to appeal the relevant actions of units that make operative and investigative activities and effectively use the mechanism of judicial protection of their rights.

Finally, summarizing the above material, it should be emphasized that in the Criminal Procedure Regulation of restricting a person's right to secrecy of phone calls there are shortcomings that need to be addressed to prevent illegal encroachment on the inviolability of this right.

The legislative definition of the concept of "information" collected from transport telecommunication networks needs to be clarified. In our opinion, the "information" for which the court's permission must be obtained should be understood as: the content of information that was transmitted through the communication channel; information on incoming and outgoing connections of a specific subscriber (information on subscriber numbers (IP – numbers) with which the connection was made; date, time, total duration of calls in seconds; call type; total number of connections recorded for a specific time period; International Mobile Equipment Identity (IMEI).

We believe that the restriction of a person's right to secrecy of phone calls may occur in criminal proceedings for crimes of medium gravity against the National Security of Ukraine. Therefore, it is proposed that the Part 2 of Article 246 of the CPC of Ukraine to be worded as follows: "Covert investigative (detective) actions are conducted if information on criminal offence and its perpetrator cannot be obtained otherwise. Covert investigative (detective) actions specified in Articles 260, 261, 262, 263, 264 (in part of actions based on the investigating judge's ruling) 267, 269, 270, 271, 272 and 274 of the present Code, shall be conducted exclusively in criminal proceedings in respect of crimes of medium gravity, grave crimes or crimes of special gravity.

The shortcomings of legal regulation of collecting information from transport

telecommunications networks include contradiction and inconsistencies between the above regulations and the Constitution of Ukraine.

In order to eliminate the above shortcomings, it is proposed:

– to exclude the Article 250 of the CPC of Ukraine "Conducting a covert investigative (detective) action before investigating judge adopts a ruling";

– the Part 1 of Article 248 of the CPC of Ukraine shall be worded as follows: "Investigating judge is required to consider the request to obtain permission for the conducting of a covert investigative (detective) action within two hours after he has received such request...";

– the Paragraph 3.5 of the Instruction on the organization of covert investigative (detective) actions and the use of their results in criminal proceedings approved by Order of the Prosecutor General's Office of Ukraine, the Ministry of Internal Affairs of Ukraine, the Security Service of Ukraine, the State Border Service of Ukraine,

the Ministry of Finance of Ukraine, the Ministry of Justice of Ukraine dated 16.11.2012 № 114/1042/516/1199/936/1687/5 to state in the following wording: covert investigative (detective) activity – collecting information from transport telecommunication networks is assigned only to the relevant departments of the internal affairs bodies, the National Anti-Corruption Bureau of Ukraine, the State Bureau of Investigation and the Security Service of Ukraine".

It is proposed to complement the Article 8 of the Law of Ukraine "On Operative Investigation Activity" with a new part as follows: "Persons whose constitutional rights have been temporarily restricted during the collecting information from transport telecommunications networks must be informed by the prosecutor of restrictive measures. The specific time of notification should be chosen taking into account the presence or absence of a threat to public safety, life or health of persons, who is involved in the conduct of such operative investigation activity".

#### REFERENCES:

1. The Constitution of Ukraine from 28.06.1996. URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96%D0%B2%D1%80?lang=en#Text> (application date 10.11.2021).
2. The Criminal Procedural Code of Ukraine from 13.04.2012 № 4651-VI. URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (application date 10.11.2021).
3. Instruction on the organization of covert investigative (detective) actions and the use of their results in criminal proceedings approved by the Order of Prosecutor General's Office of Ukraine, the Ministry of Internal Affairs of Ukraine, the Security Service of Ukraine, the State Border Service of Ukraine, the Ministry of Finance of Ukraine, the Ministry of Justice of Ukraine dated 16 of November 2012 № 114/1042/516/1199/936/1687/5 URL: <https://zakon.rada.gov.ua/laws/show/v0114900-12#Text>. (Application date 19.05.2021).
4. Scott, P.F. Secrecy and surveillance: lessons from the law of IMSI catchers International Review of Law. *Computers and Technology*. 2019. № 33 (3). P. 349–371.
5. Case of Malone v. the United Kingdom: Judgment of the European Court of Human Rights from 02.08.1984 URL: <https://www.bailii.org/eu/cases/ECHR/1984/10.html> (Application date 10.11.2021).
6. Skorupka, J. Krytycznie o stanowisku Sądu Najwyższego w kwestii legalności kontroli rozmów telefonicznych. *Prokuratura i Prawo*. 2011. № 4. C. 5–19.
7. Criminal Procedure Code of the Republic of Kazakhstan dated July 4, 2014 № 231 (amended and supplemented as at 02.01.2021). URL: [https://online.zakon.kz/document/?doc\\_id=31575852#pos=3;-106](https://online.zakon.kz/document/?doc_id=31575852#pos=3;-106) (Application date 07.06.2021).
8. Case of Klass and others v. Germany: Judgment of the European Court of Human Rights from 06.09.1978 URL: [https://hudoc.echr.coe.int/rus#{%22itemid%22:\[%22001-57510%22\]}](https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-57510%22]}) (Application date 10.11.2021).
9. On Operative Investigation Activity: the Law of Ukraine from 18.02.1992 № 2135-XII. URL: <https://zakon.rada.gov.ua/laws/show/2135-12?lang=en#Text> (Application date 10.11.2021).