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UNDERCOVER INVESTIGATOR IN SPECIFIC COUNTRIES OF THE EUROPEAN CONTINENTAL LEGAL SYSTEM

ABSTRACT: Elaborate mechanisms of a criminal activity, a high level of secrecy, a hierarchical structure and diversification of tasks among the members of the organized criminal group, make it a complex phenomenon. Due to its specificity, uncovering the crimes and perpetrators of the organized crime requires the use of special methods and techniques. One of them is a special evidentiary action, the deployment of an undercover investigator, which is used to obtain evidence and information necessary for uncovering criminal acts, as well as the organized criminal groups. The purpose of this paper is to present the specific characteristics of this special evidentiary action in certain countries of the European continental legal system, where the covered questions are, when, in what way, and under what conditions a certain person can act as an undercover investigator.

Keywords: *special evidentiary procedure, undercover investigator, organized crime, police officer.*

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1. Introduction

Today, more than ever, on the one hand, states face numerous threats and challenges, and on the other hand, they are not able to respond to various forms of threats (Bjelajac, 2016). Intelligence and security services, as indispensable bearers of security functions, through their activities tend to affect the lives, survival and dignity of potentially endangered people on a daily basis, which ultimately reflects on the level of human development, governance and rule of law in the modern society that is turbulent in many ways, faced with numerous contradictions and difficulties. The diverse nature of security threats logically conditions different reactions to their prevention (Bjelajac, 2017). Organized criminal groups are characterized by closed circle groups, the commitment of group members, intertwining of legal and illegal affairs, a high degree of secrecy, and all of this creates great difficulties for the authorities when uncovering their crimes and perpetrators. Hence, analog to such a complex form of criminal activity, methods used for "classic" crime can be proven inadequate. Thus, "in essence, organized crime is a specific form of modern professional crime that differs in many aspects from traditional forms of criminal association, as well as from classic forms of crime on both national and international proportion" (Matijašević-Obradović, 2017, p. 393).

As a response to this type of crime, governments have had to resort to new methods of suppressing crime in order to improve the efficiency of uncovering and solving these types of crime. Our current Law on Criminal Procedure from 2011, much like other modern criminal procedure legislation, prescribes the possibility of undertaking special evidentiary actions. In the literature, special evidentiary actions are also called special investigative techniques, covert operations, special measures, special investigative methods, and other similar terms. Whatever term we use, it encompasses a secret, covert operation that is carried out with the help of appropriate technical means suitable for gathering evidence without the knowledge of the person against whom the measures are applied (Vuković & Bošković, 2012). Therefore, special evidentiary actions represent certain ways of gathering atypical evidence and are applied only concerning certain criminal offenses, and their wide application is never considered because it would jeopardize their exceptional character and make them less efficient, while also unjustifiably restricting certain human rights and freedoms (Matijašević & Zarubica, 2020).

One of the special evidentiary actions prescribed by law is the deployment of an undercover investigator. The Undercover Investigator Institute is one of the most effective instruments in the fight against organized crime. In other words,

the use of undercover investigators as a method of infiltration into the criminal environment, over time, became an unavoidable criminal-strategic institute when it comes to uncovering and proving organized crime (Jevremović, 2020, p. 60).

In this research, special emphasis will be placed on defining the institute of undercover investigators and determining its basic characteristics, then on the analysis of this special evidentiary action from the aspect of legal solutions in comparative law through the lens of the continental legal system. In addition, special emphasis will be placed on the formal and material conditions for hiring an undercover agent and on the characteristics of the instute form the aspect of the current criminal procedure legislation of the Republic of Serbia.

2. Undercover investigator in German Law

As a special piece of the evidentiary procedure, the undercover investigator, as far as European countries are concerned, was first envisaged in German criminal law in 1989. In German legal theory and practice, the term undercover investigator implies a police officer who conducts investigations under an assigned, altered, or false identity, and who has the right to participate in legal transactions under such identity, including signing contracts, establishing companies, participating in court proceedings and similar activities. German author Koriath (1996) defines an investigator as "a police officer with a changed identity who, acting in secret for a certain period of time, in contact with criminals, obtains data and information useful for uncovering, solving and preventing crime related to organized crime" (p. 535). In Germany, the main condition for hiring an undercover investigator is the existence of initial suspicion or the basis of suspicion that a serious crime was committed, or when there is a danger of recurrence of criminal activity, such as drug abuse, arms smuggling, counterfeiting money, or if the crime was committed by a criminal organization.

The use of this institute is prescribed by the provisions of the Criminal Procedure Code and the police laws of certain German states. In the Republic of Germany, there are three types of participants in secret investigations: an undercover investigator whose identity has been changed; police officers whose identity has not been changed, they are not publicly known, but only occasionally act covertly; and informants, persons who often or occasionally provide information in order to combat crime, while their identity remains a secret, and it's not disclosed to the public.

The legal provision for undercover investigators is located in Article 110a of the German Code of Criminal Procedure. Article 110a reads as follows:

Undercover investigators may be engaged in uncovering criminal offenses, if there are sufficient grounds that show that a criminal offense of special significance was committed: 1) in the area of illicit trafficking in narcotic drugs or weapons, or counterfeiting money or securities; 2) in the field of state security; 3) if the person is regularly engaged in committing criminal offenses or, 4) if the offense was committed by a member of a criminal group or in some other organized manner (Strafprozeßordnung, 1987).

Germany has reduced the application of this provision to a limited number of circumstances, but it does not provide a list of specific crimes. However, the offenses covered are serious, and this will help to meet the conditions of necessity and proportionality. The duration of the measure of deploying an undercover investigator can be approved for a period of up to 3 months, but for justified reasons it can be extended, the maximum duration is not determined, but it can be extended as long as there are justified conditions for its application.

The next provision of the same Law, 110a (1) stipulates that undercover investigators may also be engaged in shedding light on serious criminal offenses when certain facts indicate the danger of recidivism. The use of undercover agents is allowed only when a serious crime cannot be solved in any other way or if its investigation would be associated with disproportionately great difficulties. In addition, undercover investigators can be used to shed light on serious crimes when the severity of the crime requires it, and other measures would likely not succeed.

Article 110b (1) stipulates that approval must be given by the public prosecutor (except in urgent cases, where subsequent approval is required within three working days, and in this case, the deployment is decided by the competent police chief), but only after the expressed willingness of the police officer who will act as an investigator under a fake identity. The deployment of an undercover agent is allowed only with the consent of the competent prosecutor. If there is a danger of delay, and the decision of the prosecutor's office cannot be obtained in time, it should be obtained later as soon as possible, with the measure being revoked if the prosecutor's office does not approve it within three working days. The approval is issued in writing and for a certain period of time and must be explained in detail. However, judicial approval is required in cases when:

1. the investigation is pointed toward a specific individual, or
2. in cases when the undercover agent is going to enter private premises that are not publicly accessible – then the approval of the court is required. If there are circumstances that indicate a danger of delay,

> the approval of the prosecutor is sufficient. If it turns out that the decision of the prosecution cannot be obtained in time, that approval must be obtained later as soon as possible. The measure is revoked if the court does not approve it within three working days.

Article 110b also establishes the anonymity of undercover agents as witnesses in the court proceedings, while Article 110c limits their powers in relation to entry into private premises. Undercover investigators may use their false identities to enter private premises with the consent of an authorized person. Consent must not be coerced by misrepresenting the right of access beyond that resulting from the use of a false identity. Therefore, according to German legislation, an undercover investigator can enter private premises under certain conditions, for which he primarily needs the approval of the court, but in case of urgency, the approval can also be given by the public prosecutor. It is allowed to issue, change and use appropriate documents if necessary to create and maintain a fake identity under which the investigator operates. The undercover investigator must make a report on each undertaken investigative action and submit it to the acting public prosecutor.

Article 110d stipulates that the persons into whose private premises the investigator entered have to be notified of the application of this measure unless it directly affects the security of the undercover investigator or his further engagement, investigation, or public safety. The entire documentation on the application of this institute is being kept in the Public Prosecutor's Office, while Article 110e emphasizes that if the application of this measure gathers evidence of a crime or perpetrator that was not covered by a specific decision, such evidence may be used in other criminal proceedings, but only if it relates to criminal offenses for which the deployment of an investigator may be authorized.

The German Criminal Procedure Code does not contain a provision that explicitly prohibits the commission of criminal offenses by an undercover investigator, nor encourages a police officer with a changed identity to commit a criminal offense, but the prohibitions prescribed in another document, the Common Guidelines.

According to the Common Guidelines of the Ministers of Justice and Interior of the federal states, undercover investigators may not commit a crime during their engagement, while encroachments on the rights of third parties are allowed only within the applicable laws. General legal authority to commit criminal offenses cannot be given based on Article 34 of the Criminal

Code, which regulates the institute of extreme necessity. In exceptional cases, a justification or exemption for the conduct of individual officers may be considered, assuming an exemptive urgency. If there is a violation of legal property available to authorized persons, the illegality of such an act may not be considered from the standpoint of presumed consent (Marinković, 2010, p. 425).

3. Undercover investigator in French Law

In the French Republic, the institute of the undercover investigator is applied only in exceptional cases, and as a last resort, since in this country priority is given to the protection of the rights and freedoms of citizens.

This measure can be approved only if the application of other simpler means and methods that interfere less with human rights does not bring the expected results, and thus at the same time the rational use of this covert investigative measure only in the most complex cases and at a highly professional level must be ensured. This measure is applied to uncover criminal offenses related to drug trafficking, while legally prescribed cooperation with other law enforcement agencies further strengthens the legality and professionalism of this type of police operation (Jović, 2008, p. 175).

The use of the institute of undercover investigators in France is regulated by the provisions of the Criminal Procedure Code (Code de procédure pénale, No.1719, 2020) and the Law on the illicit use of narcotics. With the approval of the competent pre-trial judge or the public prosecutor, this measure can be taken, while the police are obliged to provide detailed information on the fulfillment of the conditions for its undertaking. Infiltration into the criminal environment, the entire mechanism of this measure, can be undertaken only by police officers or customs officers, in cooperation with the judiciary organs, unlike in the case of Germany, ordinary citizens cannot "infiltrate" a criminal organization and act as an undercover investigator. It is forbidden for an undercover investigator to incite the commission of a crime, for example, to incite the suspects of buying drugs or selling narcotics. However, an investigator will not be prosecuted if, during his/her engagement, with the approval of a judge or public prosecutor, he/she possesses, buys, transports or delivers narcotics for the purpose of his/her mission, under the mentioned laws. The duration of the measure of deployment of an undercover investigator is approved for a period of up to 4 months, while the maximum duration is not determined, it can be extended as long as there are conditions for its application.

Under the law, an undercover investigator can act as a buyer if he gathers evidence and exposes the core of a criminal organization. In these cases, the appeal of the defendant based on incitement to commit the crime was always rejected by the court, because the provocation neither caused nor affected the crime, but was only a confirmation of the crime which the defendant would have committed regardless. It is not legally allowed for the undercover investigator to commit a crime to successfully infiltrate a criminal organization, but if the undercover investigator committed a crime during the operation, with the aim of not being uncovered by members of the criminal organization, the illegality of such crime is excluded (Jović, 2008, p. 178).

Members of the investigative bodies authorized to conduct a covert operation will not be criminally liable for certain acts if:

1) Collect, hold, transport, or deliver substances, goods, products, documents, or information arising out of the commission of criminal offenses or used for the commission of such offenses.
2) Use or make available to persons dealing with these criminal offenses means of a legal or financial nature, as well as means of transport, deposit, accommodation, storage, and telecommunications.

The real, true identity of a police officer who has infiltrated a criminal environment under a false identity must not be revealed at any stage of the proceedings. Questions posed to the undercover investigator during the proceedings must not be aimed at revealing, directly or indirectly, his true identity. A criminal conviction may not be rendered solely based on statements made by police officers who conducted a covert operation, however, when police officers testify under their true identity, the provisions of this Article shall not apply.

4. Comparative legal analysis of the institute of undercover investigator in the ex-Yugoslavian countries

All ex-Yugoslavian states prescribe, in their criminal legislation, prescribe the institute of an undercover investigator in the same or similar matter, but there are some differences. The legislation of some countries also envisages the use of criminals, who can act as undercover investigator. In Montenegro. Croatia and Bosna and Herzegovina informants can be hired, while in Serbia only members of the police force can be undercover investigators. As for the material conditions for using an undercover investigator, in all the mentioned countries of ex-Yugoslavia, there is an identical legal solution, and that is

the existence of reasonable doubt that a crime was committed for which the measure of the undercover investigator can be determined if evidence cannot be collected in another way or it would be difficult to do so. About the criminal offenses in respect of which this particular evidentiary action may be ordered, this is regulated similarly in all the countries mentioned, by providing a list of offenses for which this measure may be imposed. In the Republic of Serbia, the Criminal Procedure Code has largely narrowed the range of criminal offenses for which an undercover investigator may be used, as it stipulates that this institute may exceptionally be determined only for criminal offenses within the competence of the special prosecutor's office. These are the most serious crimes of organized crime, terrorism, corruption, and war crimes. Contrary to this solution, a rather extensive, broad framework of solutions is envisaged in Bosnia and Herzegovina, as this measure can be used for all criminal offenses punishable by imprisonment of three years or more. Such a solution may lead to frequent, widespread application of this special evidentiary action, which may lead to the loss of its significance and potency.

The notion and procedural nature of the undercover investigator derive from his position in the pre-investigation and criminal proceedings, and they are essentially marked by a series of elements of a specific sui generis procedural subject (Škulić, 2005, p. 666).

The formal condition for using an undercover investigator is a written, explained court order at the request of the prosecutor, and the content of the order itself is the same in the mentioned Balkan countries. The duration of the undercover mission is similarly determined, with differences in the initial determination and extension of the duration, while in Bosnia and Herzegovina this timeline is not precisely determined, but may last until the goal of the measure is met or the investigation is completed (Criminal Procedure Code of Bosnia and Herzegovina, 2003). Due to the peculiarities of this evidentiary action, it is desirable and justified to limit its duration, because otherwise various abuses may occur. It is indisputable that if the mission of an undercover investigator lasts longer, the probability of success of the measure is higher, and the possibility of gathering evidence and penetrating the very top of criminal organizations rises, but we should also keep in mind the protection of citizens' rights and freedoms.

Persons in charge of implementing this measure, in Bosnia and Herzegovina and Croatia it is prescribed that it is within the competence of the police, while in Serbia and Montenegro it is envisaged that in addition to a police officer a person in charge can be a member of another state body, agency, even a foreign national if the special circumstances of the case so

require. All criminal legislation of the mentioned countries contains the possibility of changing the official records in the databases of state bodies, as well as the possibility of issuing documents with changed data, all in order to protect the true identity of the undercover investigator. All current laws of the mentioned states of the former Yugoslavia explicitly prohibit incitement to commit a criminal offense by an undercover investigator, meaning that acting as an agent provocateur is forbidden. During the covert mission, the investigator collects various data and information, which can be used as evidence in criminal proceedings, and this primarily refers to audio and video recordings, photographs, documents, and more. Furthermore, all the legislations of the mentioned countries stipulate that the undercover investigator can be heard as a witness in criminal proceedings after his mission, and his statement has the force of evidence. Although the purpose of the mission of an undercover investigator is not in his testimony in court about what he discovered during his activities, in directing operational, tactical, and investigative actions in a specific case. However, there may still be a need to examine an undercover investigator as a witness (Delibašić, 2016, p. 86). The interrogation of the investigator refers to all the information he gained during the infiltration into the criminal environment, either by direct observation or through a conversation with the suspects. Only the Criminal Procedure Code of the Republic of Croatia restricts the possibility of testifying, regarding the conversations that the undercover investigator had during his engagement with the persons against whom this special evidentiary action was determined (Zakon o kaznenom postupku, 2011). In order to protect the true identity, a person who was on a secret mission is questioned under special conditions and circumstances, and this is present in all countries of ex-Yugoslavia. Of all these states, only the Serbian criminal legislation stipulates that a court verdict cannot be based solely and exclusively on the testimony of an undercover investigator, while that is the practice in the judiciary of other states.

Only the criminal legislation of Northern Macedonia and Montenegro further stipulates that an undercover investigator will not be criminally liable for aiding and abetting in criminal activities for which the measure was imposed if it was done in order to gather evidence and information for which the measure was imposed. In a way, this has a positive effect on the investigator, allowing him to act more freely and safely in a criminal environment (Code on Criminal Procedure of Montenegro, 2009).

In the Republic of Serbia, the issue of the responsibility of the undercover investigator for committing crimes during his mission has not been adequately regulated. There is only one provision in our Code of Criminal Procedure

regarding the criminal responsibility of an undercover investigator during his mission. An explicit legal provision prohibits an undercover investigator from inciting any criminal activity (Code on Criminal Procedure of the Republic of Serbia, 2011). He cannot act as an "agent provocateur", meaning that, if an undercover investigator verbally or by some other act created or strengthened the decision of a member of a criminal group to commit a crime, he would be exposed to criminal prosecution and punishment. Therefore, the only incitement to commit a crime is explicitly prohibited. Therefore, a logical question arises whether abetting, co-perpetration, and aiding are allowed. By prohibiting incitement, the legislator inevitably prohibits aiding and abetting, given that the instigator is liable just like he committed a crime. The situation is similar to aiding, which is also not allowed, although in this case, certain controversial situations may arise. Formally, an undercover investigator remains responsible because an explicit legal provision that excludes his responsibility does not exist.

Our Code of Criminal Procedure does not have explicit provisions for the commission of a criminal offense by an undercover investigator. With regard to this issue, two situations should be distinguished: 1) if the undercover investigator commits a criminal offense outside his engagement and 2) if the undercover investigator commits a criminal offense during the engagement, either by concealing his position and identity or does not prevent the commission of a criminal offense). Concerning the first situation, if the undercover investigator commits a criminal offense outside his/her engagement, the general rules for determining the responsibility and guilt of the undercover investigator apply. The second situation is extremely complex, and in that sense, the commission and provocation of criminal acts by undercover investigators in the countries of the continental legal system are prohibited. In Italy, an undercover investigator is not allowed to commit or provoke crimes, and to act in the role of "agent provocateur". In Germany, it is forbidden to commit criminal acts, but the investigator is released from responsibility for possible criminal acts he committed in case of extreme necessity in order to gain the trust of a criminal organization (Petrović, 2016, pp. 160–161).

In our theory, the view is expressed that the responsibility of the undercover investigator should be resolved only following the general rules relating to extreme urgency. Therefore, the crimes of an undercover investigator committed in the course of his work should be treated as acts committed in an emergency. This specifically means that an undercover investigator has not committed a crime if he has taken the appropriate action by which he

caused the consequences of the crime, in order to prevent a simultaneous clear danger that could not otherwise be eliminated, and the consequences are not greater than the consequences that were threatened. Also, if the undercover investigator causes danger in negligence, or exceeds the limits of extreme necessity, he is then considered a perpetrator of the crime, but can be punished less severely, and if the situation occurred under particularly mitigating circumstances, he can be released from punishment.

It is necessary to determine in which cases it is possible to give legitimacy to criminal offenses committed by the investigator, and which criminal offenses? These cases could be grouped into two groups, as follows:

1) commission of a criminal offense by an undercover investigator within a criminal group, in order to establish a false or prevent his true identity from being discovered and
2) committing a criminal offense in connection with an illegal activity investigated by an undercover investigator, in order to provide evidence of the guilt of certain persons (Marinković & Đurđević, 2007, p. 50).

5. Conclusion

Due to the specifics and complexity of organized crime, it is often impossible to uncover these acts and their perpetrators through the usual investigative techniques and actions that normally uncover more classic crimes, so the main purpose and justification of legal prescribing of special evidentiary procedure, including undercover investigator, is to solve and prove acts of organized crime

Since in our legal system the issue of the responsibility of the undercover investigator for the committed criminal offenses during his mission is not regulated completely, there are various interpretations and opinions regarding this issue. According to one view, an undercover investigator should not be held accountable for crimes committed during his deployment. Since the nature of his task is such that he inevitably gets into a situation where he has to commit crimes in order to succeed in the mission. Infiltration into criminal environments is possible only if he commits crimes like all other members of the group. Other views take the stance that an undercover investigator is strictly prohibited from committing criminal offenses, or in other words, he is criminally liable for the committed criminal offenses. This is the case with our legislation, and accordingly, it is not disputed that an undercover investigator may not, in general, commit criminal offenses during his activities, but it is

necessary to provide certain exceptions to this rule. Thus, according to the third, compromise solution, the undercover investigator would not be liable under certain conditions for criminal acts during his activities.

It is important to point out that regardless of the still insufficiently precise definition of the institution of the undercover investigator, as well as the existence of certain legal ambiguities on certain issues, it can be said with certainty that the institute of the undercover investigator is of great importance as an evidentiary action and investigative method within the state's response to organized crime. Because, as already pointed out, the complexity and specificity of organized crime require the existence of complex and special methods for preventing, solving, and punishing its members, because the very occurrence of organized crime is specific, and one of the specific evidentiary methods is certainly using a covert investigator.

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PRIKRIVENI ISLEDNIK U POJEDINIM DRŽAVAMA EVROPSKOKONTINENTALNOG PRAVNOG SISTEMA

REZIME: Razrađeni mehanizmi kriminalnog delovanja, visok stepen tajnosti, hijararhijska struktura i podela zadataka članova organizovane kriminalne grupe, čine je kompleksnom pojavom. Zbog svoje specifičnosti, otkrivanje krivičnih dela i učinioca organizovanog kriminaliteta, zahteva primenu posebnih metoda i tehnika. Jedna od njih jeste posebna dokazna radnja, angažovanje prikrivenog islednika, kojom se pribavljaju dokazi i informacija koje su neophodne za otkrivanje krivičnih dela kao i same organizovane kriminalne grupe. Cilj ovog rada jeste prikazivanje specifičnosti ove posebne dokazne radnje u pojedinim državama evropskokontinentalnog pravnog sistema, gde se odgovara na pitanja,

kada, na kojin način i pod kojim uslovima određeno lice može istupiti u svojstvu prikrivenog islednika. Metode koje su korišćene u ovom radu su normativni metod, uporedni metod, istorijski metod i metod analize sadržaja.

Ključne reči: *posebne dokazne radnje, prikriveni islednik, organizovani kriminalitet, policijski službenik.*

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