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SPECIAL INVESTIGATIVE ACTIVITY: CONTENT OF THE DEFINITION, LEGAL ESSENCE, CONCEPTUAL DELIMITATIONS

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Definition of the notion, determination of the legal essence and delimitation of the special investigative activity from other types of activity, especially from the criminal prosecution activity, are the fundamental issues the solutions of which the architecture and the quality of the entire system of legal regulations of the special investigative activity rely on, which in its turn, carries out specific tasks related to combating crime. The article presents the authors’ own solutions to these issues, hoping that contradictory private discussions on this topic will come to the forefront of scientific approaches.

Keywords: special investigative activity, special investigative measures, special investigative techniques, criminal offence, criminal liability, ground, criminal trial, criminal investigation, evidence.

ACTIVITATEA SPECIALĂ DE INVESTIGAȚII: CONȚINUTUL NOȚIUNII, ESENȚA JURIDICĂ, DELIMITĂRI CONCEPTUALE

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Definirea noțiunii, stabilirea esenței juridice și delimitarea activității speciale de investigații de alte genuri de activitate, în special de cea de urmărirea penală, sunt probleme fundamentale de soluționarea cărora depinde arhitectura și calitatea întregului sistem de reglementări juridice al activității speciale de investigații, menit, la rândul său, să realizeze anumite sarcini concrete legate de combaterea criminalității și asigurarea ordinii de drept. În articol sunt prezentate propriile soluții ale autorilor la respectivele probleme în speranța ca discuțiile private contradictorii la acest subiect să ajungă pe platoul abordărilor științifice.

Cuvinte-cheie: activitate specială de investigații, măsuri speciale de investigații, utilizare rezultate ASI, tehnici speciale de investigare, infracțiune, răspundere penală, teme, proces penal, urmărire penală, probe.

Introduction. The legal reform from 2012 regarding special investigative field has fundamentally changed the concept of this type of activity, transforming it from an operative activity of obtaining the necessary information in order to accomplish equally

all tasks established by the Law (revealing attempts to commit crime; preventing, suppressing or discovering criminal offences and the persons who organize, commit or have already committed offences etc.) into

a probative one, focused on prioritizing the accomplishment of one singular task - investigating and revealing criminal offences. Hence, the efficiency of the subjects who conduct special investigative activities has decreased substantially.

As a reaction to the newly created situation through the Decision of the Committee on national security, defense and public order CSN/7 No 257 from 10 June 2015, it was decided that the Government, by the means of Ministry of Justice, shall establish a task force and shall submit, according to an established procedure, the draft law on the amendment and completion of legislative acts regarding the special investigative activity based on the problems identified in the process of implementing the given legislation.

As a result of the activities conducted by the given Committee, many problems were identified, including the problem mentioned above. Though several draft laws were designed in this regard, none of them was submitted to the Parliament. Each year, the Ministry of Justice representative informs the parliamentary Committee on the activity of the task force which is preparing amendments and additions to necessary legislative acts, but due to conflicting visions the draft law has not been completed.

After private discussions with some of the members of the given Committee, we understood that one of the major problems is related to the definition of the special investigative activity on which the entire system of legal regulations from this field is based. This has actually been the main ground for preparing the current study. Its purpose is to identify the content for defining the special investigative activity, its legal essence and its delimitation from other types of activity.

The methodology of the research derives from the object, purpose and tasks of the research. The given study is a synthesis of international and national thinking and practice regarding the special investigative activity.

Results and Discussions. Special investigative activity, according to the Article

1 of the Law 59 from 29.03.2010, represents *a procedure with secret and/or public nature, carried out by competent authorities, with or without the usage of special technical equipment, in order to gather the information needed for preventing and fighting crime, ensuring State security, public order, protection of human rights and legitimate interests, revealing and investigating criminal offences.*

The need and the importance of legally defining the special investigative activity are shaped by the need to have a correct understanding of the legal essence and of the sphere of action of one of the most important fields of State activity by the means of which the government fulfills the responsibility it assumed before its citizens, that is, the fact of being the guarantor for the essential social values [1] - fundamental rights and freedoms of the citizens - against the dangers generated by those who do not comply with the rigours of the criminal Law; those who avoid criminal liability or are absconding from criminal sanction.

From the international Law's perspective, it is absolutely natural for a State to anticipate and to quickly react in order to stop criminal activities that are being prepared or carried out, the purpose being that of ensuring the essential values of the citizens and its national security. The most important thing in this regard, is to obtain, as quick as possible, the necessary information on criminal plans and actions of those who prepare or carry them out. The involvement of the profile State bodies in the process of identifying and holding accountable the perpetrators is also a natural procedure which takes place when, due to some reasons, the criminal activity could not be stopped on time.

The State bodies in charge of fighting crime encounter great challenges due to the secrecy of criminal activities and due to the fact that the newest and the most sophisticated methods and techniques of camouflage are used to hide the activities and criminal traces. The tiniest suspicion spotted by the criminal as a potential game changer or trap

in which he can be caught, makes him act more cautiously and keep changing his criminal plan and be very careful in erasing the traces that could uncover him.

Thus, the responsible State bodies must be professionally equipped, all the time, in order to be able to identify and stop the act of conducting criminal offences. Also, they have to manage to identify the people who organize or/and carry out these activities. So, in other words, it is important to train some specialized bodies which would be able to solve extremely important and difficult tasks. **The essential element** is the secrecy of their activity, that is, to collect the information without the knowledge of the persons who are subject to verification.

The gathering of the information at the end of the 20th century and in the beginning of the 21st century has been, indeed, a thriving governmental activity, thanks to the technological advances. Never before have there been so many opportunities of knowing things about people or events. Never before has the accessibility of data-processing means been so great. Therefore, the States adopt policies regarding collecting information and implement the necessary legislation according to which, in order to conduct well their duties, the specialized bodies are given adequate legal tools of collecting information, which in the international language are called - *special investigative techniques* [2], and in the national language, initially - *operative investigative means* [3], recently - *special investigative means* [4], and even more recently - *special investigative methods* [5].

The problem is, however, that these tools of collecting information, imply in their nature, more or less, the restriction of the constitutional human rights, that is, the right to privacy, the right to inviolability of the home and the right to the secrecy of correspondence [6].

Thus, though the need and the efficiency of using such legal tools is absolutely obvious, hesitation still exists towards their application, because the individual prevails

over the general interest.

On one hand, the banning or the exaggerated limitation of such legal tools of obtaining information, leads to deterrence of the given bodies to conduct well their duties, which inevitably increases the level of crime. On the other hand, it was always feared that the governments could abuse these tools and use them under the guise of the national interest. Hence, this leads to sensitive political debates.

Therefore, one of the most important and delicate problems of the given field is to balance, on the one hand, the need of applying the special techniques of obtaining information (which becomes acute if taking into account the advanced level of the criminal phenomenon) and, on the other hand, the rigours and the requirements of the rule of law in which the rights and the fundamental freedoms are the supreme values.

The answer, of course, cannot be taken as a universal one [7], because each society, or more accurately, each country has its own peculiarities, and in order to solve such an issue one must take into account the indexes which describe the development level of the society, its culture, education, civic and moral spirit, the level of trust that the population has in the public authorities etc.

The perception [8] and the understanding of the essence and content that the special investigative activity holds shapes its definition and the entire system of legal regulations designed to establish a demarcation line between the State's obligation to protect the common interest through the use of non-traditional means to the detriment of individual interest.

The right perception of the activity's social calling may tip the balance towards the positive side of the things and may succeed in the fight against crime. Otherwise, the achievement of the intended result shall remain an illusion but not a reality.

Under this doctrinal aspect, the problem of defining the special investigative activity is not unanimously solved [9]. There is not enough firmness regarding this issue at

the official level. Every national lawmaker, in various legislative acts, pronounces the definitions in different ways.

The previous Law 45 on operative investigative activity [3], contained a different definition as compared to the current one. Not only the terminology being different, but the content as well. The Article 1 of the given Law mentioned: *“The operative-investigative activity, the legality of which is guaranteed by this Law, constitutes a legal tool that the State has in order to defend its interests, its territorial integrity, the rights, freedoms and legitimate interests that individuals and legal entities have, as well as all forms of property, against criminal attacks.”*

From the text of this definition we notice that the Law 45 was the only Law which regulated the type of activity we are discussing in this study. The current Law 59 does not have such provisions because it is not the only one which regulates this field.

After the repeal of the Law 45 and the entering into force of the Law 59 on 08.12.2012, the amendments and the additions were implemented in the Code of Criminal Procedure. Thus, a whole section was reserved for the special investigative activity, in which a new definition of the special investigative activity can be noticed.

Therefore, according to the Article 132¹ of the Code of Criminal Procedure of the Republic of Moldova: *“Special investigative activity represents the overall actions of criminal prosecution with public and/or secret nature carried out by the investigating officers in the framework of criminal prosecution only under the conditions and the manner provided for by this Code”*.

According to this definition the field of action of the special investigative activity is narrower than that laid down by the Law 59, reducing it to actions of criminal prosecution which can be applied only in the framework of criminal prosecution and only under the conditions of the Code.

If we look at the informative notes [10] established in the period of drafting the Law 59, we can notice that the concept of erasing

the differences between the criminal prosecution and special investigative measures, was promoted. As a result, the sphere of the given activity was substantially reduced. The focus was given to the accomplishment of one singular task, that of researching and revealing criminal offences. The accomplishment of the other tasks stayed rather formal.

Those mentioned above, give us the right to believe that those three legal definitions, and especially those two concerned here, were drafted by different authors with different visions and perceptions on the essence, sphere of application and social calling of the same type of activity.

These gaps of perception diminish the foundation of the special investigative activity on which the entire system of legal regulations in this field stands. The inconsistency between the provisions of those two legislative acts may paralyze a potentially rich impact of the special investigative activity, and the citizen of the Republic of Moldova may keep losing confidence in the accuracy and legality of the law enforcement bodies, due to the fact that the wording of the Law remains open to interpretation in the favour of those who show more interest.

According to the literature and to the existing experience in this field of activity, it may be mentioned with certainty that the special investigative activity does not identify itself with the measures and actions of the criminal prosecution. The special activity is more comprehensive according to its sphere of actions than the amount of criminal prosecution actions. Moreover, the special investigative activity, as compared to that of criminal prosecution, cannot be treated as a part of a whole. These two activities are very close to each other. Both of them are State activities of law enforcement bodies. Both of them have, in general terms, the same social calling - fighting against crime, but are still different according to a series of criteria.

Criminal prosecution starts only when an act was committed and it shows signs of offence, that is, post factum [11], and continues

until its cessation/closure or until the submission of the criminal case to the Court, whereas the special investigative activity is not limited to the stages of the criminal trial, but may be carried out after the start of the criminal prosecution, as well as after its cessation.

The task of the investigating officer is to know (what, where, who, how, when etc.), but the task of the criminal investigating officer is not only to know, but also to prove, show what he knows based on evidence [12].

Thus, the object of the special investigative activity is gathering the necessary information which allows the accomplishment of several concrete tasks laid down by the Law (preventing offences, searching the missing people, searching those who are absconding from criminal liability or from criminal sanction etc.) whereas the object of the criminal prosecution, according to the Article 252 from the Code is to gather the necessary evidence regarding the existence of the offence, that leads to identifying the perpetrator in order to establish whether the criminal act needs to be submitted to the Court under the Law provisions as to determine the criminal liability.

The methods and the means of accomplishing the tasks of those two activities are also different. The tasks of the special investigative activity are done according to the underground principle, but those of the criminal prosecution - not. Thus, the results obtained through special investigative techniques have an unofficial, confidential or even secret nature, whereas the results obtained through probative procedures usually have a public or work related nature.

In the same vein, another extremely important difference is that the veracity of information, more precisely, of the data and evidence obtained through probative procedures is ensured by criminal liability over the provision of false information, for instance, for false statements behalf of witness or injured party, false conclusions of specialist or expert (Article 312 of the Code), whereas the veracity of the information obtained through special investigative techniques does not

benefit from the same guarantee, hence, such information holds an uncertain veracity nature which relies mostly on trusting the one who provided the necessary information.

One reminder here, that is, not any information related to a certain act may be considered as evidence, but only that which underwent a certain path established precisely by the processes of the criminal Law and was exposed according to this Law [13]. If, for example, the statements of one party (witness or the injured party) on a certain offence were gathered while infringing the Code (the parties were not warned about the existence of criminal liability over false statements (Article 105, 111 of the Code)), then, these statements, according to Article 94 of the Code, cannot be admitted as evidence, because innocent people may be wrongly sentenced without holding accountable any of those who gave false statements. In order to avoid such scenarios, we have a Law principle which states that it is better to let some guilty individuals be set free than to mistakenly convict an innocent [14].

Although this path of gathering information is a safe one and guarantees sufficient trust in the objective reality of the crime committed, very often, especially lately, it turns out to be too slow if compared to the offenders' speed and mode of operation, thus, it becomes less efficient in preventing offences in due time, in quickly identifying the perpetrators and co-participants in the offence, in establishing the place where they are absconding from criminal liability etc. The failure to arrest the offender in due time may delay the process for months or even years, or, worse, may lead to the expiration of prescription periods and the creation of a sense of avoiding punishment in the society.

It is precisely here that the special investigative activity, in order to support this type of problems (tasks) gets involved with all its legal tools of obtaining information which, though, does not enjoy too much credibility, is obtained faster and can ensure a proper conduct of the criminal prosecu-

tion. In the special investigative activity, the person who is providing the information not only is not informed about the criminal liability over false statements, but, very often, is not even aware of the fact that he or she is talking to a special agent.

The details of tactical procedures used in obtaining information will not be described here as it exceeds the limits of this paper, once again, though, it shall be stressed out the fact that in criminal prosecution the focus is on the safety of information, while in the special investigative activity the focus is on the operative mode of obtaining it. Not in vain the previous Law was called “*on the operative-investigative activity*”.

The things mentioned above need not be understood as something that diminishes the value of the information obtained by the means of special investigative activity. The data obtained through this activity is very precious, first of all, taking into account the operative aspect because it allows for an immediate accomplishment of measures, for the removal of imminent damages which are, often, great and irretrievable. It may also be, that the obtained information is false because the intercepted discussions, for instance, contained lies or had the aim of manipulation, misinformation and these cases should be treated as such. However, using this information as evidence without submitting it to criminal procedural exam, can lead to the conviction of innocent persons.

The fact that a series of special investigative measures were included in the Code of Criminal Procedure means that the lawmaker's desire is to give more value to the information obtained through the means of these legal tools under the criminal probative aspect. This fact is fully understood, especially due to the fact that the gathering of evidence by traditional means is increasingly difficult. The criminal world keeps self-improving and using, to the largest extent, all the advances of the technical-scientific progress. At the same time, it should be noted that the simple addition of these special procedures in the procedural Law does not increase at all the level of

credibility of the information thus obtained.

Therefore, we come to the conclusion that the information obtained through special procedures, regardless of their future names (means, methods, techniques, actions etc.), must not be used directly as an evidence in the criminal trial, but undergo a prior procedure of verification under all aspects of criminal procedure. This is exactly the idea laid down in the Article 93(4) of the Code of Criminal Procedure of the Republic of Moldova which states: *The data actually obtained through special investigative activity may be admitted as evidence only if it was managed and verified through the means referred to in paragraph (2) in accordance with the provisions of procedural Law, while respecting the individual's rights and freedoms or with the restriction of certain rights and freedoms approved by the Court.*

Therefore, taking into account those mentioned above, as well as the fact that the definition should contain only general, essential and necessary signs which characterize a certain object [15], it may be said that the **special investigative activity** is a legal and complex genre of physical and intellectual acts of specialized State bodies aimed at conducting, first of all, underground and operative activities of obtaining the necessary information, in order to accomplish certain tasks provided precisely by the Law.

In drafting the definition, certain remarks of experts were taken into consideration, according to whom the term “activity” contained in the legal definition of the special investigative activity means, in general terms, a set of physical, intellectual and moral acts aimed at reaching a certain result, and the term “procedure” - a set of acts and forms carried out by a judicial, enforcement or any other State body. Thus, the definition of “activity” is more comprehensive than that of the “procedure”, and cannot be defined with the last one [16].

At the same time, we want to mention the fact that there is an inconsistency between the tasks indicated in the legal definition of the

special investigative activity and those included in Article 2 of Law 59, in which the tasks of the special investigative activity are expressly listed. Thus, *ensuring the security of the State, public order, respect for human rights and legitimate interests* is provided in the definition but is missing in Article 2 of the given Law. In the same vein, since the tasks of the special investigative activity are stipulated separately, it is not necessary to include them in the definition, and have a voluminous definition, a mere reference would suffice.

As regarding the public nature of the special investigative activity, we believe that this peculiarity does not belong only to special investigative activity, but to criminal prosecution as well, thus introducing this detail in the definition is useless. Meanwhile, the operative nature of the obtained data is, as already proved, an essential peculiarity of the special investigative activity and should be contained in the definition.

Conclusions. Due to the fact that, for many years the draft law on special investigative activity is being worked on, and one of the fundamental problems is its definition, we come with the following suggestions:

The content of the special investigative activity definition – *a legal and complex genre of physical and intellectual acts of specialized State bodies aimed at conducting, first of all, underground and operative activities of obtaining the necessary information, in order to accomplish certain tasks provided precisely by the Law.*

Legal essence of the special investigative activity – *legal, operative and nontransparent obtaining of the necessary information in order to accomplish certain tasks provided precisely by the Law.*

Delimitation of special investigative activity – *the special investigative activity does not identify itself with the criminal prosecution activity, these two activities being different from a series of criteria: different aims, different bodies that conduct these activities, different legal basis, different methods of obtaining information, the veracity of information differs, the legal value of obtained data is different.*

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3. RM Law 45 from 12.04.1994 on the operative-investigative activity.
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6. It should also be noted that the rights set forth in comparison with others are not absolute in nature and may be restricted under certain circumstances. According to the Article 54 of the RM Constitution, the rights may be restricted under the conditions expressly stated in the law and complying with the unanimously recognized international law and are necessary in the interests of national security, territorial integrity, country economic welfare, public order, in preventing disorder and protecting the rights, freedoms and dignity of other people, preventing the disclosure of confidential information or guaranteeing the justice authority and impartiality.
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 13. According to the provisions of the Article 93 of the Code of Criminal Procedure of the Republic of Moldova, the elements stipulated in the paragraph (2) are considered evidence during the criminal trial.
 14. This principle is reflected in the Article 1 of the Code where it is mentioned that "... any person who has committed an offence must be punished according to his/her guilt and no innocent person must be held criminally liable and convicted."
 15. According to DEX (dictionary), the term NOȚIUNE (definition) means: **1.** The fundamental logical form of human thinking that reflects the general, essential and necessary characters of a class of objects; concept. **2.** General knowledge of the value, sense, meaning of a thing; idea, view of something. **3.** (pl.) Knowledge, basic general principles in a certain field.
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