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# ACTUAL PROBLEMS IN THE USE OF SPECIAL INTELLIGENCE MEANS AS A TECHNIQUE FOR ESTABLISHING EVIDENCE IN THE CRIMINAL PROCEDURE OF THE REPUBLIC OF BULGARIA

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***Abstract:*** *The reason for drafting this short paper is to accept the need for further consideration and refinement of the existing shortcomings in the legal regulation of special intelligence as a technique for establishing and verifying evidence in the criminal proceedings of the Republic of Bulgaria. In particular, it is an attempt to answer the question - what is the legal nature of special intelligence means and how does their application affect the accused's rights of defense? For this purpose, the publication analyzes the degree of correspondence between the rulings of some of the main principles of the criminal process and the regulation of special intelligence means. It has been studied in principle from the point of view of the potential of special intelligence to uncover objective truth. The "toxic" impact of special intelligence on the rights of the defense and the activity of proof as a whole has been investigated.*

***Keywords:*** *criminal proceedings, special intelligence means, right of defense, accused, evidence*
***JEL Codes:*** *K410, K420*

## INTRODUCTION

The present report is a modest attempt to identify and characterize some of the more important, theoretical and practical problems encountered in criminal proceedings in the use of special intelligence as a means of proof. For this reason, the report has too little subject matter - it does not discuss the prerequisites or the order of use of the special intelligence tools, but their legal nature, as well as its compatibility with the beginning of objective truth and the right of defense. Thus, the paper contains an exhaustive, and from this point of view, unsatisfactory analysis of the legal framework of the operation of the special intelligence means[1] in the criminal process of the Republic of Bulgaria. But on the other hand, the latter sheds light on important fundamental issues related to the consequences of the admission of the SIM in the process of revealing objective truth, while also denouncing their "essential" importance for the construction of timely, substantiated and fair convictions and sentences.

## EXPOSITION

The paper presents the need for additional consideration and refinement of the existing deficiencies in the legal regulation of the special intelligence means as a way of collecting and verifying evidence in the criminal proceedings of the Republic of Bulgaria. The subject of the review also covers some important contradictions in the legal situation of the accused resulting from the application of the SIM in the investigative activity. Therefore, more generally, the relevance of a report should be sought mainly in its conditionality from existing and finally overcome in legal theory, scientific gaps.
The contraversial issues analyzed in the paper are mainly three:
The first is: What is the legal nature of special intelligence means, and is it compatible with the main origins of the criminal process of the Republic of Bulgaria?
Second: What is the potential of the SIM for revealing the objective truth in criminal cases?, and

[1] called below- SIM.

The third: How does it affect of the defendant's right to the application of the SIM?

Concept of SIM

Our law knows several distinct ways of investigating criminal proceedings. According to Art. 136 of the Criminal Procedure Code (CPC), special intelligence means is one of them. According to Art. 172 of the CPC special intelligence means are: "…technical means - electronic and mechanical devices and substances that serve to document operations of the controlled persons and sites, as well as operational techniques - observation, interception, shadowing, penetration, marking and verification of correspondence and computerised information, controlled delivery, trusted transaction and investigation through an officer under cover". Therefore, SIM are those technical means and operational means that, according to the CPC, serve to reveal the objective truth in a particular category of criminal cases.

Exposition of the problems

The report does not argue about the regulatory existence of the SIM; they are regulated in both the Special Intelligence Means Act and the CPC. It is also not denied that the exploitation of SIM in some sense aids and facilitates the fight against serious deliberate crime. Their application is very useful in the detection of crimes whose proving is extremely difficult. But this benefit should not be overestimated or unilaterally explicated as a modern, European and democratic achievement that makes the SIM an important guarantee of citizens' rights and the disclosure of objective truth in criminal cases. It is time to recall that the procedural law itself gives secondary importance to the SIM as a means of reaching objective truth. According to Art. 172, para 2 of the CPC, special intelligence means are used when required in the investigation of serious criminal offences, if the relevant circumstances cannot be established otherwise, or if their establishment is connected with significant difficulties. Therefore, SIM should apply "ipso jure" only subsidiarily. By which, "…the legislator reasonably acknowledged that SIM are something potentially dangerous for a fair criminal trial. If not, then it would have equated them to the other methods."[1] As it became clear above, SIM are of two main types: technical means and operational methods. The publication focuses mainly on the latter. It is interesting to note that the legislator himself used the word "operational methods". And this is correct, because the listed methods by their nature are actually operational search methods. However, whether their inclusion as means of proof in the criminal process is a separate issue of much greater importance than their explicit formal characterization as such. In this sense, I fully support Ivan Salov's opinion, namely: "… I do not know if we are fully aware of what the legislator did with the provision of Art. 136, para.1 CPC - I mean the inclusion of SIM as a means of proof, and with the provision of Art. 172, para. 1 CPC - the SIM defined as technical means are not interesting here, operational methods are interesting - observation, interception, shadowing, penetration, marking and verification of correspondence and computerised information, controlled delivery, trusted transaction and investigation through an officer under cover. In my opinion, these are the real SIM. And, by their very nature, they are called operational methods, methods of operational tracing acrivities (OTA), of being an extra-procedural, conspiratorial, secret activity, which is particularly susceptible to abuse ... This means only one thing - criminal-procedural activity has been replaced by the operational tracing acrivities of the respective executive authorities, the criminal process was essentially replaced by the OTA dissolved in it."[2] **Then, the question arises: where remain the origins of publicity, immediacy, independence and protection?** The serious answer is - they are not present in a pure and unfolded form, but as essentially damaged! How is it possible, for example, a prosecutor to be involved personally in conducting investigative actions through a SIM in a pending criminal proceeding, since he does not have the special knowledge necessary to deal with them, and after being explicitly excluded by law from the jurisdiction to apply SIM - Arg. 175 CPC? How, then, does the prosecutor exercise constant supervision over the lawful conduct of the pre-trial investigation

[1] Сълов, И. Тенденции в развитието на наказателнопроцесуалното доказателствено право – успешно защитена дисертация за получаване на научна степен „доктор на юридическите науки", Пловдивски Университет „Паисий Хилендарски - Юридически Факултет, Пловдив, 2017г., с. 162.

[2] Сълов И,. Актуални въпроси на наказателния процес. С., „Нова звезда" 2014., с. 48

 

(Article 46, paragraph 2, item 2 of the CPC), and how to obtain immediate impressions of its proper conduct after the investigation through the SIM is carried out secretly , what can the prosecutor guarantee? How can the supervising prosecutor remove the investigating body if he has committed a violation of the law or if he cannot ensure the proper conduct of the investigation under Art. 196 para 1, item 4 of the Criminal Procedure Code, after the respective persons applying the SIM are subordinate only to the head of the structure to which they belong – State Agency Technical Operations, State Agency for National Security, etc., and since they themselves are not explicitly mentioned as investigative bodies in Art. 52 of the CPC? Further, how is it possible, for example, for the court to carry out an examination of the evidence collected in the case using the SIM, since it does not possess the necessary knowledge and skills and also cannot participate personally in the actual investigation with SIM? Who will ensure that the evidence collected is authentic and reflects precisely the objective truth? Here it is time to point out that such guarantee cannot be the certifying witness, because according to Art. 137 of the CPC, they cannot be present when conducting an investigation with a SIM, and quite naturally this investigation is classified.

The conclusion is that there is no obstacle the indictment or sentence to be based on practically very difficult controlled evidences!

In my oppinon, the correct answer to the second contraversial question, namely what is the potential of the SIM for revealing the objective truth, is sufficient to proceed from the considerations set out below. Namely, one should not neglect the fact that SIM have many organically inherent disadvantages: they are manipulated, subject to multivariate interpretation, they create alleged cause and effect relationships, their control is extremely difficult and so on.[1] In addition, it can be added that the operation of SIM entails considerable costs which, in practice, are unjustified in view of their extremely low efficiency.[2] The results obtained through the use of the SIM can ingeniously aggravate the situation of the accused by totally eliminating the equal opportunities between defense and prosecution. It turns out that the prosecution may have two types of information obtained from two different types of investigation to convince itself of its thesis. Thus, the next important question arises, where does the beginning of objective truth remain, since with the help of the SIM there is no obstacle to directing any truth? As has already been made clear, it is always imperative to bear in mind that the SIM under Art. 175 of the Criminal Procedure Code are applied by persons qualified for this purpose from the specialized state structures of the Government, for example State Agency Technical Operations, State Agency for National Security and the Ministry of Interior. Therefore, the prosecutor, investigator or court was initially denied the opportunity to apply this method of proof personally and directly in their work, unlike the other methods specified in the law, such as interrogation, examination, search, seizure, etc. that they are subordinate in their procedural activities to the results of the activities of SIM implementing staff. Which raises another equally important issue about the ability of the court and the prosecutor in these cases to carry out a serious review and evaluation of the evidence collected, using free-standing, independent, and in-house evidence? At present, only the correctness and good faith of the executive bodies operating the SIM appear to serve as insurance against the substitution of the material reality of interest. However, faith in them and their work is not a good enough tool to guarantee the rights of citizens. Here is the moment to point out an established theory of procedural, old truth - the only procedural guarantee of certainty in the criminal process is compliance with the procedural form.[3] Here is what he shares on the issue of procedural reliability of the materials obtained through the use of SIM, Ivan Salov "… The usefulness of technical means can only be used if they are applied in the context of the procedural form… Procedural reliability is guaranteed only by the procedural form. And the distinction must be made between technical and procedural reliability, and not in a layered way to mix these so different things. If things were so simple, then there would be no need for a SIM and a criminal trial. The

[1] Вж. Пак там.

[2] И. Сълов, Тенденции в развитието на наказателнопроцесуалното доказателствено право – успешно защитена дисертация за получаване на научна степен „доктор на юридическите науки" (под печат), София, 2017г., с. 50.

[3] С. Павлов, Наказателен процес на Република България – обща част., С. „Сиби"., 1996 г., с. 13 – 17.

CPC would be successfully replaced by a photo and cameras and investigators would be left with nothing but armed with tape recorders, photo and cinema cameras (and with the guide, of course) to record, shoot and solve crimes ... " [1]And so, is the CPC investigation being carried out in the form of a SIM guarantee? Of course not, the legislator himself said in the same Art. 175 of the CPC that the SIM are implemented in accordance with the procedure of the Special Intelligence Means Act. Then, what is the authenticity and validity of the evidence collected by the SIM? I leave the question open for further answer from the reader's side. It can be summarized that the use of SIM as a means of investigation creates conditions for distorting and substituting objective truth in criminal cases.

With regard to the third contraversial issue raised by the research problem, it is necessary first of all to ask whether a person actually investigated in the conditions of secrecy and confidentiality can exercise a right of defense understood as active participation in criminal proceedings in on the assertion of personal rights and legitimate interests after being initially denied the quality of a subject who knows he or she is being investigated and given this to be the subject of criminal investigation? In other words, how is it possible to exercise the right of defense in a classified investigation without knowing the beginning and the course of the investigation itself? Moreover, what is the guarantee that the SIM will be used as a means of exposing criminal actors, and not vice versa - as a means of reproducing such by artificially creating one never material reality, respectively - a criminal environment? It is enough to recall what Boris Veltchev says about the "art" of compromising: "... We live in a society where the compromise continues to be respected. The art of compromise does not require much intelligence. Even less intelligence is needed for the enthusiastic audience of compromises. It doesn't matter if something is true, the important thing is that it is humiliating for someone and that is enough to be welcomed already ..."[2]

Once again, it is clear from Art. 136 CPC, SIM are expressly admitted as a way of collecting and verifying evidence, ie the information collected through them on a general basis constitutes evidence. In this sense, is the Decision № 10 of 28.10.2010 of the Constitutional Court of the Republic of Bulgaria. The above mentioned judicial act adopts the following: "... The physical evidence produced or collected in the order of the special intelligence means, on a general basis, like all other physical evidence, is subject to challenge and verification in the course of a competitive trial. They can be disputed through admissible procedural means and means of proof. According to the Constitutional Court, in such a situation the situation of the defense is not materially different from the situation it would be in if it had to disprove any other material means of proof. Admittedly, the use of special intelligence means usually creates material carriers of information without the knowledge and consent of the controlled person, but no different is the situation when leaving traces on any other objects that could be used as material evidence." In my opinion, this conclusion of the Constitutional Court of the Republic of Bulgaria is a little exaggerated. It is true that the materials produced under the SIM are material means of proof, it is also true that they can be disputed only through the other admissible procedural means of proof, but it is not true that the defense is in the same situation as it would be if she had to disprove any other material means of proof. The Constitutional Court omits to note that in one case where an investigation with the SIM is not conducted, the accused has the principal opportunity to participate in the criminal proceedings under Art. 55 of the CPC, which will also say in the investigation itself, in order to have an opinion on its lawful conduct, and in the other case in the application of the SIM, this issue is not at all, the accused is the subject of investigation. Furthermore, it is not at all convincing to argue that the latter can satisfactorily and easily verify the other means of proof produced using the SIM. Here is a good example of what is being said. The circumstances perceived by the undercover officer in his / her capacity as a SIM shall be

[1] И. Сълов, Тенденции в развитието на наказателнопроцесуалното доказателствено право – успешно защитена дисертация за получаване на научна степен „доктор на юридическите науки" (под печат), София, 2017г., с. 44-45.

[2] Б. Велчев. Проблеми на наказателната политика в Република България. С. „Сиела", 2012 г., с.11.

 

reproduced in the criminal case in the form of testimony given by interrogation in accordance with Art. 141a of the Criminal Procedure Code. The undercover officer is questioned in a changed voice, and in a videoconference and in a changed image, before the start of the questioning the respective head of a specialized structure certifies that the interrogated person is the one to whom the undercover ID was given - Art. 141a, para 2 of the Criminal Procedure Code. Therefore, a number is being questioned in the criminal case whose testimony can be arbitrary and difficult to verify with other appropriate means of proof. There is no way, for example, that the circumstances which an undercover officer reproduces with his testimony can be verified through an investigative experiment requested by the accused. Thus, first, because they were collected in a conspiratorial manner, and second, because the interrogations were secreted behind a number. How, then, to order the restoration of the facts and circumstances of which he (the number) speaks, in order to verify that they may have occurred exactly as allegedly having occurred in the manner alleged to have occurred? It is not at all clear how the accused can take into account the witness's ability to orient himself properly in the case and to give credible information after the latter has given evidence with a hidden identity? The court's view that the use of special intelligence tools usually creates tangible media without the knowledge and consent of the controlled person cannot be shared, but the situation in leaving traces on any other objects is no different that could be used as material evidence. " First, as a result of the application of the SIM, material evidential means arise - Article 125, para. 2 CPC, not physical evidence, there is at all a difference between the two types of evidence - arg. Art. 104 and Art. 105 of the Criminal Procedure Code. Second, the natural leaving of the accused's footprints on objects that could be used as material evidence always objects his actual connection to the criminal event, both directly and independently, such as the production of material evidence (such as video recordings, sound recordings and surveillance and eavesdropping) in the order of the SIM, can reproduce both real and imaginary links to the criminal event. In one case, the physical evidence shall be incorporated in accordance with the CPC with the relevant probative value and the possibility of the accused to be examined, and in the second, the physical evidence shall be prepared out-of-process, through the application of the operational tracing activities. Therefore, the situation is different, both in the creating of evidence and in relation to the defendant's ability to defend himself.

The conclusion is that to some extent the application of the SIM restricts the defendant's ability to exercise his or her full rights of defense, both in the course of the investigation itself and in contesting the results of the latter.

## CONCLUSION

The admission of SIM as a way of collecting and verifying evidence in criminal proceedings raises a number of important questions whose answers cast doubt on their role as a determining factor in the construction of a fair and democratic criminal process. It can be said that 'de lege lata', the application of the SIM reveals some contradiction with the content of much of the main origins of the process, as well as a certain eclecticism in the legal position of the accused. In its current form, the SIM institute is a "favorable breeding ground" for the development and "cultivation" of unfair, unjustified and hasty accusations. For this reason, a future extension of the scope of operational tracing activities practices in the area of procedural evidence will inevitably turn the CPC investigation into a damning "exotic" of minimal utility for citizens' rights and the disclosure of objective truth. So, the resurrection of old and past Inquisition practices will come by itself!

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