

## Judicial control over investigative (search) actions that require prior permission

### Судовий контроль при здійсненні слідчих (розшукових) дій, які потребують попереднього дозволу

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#### Abstract

The purpose of the article is to investigate the peculiarities of judicial control during investigative (search) actions that require prior permission on the basis of the analysis of legislation and modern theoretical concepts of the science of criminal process. Special research methods were also used in the work, in particular, comparative legal; special legal, logical-legal and systematic.

The article is devoted to specific issues of judicial control, which, in accordance with the current legislation of Ukraine, is carried out when granting permission for investigative (search) actions that require it. The investigative (search) actions that require the prior permission of the investigating judge are identified. The norms of the international and national legislation are analyzed, which enshrines guarantees from illegal entry into the dwelling or other property of a person and carrying out of procedural actions there. Attention is drawn to the need for a clear delineation of investigative (search) actions, such as inspection and house search or other property of a person, since their

#### Анотація

Мета статті полягає в тому, щоб з урахуванням аналізу законодавства та сучасних теоретичних концепцій науки кримінального процесу дослідити особливості судового контролю при здійсненні слідчих (розшукових) дій, які потребують попереднього дозволу. У роботі були застосовані такі методи наукового пізнання, як порівняльно-правовий, спеціально-юридичний, логіко-правовий та систематичний. Стаття присвячена окремим питанням судового контролю, що відповідно до чинного законодавства України здійснюється при наданні дозволу на проведення слідчих (розшукових) дій, які його потребують. Наведено слідчі (розшукові) дії, проведення яких потребує отримання попереднього дозволу від слідчого судді. Проаналізовано норми міжнародного та національного законодавства, в яких закріплені гарантії від незаконного проникнення до житла чи іншого володіння особи та проведення у них процесуальних дій. Акцентовано увагу на необхідності чіткого розмежування таких слідчих (розшукових) дій, як огляд та обшук

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substitution will lead to the court finding the evidence inadmissible. The position of the European Court of Human Rights on the criteria for the lawfulness of the search is outlined. Emphasis is placed on the specifics of conducting a house search or other property of a lawyer. It is concluded that the effective provision by the investigating judge of the rights, freedoms and interests of persons whose housing or other property is planned to be searched is a necessary condition for the realization of the principles of criminal proceedings.

**Key words:** criminal proceedings, investigating judge, court, investigative (search) actions.

## Introduction

Ukraine's orientation towards European Union integration implies a commitment to the international community to ensure that the national legal system conforms to the standards of the European community, including the creation of an effective mechanism for the protection of human rights and citizens (Arakelian, Ivanchenko, Todoshchak, 2020, p. 61). For more than five years, Ukraine has been declaring at all levels that there is no alternative to the European choice, as evidenced by the entry into force of the Agreement about Association between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other (Association, 2014). According to Article 14 of that Agreement within the framework of cooperation in the area of justice, freedom and security importance is attached to the consolidation of the rule of law and to the strengthening of institutions of all levels, including the judiciary. In this area, cooperation should be aimed at strengthening the judiciary, enhancing its effectiveness, guaranteeing its independence and impartiality, which should be based on the principle of respect for human rights and fundamental freedoms. This course is completely correlated with the normative prescriptions of the Constitution of Ukraine, according to which the court is the main guarantor to ensure the protection of the rights, freedoms and legitimate interests of the individual and the citizen (Constitution of Ukraine, 1996). The court, as a judicial authority, has a particular responsibility for the correct application of the laws and the establishment of the rule of law in the state. With the adoption of the Fundamental Law, the powers of the judiciary have been significantly expanded, in

житла чи іншого володіння особи, оскільки їх підміна призведе до визнання судом доказів недопустимими. Наведена позиція Європейського суду з прав людини щодо критерії правомірності проведення обшуку. Звернуто увагу на особливості проведення обшуку в житлі чи іншому володінні адвоката. Зроблено висновок, що ефективне забезпечення слідчим суддею прав, свобод та інтересів осіб, у житлі чи іншому володіння яких планується провести обшук, є необхідною умовою реалізації засад кримінального провадження.

**Ключові слова:** кримінальне провадження, слідчий суддя, слідчі (розшукові) дії.

particular the legislator has assigned it the function of controlling the procedural actions of pre-trial investigation bodies and prosecutors. Granting of permission by the investigating judge to conduct individual investigative (search) actions at the stage of pre-trial investigation was not an exception to this issue. This issue has become particularly relevant since the entry into force of the Criminal Procedure Code of Ukraine, 2012 (hereinafter - the CPC of Ukraine). Thus, one of the legislative innovations was the introduction of a new participant in criminal proceedings - an investigating judge.

*The purpose of the article* is to investigate the peculiarities of judicial control during investigative (search) actions that require prior permission on the basis of the analysis of legislation and modern theoretical concepts of the science of criminal process.

## Theoretical framework

Various problematic aspects of judicial control in criminal proceedings are under review both scholars and legal practitioners. To the theme of judicial control during the investigative (search) actions requiring prior permission such scientists as Arakelian M., Ivanchenko O., Todoshchak O. (Alternative dispute resolution procedures using information technologies: legal regulation in the European Union and the USA, 2020); Barbu D. (The principle of separation of judicial functions, 2016); Gorodovenko V. (Judicial control over the investigative (search) and covert investigative actions, 2013); Hloviuk I., Hryniuk V., Kovalchuk S. (Modern Challenges to Engagement an Expert in Criminal Proceedings on Economic Crimes in Ukraine,

2019); Levin V. (Judicial control in the mechanism of ensuring the rights, freedoms and legitimate interests of a person during a search, 2018); Lynnyk O. (Features of judicial control during the search related to the interference with the rights of the individual, 2017); Maliarenko V. (On safety for residence and other personal possession as a principle of criminal proceeding, 2013); Novokmet A. (The European public prosecutor's office and the judicial review of criminal prosecution, 2017); Pitcher K. (Judicial Responses to Pre-Trial Procedural Violations in the Netherlands. In: Judicial Responses to Pre-Trial Procedural Violations in International Criminal Proceedings, 2018); Trechsel S. (Human Rights in Criminal Proceedings, 2006); Zavtur V. (Peculiarities of proving during the consideration and decision of the investigating judge and court the petitions on the application of measures to ensure criminal proceedings, 2017) and others addressed.

At the same time, legal sources express different scientific points of view regarding the efficiency (inefficiency) of the judicial control function, which, among other things, is carried out during investigative (search) actions, which require prior permission.

Nowadays, scientists have expressed controversial opinions about: the concept of judicial control; the content of this procedural function; the scope of entities entitled to appeal to the investigating judge the actions and decisions of the pre-trial investigation bodies and the prosecutor; the limits of judicial control etc. Considering the extent of our study, it is clear that we will not cover all of these discussion issues, but will focus on judicial control when conducting investigative (search) actions that require prior permission.

The legal framework of the study was the international legal acts ratified by the Verkhovna Rada of Ukraine, the Constitution of Ukraine and the current criminal procedural legislation.

### Methodology

According to the goal, a set of scientific methods of modern epistemology are used in the article. The methodological basis of the study is the theory of knowledge of social and legal phenomena, as well as the scientific foundations and conceptual provisions that are developed by experts in the field of criminal procedural law.

Special research methods were also used in the work, in particular: a) comparative legal - to

analyze the norms of the Constitution of Ukraine, the case law of the European Court of Human Rights and the current criminal procedural legislation concerning the judicial control over investigative (search) actions, which require prior permission; b) special legal - contributed to a detailed examination of the current state of the legislative provisions, which resulted in the development of proposals for overcoming the existing theoretical and legal contradictions and collision in the legislative acts.

Logical-legal and systematic methods were used for the formulation of logically relevant conclusions, and consistent presentation of study materials.

### Results and discussion

One of the goals, which stay in front of the legal order authorities, is the struggling with crimes, which lately have been widely spread and infringe damages upon our country (Hloviuk, Hryniuk, Kovalchuk, 2019).

Every criminal procedure is repressive by nature. This means that when aiming to disclose a crime, find the perpetrator and obtain evidence needed to make a decision on indictment issues, a legal regulation is employed to legitimize actions and measures that interfere with human rights and freedoms. Today, all the criminal procedures involve the investigative phase, which is aimed at creating grounds for a decision as to whether charges against a person will be brought and presented at court or the procedure will be discontinued. This fact itself largely depicts the character of investigation as an utterly repressive phase of the procedure in which the respect for human rights and the fundamental rights of the defence are challenged. For that reason, all the criminal procedures prescribe a threshold for investigation initiation as the lower limit of guarantees aimed at providing citizens in a dispute with the state with protection. The state should never go beyond that limit; otherwise, it may result in the unlawful prosecution of a person and the limitation of his or her fundamental rights and freedoms. Simply said, the state's right to prosecute and to exercise its *ius puniendi* should not collide with the subjective right of citizens to be lawfully prosecuted. Such security can be provided only by criminal procedure in which the central place is reserved for the judicial review standard, which imposes the requirement that every restriction of an individual's fundamental rights by the state shall be subject to judicial review (Novokmet, 2017, p. 399).

Absolute proving of a person's guilt is not possible without carrying out an appropriate set of procedural actions, the main place among which is assigned to investigative (search) actions. At the same time, most of them involve restrictions on the rights, freedoms and legitimate interests of the individual. In this regard, it is now recognized by the international community that the most efficiently and effectively human rights and freedoms can be protected only by the court, since it has the guarantees of independence and acts in accordance with the procedure prescribed by law. Such a place and role of the court is one of the main features of the rule of law, where human rights and freedoms are not only declared at the legislative level but are actually ensured. In this regard, it can be argued that judicial control by the investigating judge during investigative (search) actions which require prior permission is of a guarantee nature.

It is also worth noting that nowadays the right to judicial protection is one of the constitutional rights of a person and a citizen, guaranteed to everyone and cannot be restricted, which emphasizes its social value. In addition, judicial control is intended to ensure steady compliance with legal requirements during the pre-trial investigation in criminal proceedings. In this regard, judicial control is essential during investigative (search) actions that require prior judicial permission. Otherwise, taking into account the requirements of paragraph 1 of Part 2 of Art. 87 of the CPC of Ukraine, the court is obliged to recognize the carrying out of procedural actions that require the prior judicial permission, without such permission or with violation of its essential conditions as a substantial violation of human rights and fundamental freedoms (CPCU, 2012).

Thus, judicial control by the investigating judge should be recognized as an effective way to protect against unlawful proceedings or their implementation in violation of a statutory order. Therefore, judicial control can be considered as a kind of precautionary measure against the incompetence, dishonesty or bias of the participants in the proceedings who have the right to conduct investigative (search) actions.

V. A. Zavtur points out that the practice of implementation of the current criminal procedural law, doctrinal developments, numerous legal draft proposals indicate the insufficient effectiveness of judicial control of limiting the rights, freedoms and legitimate interests of a person in criminal proceedings and formalizing the process of making appropriate

procedural decisions. This indicates that the process of reforming the judicial control institution is ongoing, and the search for ways to improve it remains a priority area of domestic criminal procedural doctrine. Creating an accessible and effective judicial system that meets European values and human rights standards continues to be a strategic goal of the Ukrainian state in accordance with the Decree of the President of Ukraine "On Approval of the National Human Rights Strategy" of 25 August 2015 (Zavtur, 2017, p. 19).

Based on the systematic analysis of the provisions of the CPC of Ukraine, it can be noted that judicial control is a separate function, the goal of which, on the one hand, is the strict compliance with the legislative requirements by the participants of the process, and on the other - to control over compliance with the rights, freedoms and interests of persons in criminal proceedings. Therefore, it should be emphasized that the protection of human rights and freedoms cannot be reliable without giving interested persons the right to appeal to the investigating judge the conducting of investigative (search) actions which implementation requires the prior judicial permission. This is due to the fact that the investigating judge, by virtue of his independence, is the most impartial guarantor of the respect for rights and freedoms of the individual during investigative (search) actions.

Having analyzed the provisions of the CPC of Ukraine, it is possible to identify the following investigative (search) actions, the implementation of which requires the prior judicial permission: 1) house search or other property of a person (Part 2 of Article 234 of the CPC); 2) house inspection or other property of the person (Part 2 of Article 237 of the CPC); 3) investigative experiment conducted in the dwelling or other property of a person without the voluntary consent of the person who owns them (Part 5 of Article 240 of the CCP); 4) compulsory taking of biological samples in case of refusal of a person to provide them voluntarily (Part 3 of Article 245 of the CPC). And as the judicial and investigative practice shows, house search and house inspection or other property of a person are the most common of this list.

According to O. V. Lynnyk, the functionality of an investigative judge granting permission to conduct investigative (search) actions, which according to the law are carried out on the basis of his decision, is to justify the restriction of the rights and freedoms of a person with the

achievement of the needs of pre-trial investigation (Lynnyk, 2017, p. 565). In addition, it is the responsibility of the investigating judge to prevent the possible restriction of human rights and freedoms at the pre-trial stage (Pitcher, 2018).

Supporting assertions outlined above, we add that granting prior permission by the investigating judge to conduct the investigative (search) action is connected with its conducting in the dwelling or other property. This is due to the fact that dwelling is as necessary for humans as clothing and food. From time immemorial, a person takes care of his dwelling, protects and defends it. Housing is integral to a person's privacy, so he has the natural right not only to have it but also to its inviolability (Maliarenko, 2013). In addition, the standardization of judicial control when conducting investigative (search) actions which require prior permission is intended to align national legislation with the requirements of international legal acts that guarantee the human right to inviolability of dwelling. So, in Article 12 of the Universal Declaration of Human Rights provides that no one may be subjected interference in his personal and family life, encroachment on the inviolability of his dwelling. Everyone has the right to be protected by law from such interference and encroachment (Universal Declaration, 1948). A similar requirement is enshrined in Article 17 of the International Covenant on Civil and Political Rights (International Covenant, 1966). In the norms of Article 8 of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms states that everyone has the right to respect for his private and family life, dwelling and secrecy of correspondence (Convention, 1950).

Taking into account the international requirements, adopting the Constitution of Ukraine lawmakers in Article 30 stipulated that entering the dwelling or other property of a person, inspection or search of them should not be allowed except by a reasoned court decision. Only in urgent cases related to the saving of life and property or the direct prosecution of persons suspected of committing a crime, another procedure established by law, the procedure for entering the dwelling or other property of a person, their inspection and search are possible. Constitutional norms with regard to the protection of human rights and freedoms are of fundamental importance, and therefore they are enshrined in the CPC of Ukraine as the basis of criminal proceedings.

Nowadays the issue of judicial control over the lawfulness of the search without the prior permission of the court is rather up-to-date. The European Court of Human Rights has repeatedly emphasized the need to comply with the criterion of lawfulness of the search without the prior permission of the court. Thus, in the case of "Iliev v. Bulgaria", the European Court reiterated that a search carried out in a person's apartment is an interference with his right to housing, protected by Article 8 of the 1950 Convention on Human Rights and Fundamental Freedoms (Judgment of the ECHR, 2019). The Court noted that the absence of prior judicial permission could be counterbalanced by the existence of an effective retrospective judicial revision. But no effective retrospective judicial revision was carried out in the present case, as the judge considering the search report simply signed it without giving any specific reasons for its approval. On this basis, the Court found that the measures applied were not "in accordance with the law" and thus violated the requirements of Article 8 of the Convention.

It is worth noting that the European Court of Human Rights, the first judicial body of a continental dimension and with a continental competence, has carried out a thorough work on the single legal systems, going at the heart of their procedural rules, each time assessing their compatibility with the guarantees enshrined in the Convention 1950 (Trechsel, 2006). The European Court of Human Rights is conscious that by protecting the fundamental principles it does not only aim at the protection of super eminence of the inextricably right tied to the state of law. These principles represent a set of obligations imposed on the State that has as the sole purpose the protection of fundamental rights and freedoms (Barbu, 2016).

In addition, we should note that the strict adherence to the legal requirements in terms of house search or other property is important, because in Part 3 of Article 233 of the CPC of Ukraine there are fixed urgent cases when the investigator, the prosecutor has the right to entry into the dwelling or other property of the person before making an order by the investigating judge. In such a case, after taking appropriate action, they are obliged to make an application to the investigating judge about the conducting of the search. Such a check is due to the fact that entering the dwelling or other property of a person is carried out without the order of the investigating judge, and this does not contradict the prescriptions of Article 30 of the Constitution of Ukraine, which establishes that in urgent cases



related to the saving of life and property or the direct prosecution of persons suspected of committing a crime, another procedure established by law, the procedure for entering the dwelling or other property of a person, conducting of the inspection or a search.

In accordance with generally accepted rules, enshrined in Article 234 of the CPC of Ukraine, the search is conducted on the basis of the decision of the investigating judge of the local general court, which is decided by the results of the petition of the investigator agreed with the prosecutor or prosecutor (procedural supervisor). However, there are certain exceptions to the general rule, which are not always provided for in the CPC of Ukraine, so you should refer to the rules of special legislation. For example, the above applies to investigations against a lawyer and which can be conducted only with the permission of a court. The CPC of Ukraine on this issue does not contain a separate requirement, while in paragraph 3 of Part 1 of Article 23 of the Law of Ukraine "On the Bar and Lawyer Activities" of July 5, 2012 established that the conducting of investigative actions against a lawyer, which can be conducted only with the permission of the court, is carried out on the basis of a court decision, made at the request of the Prosecutor General of Ukraine, his deputies, the prosecutor of the Autonomous Republic of Crimea, the region, the city of Kyiv and the city of Sevastopol (Law of Ukraine, 2014). The ECHR's practice should be taken into account on this point. Thus, in the case of "Kruglov and Others v. Russia", the European Court emphasized that by examining the applications of the persons being searched, national courts need to find out whether the disputed measures were necessary in a democratic society, in particular whether they could be considered adequate match between the goal of such activities and the measures used. In order to determine whether such measures are "necessary in a democratic society", the court must determine whether domestic law has effective assurance against abuse or arbitrariness and how those assurance have acted in specific cases. In this connection, the following should be taken into account: 1) the gravity of the crime that led to the search and seizure, 2) whether they were carried out in accordance with the decision of a judge or judicial officer or was re-examined after its conducting, 3) whether the decision was based on reasonable suspicion and whether its scope was reasonably limited. The court must also consider the procedure for the search, including - if it is a lawyer's office - whether it was conducted in the presence of an independent

observer or whether there were other special assurance to ensure that material covered under the professional secrecy, were not removed. Finally, the court must take into account the extent of the possible consequences for the work and reputation of the persons being searched (ECHR, 2020).

Another equally important practical issue, which is nowadays essential for obtaining admissible evidence, is a clear delineation of investigative (search) actions such as inspection of a dwelling or other property and search of a dwelling or other property. The fact is that the substitution of these investigative actions will inevitably lead to the court finding the evidence inadmissible. That is why practitioners need to understand that inspection, as an investigative action, includes the direct observation, identification, recording and investigation by participants of material objects related to the circumstances of the criminal offense. In turn, the search is a compulsory action, which is targeted to examine rooms, buildings and areas. Thus, in order to distinguish the conducted investigative action, its evaluation, as well as the evaluation of the evidence obtained as a result of the investigative (search) action, it is necessary to take into account not the name of the document used for the registration of the procedure of its conducting, but the content and method of the actions actually done by the authorized person, the goal of investigative (search) action (Decision, 2018).

From a practical point of view it is necessary to take into account the scientific position of V. I. Levin, who pointed out that the following aspects should be taken into account when the investigating judge decides about granting or refusing search permission (Levin, 2018).

- I. The object of the search, which is the dwelling or other property of the person or their part where the search is planned. The investigating judge is obliged to check whether the prosecution has indicated the exact address where the search is to be conducted. This is important for figuring out the limits of a search.
- II. The subject of the search. Based on the provisions of Article 234 of the CPC of Ukraine, these are things and documents that are directly relevant to criminal proceedings and / or at the same time the information contained in them and

have probative value, as well as the persons to be searched (location of wanted persons). That is why the investigating judge, when considering the application for the search, is obliged to investigate the possibility of the prosecution to specify as much as possible information about the things, documents or persons that are planned to be found. It is worth mentioning here the case of “Bagiev v. Ukraine”, dated June 29, 2006, in which the European Court stated that the absence in the court document of the details of the things and documents that are planned to be searched and which serve as a basis for the search, leads to vagueness and excessive generalization which, in turn, provides the search authority an unreasonable discretion in establishing the required search scope (Judgment, 2006).

- III. The person authorized by the judge's order to conduct the search. Finding out the information about the persons who will conduct the search, and clearly indicating them in the decree is one of the main guarantees of the lawfulness of the search of a home or other property of a person. This thesis results from the nature of the search, since in certain cases, its conduct requires the involvement of a considerable amount of human resources of law enforcement officials.
- IV. The entity, the rights, freedoms and legitimate interests of whom may be restricted by the conduct of a search, that is, the person who owns the dwelling or other property and the person in whose actual possession it is. Thus, it is the duty of the investigator, the prosecutor to clearly state in the request for a search the information concerning the person in the ownership and / or possession of whom is a dwelling or other property, and the investigating judge to check their presence, which is a guarantee of preventing unjustified procedural coercion of persons, who are not involved in criminal proceedings.
- V. The logical connection between the object, the subject and the entity,

the rights, freedoms and legitimate interests of whom are restricted as a result of the search. In this case, the prosecution, having substantiated the grounds for the search, is obliged to prove the logical interconnection of the things and documents that are planned to be searched and the relationship between the subject of the search and the person whose rights, freedoms and legitimate interests will be restricted due to the search.

We believe that the consideration and adherence of the above provisions by investigating judges will be the guarantee of the rights, freedoms and legitimate interests of the person whose dwelling or other property is intended to be searched.

### Conclusion

An analysis of domestic legislation and case law on judicial control over investigative (search) actions showed that the protection of fundamental rights and freedoms of human and citizen in Ukraine by judicial control over their implementation reached the level of international standards, and in the system of legal guarantees of protection of rights and the freedoms of the individual and the citizen have become particularly important to ensure that the rights of participants in criminal proceedings are respected during the investigation of crimes (Gorodovenko, 2013).

As we can see, judicial control, enshrined in legislation, by an investigating judge for the compliance with the rights, freedoms and interests of persons in criminal proceedings is a necessary condition. On the one hand, it ensures respect for the constitutional guarantees of protection of human rights and freedoms in the field of criminal justice, and on the other - it is aimed at implementing the principles of criminal proceedings. Therefore, it can be argued that effective provision of such conditions by the investigating judge is aimed at fulfilling the task of criminal proceedings. In particular, this concerns both the protection of individuals, the state and society from criminal offenses, the protection of the rights, freedoms and legitimate interests of participants in criminal proceedings, as well as the application of due process of law to every participant in criminal proceedings.

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