

THE UNDERCOVER INVESTIGATOR IN THE VISION OF THE NEW ROMANIAN CRIMINAL PROCEDURE CODE

Isabelle VLĂDOIU
Graduate Faculty of Law
University of Bucharest, Romania

Nasty Marian VLĂDOIU
Faculty of Law,
“Transilvania” University, Braşov, Romania

Abstract

A new Criminal Procedure Code has entered into force on 1st February, 2014 according to Law no. 255/2013 for the implementation of the Law no. 135/2010 on the Criminal Procedure Code¹.

Under the provisions of Article 3 of the Implementing Act, the new law shall apply from its entry into force to all cases pending before the courts, with certain exceptions set out in its content. Thus, the provisions of Articles 224¹ - 224⁴ from the Criminal Procedure Code of 1968 shall be repealed and the new criminal procedural provisions will apply from this time forth.

The New Criminal Procedure Code regulates issues concerning the undercover investigator in Title IV – Evidences, means of evidence and evidentiary procedures, within the Chapter IV relating to special surveillance or research methods, consecrating to this institution three articles (Articles 148-150 of the New Criminal Procedure Code).

Keywords: *new Criminal Procedure Code, undercover investigator, collaborator, reasonable suspicion.*

§ 1. Introduction

The evolution of technology and information has brought an alarming increase in criminal activity, being registered the emergence of new offenses or even the increase of the traditional crimes through the new technologies, making them more difficult to be discovered, given the increasingly diversified practical ways of commission.

In this context, in recent decades, the use of undercover investigators has become more frequent, being felt the need of applying some effective and necessary strategies to prevent and combat crimes with a high degree of dangerousness.

Since in the present paper we will be using notions and concepts that have no legal definition, it is necessary to make a brief overview of the opinion expressed in

* Ph.D., Associate Professor, Faculty of Law

¹ Law no. 135/2010 on the Criminal Procedure Code, published in Official Journal no. 486 of 15 July 2010 .

jurisprudence and specialized literature. The concern was to define the undercover investigator and other similar categories, so that they cannot be confused.

Therefore, it has been considered that when we talk about the undercover investigator we have to keep in mind two meanings: on the one hand, it represent an institution of criminal procedure law and, on the other hand, it is the person authorized by law to conduct covert operations. In this second acception, the undercover investigator is “the person that has other identity than the real one, who thoroughly and systematically investigates in order to uncover data on the existence of a crime and data on the preparation of a crime, and to identify the persons on which there is the assumption that they have committed or are about to commit a crime”¹.

The provocateur agents were defined as “those infiltrated agents of the state or any person acting under the direction or supervision of an authority, who exceeds in his activity the attributions conferred by law and limited to act only for the purpose of identifying the criminal activity of a person, by provoking the latter to commit crimes with the aim to gain evidence in indictment”².

When the acts performed by the same person are used as emanating either from the undercover investigator or the police officer, we are in the presence of an undercover investigator who draws procedural acts with his real identity³.

§ 2. The use of undercover investigator or with real identity and of collaborators

2.1. Provisions regarding the necessary conditions for using undercover investigators

According to Article 148 paragraph (1) Criminal Procedure Code, the use of undercover investigators shall be authorized by the prosecutor supervising or conducting the prosecution for a period not exceeding 60 days, whether several conditions are met.

A first set of conditions relates to the circumstances where allowed undercover investigation and the reasons that should be considered when authorizing the use of an undercover investigator in a particular case.

Thus, it is permitted the use of undercover investigators if:

a) there is a reasonable suspicion about the preparation or commission of a crime

b) it is about one of the following offences

- crimes against national security provided in the Criminal Code or other specific laws;
- crimes of drug trafficking, arms trafficking, human trafficking, acts of terrorism or assimilated thereto, terrorism financing;
- money laundering, forgery of coinage or other values, forgery or electronic payment instruments;
- crimes of extortion, deprivation of liberty, tax evasion;
- crimes of corruption or assimilated thereto;
- crimes against the financial interests of the European Union;

¹ D. Voica, *The undercover investigator, a new institution of the Romanian criminal procedure law*, in “Dreptul” Magazine no. 5/2004, p. 9.

² M. Udrioiu, O. Predescu, *The jurisprudence of the European Court of Human Rights on the provocateur agents*, in “Dreptul” Magazine no. 1/2009, p. 243.

³ L. Herghelegiu, *The undercover investigator*, in “Revista de Drept Penal” no. 2/2005, p. 120.

- crimes that are committed through computer systems or electronic media;
- offenses for which the law provides imprisonment for seven years or more.

or,

c) there is a reasonable suspicion that a person is involved in the conduct of criminal activities in connection with the offenses listed above.

We observe that the scope of the undercover investigator is much broader now, compared to the previous provisions. In addition, it has been waived the requirement of solid and specific grounds, this being replaced with the requirement of “reasonable suspicion”.

The reasonable suspicion is the legitimate and rational presumption about the illegality of the actions taken or that might be undertaken by a person in relation to the requirements imposed by the rules of criminal coercion.

The second set of conditions envisages the investigative measure, which must be necessary and proportional to the restriction of fundamental rights and freedoms by reference to the particularities of the case, the importance of information or evidences that are to be obtained or to the gravity of the offense.

We infer that the requirements expressed must be cumulatively fulfilled and the measure will be legitimate if and only if, it is both necessary and proportionate to the restriction of the fundamental rights. These requirements provide guarantees against possible abuses of the authorities and their interference with the right to a private and family life, as it is protected under Article 9 of the European Convention on Human Rights (ECHR).

Finally, a third set of conditions on the use of undercover investigators refers to obtaining evidence or locating and identifying the perpetrator, the suspect or the accused, provided that those:

- cannot be obtained in another way,
- although obtainable in another way, it would require major difficulties that would prejudice the investigation,
- can represent a threat to the safety of persons or to some valuable goods.

The conditions laid down in Article 148 paragraph (1) Criminal Procedure Code must be cumulatively met in order to authorize the use of undercover investigators.

2.2. Provisions related to the taking of the measure and the document ordering it

The use of undercover investigators, according to Article 148 paragraph (2) Criminal Procedure Code, shall be ordered by the prosecutor, ex officio or at the request of the criminal investigation body.

Authorization of using the undercover investigator is ordered by the prosecutor supervising or conducting the criminal investigation, by ordinance, which shall include also, outside the terms set out in Article 286 paragraph (2) Criminal Procedure Code, the following: the list of activities the undercover investigator is authorized to carry on, the period of authorization and the identity assigned to the undercover investigator.

Thus, under the new regulations, similar to Article 224² of the old Criminal Procedure Code, the document authorizing the measure is the prosecutor’s ordinance, and it shall contain roughly the same terms. The difference, this time, can be found in the authorization request, since as we have seen, the prosecutor may order the taking of the measure also in

the absence of a request, by ex officio notification, hypothesis which was not feasible under the old legislation.

As regards the period for which the measure can be taken, the authorization of using undercover investigator is limited in time and may be ordered for a maximum of 60 days.

2.3. The authorization of technical surveillance measures

According to Article 148 paragraph (3) Criminal Procedure Code, insofar as the prosecutor considers it necessary for the undercover investigator to use technical devices in order to get photos or video and audio, he will notify the judge of rights and freedoms¹ for the issuance of technical supervision warrant. The warrant shall be obtained under the conditions laid down in Article 141 Criminal Procedure Code.

2.4. Terms regarding the investigator person. Competence and undercover work

In accordance with Article 148 paragraph (8) Criminal Procedure Code, undercover investigators shall be operative workers of the judicial police and, in case of national security offenses and terrorism, can be used also as undercover investigators, operative workers of other government agencies carrying out intelligence activities in order to ensure national security.

The Judicial Police is organized under the Law no. 364/2004 on the organization and functioning of the judicial police, and operates within specialized structures of the Ministry of Internal Affairs. Within it, we encounter police officers and agents that are specialized in carrying out crime finding, data gathering for prosecution and criminal investigation. They have the status of judicial police investigation bodies and operate under the authority of the General Prosecutor of the Supreme Court of Justice or, in other ways, as determined by special laws.

May be also undercover investigators, according to the text of law, the operative workers from other government agencies engaged in intelligence activities (e.g. SRI, SIE), expressly designated for national security purposes, but only for crimes threatening the national security, as well as for terrorism offenses. In this case, it shall be respected also the provisions contained in special laws as, Law no. 51/1991 on the national security of Romania², Law no. 14/1992 on the organization and functioning of the Romanian Intelligence Service³, Law no. 1/1998 on the organization and functioning of the Foreign Intelligence Service⁴, etc.

In his activity, the undercover investigator has the power to gather data and information in compliance with the limitations set out by the prosecutor's ordinance. Such data and information should be given in full at the disposal of the prosecutor who supervises or conducts the criminal investigation. In relation to the data and information provided, it is established by law the obligation of the prosecutor to write a report.

¹ Article 53 Criminal Procedure Code – The jurisdiction of judge of rights and freedoms

² Law no. 51/1991 on the national security of Romania, published in Official Journal no. 163 of 7 August 1991.

³ Law no. 14/1992 on the organization and functioning of the Romanian Intelligence Service, published in Official Journal no. 33 of 3 March 1992.

⁴ Law no. 1/1998, republished under Article II. of the Law no. 138/2000, in Official Journal no. 353 of 28 July 2000.

Sometimes, in order to carry out certain activities, the undercover investigator needs also an authorization as provided by Article 150 Criminal Procedure Code, that we are going to analyze in detail later in this paper.

The work of the undercover investigator can be supported by the judicial bodies, who are allowed to use or provide him any necessary documents or objects in order to achieve his mission. The law states that, in this case, both the provision of documents or objects and their use will not be considered an offense [Article 147 paragraph (7) Criminal Procedure Code].

According to Article 148 paragraph (8) Criminal Procedure Code, undercover investigators can be heard as witnesses in criminal trials under the same conditions as the threatened witnesses¹.

§ 3. Functional and attributional comparison between the undercover investigator and the collaborator

According to Article 148 paragraph (10) Criminal Procedure Code, “In exceptional circumstances, whether the conditions laid down in Para. (1) are met, and the use of undercover investigators is not sufficient to obtain data information or is not possible, the prosecutor supervising or conducting the prosecution may authorize a collaborator, for which can be assigned a different identity than the real one. The provisions of paragraphs (2)-(3) and (5)-(9) are applied accordingly”.

From this we can draw the following conclusions:

- the undercover collaborator is not the same person with the undercover investigator
- collaborators are used only in exceptional cases where the conditions for authorizing the investigative measure conducted undercover are met, namely: there is a reasonable suspicion about the preparation or commission of any of the offenses referred to Article 148 para. (1) letter a) or, there is a reasonable suspicion that a person is involved in criminal activities in connection with one of these offenses; the measure shall be necessary and proportional to the restriction of fundamental rights and freedoms, given the particular circumstances, the importance of information or evidence that will be obtained or the gravity of the offense; the evidence or locating and identifying the perpetrator, the suspect or the defendant cannot otherwise be obtained or, obtaining them would require major difficulties that would prejudice the investigation or, there is a threat to the safety of persons or some valuable goods.
- collaborators are being used where the use of undercover investigators is not sufficient or not possible for deriving data or information;
- the use of collaborators can be done only with the authorization of the prosecutor who performs or supervises the prosecution, through this understanding that, in cases where investigators have been authorized, there will be needed a new authorization from the

¹ Article 125 Criminal Procedure Code – The threatened witness: „If there is a reasonable suspicion that the life, physical integrity, freedom, property or occupation of the witness or of a member of his family could be in danger as a result of the data they provide to the judicial bodies or as a result of their statements, the competent judicial bodies give him the status of threatened witnesses and dispose one or several of the protective measures provided for in Article 126 or 127, where appropriate.”

prosecutor for the use of undercover collaborators and, as we have seen, the authorization conditions should be fulfilled also in the person of collaborator;

- authorizing the use of undercover collaborators shall be done also by prosecutor's ordinance, as in case of the undercover investigator, with the requirement that it shall include the mandatory particulars laid down in Article 148 para. (2) Criminal Procedure Code;

- the collaborator can be allowed to use technical devices to get pictures or audio and video recordings. In this regard, it is necessary to be obtained a technical surveillance warrant from the judge of rights and freedoms;

- the work of undercover collaborators, similar to that of undercover investigators, is limited to collecting data and information, that must make them available to the prosecutor;

- there can be made available to the collaborator documents or objects required for carrying out the activity authorized by the judicial bodies, and their use does not represent a crime;

- undercover collaborators can be heard in criminal trial under the same conditions as the threatened witnesses;

- the use of collaborators has a limited duration in respect of the same case and on the same person, thus the authorization shall not exceed a period of 60 days, except that, for good reasons, it is requested the extension of the measure, extension which can have up to 60 days but, in case of successive extensions, the total duration of the measure shall not exceed one year;

Therefore, we observe that, although there is no legal definition of undercover collaborator, its work and its limits of action are established by law, by reference to the institution of the undercover investigator. Previously in the specialized literature, it has been proceeded to the definition and delimitation of the undercover collaborator and his activity, through the broad interpretation of the undercover investigator's institution, considering that any person, even if it is not a judicial police worker, but helps the prosecution bodies into the work of identification, investigation and prosecuting those who have committed crimes, can be a collaborator¹.

This interpretation was not free from criticism, being considered that a person who is not a state entity could not be included in the category of undercover collaborators, being just an auxiliary of the competent bodies in criminal investigations, and the classification of the undercover collaborator's activity by interpreting in an extensively manner the authorization given to the undercover investigator, is clearly illegal.²

The European Court of Human Rights reiterated that in the category of undercover agents shall be also included the undercover collaborator, but without being confused with the provocateur agent, because the action of the collaborator is limited to collecting data and information, while the provocateur agent incite to the commission of offenses³.

¹ I. Pașca, *Issues concerning the use of undercover collaborators in the Romanian criminal trial. Their encoding in the new criminal legislation*, Annals of West University of Timisoara, Series Law no. 2/2012, p. 2

² See L. Herghelegiu, *The undercover investigator*, op. cit., p. 119; V. Pușcașu, *The undercover agents. Illegal provocation of the offense. Considerations (I)*, Criminal Law Notebooks no. 2/2010, p. 32.

³ CEDO, Teixeira de Castro c. Portugalia no. 44/1997/828/1034 of 9 June 1998, *infra*. §27.

Since, in accordance with Article 148 para. (10) Criminal Procedure Code, the institution of undercover collaborator is defined by reference to the undercover investigator and his activity, specifying that they are not operative agents of the judicial police (fact that results from the expressly elimination of the application of Article 148 para.(4) Criminal Procedure Code in case of collaborators), we consider that the undercover collaborator shall be any person who expresses the wish to help the state bodies to investigate those which are reasonably suspected of preparing or committing an offense and, who contributes to the collection of data and information about their criminal activity.

The undercover collaborator should differ however from the mere informant, who collaborates with the judicial bodies in order to help with the investigation, the localization and identification of the suspects or defendants and, who does not require authorization from the prosecutor to carry that activity, since the information provided has been received by him before taking any decision to collaborate with the authorities.

§ 4. Protective measures for the undercover investigators and collaborators

Considering the offenses for which is authorized the use of undercover investigators and the high degree of hazardousness, the establishment of some protective measures, both in terms of their person and their families, was necessary.

The current Criminal Procedure Code, although brings changes to the institution of undercover investigator, keeps the provisions on protective measures of the undercover investigator, previously existing in Article 224⁴ of the old Criminal Procedure Code.

Thus, according to Article 149 para. (1) Criminal Procedure Code, “the real identity of the undercover investigators and collaborators with other identity than the real one, cannot be disclosed”.

By exception, has the right to know their true identity: the prosecutor, the judge of rights and freedoms, the preliminary judge or the court [Article 149 para. (2) Criminal Procedure Code]. This exemption is explained by the fact that the judicial bodies mentioned above authorize the use of undercover investigators and of certain activities conducted by them. In addition, they have the obligation of professional secrecy, so that knowing the true identity of the undercover investigators or of collaborators will not jeopardize their safety.

Although the text of law is similar to that provided in the Criminal Procedure Code of 1968, the scope of protection is now wider, because there are protected not only the undercover investigators, but also the collaborators with different identity than the real one. Moreover, Article 149 para. (3) provides that “the undercover investigator, the collaborator, the informant and their family members or other person subject to threats, intimidation or violence in connection with their undercover work may benefit of specific measures for witness protection”.

So, not only to the undercover investigators, the informant or the collaborators called to testify, it shall be provided protection, but also to their family members and other persons.

Regarding the statements given by the investigator, the collaborator or by the protected witnesses, Article 103 para. (3) Criminal Procedure Code, expressly states that the judgments of conviction, the abandonment of the application of penalty or the decision to postpone the penalty, cannot rely on these to a decisive manner. By this text, it is properly granted protection, to the defendant too, thus respecting the equality of arms principle, essential principle of a fair trial.

§ 5. The authorized participation to certain activities

Speaking about the special surveillance methods or investigative methods set out in Chapter IV, the Criminal Procedure Code in the provisions of Article 138 para. (11) provide what is meant by authorized participation to certain activities.

Thus, according to the text of law, “through authorized participation in certain activities we understand the commission of acts similar to the actus reus of an offense of corruption, the conducting of transactions, operations or any other agreement concerning a good or a person suspected to be missing, to be a victim of trafficking or kidnap, conducting operations on the drug and, provision of a service, held with the authorization of the competent judicial body, in order to obtain evidence”.

The regulatory framework that describes the conditions under which it is authorized the participation to these activities, the period of authorization and the persons who may carry out the activities authorized, is represented by the Article 150 of the Criminal Procedure Code.

According to it, the one who has the power to order the authorized participation in certain activities under Article 138 para. (11) is the prosecutor who supervises or conducts the criminal prosecution.

The authorization shall have a maximum of 60 days and is subject to the following conditions:

a) there is a reasonable suspicion about the preparation or commission of a crime

b) it is about one of the following offences

- Crimes of drug trafficking, arms trafficking, human trafficking, acts of terrorism;
- Money laundering, forgery of coinage or other values;
- Crimes of extortion, deprivation of liberty, tax evasion;
- Crimes of corruption or assimilated thereto;
- Crimes against the financial interests of the European Union;
- Crimes that are committed through computer systems or electronic media;
- Offenses for which the law provides imprisonment for seven years or more.

or,

c) there is a reasonable suspicion that a person is involved in criminal activities which relates, in accordance with art. 43 Criminal Procedure Code, to the offenses listed above¹.

Specifications made earlier about the concept of reasonable suspicion applies also in this case.

d) the investigative measure, must be necessary and proportional to the restriction of fundamental rights and freedoms by reference to the particularities of the case, the importance of information or evidences are to be obtained or to the gravity of the offense.

e) the evidence cannot be obtained in another way, or obtaining them would involve major difficulties that would either prejudice the investigation or endanger the safety of persons or some valuable goods.

These conditions must be cumulatively fulfilled in order that the participation in certain activities to be authorized under the law.

¹ Article 43 Criminal Procedure Code – Joinder of cases.

The document ordering the authorization is the prosecutor's ordinance. The ordinance is issued upon the request on taking the measures, coming from the criminal investigation bodies or upon the *ex officio* intimation of the prosecutor, when he considers necessary and ascertains the fulfillment of the conditions mentioned above.

The ordinance shall contain, in addition to the endorsements of Article 286 para. (2), a list of the authorized activities, the period of authorization and the person conducting the authorized activities [Article 150 para. (2) Criminal Procedure Code].

In relation with those who can carry out the authorized activities, the law designates the following persons:

- a criminal investigative body;
- an investigator with real identity;
- an undercover investigator;
- a collaborator;

The list provided by the text of law is exhaustive, so we can justly infer that only such persons can carry out the activities referred to in Article 138 para. (11) Criminal Procedure Code.

As the activities of Article 138 para. (11) are considering the commission of acts similar to the *actus reus* of an offense and, therefore, might constitute crimes, Article 150 para. (4) provides that the conducting of such activities by the person authorized pursuant to the prosecutor's ordinance shall not be considered misdemeanors or crimes.

About the enforcement of the investigative measure shall be concluded a report, in which is recorded the time the measure began and ended, the data on the persons the authorized activities have been carried for, the description of the technical devices used, if they were approved by the judge of rights and freedoms, the use of technical means of surveillance and the identity of the persons on which the measure was implemented [Article 150 para. (5) Criminal Procedure Code].

If the judicial body considers that a hearing is necessary, the person who carried out the authorized activities may be heard as witness in criminal trial, in compliance with the provisions about the hearing of the threatened witnesses [art. 150 para. (6) Criminal Procedure Code].

The judicial bodies, in accordance with Article 150 para. (7) Criminal Procedure Code, can use or make available to any person carrying out the authorized activities, necessary documents or objects to support this activity, and the person providing them and also the one who uses them will not commit a crime, even if normally such activities would constitute a criminal offense under the law.

Finally, the last paragraphs of Article 150 of the Criminal Procedure Code, contain provisions on the period for which the measure can be authorized, setting that the prosecutor is able to extend the initial period of 60 days when there are good reasons and are still satisfied the conditions that underpinned the measure, without the extension being able to go beyond 60 days. Successive extensions are possible, but the total duration of the taking measure, on the same person and the same act, may not exceed one year.

§ 6. Conclusions

It has been said many times that in a democratic society, the conduct of covert operations is a "necessary evil", this because, although it has been proved useful and

effective in the prosecution of the perpetrators, it poses a major risk of interference from the state authorities in the privacy of individuals, a restriction to their fundamental rights and freedoms and also a risk that those authorized to collect data and information on the preparation or committing of a crime may come to be corrupt.

The current need of implementing strategies to combat and prevent crime, among which we can include the use of undercover investigators, motivates the act of the legislator to try to shape a regulatory framework able to enframe and discipline the new social reality.

References

[1] D. Voica, The undercover investigator, a new institution of the Romanian criminal procedure law, in "Dreptul" Magazine no. 5/2004, p. 9.

[2] M. Udroi, O. Predescu, The jurisprudence of the European Court of Human Rights on the provocateur agents, in "Dreptul" Magazine no. 1/2009, p. 243.

[3] L. Herghelegiu, The undercover investigator, Journal of Criminal Law no. 2/2005, p. 120;

[4] I. Pașca, Issues concerning the use of undercover collaborators in the Romanian criminal trial. Their encoding in the new criminal legislation, Annals of West University of Timisoara, Series Law no. 2/2012, p. 2

[5] V. Pușcașu, The undercover agents. Illegal provocation of the offense. Considerations (I), Criminal Law Notebooks no. 2/2010, p. 32.