

# Conditioning by a Covert Investigator

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## Abstract

*Human intelligence measures, such as informants, undercover persons, or other private individuals cooperating with the police in disguise play an important role in combating organised crime. Nonetheless, due to their professional skills, and with regards to their legal authorizations and responsibilities, covert investigators provide more substantial guarantees to the legality and effectiveness of the procedure than informants of criminal backgrounds.<sup>1</sup> This study aims to enhance the significance of covert investigators, but with a view on the weak points of the institution, specifically the limits of influencing and conditioning, that can lead to misinterpretation of data.*

**Key words:** *organized crime, covert investigator, influencing, covert intelligence gathering, evidence.*

## Introduction

In the course of undercover operations the covert investigator infiltrates into the criminal organization in target and to be eliminated, and may even commit criminal offences if necessary. Official documents (ID, drivers licence) and covert documents shall certify the alias of the covert investigator. The applicable statutory provisions of law allow such covert documents to be part of the administrative registries.<sup>2</sup>

Decision of the Federal Supreme Court of Germany (Bundesgerichtshof, henceforth referred to as BGH) of 1983 sets the principles and guidelines on combating organized crime and the necessity of covert investigative operations. BGH draws the attention to the fact that the evolution of crime can not only be characterised by the increasing numbers of criminal acts committed in the past few years, but a change of quality must be recognised in the enhanced appearance of criminal organisations, considerably

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<sup>1</sup> Géza, Finszter, Special methods and measures of detecting evidential proof, Criminalistics 1-2, p 734, BM Publishing, 2004, Budapest

<sup>2</sup> Bence, Mészáros, Actual questions of regulating and using covert investigators, Journal of Internal Affairs, Volume 53, 2005/2, p 74-75, Budapest

encumbering criminal investigations. This principle shall specifically apply to drug trafficking, to criminal offences related to night-life, to stealing premium quality vehicles, to other acts of burglary – committed to the request of background receivers or fences -, furthermore, to producing or circulating counterfeit money and to illicit arms trafficking. The strategy of the offenders is to protect and veil the identity of the chiefs of the criminal organisations in front of outsiders.

According to the decision, using traditional measures, in most cases the police can only capture the offenders who stand at a lower or subordinated level in the given criminal organisation. These offenders can be replaced or substituted at will, any time on the given level of the organisation, without interrupting the activities of the group, especially because they do not possess any insights of the structure or constitution of the entire organisation. The persons inevitably given insight into the operation of the system are detained from disclosing information through threat, intimidation or by being paid of for keeping quiet.

If an offender is being arrested or imprisoned, in most cases, the organisation supplies financial support to the family members and relatives, and often overtakes defence costs in order to establish even firmer dependence in order to prevent disclosure of information to the authorities. In conclusion, the result of combating crime depends on how firmly the criminal conduct can be attested to the main offenders, to those who organise activities from the background and to other persons involved in financing and controlling organised crime. In order to get closer to their targets, law enforcement entities employ covert police officers and other undercover persons. Cooperating individuals are persons of confidence hidden from the public, who assist police operations by gathering and transmitting intelligence in order to prevent, hinder, deter or detect criminal acts. Covert persons include informants (for example taxi drivers, bartenders etc.) or other individuals infiltrating into the organisation (for example, covert agents) who gather intelligence for the police, and whose identity is not disclosed by the law enforcement bodies.<sup>3</sup>

The institution of covert investigator contributes to the disorganization of a criminal group, and the intelligence gathered by the investigator may establish the order of covert intelligence gathering or the application of other procedural measures subject to a later judicial permit. Nevertheless, intelligence delivered by a covert investigator is not necessarily used in criminal procedure by all means, it's more to likely to assist covert intelligence gathering operations (i.e. employing a covert investigator shall remain veiled), while transmitted information is classified, establishing the introduction of added means and measures provided that police may gather further information of relevance.

## 1. Conditions of using a covert investigator

The instrument of the covert investigator is an operational opportunity to gather evidence directly from the offenders or members of the criminal organisation. Information gathered and transmitted by the covert investigator can be useful in many aspects:

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<sup>3</sup> BGH, 17. 10. 1983-GSSt 1/83: Zur gerichtlichen Vernehmung von Vertrauenspersonen der Polizei und zur Zulässigkeit verdeckter Ermittlungen <http://www.verkehrlexikon.de/Texte/Rspr3817.php> 2016.03.03.

- all intelligence gathered can directly help the investigative operations of the police;
- the report can be used as evidence during the criminal procedure;
- the covert investigator may be interrogated in the criminal procedure if things he'd seen or heard may be important;
- law enforcement bodies may collect direct evidence through the covert investigator's operation.<sup>4</sup>

The intelligence gathered by the covert investigator gives the opportunity to law enforcement entities to map criminal organisations, furthermore, they may use the gathered information in later investigations and in collecting evidence. Moreover, intelligence gathered by the covert investigator can be used to compare and supervise the information supplied by other covert persons who cooperate with the police.

Covert investigators can be used in covert intelligence gathering (hereinafter referred to as TIGY), a procedure not subject to judicial permit, or in the frame of other data gathering activities (hereinafter referred to as EASZ). In case of TIGY, covert investigator is used prior to the criminal procedure, while in case of EASZ, such measure is used as an actual part of the procedure. In case of EASZ, the investigating authority may use a covert investigator upon the prosecutor's permission, while during TIGY the investigating authority may use a covert investigator for intelligence gathering, data control or mystery shopping without the preliminary permission of the prosecutor or the court. Exceptionally, the prosecutor's permission is needed during covert intelligence gathering, if the investigating authority uses a covert investigator to pursue pseudo-, or test purchasing, to infiltrate into a criminal organisation, or if the investigator is involved in controlled shipping.

The investigating authority is not entitled to use a covert investigator during covert data gathering (henceforth referred to as TASZ). In case the investigating authority manages to obtain a court order necessary to use a special technical device subject to judicial permission, the covert investigator may record the events in a private home (for example, intercommunication of the person(s) under surveillance) with a special technical device during the course of the criminal procedure. According to Section 206/A (1) b) of Be. (Act XIX of 1998 on Criminal proceedings), should such record be taken prior to the criminal procedure, it may only be used as evidence, if the body requesting for the permission for covert intelligence gathering has ordered initiation of the investigation immediately after obtaining the information intended to be used in the criminal procedure or the law enforcement body has immediately fulfilled its obligation to report the criminal act.

Upon the authorization of Section 64 (1) d) of the Rtv. (Act XXXIV of 1994 on police forces, hereinafter referred to as Rtv.) the covert investigator may – besides his surveillance competences related to private homes - *'keep under surveillance the person suspected of having committed a crime, or any individuals, facilities, buildings or other implementations, pieces of fields or roads, vehicles or events that can relate to proceeds of crime, and may and record the result of the surveillance with a technical device (henceforth: technical device)'*. Without a judicial permit, the covert investigator may only be entitled to record any correspondence at places that shall not be deemed a

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<sup>4</sup> Bence, Mészáros, Actual questions of regulating and using covert investigators, Journal of Internal Affairs, p 77, Volume 53, 2005/2, Budapest

private home according to the applicable provisions of law, consequently, at public areas or at places, areas or facilities otherwise opened for the public.<sup>5</sup>

Principally, the victims of organised crime have no information on the identity of the offender, and commonly, they do not facilitate much trust to turn to the authorities. Also, if the injured party happens to be a criminal, he is more unlikely or will never file a complaint or a report on any injury he'd suffered.<sup>6</sup> In such cases, authorities may only gather information on criminal acts by using the channels of human intelligence.

Besides the essential incorporation of statutory provisions on the covert investigator's operations, clarification of the rules and terms of tactical steps of intelligence, uninfluenced intelligence gathering and maneuvering information should be taken into consideration.

In accordance with the provisions of Section 67/A (1) of Rtv. the complaint may be rejected and / or the the criminal procedure pending against the covert detective may be terminated

- if the covert detective infiltrating the criminal organisation has committed the criminal act in the line of duty in the interest of law enforcement ;
- and the later interest takes precedence over the interest to enforce the claim of the state under criminal law.

Although it is not necessary, that a covert investigators has to breach legal norms in the course of his operation, however, we can not exclude the possibility that he shall become a perpetrator or a co-actor of crime due to conspirational reasons, or just because he's got too close to the offender(s).<sup>7</sup>

## 2. Influencing (conditioning)

However, this also begs questions whether the covert investigator has gathered and transmitted uninfluenced and unprejudicated information, or whether the data provider has transferred undistorted data or not? The investigating authority shall supervise and check the intelligence, nevertheless, it's highly probable that they shall never reveal whether the covert investigator has asked the proper questions during intelligence gathering, or if he'd influenced the data provider or eventually misinterpreted the information. By all means, it's advisory to conduct the query in accordance with the principles stipulated in the previous chapter to ease the tasks of the officers pursuing the investigation and processing the gained information. In the majority of the cases the authority processing the information has does not have the necessary means and measures to check the information, except for the audio or visual recordings made by the covert investigator.

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<sup>5</sup> Should the covert investigator proceed otherwise, the evidence obtained shall be deemed unlawful. According to Section 78 (4) of Be. facts derived from means of evidence obtained by the court, the prosecutor or the investigating authority by the way of committing a criminal action, or by other illicit methods may not be admitted as evidence. In this case, covert investigator shall be charged by committing the offence of unauthorized information or data gathering.

<sup>6</sup> Bence, Mészáros, Covert investigator and 'criminal acts committed in duty' - *de lege ferenda*, Hungarian Law Enforcement, Volume VII, issue 2007/3-4, p 120, Budapest

<sup>7</sup> Géza, Finszter, Special methods and measures of detecting evidential proof, *Criminalistics* 1-2, p 733, BM Publishing, 2004, Budapest

In its order No 8. B. 904/2006/86 the council of the Metropolitan Court has expressed that the motion of the covert investigator to buy narcotics had some sort of motivating impact on the execution of the criminal act, furthermore, in the given case it is presumable, that the given action would not have been completed without the conduct of the covert investigator.

As the appeal court, the Metropolitan Court of Appeal has changed the decision of the Metropolitan Court No 8. B. 904/2006/86 and terminated the procedure against the defendants. The Metropolitan Court has stated that none of the defendants was 'tending' to commit the criminal action, but they have conducted it to the request and incitement of the covert investigator. The covert investigator was not a passive observer, but an active indicator of the crime. Consequently, the actions of the covert investigator breached the demands of the European Court of Human Rights on the essentially passive actions of covert secret agents, and the covert investigator has provoked the criminal action, that the defendants would have not committed without his intervention.

The defendants have been deprived from their right to righteous procedure, thus the procedure has breached Section 1 of Article 6 of the European Convention of Human Rights signed on 4 November, 1950 in Rome.

According to the applicable state of facts, acting as an abettor, the covert investigator had intentionally persuaded the defendants to commit the crime. The covert investigator has provoked the conduct of the criminal action, therefore, the criminal act subject to the accusation is an act of the covert investigator committed against the permission of the prosecutor, thus the investigator did not meet the requirements stipulated in the police act and the act on criminal proceeding, and they can not be considered as righteous actions.

Undoubtedly, it is rather difficult to evaluate, whether the officer's conduct involves any measures of illicit persuasion or not, therefore, such debates must be trusted to the judgement of the court, upon and in possession of any and all proof of evidence.<sup>8</sup>

The European Court of Human Rights (henceforth referred to as ECHR) has defined the frames of the abettor's actions if committed by an undercover officer in the case of *Ramanauskas v. Lithuania*, and the ECHR further referred to the subject in its decision in the case of *Bannikova v. Russia*<sup>9</sup>:

Police incitement is conducted if police officers are participants (co-actors) of the action, - whether they are security officers or other individuals following orders - if they do not stay essentially passive during the investigation, and if they attempt to influence, persuade and incite another person to commit a crime that she would not have committed otherwise, in order to secure the judgement of the criminal action, or to provide evidence of proof or in order to initiate accusation.<sup>10</sup>

Furthermore, ECHR demonstrated, that in case the defendant complained, that she has been persuaded and incited to commit a criminal act, the court had to go on examining any and all details and records included in the accounts, hence the trial has to

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<sup>8</sup> Bence, Mészáros, Decision of the Metropolitan Court of Appeal on state incitement to drug abuse: inappropriate investigating measures and legitimate accusation, *JeMa* – case Commentaries, p 30, 2011/2, Budapest

<sup>9</sup> *Bannikova v. Russia*, no. 18757/06, 4 November 2010, <http://www.hrr-strafrecht.de/hrr/egmr/06/18757-06.php>

<sup>10</sup> *Ramanauskas v. Lithuania* ([GC], no. 74420/01, ECHR 2008, [http://en.tm.lt/dok/Ramanauskas\\_v\\_Lithuania\\_JUDG.pdf](http://en.tm.lt/dok/Ramanauskas_v_Lithuania_JUDG.pdf))

be fair and righteous in accordance with Section 1 of Article 6 of the Convention and any and all evidence that's a proceeds state incitement must be excluded.<sup>11</sup>

Covert investigators and informants may manipulate the recorded correspondence, and may intentionally use certain communication techniques with the target person. The American linguist Professor Shuy concluded his experiences in his study, stating that he'd listened to hundreds of conversations related to criminal actions, in which covert investigators or other undercover persons have knowingly and deliberately applied certain communication strategies during the correspondence. The recorded correspondences has created an illusion, according to which the suspect had taken part in certain the criminal act, an act that has never actually been conducted. This also begs the question whether the covert investigators and other undercover agents had the intention to raise this suspicion or not? Linguistic analysis of the recorded conversations has confirmed the statements of the linguist, and the conclusions remained undebated. The communication strategies of the police officers illustrated in the study have had a serious impact on the target persons. Not being in possession of the necessary skills, the target persons could not realise that they have been manipulated, so they've been easily mislead. Listening to the audio recordings the target persons seem to be guilty, nonetheless, the criminal acts subject to the records have never actually happened. The covert investigator has deliberately led and moderated the conversation in a certain way, implying that the target person had committed a criminal act.<sup>12</sup>

The above cited study points out to the dangers of conditioned correspondence, and to the requirement, that the covert investigator must avoid such measures and tools.

### Final remarks

During his activity the covert investigator conceals his identity, 'misleading' the target person in order to gather the desired intelligence. However, the covert investigator must keep his conduct essentially passive, he may not influence or condition the target person, he may not incite or persuade another person to commit a crime, otherwise he shall become an abettor.

Nevertheless, according to Sándor Nyíri, exemption from punishability shall not apply in this case when shaping of the intent is the consequence of the covert investigator's conduct, since the illicit action is the result of incitement. In these cases the covert investigator shall be punishable as an abettor.<sup>13</sup>

Continuous education and constant training of the covert investigators is required, moreover, there's a definite need for field practices, and paying special attention to the effects and possible consequences of undesired conditioning.

### Notes

Géza, Finszter, Special methods and measures of detecting evidential proof, Criminalistics 1-2. BM Publishing, 2004, Budapest

<sup>11</sup> Ramanauskas v. Lithuania § 60.

<sup>12</sup> Roger W. SHUY: Creating Language Crimes: how Law Enforcement Uses (and Misuses) Language, Oxford University Press, p 13-15, 2005, New York

<sup>13</sup> Sándor, Nyíri, The covert investigator, Journal of Internal Affairs, 1999/12, p 185, Budapest

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