The Secret Service Tools in the New Hungarian Criminal Procedure Code

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Abstract

The main source for criminal procedure is now the Act XIX of 1998 on Criminal Proceedings (CPC) which due to numerous modifications could take place on 1st July, 2003. The new Code on Criminal Proceedings is the Act XC of 2017 (new CPC), which will be enter into force on 1st July 2018.

In this new Criminal Procedure Code in the sixth part will be included the rules of secret evidences under the name of "Unveiled devices". The part sixth contains eight chapters (chapters number XXXV-XLII.) and 37 sections (sections number 214-260).

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1. Covert gathering of data in the current code

The CPC provides the rules of covert data gathering subjected to judicial permit in a very detailed form (sections 200 to 206). Thus in particular its:

a) conditions,
b) the motion of the prosecutor and the permission of the judge therefore,
c) the performance thereof,
d) the use and disclosure of its results.

Besides,

e) the covert information-gathering completed prior to the commencement of criminal proceedings shall be broached briefly as well.

ad a) In order to establish the identity of the offender, locate or arrest him/her or to find means of evidence which all are subjected to judicial permit, from the time the investigation is ordered until the documents thereof are presented, the prosecutor and the investigating authority may, without informing the person concerned:

- keep under surveillance and record the events in a private home with a technical device,
- open and check and record with a technical device the contents of pieces of mail, closed postal matters of a person who can be identified, as well as learn and record with a technical device the communications made by electronic means of communication,
- learn, record and use data transmitted and stored by way of a computer or computer system (section 200 (1)).

The CPC allows only in cases specified in section 201:

When the investigation is conducted by any investigating authority	When only the prosecutor investigates
• the crime was committed intentionally and punishable with imprisonment of 5 years or more • the crime was committed in a businesslike manner or as a part of a criminal association and punishable with imprisonment of up to 3 years • the following crimes were committed: violation of freedom of conscience and religion and abuse of authority • the crime committed is punishable with imprisonment of up to 3years regarding the following crimes: Trafficking in Human Beings, Misuse of Illegal Pornographic Material, Pandering, People Smuggling, Abuse of Authority, Harbouring a Criminal, Bribery, Bribery regarding International Relations, Damaging the Environment, Damaging, Violation of the rules of Waste Management • the crime of misuse of classified data was committed • an attempt of or preparations – if preparation is penalized by the law - for the above written crimes	• if violence against official persons was committed against a person enjoying immunity due to public office or due to international law, furthermore threatening an internationally protected person with violence • if violence against official persons was committed against the judge, the prosecutor, the secretary of the court or the prosecutors' office, the independent and the County Court- bailiff and the deputy-bailiff, the notary public and the deputy-notary public sworn member of the police, as well as if a crime against the purity of public life, which is punishable by at least 3 years of imprisonment was committed regarding the above-mentioned and sworn member of National Tax and Customs Office, furthermore the non-sworn financial investigator • if failure to report bribery or trafficking in influence was committed against persons written above • if crimes against the administration of justice have been committed (except of misleading of authority) • if crimes against foreign officials was committed and crimes against the propriety of international affairs have been committed • if the above written crimes fall under military criminal procedure

Covert data gathering may be conducted against:

- the suspect (or a person presumably is going to be a suspect),
- a person having culpable relations with him,
- if there is reasonable ground to suspect that the person has committed a criminal offence related to the case in progress against the defendant:
  - defence counsel, (including the attorney-client interview room)
  - priest (clergyman) or witnesses who may refuse to testify.

Covert data gathering may only be conducted if obtaining evidence by other means reasonably appear to be unlikely to succeed if tried or would involve unreasonable difficulties, and there is probable cause to believe that evidence can be obtained by covert data gathering (section 202).

ad b) Covert surveillance data gathering shall be permitted by the court at the motion of the prosecutor for a maximum period of 90 day (may be extended for a further 90 days on one occasion). If the permission procedure caused a delay that would jeopardise the success of covert data gathering, the prosecutor may order for maximum period of seventy-two hours, but simultaneously with the order, the motion for the permit shall also be submitted.

ad c) Covert data gathering is performed by the organisation specified in separate laws. According to the CPC, such organizations are:

- local, district and central police organs,
- National Protection Service of the Police,
- Affected national security service (concerning crimes committed by a sworn officer of national security services).

ad d) The fact of performing covert data gathering, as well as the data produced and recorded in the course thereof may be disclosed only to the judge having issued the permit, the prosecutor and the investigating authority, further, by superior (senior officer) of the prosecutor and the investigating authority. Court documents related to the permission of covert data gathering may also be disclosed to the administrative superior of the judge having issued the permit (section 205 (2)).

If the prosecutor intends to use the result of covert data gathering as evidence in the criminal proceedings, the motion for the permit of the covert data gathering, the court's decision and the report on the performance of covert data gathering shall be attached to the files of the investigation (section 206 (1)).

The result of the covert data gathering may be used for the proof such crime which was the basis for and against such person who was the subject of the permission of gathering secret intelligence issued by the court (section 206 (3)).

ad e) The CPC has only framework regulations regarding the admissibility of the results of covert information-gathering conducted prior to the criminal proceedings upon a judicial permit (section 206/A). The detailed rules of covert information-gathering are provided by separate laws.

2. The unveiled devices in the new Code

The conditions of the use of unveiled devices in the new CPC are the following:

- it can reasonably be assumed that the information (evidence) to be obtained is indispensable and can not be otherwise obtained,
- its application does not involve a disproportionate restriction of the fundamental right (it is proportional to law enforcement)
- the information (evidence) can be obtained by using it.

In criminal proceedings the following unveiled devices can be used: which is

- not bound by a judicial or prosecutorial authorization,
- bound to a prosecutor 's authorization,
- bound to a judicial authorization

2.1. Unveiled devices without bounded by a judicial or prosecutorial authorization

The unveiled devices without bounded by a judicial or prosecutorial authorization are the following:

a) secretly cooperating person,
b) collect and verify information,
c) use a trap,
d) replace the victim or other persons,
e) hidden surveillance,
f) disclose inaccurate or deceptive information.

In this paper we would like to focus on these tools with the hidden surveillance and the disclose the inaccurate or deceptive information.

During the hidden surveillance the body authorized to use unveiled devices can observe secretly, collect information about what's happening, and record the perceived ones by a technical means from

- a person, apartment, other premises, enclosed space or vehicle (with the exception of a place open to the public or publich vehichle), or
- the thing that constitutes material evidence

can be connected to a criminal offense

For the purpose of hidden surveillance, a body authorized to use unveiled devices may also use a secretly cooperating person.

Finally, it should be noted, that the inaccurate or deceptive information

- shall not be applicable to interrogation of an accused or witness,
- can not contain promise incompatible with the law,
- can not be threatened or incited nor may it render the person concerned subject to a more serious offense than was originally planned.

2.2. Unveiled devices bounded by prosecutorial authorization

The prosecution decides on the authorization of the unveiled devices within the seventy-two hours from the receipt of the petition of the head of the body authorized to apply the unveiled devices (standard application).

Perriculum in mora the authorized head of the body authorized to use the unveiled devices may start deploying the unveiled devices until the prosecution is taken but shall submit a motion to the prosecution for the post authorization of the application within seventy-two hours after the decision to commence the application. The prosecutor decides on the motion within a hundred and twenty hours. If the prosecution refuses the request for ex-post authorization:

- the result of the use of the unveiled devices shall not be used as evidence and
- the obtained data shall be immediately deleted.

The unveiled devices bounded by prosecutorial authorization in the bill are:

a) observing payment transactions,
b) prospect of avoiding criminal liability,

c) observation with approval,
d) phony purchase,
e) applying undercover agent,
f) it is a member of a body authorized to use discarded tools and a secretly cooperating person to a phony purchase,
g) use of cover charter, institution and data.

ad a) The observing (monitoring) of payment transactions is the recording or transmitting relevant data in particular of

- all payment transactions relating to the payment account,
- payment transactions in accordance with specified conditions.

The prosecutor may require the service provider to suspend payment transactions in accordance with specified payment transactions or transactions between persons or a specific condition

- in the case of a domestic payment transaction up to two business days,
- in the case of a non-domestic payment transaction up to four business days.

The observation of payment transactions may be made up to three months, which may be extended by a maximum of three months with the authorization of the prosecutor.

If the prosecutor determines that the terms and conditions for the attachment of the account or electronic money concerned with the payment transaction are in force, he shall ordering the sequestration.

ad b) A body authorized to use unveiled devices with a prosecution authorizing entitled to establish an arrangement with the accused. During this arrangement the body can intend for the completion of denunciation or termination of the investigation. The so-called "investigatory bargain" can be made with a person who may be reasonably suspected of having committed the criminal offence co-operates to such an extent that the interests of national security or law enforcement takes priority over the interest to enforce the claim of the state to punish this person.

An agreement shall not be concluded if the accudes is to be prosecuted for an offense that

- has deliberately extinguished somebody's life,
- intentionally causes permanent disability or
- serious deterioration of health.

If the accused fulfills the agreement, no criminal proceedings may be instituted against him or the ongoing criminal proceedings shall be terminated.

ad c) The body authorized to use unveiled devices may use observation with the permission of the prosecution and with the written consent of the victim up to forty-five days

- for offense related violence or bullying, or
- for an offense that is threatened.

During the observation the body

- can observe and record the acts by means of a technical means in apartment, other premises, enclosed location or vehicle (exception of a place open to the public or public transport vehicle);
- may know the communication in the electronic communications service.

ad d) With the permission of the prosecution an implied agreement can be made and fulfilled (so-called phony purchase)

The goal of the phony purchase can be

- the acquisition or use of a service likely to be related to a criminal offense,
- the purpose of strengthening the trust of the seller,
- the purpose of arresting the accused or providing a material means of proof.

ad e) The body authorized to use unveiled devices may to use with the permission of the prosecution an undercover agent in the criminal proceedings for a period of up to six months (may be repeatedly extended for up to six months).

The undercover agent can be used in the following cases:

- integration into a criminal organization,
- incorporation into a terrorist group,
- phony purchase,
- hidden surveillance,
- the transmission of information,
- obtaining information and evidence relating to a crime.

The undercover agent must not be punished for the commission of an offense if

- the law enforcement objective to be achieved with the application,
- it needed to ensure the security of the undercover agent, or
- it is necessary to prevent or interrupt the commission of another crime,

and the interest of law is greater than the interest in the criminal prosecution of the undercover agent

An undercover agent shall not commit a deliberate abolition of somebody's life or intentionally causing a permanent disability or serious deterioration of somebody's health.

An undercover agent may not commit to another a criminal offense and shall not mislead the person concerned to commit a more serious offense than was originally planned.

ad f) For a phony purchase a member of a body authorized to use unveiled devices may also be used or this body may also use a secretly cooperating person but the body may use a secretly cooperating person to acquire a repurchase if the aim sought by the buy-in is not achieved with an undercover agent or a body authorized to use the unveiled devices.

ad g) The body authorized to use unveiled devices with the permission of the prosecution

- may produce or use a document or authentic instrument ("cover charter") containing an incorrect data, fact or declaration,

- establish and maintain an organization,
- authentic data ("cover data") may be reconciled in the public records

for the purpose of detecting or proving the crime.

The "cover charter" shall be destroyed and the "cover data" deleted from the public records if it is no longer necessary for the purpose of criminal proceedings.

2.3. Unveiled devices bounded by Judicial authorization

The following unveiled devices may be used in the criminal proceedings bounded by Judicial authorization:

a) secret surveillance of the information system,
b) secret research,
c) secret observation of a place,
d) secret knowledge of the consignment,
e) interception.

ad a) During the secret surveillance of an information system, information obtained by an authorized body for the use of unveiled devices can be secretly known to the information system managed by a judicial authorization and can record the perceived ones by a technical means.

ad b) In the course of a secret research, with a judicial authorization the body authorized to use unveiled devices can securely scan and record the detected ones with a technical tool. The body can search

- a room,
- a fenced area,
- a vehicle or
- a subject (with the exception of a place open to the public or publich vehichle).

ad c) In the secret observation of a site, with a judicial authorization the body authorized to use unveiled devices able to observe secretly by means of a technical device and record the things happened in the above places.

ad d) In the case of secret information of a consignment with a judicial authorization the body authorized to use unveiled devices may open secretly the sent mail or other similar items, and the body can know, check and record its contents.

ad e) During hearing with a judicial authorization the body authorized to use unveiled devices able to secretly know and record the content of the communication through the electronic communications network or information system.

Unveiled devices bounded by a judicial authorization may be used for intentional offenses

- punishable by imprisonment of up to five years or more;
- punishable by imprisonment of up to three years by some crimes (*e. g.* sexual abuse, damage to the environment, corruption offenses etc.);
- regardless of the threat of imprisonment by some crimes (*e. g.* abuse of office, abuse of an official person, unauthorized financial activity etc.)

The court shall decide on the basis of a motion of the prosecution within seventy two hours of the submission of the petition.

Perriculum in mora the prosecution may order the use of an unveiled device up to a maximum of one hundred and twenty hours. In this case the prosecution shall submit a motion to the court in seventy-two hours following the order for ex-post authorization. The court decides on the motion of the prosecutor within one hundred and twenty hours.

The use of unveiled devices bounded by a judicial authorization may be authorized up to a maximum of 90 days, which may be extended up to 90 days per occasion. The use of unveiled devices bounded by a judicial authorization may be authorized for a total of three hundred and sixty days.