

# Legal and Scientific-practical Issues of the Criminal Intelligence Measure “Auditory Control” in the Republic of Belarus

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**Keywords:** Criminal intelligence activity, criminal intelligence measures, auditory control, special technical means, the Criminal Procedure Code of the Republic of Belarus, principles of legality, observance of the rights, freedoms and legitimate interests of citizens.

**Abstract:** The study carried out some legal and scientific-practical analysis of the issues and certain provisions of the theory of criminal intelligence activity in terms of the criminal intelligence measure “auditory control”, formulated on this basis scientifically substantiated judgments on improving its legal regulation, the prospects for development of legal and regulatory framework of this criminal intelligence measure. The aim of the study is to analyze modern problems of conducting operational-search measures "auditory control". As a result, the authors draw conclusions and proposals for improving the legal regulation of operational-search activities. This article is important for the further development of the science of operational-search activities and the practice of "auditory control".


## 1 INTRODUCTION

The criminal intelligence units are entrusted with the task of ensuring public and state security, protecting a person, his rights and freedoms, property, as well as the established democratic order from criminal threats by the state. In other words, they must wage a decisive fight against crime. A significant role is assigned to the internal affairs bodies of the Republic of Belarus in its solution.

The right to conduct criminal intelligence measures is also a legislative obligation of criminal intelligence activities as part of all law enforcement system, but at the same time confirms its independence. The main arguments for such autonomy, as well as the obligation to perform it in order to early detection of crimes, their causes and conditions, the direction of criminal intelligence measures to detect the perpetrators of crimes, determine their content. It is their activity in carrying out due to the desire to establish all the facts and circumstances that precede and contribute to the commission of crimes. The society’s need for the necessity to fight crime is realized through their implementation (Bachila, 2006; Basetsky, 2009).

This activity, regulated by law in the Republic of Belarus in 1992, did not give definitions for any of the criminal intelligence measures permitted for conducting, in particular, such as “auditory control”. It led to an ambiguous interpretation of the content of their implementation. The situation was aggravated by the new version of the Law of the Republic of Belarus dated 9 July 1999 No. 289-Z “On criminal intelligence activities”, in which an inaccurate definition of “auditory control” was given, which led to an erroneous understanding of how this event could be carried out.

The revision of the article regulating such an event as “auditory control” has been significantly changed in the new law dated 6 January 2021 No. 88-Z. However, in the legal regulation of both this criminal intelligence measure and other ones, there are still subjective reasons and diametrically opposite judgments that do not allow talking about the completeness of its edition. The text of the law as a whole also revealed many problems and raised a number of questions in its implementation in general and in the organization and tactics of conducting individual criminal intelligence measures in particular.

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## 2 MATERIALS AND RESEARCH METHODS

The materials of the study were the current legal basis for criminal intelligence activities, scientific works and publications on the considered topic. In the preparation of the study, general scientific (description, comparison), formal-logical (analysis, synthesis, analogy), comparative legal methods were used to ensure objectivity, historicism and comparativeness in the study of auditory control and other research tools of modern socio-humanities, which make it possible to comprehensively study the issues of the research topic.

## 3 RESULTS AND DISCUSSION

The Chinese military leader Sun Tzu (IV-V centuries BC) instructed in the treatise that "information obtained in advance helps a wise ruler ... people should bring it" (Clearly, 1998). In this context, "auditory control", as the most "acute" covert technical action carried out around the world, requires that we focus on this criminal intelligence measure. During interpreting it scientifically, all judgments concerned its admissibility (Tarsukov, 1997). While the issues of legality in relation to the measure "auditory control" and other actions permitted by law were outside the scope of the study (Basetsky, 2009).

At the same time, the scientific and technological progress used in criminal intelligence activities helps to justify covert work with the use of technical means (Richard, 2017). Despite the legitimization of the human factor in covert work, it was not possible to completely overcome the negative attitude towards it. The use of technical devices in solving problems of criminal intelligence activity, which are the same for confidential employees, allows, in our opinion, to transfer the considered problem to the sphere of legal relations arising in connection with the legality of the use of special technical means. Their application allows them to be secretly installed in places of supposed meetings of persons of criminal intelligence interest or to use mobile devices for monitoring and recording conversations.

Allocation of technical means specially adapted for documenting intelligence information into an independent group is characteristic for the active side of criminal intelligence activity. Indeed, as a starting point of reference for their practical functioning, we can consider obtaining factual data on secretly contemplated, prepared or committed crimes,

sophisticated methods of concealing traces of criminal activity, places of storage and distribution channels of the stolen goods, finding persons hiding from the investigation and court, etc. At the initial stage, it is a kind of a single category of information, which, depending on the prevailing conditions, can be immediately implemented or sent for long-term storage for dynamic comparison with other materials. A characteristic difference of such data from other types of information is its purposeful acquisition mainly as a result of secret auditory control (Giovanni, 2016).

42.5% of the interviewed field officers consider it expedient and permissible to regulate the organization and tactics of conducting individual criminal intelligence measures by independent departmental regulations. Their absence will continue to complicate the evidentiary assessment of the course and results of the "auditory control" by investigators, prosecutors and judges (Baskov, 1998).

As international practice shows, it was the violations of law in criminal intelligence activities, especially those ones related to the use of surveillance devices, that had the most negative political consequences. Suffice it to recall that the essence of the so-called Watergate case reduced to the detection of listening devices in the premises occupied by the opposition party in the United States in 1972. As a result, it was the main reason for the failure of R. Nixon in the US presidential election. In Hungary, in 1988, covert audio monitoring was installed in premises occupied by functionaries of a number of opposition parties. Their use was carried out on the personal instructions of the Minister of the Interior. A few days later, a field officer provided the media with a written assignment for its implementation, the departmental instructions of the Ministry of Internal Affairs regulating such actions. Then, in the presence of journalists, including foreign ones, the special equipment for audio control installed into the premises was seized. As a result, not only the heads of the Hungarian Ministry of Internal Affairs were removed, but also the leaders of the state.

At the same time, it should be noted that the subjects and objects of "auditory control" only then will become full participants in the relevant legal relations, when this action and all other criminal intelligence measures will have legal force for them. At present, the specificity of "auditory control" is regulated by departmental regulations.

In this regard, it is also advisable to revise the list of existing criminal intelligence measures and additionally formulate specific actions carried out with the use of special technical means by specialized

subjects of technical units. Such an addition is necessary, proceeding from the meaning of the fact that the law lists all permitted criminal intelligence measures, which can only be changed by legislation. Today, in our opinion, all criminal intelligence and technical measures performed by the internal affairs bodies and regulated in departmental regulations have actually dropped out of the lawful space, and their legal control can be considered to some extent conditional. At the same time, it is necessary to provide for special grounds and conditions for carrying out technical measures, as is done in relation to criminal intelligence measures.

In the context of our research, we would like to pay special attention to the practice of the past and modern international criminal investigation of a number of foreign states that use both household and special (surveillance) equipment in their work.

It is noteworthy that the legislation of all those countries, that fell into the scope of our research on this problem, unconditionally recognizes the most infringing for the rights of citizens as an action that requires the strictest control from the state, a measure that generally falls under the definition of "wiretapping and control of telephone and other negotiations" or as in the Republic of Belarus "auditory control".

In the process of transformation of forensic technology into a surveillance one, certain patterns appear that persist today. As a rule, the technical means themselves and the principles of technological operations of their application are borrowed. The sources of adoption tacit techniques, tactics of using surveillance devices are mainly developed within the framework of criminal intelligence methods or are borrowed from the theory and practice of intelligence and counterintelligence.

So, one of the leaders of the Austro-Hungarian intelligence (he is also an agent of Russian intelligence) A. Redl "introduced a number of improvements", for example, imperceptible photographing of all visitors whom he received in his office and even recorded the conversation with them on a phonograph with the simultaneous secret fingerprinting of each of them in the period from 1900 to 1912 (Chernyak, 1977). It should be noted that covert photography using long-focus optics or cameras disguised in camouflage items began to be used in the intelligence and counterintelligence service of developed countries, especially for covert surveillance and obtaining intelligence information, already in the 30s. Since the beginning of the 40s in the USA, Germany, England and some other countries, wiretapping and sound recording of

telephone conversations has become widespread. To control conversations in the room, they have begun to use disguised microphones coupled with sound amplifying equipment and sound recording devices.

Since the 70s the intensive development of criminal intelligence and technical support and the approval of surveillance devices as a relatively independent direction in the theory and practice of criminal intelligence and criminal procedural activity have already begun (Mayers, 1964). In fact, today the limits of the system of criminal intelligence and technical support have already been clearly defined for ongoing criminal intelligence activities and investigative actions (Griffiths, Klein, Verdun-Jones, 1980), police intelligence and auditory control have been improved and developed (Donovan, 1992).

In addition, the above mentioned information, in our opinion, may be useful for Belarusian lawyers participating in the improvement of the norms of the Law of the Republic of Belarus "On Criminal Intelligence Investigative Activity" and the Code of Criminal Procedure of the Republic of Belarus. In this context we can formulate some of our judgments.

In accordance with the provisions of Art. 37 of the Law of the Republic of Belarus "On criminal intelligence activities" "auditory control" is carried out without prosecutorial sanctions, when it cannot be postponed until a sanction is obtained for solving the tasks of criminal intelligence activities in the fight against grave and especially grave criminal offenses, ensuring public and national security. However, an official of the body performing criminal intelligence activities that conducts "auditory control" (including with respect to certain categories of citizens specified in Parts 1, 2 of Article 36 of the Law) within 24 hours sends a written notification about it to the relevant prosecutor and within 48 hours from the moment of commencement is obliged to obtain his authorization or to stop carrying it out. According to a taken decision (authorization or refusal), the prosecutor makes an appropriate entry, which is certified with a seal. Otherwise, such control will not be legitimate, and its results will be unlawful for solving the tasks of criminal intelligence activity.

However, Part 4 of Art. 37 of the Law denies the possibility of using incriminating information received within 48 hours in relation to a person who actually prepares or who has already committed a crime. In this case, it is obvious that the legislator, on the one hand, protects the constitutional rights of citizens from unjustified persecution with the specified wording, and on the other hand, makes it difficult to implement the principle of inevitability of punishment.

In our opinion, the problem can be solved by adjusting the corresponding norm. The provision of Part 4 of Art. 37 of the Law shall be amended as follows: "Information obtained during a criminal intelligence activity, the conduct of which without the sanction of the prosecutor or his deputy was recognized by the prosecutor or his deputy as unreasonable, cannot be used to perform the tasks of criminal intelligence activities, except for cases of obtaining information about a crime is being committed or have been committed".

Thus, the range of situations in which auditory control can be carried out without the sanction of the prosecutor is quite wide, but certain provisions of the law, in our opinion, require clarification or adjustment.

It is also impossible not to pay attention to the fact that the legislator in a number of situations has established the term for the "auditory control" (Part 1 of Article 41 of the Law); it can also be performed in accordance with the terms of conducting a law enforcement operation in relation to a certain category of citizens suspected of committing crimes (Paragraph 1 of Part 1 of Article 42 of the Law); connected with the adoption of a decision on the end of the preliminary investigation in a criminal case (Part 3 of Article 42 of the Law). In the first case, this period in accordance with Part 2 of Art. 43 of the Law can be extended by the prosecutors of the regions, the city of Minsk or their deputies for up to 180 days, by the deputies of the Prosecutor General – up to 365 days, by the Prosecutor General or the person performing his duties – up to 545 days.

Thus, we see that the term of the "auditory control" is long and there is every reason to consider them sufficient to solve the problem in a particular case. However, in cases of combating organized crime and threats to national security, we believe that it is permissible to repeat the criminal intelligence measures of "auditory control", and in other cases it is not. The repetition or duplicity of its conduct in relation to the same citizen (citizens) within the framework of the same law enforcement operation may lead to provocation. The situation slightly changes when there is a need to repeat (reduplicate) auditory control to substantiate new circumstances of a committed (committing or planning) crime or to identify other previously unknown participants in a criminal act.

In conclusion, based on the consideration of the case *Ramanauskas v. Lithuania*, it is obvious that the role of field officers in the "auditory control" should be reduced to passive recording of the stages of conversation (negotiations) of the object, so as not to

influence the formation of their intent to commit a crime. Active connection is possible only at the final stage of an attempt to commit a crime (for example, after obtaining a clear consent of the person to receive a bribe and the fact of receipt). At the same time, the given example is very specific. Since "auditory control" is practically impossible without provocation. If we take a broader approach to this issue, then, despite the seemingly biased (from the point of view of law enforcement officers) position of the ECHR, since it does not allow state intervention without "strict necessity" (especially without prior judicial control) in relations between a citizen and society. However, the ECHR still allows special methods of investigating crimes in exceptional cases.

## 4 CONCLUSIONS

The study makes it possible to eliminate a number of inaccuracies in the formulation of new legal novels regulating the considered activity, and it is distinguished from other covert operations, which allows, on the one hand, law enforcement practice to avoid violations of the law, and on the other hand, protects against legal lawlessness in relation to persons involved in the field of criminal intelligence activities.

"Auditory control" as a criminal intelligence measure consists in the fact that its subjects secretly receive and record with the help of technical means sound (acoustic) information transmitted via telephone lines or other types of voice communication, for solving problems of criminal intelligence activity. As a rule, "auditory control" is accompanied by the fixation of the received information on magnetic carriers. The editorial changes to the Law of the Republic of Belarus "On criminal intelligence activity" (Part 4 of Article 37) have been scientifically substantiated, and some more areas of its improvement have been identified.

However, the traditional forces, means and methods of criminal intelligence activity are not able at the present stage to fully ensure a sufficient level of obtaining the necessary intelligence information for taking adequate measures to combat crime. Increasing the intelligence awareness of law enforcement staff is possible by introducing new means and methods of intelligence and technical infiltration into the illegal environment.

Thus, the conduct of a criminal intelligence measure "auditory control" requires of scientists and practitioners to take a fresh look at its practice and legal foundations in the Republic of Belarus.

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