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## **ADMISSIBILITY OF INTRUSION INTO THE PERSON'S PRIVATE LIFE THROUGH THE USE OF UNDERCOVER INVESTIGATORS AND COLLABORATORS IN CRIMINAL PROCEEDINGS**

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### ***Abstract***

*Through this article, we aimed to highlight the importance of using undercover investigators, as a special investigative mean in the criminal process, to obtain evidence, data and information useful for solving the case, but also to emphasize the fact that the regulation of special investigative techniques is focused on the direction of maintaining a fair balance between the purpose pursued and the respect of the fundamental rights of the persons affected by these intrusive investigative methods, such as the right to private life and the right to a fair trial.*

*The use of undercover investigators may involve intrusion into the person's private life for a shorter or longer period while the type of relationship they establish with the person targeted by the undercover operation may vary as it may be a single contact or multiple meetings where a rapprochement is established between the suspect and the investigator or collaborator.*

*The guarantees imposed by the European Convention of Human Rights and Fundamental Freedoms, as they have been developed in the jurisprudence of the European Court of Human Rights, refer to the condition that the interference is provided for by national law, the measure is necessary in a democratic state and proportionate in relation to the content and purpose pursued, and the person targeted by the undercover operation to be able to challenge the legality of the measure before an independent and impartial court.*

**Key words:** *special surveillance and investigation methods; undercover investigators; collaborators; private life; necessity; proportionality.*

# ADMISSIBILITY OF INTRUSION INTO THE PERSON'S PRIVATE LIFE THROUGH THE USE OF UNDERCOVER INVESTIGATORS AND COLLABORATORS IN CRIMINAL PROCEEDINGS

## INTRODUCTION

The development of technology and globalization have contributed to diversifying the modes of operation of criminals in such a way that it is increasingly difficult to detect both crimes and perpetrators, to the expansion of their area of action, states having to constantly adapt to new social realities and to adopt the necessary measures to counteract the criminal phenomenon, which is becoming more and more advanced in terms of the methods used and the hiding of the traces of the perpetrators.

In this international context there have been recommendations from international bodies for the use of special investigative techniques to more effectively combat organized crime and other serious crimes such as terrorism and corruption crimes.

In the "Deployment of Special Investigative Means" paper<sup>1</sup> it has been shown that special investigative techniques are those techniques used to gather evidence and/or information in such a way as not to alert the persons under investigation.

The evolution of crime has produced a change (in Europe and other parts of the world) in the way crime is investigated and discovered, with a much greater emphasis on proactive, intelligence-based investigations, with particular use of informants ("sources"), undercover agents and other covert techniques such as environmental surveillance, communications interception, and controlled delivery.

The importance of using information received from informants and collaborators has been noted both in the doctrine and by international bodies and the European Court of Human Rights, and the benefits that can be granted to them can be an important tool in their determination to provide judicial bodies with information and, possibly support to obtain evidence in criminal investigations.

The regulation of special investigative techniques is focused on two directions: the need to obtain evidence in criminal cases of a certain importance (being applicable in the case of investigating crimes of a higher gravity, such as intentional crimes against life, human trafficking, trafficking of drugs, tax evasion, corruption offences, money laundering, etc.) and maintaining a fair balance between the purpose pursued and the respect of the fundamental rights of the persons targeted by these intrusive investigative methods, such as the right to private life and the right to a fair trial.

The institution of the undercover investigator and the collaborator, as a special investigation method, has proven to be particularly useful in proving certain crimes, such as in the case of corruption, where the subjects involved have

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<sup>1</sup> Prepared within the Project on the recovery of the proceeds of crime in Serbia, available on the website [www.coe.int](http://www.coe.int)-Council of Europe, accessed on 20.05.2021, pp. 12

a high level of intelligence and commit the crimes in a rather cautious manner, so as to avoid the risk of them being discovered.

The use of the collaborator is most often essential in the investigation of drug trafficking crimes or other illegal activities carried out by organized criminal groups, considering the clandestine nature of their activities and the difficulty of infiltrating foreign persons into the criminal environment.

### **1. THE USE OF UNDERCOVER INVESTIGATORS AND COLLABORATORS: SPECIAL RESEARCH METHOD IN THE ROMANIAN CRIMINAL PROCESS**

The use of undercover investigators and collaborators, as a special investigative method, is regulated in articles 148-149 of the Romanian Criminal Procedure Code, where the legal conditions for the use of this technique, its duration, the limits within the undercover investigators and collaborators may conduct activities and protection measures that they may benefit from.

The measure is ordered by the prosecutor, *ex officio* or at the request of the criminal investigation body, by ordinance, which must include the indication of the activities that the undercover investigator is authorized to carry out, the period for which the measure was authorized, as well as the identity assigned to the undercover investigator.

Undercover investigators are operational officers within the judicial police (for example within the Special Operations Directorate or the General Anti-Corruption Directorate, within the police stations), and in the case of investigating crimes against national security and terrorist crimes they can be used as investigators under coverage and operative workers from state bodies that carry out, according to the law, intelligence activities in order to ensure national security (for example officers of the Romanian Intelligence Service, the Foreign Intelligence Service, the Intelligence and Internal Protection Directorate of the Ministry of Internal Affairs).

Exceptionally, when the use of the undercover investigator is not sufficient to obtain data or information or is not possible, the use of a collaborator can be authorized, to whom an identity other than the real one can be assigned.

The collaborator was defined in the doctrine as "that person who is not part of the judicial bodies and who acts under their coordination to obtain data and information". (*Mihail Udroi and others., 2015, p.449*)

The Constitutional Court of Romania mentioned in Decision no. 323/2017 (relating to the rejection of the exception of unconstitutionality of the provisions of art. 148 paragraph (2) letter c) of the Criminal Procedure Code) the categories of persons who can have the capacity to be collaborators in the criminal process showing that "a collaborator is not member of the judicial police and can be any person in the circle of suspects or who has interacted with the criminal area and who can bring evidence to prove crimes. Thus, since in numerous situations the infiltration of an investigator undercover or with a real identity is impossible due

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to the concrete conditions related to the clandestineness of the criminal structure or the relationships within the groups, the judicial bodies can recruit a member of the criminal network or a person who can penetrate inside it thanks to the trust it enjoys among the members.” (par. 22)

The measure is ordered for a period of 60 days, which can be extended consecutively by a maximum of 60 days, the total duration of the measure in the same case and regarding the same person not exceeding one year.

The measure can be extended indefinitely, i.e. for the entire duration of the criminal investigation, in the case of crimes against life, national security, drug trafficking crimes, arms trafficking, human trafficking, acts of terrorism, money laundering and crimes against financial interests of the European Union.

The purpose of using undercover investigators and collaborators is to obtain evidence and information in the course of a criminal investigation.

In the undercover operation the investigator or collaborator must infiltrate the criminal environment, such as within an organized criminal group, come into contact with its members, gain their trust and, apparently, act in the interests of the group and, in parallel, to obtain the data and information necessary to identify the members of the group, the organizational structure as well as the discovery of the mode of operation, the facts committed by them, the place where the proceeds of the crime are located, etc.

In practice, the use of a collaborator is resorted to since he is most often infiltrated in the targeted criminal group and his loyalty to the group is not doubted, so his access to data and information useful to the criminal case is faster and easier.

Specifically, undercover investigators and collaborators can contribute to

- establishing whether the crime of which a person or an organized criminal group is suspected has been committed, is in progress or in the preparatory acts phase;
- identification of members of the criminal group, identification of accomplices, identification of witnesses, injured persons;
- identification of the places where the product of the crimes are hidden, identification of the places where the victims of the crimes are located;
- specifying some favorable moments for carrying out searches or arrests, etc.

## 2. THE USE OF UNDERCOVER INVESTIGATORS AND COLLABORATORS AND THE INDIVIDUAL'S RIGHT TO PRIVATE LIFE

### 2.1 The right to private life. Notion

In Romanian legislation, the right to private life is regulated in article 26 of the Romanian Constitution, which provides in paragraph 1 that "public authorities respect and protect intimate, family and private life", and in article 53 of the

Romanian Constitution exceptional situations are provided, when "1) the exercise of certain rights or freedoms can be restricted only by law and only if it is required, as the case may be, for: the defense of national security, order, public health or morals, the rights and freedoms of citizens; conducting the criminal investigation; preventing the consequences of a natural calamity, a disaster or a particularly serious disaster. 2) The restriction can only be ordered if it is necessary in a democratic society. The measure must be proportional to the situation that determined it, to be applied in a non-discriminatory manner and without prejudice to the existence of the right or freedom".

This fundamental right is also protected by the provisions of the Romanian Code of Criminal Procedure, which in article 11 provides that respect for private life, the inviolability of the domicile and the secrecy of correspondence are guaranteed, the restriction of the exercise of these rights is only allowed under the strict conditions of the law and if this measure is necessary in a democratic society.

At this moment there is no clear, unanimously recognized definition of the right to private life as it can cover many aspects of an individual's life, relevant in the case of this right being the national legislation of each individual state as well as the degree of democracy in a society, in one era or another.

Private life cannot be included in an exhaustive definition, in the specialized literature a demarcation is made between the concept of "private life" in the broad sense and the narrow meaning of the expression.

In a broad sense, the right to private life protects four interests of a person: "private life (in the narrow sense), family life, the right to the home and the secrecy of correspondence, but although these aspects can be delimited, they will overlap in a way inevitable and mandatory." (*Mihai Șuiian, 2021, p. 18*)

As for the notion of "private life" in the narrow sense, the European Court of Human Rights, through some decisions (*Van Oosterwijk v. Belgium; Schiessel v. Austria; Von Hannover v. Germany; Petrina v. Romania*), has provided guidelines regarding to the meaning and scope of private life within the meaning of art. 8 of the European Convention of Human Rights and Fundamental Freedoms: the right to respect for private life is the right to privacy, the right to live as you wish, protected from publicity. The notion of private life includes elements related to a person's identity, such as their name, photo, physical and moral integrity.

"In addition, the right to personal development and the right to develop relationships with other people, covering multiple aspects of a person's physical and social identity, will also be included in the sphere of private life. The private life will not be limited only to the aspects that strictly belong to the person, but also to the way in which he decides to externalize himself in society, being able to include his professional activities, as it is often not possible to distinguish between

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the relationships that belong to the private sphere and professional relationships."  
(\*Mihai Șuian, pp. 22-23)

"The guarantee offered in art. 8 of the Convention is intended, in essence, to ensure the development, without external interference, of the personality of each individual in relation to his peers." (*Vasile Soltan, 2016*)

The use of special surveillance techniques and special investigative methods implies an intrusion of legal bodies into the private life of the person, which must be carried out within the limits imposed by the European Convention on Human Rights and Fundamental Freedoms, ratified by Romania in 1994.

The use of undercover investigators may involve intrusion into the person's private life for a shorter or longer period, the degree of interference also varying depending on the type of relationship the investigator establishes with the person targeted by the undercover operation, which may be a single contact or multiple meetings in which a connection is established between the suspected person and the investigator or collaborator. Therefore, the sensitive nature of the information that the undercover agents and, implicitly, the judicial bodies become aware of, may differ from case to case.

Certain contacts may be purely business-related, such as in drug or arms trafficking investigations, where the undercover investigator or collaborator may claim that they intend to purchase the trafficked goods.

In cases where an undercover agent befriends a suspect in order to obtain information about his involvement in a serious crime (for example, a murder), he must sometimes establish a rather intense personal and emotional connection with the suspect.<sup>2</sup>

In addition to the activities mentioned above, the use of the undercover investigator may also involve technical surveillance activities (for example, audio/video recording in the ambient environment of meetings between the agent and the person targeted by the undercover operation, taking photographs in private spaces, placing GPS tracking systems on vehicles, accessing a computer system, copying data from an accessed computer system, etc.) which represents a more serious interference with the person's right to life as a result of recording and storing aspects of private life.

In this situation, it is necessary to obtain, prior to carrying out these activities, a technical supervision mandate from the judge of rights and liberties from the court that would have jurisdiction to judge the case in the first instance or from the corresponding court in its level in whose jurisdiction is the

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<sup>2</sup> In this regard, see Kruisbergen, Edwin W., *Combating Organized Crime: A Study on Undercover Policing and the Follow-the-Money Strategy* [www.researchgate.net/publication/Combating\\_Organized\\_Crime\\_A\\_Study\\_on\\_Undercover\\_Policing\\_and\\_the\\_Follow-the-Money\\_Strategy](http://www.researchgate.net/publication/Combating_Organized_Crime_A_Study_on_Undercover_Policing_and_the_Follow-the-Money_Strategy), accessed on 30.03.2020, pp. 41-42

headquarters of the prosecutor's office of which the prosecutor who made the request is a member. Technical supervision can take place for an initial period of no more than 30 days, which can be successively extended for a maximum period of six months, with the exception of environmental registration, which can be carried out for a period of no more than four months due to the high degree of interference in the private life of the person that imposes a limitation of this measure to exceptional situations.

Given the essentially intrusive nature of the special research method, it is required that it respects all the guarantees imposed by the European Convention of Human Rights and Fundamental Freedoms, as they were developed in the jurisprudence of the European Court of Human Rights.

## **II.2 Conventional standards regarding respect for the right to private life**

With the exception of the right regulated in art. 3 of the European Convention on Human Rights (prohibition of torture, inhuman or degrading treatment or punishment), which is an absolute right, all the other rights may involve derogations under the minimum conditions provided for in the Convention, in conjunction with those provided for in the national legislation of each state.

As such, the interference of state bodies in the person's right to private life is allowed under certain conditions that must be judiciously respected.

Starting from the text provided for in art. 8 para. 2 of the European Convention of Human Rights and Fundamental Freedoms, according to which "the interference of a public authority in the exercise of this right is not allowed except to the extent that this interference is provided for by law and if it constitutes a measure that, in a democratic society, is necessary for national security, public safety, the economic wellbeing of the country, the defense of order and the prevention of criminal acts, the protection of health or morals, or the protection of the rights and freedoms of others", the Court of Strasbourg developed in its rich jurisprudence the standards of protection of the right to private life that the signatory states must fulfill when using technical surveillance methods or special research methods.

As a first condition, it is required that the measure be provided for by law, and that the legislator provides as clearly as possible the cases in which the use of undercover investigators and collaborators can be ordered, so that the persons concerned are able to foresee the cases where they might be the subject of surveillance measures or other covert operations (*Halford v. the United Kingdom*, § 49, *Silver and Others v. the United Kingdom*, § 87, *Shimovolos v. Russia*, § 68). However, predictability is not synonymous with certainty. Individuals must be able to reasonably foresee, at least with the help of legal experts, the conditions for the use of undercover agents (*Case of Slivenko v. Latvia*).

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The second condition is the need to use the measure in a democratic state for one of the purposes expressly provided for in Article 8 of the Convention: for national security, public safety, the economic wellbeing of the country, the defense of order and the prevention of criminal acts, the protection of health or morals, or protecting the rights and freedoms of others.

In its jurisprudence, the European Court of Human Rights ruled that the states have a margin of appreciation of the cases in which these special research techniques can be used, but this margin is a limited one, in the sense that their use must be reduced to an "absolute minimum". (*Case of Klass v. Germany*, point 59)

In the same decision, the Court held that there must be adequate and sufficient guarantees against abuse, which must be correlated with the conditions provided by the national law of a state which clearly indicates the nature, purpose, duration of the measures, the grounds on which the measures may be ordered, the competent authority to order and implement such measures or supervise their implementation, the remedies provided by national legislation.

Regarding the concept of necessary measure, it must reach the threshold of "imperative social need" that justifies the authorities' interference in the person's right to private life. (*Dudgeon v. Great Britain*, para. 51)

At the same time, in addition to the conditions shown above, the condition of proportionality of the measure in relation to the intended purpose must also be met. (*case of Z. v. Finland*, par. 94).

"Essentially, the proportionality test will have to take into account the fact that both public interests will have to be weighed, with their degree of importance, by reference to the investigated crime, as well as the seriousness of the interference brought to the private life of the person." (*\*Mihai Suian*, p. 56)

Proportionality is a leitmotif when the question of a state's interference in a fundamental right of the person is raised, in the sense that derogations must be evaluated concretely, from case to case, according to its particularities, so that the degree of intrusion into the fundamental right of the person not to exceed the level necessary in a democratic state to achieve the intended goal.

The evaluation of the meeting of this criterion is left to the appreciation of judicial body that orders the measure resulting in the intrusion into private life, which must make a fair assessment of all the circumstances of the case, the effects of the measure, the purpose pursued in order to establish whether there is a fair relationship between the interference with the fundamental right of the person and the imperative to protect public order by holding criminally responsible persons who commit crimes.

Last but not least, the Strasbourg Court ruled that in order to ensure the supremacy of the law, it is necessary that an intervention by an authority that is part of the executive power can be subject to effective control by the judicial authority, at least as a last resort, judicial review offering the best guarantees of



independence and impartiality, as well as due process (*Klass v. Germany case, para. 55*)

Referring to the Romanian legislation regarding the use of undercover investigators and collaborators, we can note that the legislator imposed the necessity of meeting all the conditions set forth by the European Court of Human Rights in its jurisprudence regarding the use of special surveillance and investigative techniques: the provision of the measure in the legislation, the condition of necessity and proportionality, as well as that of subsidiarity.

In this sense, the legislator provided in art. 148 para. 1 of the Code of Criminal Procedure the conditions for ordering the measure, this being limited to the cases expressly provided by law, when there is a reasonable suspicion regarding the preparation or commission of a crime of a certain gravity, such as those against national security provided by the Code criminal and other special laws, drug-trafficking crimes, crimes under the regime regarding doping substances, trafficking and exploitation of vulnerable persons, acts of terrorism or similar, or in the case of other crimes for which the law provides for a prison sentence of 7 years or more or there is a reasonable suspicion that a person is involved in criminal activities related to the crimes listed above.

It was pointed out in the doctrine that the phrase "a person is involved in criminal activities related to the crimes listed above" is not clear enough because those activities that could attract the use of undercover investigators are not determined. (\**Mihai Şuian, p. 435*)

Thus, it was argued that the notion of "involvement in criminal activities" can mean the commission of any crime related to those provided for in art. 148 para. 1 lit. a of the Criminal Procedure Code, which would constitute a much too extensive approach and it would be possible in this way to use investigators and collaborators in any case. It was thus proposed that the law be amended to provide for the possibility of using undercover agents only if related crimes are committed to support the commission of one of the crimes referred to in art. 148 para. 1 a from the Romanian Criminal Procedure Code.

We agree with the opinion that the Romanian law is not sufficiently clear and predictable regarding the scope of the special investigative method because, on the one hand, as indicated in the doctrine, any criminal activity can be related to the commission of the crimes expressly provided for in art. 148 para. 1 a of the Romanian Criminal Procedure Code, which would extend the scope of using undercover agents to all crimes, without a penalty limit, without specifying the type of connection and, on the other hand, without specifying the form of guilt with that the respective acts can be committed.

We are of the opinion that the scope of application of the phrase "criminal activities related to the crimes listed above" should be limited to intentional or intentional combined with negligence crimes, because the possibility of using undercover investigators and collaborators for investigating crimes committed

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through negligence and that do not reach the minimum punishment threshold of 7 years in prison would represent a risk of using the special method under far too permissive conditions in relation to the importance of the fundamental right to private life.

Regarding the degree of connection with the crimes expressly indicated by the legislator in art. 148 para. 1 a of the Romanian Code of Criminal Procedure, we believe that it must be sufficiently strong, coherent, to highlight the determination of the criminals in supporting the commission or concealment of the traces or products of the serious criminal activities mentioned above or of hiding the criminals.

Regarding the first connection hypothesis, respectively for supporting the commission of the crimes mentioned in art. 148 para. 1 a of the Code of Criminal Procedure, this would justify the use of undercover investigators and collaborators since, by committing these acts, criminals are also participants as accomplices in more serious crimes. However, it would be appropriate to delimit this type of connection between crimes to also cover those situations in which it is difficult from a legal point of view to retain complicity in the commission of a more serious crime, such as in the case of committing acts involving a qualified perpetrator.

The other hypothesis of connection that I proposed, the concealment of traces or serious criminal activities or crimes, acts of hiding or favoring the perpetrators who committed one of the express crimes of art. 148 para. 1 a from the Romanian Criminal Procedure Code.

It is worth noting that, in principle, for the crimes of favoring the perpetrators and concealment, it is ensured in art. 269, respectively art. 270 of the Criminal Code, the penalties provided by the law are prison from 1 to 5 years or a fine, for the investigation of which the use of undercover investigators or collaborators would not be allowed.

We note that the connection between related and serious crimes in such cases is sufficiently well outlined to justify the need to resort to special investigative methods that involve interference with the right to private life of individuals.

Therefore, I have that art. 148 para. 1 a of the Code of Criminal Procedure, the final part, should be amended in the sense of indicating as crimes that are related to the crimes expressly indicated by the legislator those that facilitate the commission of crimes, the concealment of the traces of the commission or of the assets of those serious crimes, as well as the hiding of the perpetrators that commit such serious crimes. Such a regulation would ensure clearer and more predictable conditions for investigating the criminal phenomenon by modern means.

Also, the legislator provided that the measure must be necessary and proportional to the restriction of the fundamental rights and freedoms of the person, taking into account the particularities of the case, the importance of the information or evidence to be obtained or the seriousness of the crime, and at the same time be disposed only in the alternative, if the evidence or the location and identification of the perpetrator, the suspect or the defendant could not be obtained in any other way or obtaining them would involve special difficulties that would prejudice the investigation or there is a danger to the safety of persons or valuable goods.

The proportionality of the measure must be taken into account not only at the time of its disposition, but throughout its use and subsequently, at the time of the evaluation of the results obtained. Thus, the use of undercover investigators must be stopped by the prosecutor as soon as all the conditions provided by law for its disposal are no longer met, for example, if the evidence and information necessary to establish the mode of operation of a criminal group have been obtained.

Also, judicial bodies will avoid including in the case file information that concerns the private life of the person and is not related to the criminal case in order to limit as much as possible the interference with the fundamental right of the person.

The evaluation of the meeting of all the conditions for the use of undercover investigators and collaborators will be done by the prosecutor when he analyzes the opportunity to use the special investigative method, and the legality of the evidence administration may be challenged by the person targeted by the undercover operation (whether or not they are parties or main procedural subjects) to the superior hierarchical prosecutor according to art. 339 of the Romanian Code of Criminal Procedure or before the judge of the preliminary chamber, or in the procedure of the complaint against the solution of not sending to trial, when there was a defendant in the case, according to art. 341 para. 2 of the Code of Criminal Procedure, either in the procedure of the preliminary chamber, the object of which consists, among other things, in verifying the legality of the administration of evidence during the criminal investigation.

The constitutional court recalled in Decision no. 244 of April 6, 2017 that the conventional standards for the protection of fundamental rights imply the right of persons whose rights have been affected to challenge the legality of the measure and obtain, if necessary, compensation for the interference suffered.

We note that in the Romanian Code of Criminal Procedure there are no special provisions regarding the granting of compensation in the event that the right to private life has been violated by the measures of state bodies, but it is possible to obtain them through a civil action for tortious civil liability, according to art. 1349 et seq. of the Romanian Civil Code.

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If evidence obtained as a result of the use of undercover investigators and collaborators has been declared illegal, it will be excluded from the criminal record.

### CONCLUSIONS

*The use of special investigative methods is a modern and effective tool in combating the phenomenon of crime, thus being able to obtain evidence that could be more difficult for the defense to combat since the persons targeted by these criminal investigation measures are not alerted to the conduct of a criminal investigation towards them so that their behavior during the investigation is not extremely cautious.*

*Undercover investigators and collaborators may have access to highly intimate and personal information through the nature of the relationships they may form, develop or maintain with individuals targeted by undercover operations, information that will be made available to law enforcement. Such information, if useful for solving the case, will also be presented in the documents in the file, such as the reports written by the undercover investigators, but also in the statements given by them or by the collaborators.*

*Because of those mentioned above, it is required that the judicial bodies, when they analyze the necessity of using this special investigative method, make a thorough assessment of all the aspects that contribute to establishing the proportionality of the measure in relation to the nature of the facts that are the subject of the research and the result that is sought to be obtained through the use of undercover agents and the degree of intrusion into the person's right to private life.*

*In this sense, all the standards for the protection of the right to private life established by the jurisprudence of the European Court of Human Rights must be taken into account as a starting point.*

*The level of protection of the right to private life that the judicial bodies must ensure at the time of taking the decision by which it is interfered with must be adequate, so that the fundamental right of the person is not an illusion, but a concrete one and effective.*

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