

# Problems of Determining the Subject of Illicit Trafficking of Special Technical Means for Covert Information Acquisition

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**Keywords:** Criminal law, investigative activities, covert means, illicit trafficking, obtaining information surreptitiously, subject matter of the crime, challenges of determination of the nature of a crime.


**Abstract:** The study is novel due to the comprehensive approach to the research in terms of forensics, the theory of investigative activities, the bases for the use of covert means and criminal law as well as the development of proposals to improve the criminal law of the Russian Federation in terms under consideration based on the research. Purpose of the study: evaluation of the effectiveness of legal regulation of trafficking of covert means intended for covert information acquisition. Objectives: to develop a unified approach to the criteria for attributing objects to the category of covert means intended for surreptitious information acquisition, addressing the problems of classification of illegal trafficking in such means. Methods: dialectical method of scientific understanding, as well as general scientific methods: logical, hermeneutical, comparative law research. As a result of the study, the authors conclude that there is a need to develop a unified approach to the criteria for classifying certain objects as covert means intended for surreptitious information acquisition, their essential features and to enshrine it at the statutory level, as well as the need for a clearer clarification of the terms "production", "acquisition" and "sale" in the current resolution of the plenum of the Supreme Court of the Russian Federation.


## 1 INTRODUCTION


Illegal trafficking of covert means intended for covert information acquisition is a fairly common crime, but the persons committing such a crime are not always aware of its increased danger to society and the fact of committing the crime. At the same time, not all aspects of this crime have been revealed in scientific studies. Certain issues are addressed in the works by S. D. Petrochenkov (Petrochenkov 2013), V. I. Plokhova (Plokhova, 2018), V. G. Usov (Usov, 2019).


(Petrochenkov 2013) and some other authors. The peculiarities of the use of such surreptitiously used devices have been also considered by foreign authors (Wilhelm, Address, Hacking, 2011).

The study is novel in its integrated approach. Furthermore, the speed of technological advancement leads to the continuous emergence of technical devices (gadgets) which, under certain conditions (modifications, unconventional use, etc.) can be used for covert information gathering, though this function was not envisaged in their original purpose. In particular, Australian authors Rob Abbas, Katina Michael, M. G. Michael and Anas Aloudat (Abbas, Michael, Aloudat, 2011) as well as other authors (Peer, Egelman, Harbach, Malkin, Mathur, Frik, 2020) have pointed to such technical means in their articles. The above circumstances predetermine the need for a comprehensive study of covert means, the purpose of which is to obtain information covertly, and their illicit trafficking. On this basis, there is a

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need to review and analyze the current criteria for classifying certain objects as cover means intended for obtaining information surreptitiously, to develop the author's position on the issue, as well as to identify and address the issues of qualification of criminal offenses, generated by the imperfection of the legislative concept of the criminal offenses under analysis, where the covert means, intended for obtaining information surreptitiously, are the constructive feature (in this case – the subject matter of crime).

## 2 METHODS

The traditional set of scientific methods was used in carrying out the study. The generic dialectical method of scientific understanding has been widely used, as well as general scientific methods: logical, hermeneutical, comparative law analysis. The above combined set of methods ensures that the principles of development of scientific knowledge and the logic of research are followed.

## 3 RESULTS AND DISCUSSION

In the Russian Federation, only bodies engaged in investigative activities are authorized to use devices designed for the covert collection of information in their professional activities. This limitation is based on the conspiratorial, secretive nature of their information gathering. Technological progress affects all phenomena and processes of social life, and crime is no exception (Solovyov, 2016; Volevodz, Shestak, 2019). The seemingly "harmless" use of such devices by other performers conceals a very common, multifaceted criminal phenomenon (Bublik, Kozachenko, Gubarev, 2015), which infringes on constitutional rights and freedoms of the person and of the citizen, as well encroaches on information security (Usov, 2018), since their use may give rise to a number of criminal offenses (e.g. violation of privacy, inviolability of housing, the secrecy of correspondence etc.).

What exactly are the technical devices designed for covert collection of information? After all, it is possible to collect information without notifying citizens not only through various radio technical devices (listening devices) (Lantukh, Ishygeev, Gribunov, 2020; Dale, 2017), but also through UAVs (Vardanyan, Andreev, 2018), and billing by mobile network carriers. It is also difficult to ignore the

potential of smart information collection devices (meters, trackers, etc.) (Nancy, 2014). In addition, intelligent house and intelligent vehicle systems cannot be ruled out (Smushkin, 2020).

Analysis of the current Russian legislation in so far as relevant shows that currently the Russian legislative establishment does not define clearly enough which technical means should be classified as covert, intended for gathering information surreptitiously. The rules of law are divergent and sometimes contradictory, while being inconsistent with Russian civil law. Such judgment has been repeatedly expressed by the academic community (Plokhova, 2018).

The Russian legislator, in a Note to Article 138.1 of the Criminal Code, has defined what shall be meant by special hardware, intended for covert obtainment of information. In particular, Note 1 to Art. 138.1 of the Criminal Code states: "By special technical means intended for secretly obtaining information, we mean devices, systems, complexes, devices, special tools for penetrating into rooms and (or) other objects and software for computers and other electronic devices for accessing information and (or) obtaining information from technical means of its storage, processing and (or) transmission, which are intentionally given properties to provide the function of hidden information or access and to her without the knowledge of its owner." In this case, the Russian legislator defined the term in question by decomposing the general concept into subordinate concepts that are significantly smaller in scope. However, the specific characteristics that are unique to the technical means in question and that make it possible to distinguish them from other technical means are not pointed out. Such an approach raises qualification problems, as it does not contain clarity in the definition of the term in question. Moreover, the analysis of this legal definition leads to a conclusion that this definition, if read literally, applies only to the devices and hardware/software systems designed for eavesdropping, retrieval of information from technical communication channels and acquisition of computer data. The list of devices that allow for covert audio and video recording of what goes on around the user, to obtain information on their movements, is not exhaustive.

More detailed regulation including 10 types of special technical means is contained in the List approved by the RF Government Decree No. 214 dated March 10, 2000. It provides not only the list of categories of special technical means allowing for secret obtainment of information but also groups of special technical means.

In addition, Decree of the Government of the Russian Federation No. 314, dated April 16, 2012 is in force in the Russian Federation. The weak point of this regulation, as well as the other above-mentioned legal acts, is that it does not define the structural features that are inherent to these special technical means, but only determines their general categories. This approach is fundamentally unacceptable as it does not allow a technical means to be classified as special technical means that are designed to obtain information covertly, creating room for expansive interpretations and creating problems of qualification of criminal offenses.

The distinction between the technical means in question and other means which do not constitute the object of the criminal offense analyzed is contained both in note 2 to article 138.1 of the Criminal Code and in the explanations of the Constitutional Court and the Supreme Court of the Russian Federation. The practice has followed the path of camouflage as the main feature identified by experts in determining whether a device qualifies as a hardware to be analyzed. However, this criterion appears clearly sufficient to the authors. It seems that the key to distinguishing between the related devices, apart from their original purpose, is precisely the informed consent of the user or other person whose actions are being monitored. However, if these devices are used both for minors and for animals or other objects (installation of a tracker in a car alarm system for tracking it in case of theft), the need for use is determined by the legal representative of the minor, the owner of the animal or object itself. In addition, the technical means in question must in no way reveal their functional purpose (e.g. must operate silently, without light signals).

The problem of defining the concept of technical means, being the subject of the criminal offense under analysis, is further complicated by the fact that the solution of this issue is debatable in the domestic legal doctrine. The viewpoints of academics do not always coincide and sometimes differ significantly, contradicting each other. Thus, some authors prefer the abstract formulation of the concept under study, through its attributes (Rarog, 2019), while others prefer the definition of specific groups of such technical means (Brilliantov, 2016). Due to the uncertainty and ambiguity of the definition of special technical means designed to obtain information covertly in the current legislation and legal doctrine, there are problems of qualification of the analyzed criminal offense in the regulatory enforcement. Failure to address these issues creates a real risk of failure to bring to justice, which in itself can have a

negative impact on the security of individuals and their rights and freedoms. Therefore, there is a need to develop a unified approach to the criteria for classifying certain objects as covert means intended for surreptitious information acquisition, their essential features, and to enshrine it at the statutory level.

The term "technical means" means an item, equipment, apparatus or parts thereof. On this basis, it must be concluded that technical means are objects of the material world (e.g. hardware, hardware/software, digital electronic or other analogue devices that do not have the attribute of electronic device). Software is not and cannot a priori be regarded as technical means because software, unlike technical means, is intangible in nature and represents a collection of data and commands existing in the form of electronic signals. Only those technical means that are capable of obtaining information should be regarded as special technical means, which constitute the object of the criminal offense in question. However, these technical aids must not be intended for domestic, mass-market use.

In addition, the analysis of regulatory enforcement materials shows that in addition to the challenges of qualification of the criminal offense in question, there are other problems associated with the imperfection of the legislative regulation of the criminal law standards that establish responsibility for the criminal offense in question. This fact has been repeatedly highlighted by practitioners and research community (Usov, 2019). In particular, one of the qualification issues under consideration is the identification by law enforcement authorities of the production of special technical means, which are the subject of the analyzed criminal offense. Despite the current clarifications of the Supreme Court as to what should be understood by the production of the subject matter of the offense under Article 138.1 of the Criminal Code, the law enforcement practice in this respect is very contradictory.

In law enforcement practice, there are also problems in qualifying the criminal offense in question when defining the concept of the sale of special technical means, which is the subject matter of the offense under article 138.1 of the Criminal Code. It should be noted that in law enforcement practice, the problems in delineating the sale are inherent not only to the offense in question but also to other offenses, as there is currently no unified approach to the definition of sale. For example, the sale of narcotic drugs, psychotropic substances are actions aimed at transferring the object of criminal encroachment (in this case narcotic drugs or

psychotropic substances) to a third party, while the sale of weapons are irrevocable alienation of weapons in favour of third parties, for the term "alienation" is included in the concept of "transfer".

In addition, law enforcers face qualification issues in distinguishing the criminal offense in question from administrative offenses; for multiple offenses; in establishing the signs of accompliceship and many others. It should be noted that the authors have not touched on all the problems of qualification of the crime under Article 138.1 of the Criminal Code of the Russian Federation, which undoubtedly requires further elaboration of the stated problem by the scientific community.

## 4 CONCLUSIONS

Despite the fact that the speed of technological advancement leads to the continuous emergence of technical means, which under certain conditions can be used for covert collection of information, thereby encroaching on the benefits protected by criminal law, there is currently no effective mechanism for countering them through the means of criminal law. This is due to the lack of clear legislative regulation of the criminal law provision, establishing the liability for committing the analyzed criminal offense, the presence of different approaches to the definition, the criteria for attributing certain objects to special technical means, designed to obtain information covertly. On this basis, in order to alleviate the above problems, there is a need to develop a unified approach to the criteria for classifying certain objects as covert means intended for surreptitious information acquisition, their essential features and to enshrine it at the statutory level, as well as the need for a clearer clarification of the terms "production", "acquisition" and "sale" in the existing resolution of the plenum of the Supreme Court of the Russian Federation.

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