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Characteristics of the Legal Institution and Legal Relations of Confidential Cooperation

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■ **Abstract.** Confidential cooperation is a separate intersectoral legal institution and a separate type of procedural and legal relations between authorised employees of state authorities and individuals who cooperate with them. According to Article 19 of the Constitution of Ukraine, such relations and activities of these bodies must be regulated by the laws of Ukraine. However, the institution of confidential cooperation is not sufficiently regulated in the legislation, there is no definition of the basic concepts, and the existing legal norms are contained in different laws and only fragmentarily regulate the relevant legal relations, which complicates their understanding, research and use. The purpose of the study is to provide a general legal analysis of the institution of confidential cooperation and relevant legal relations; to define its concepts, principles, subjects, object and content in the context of the National Anti-Corruption Bureau of Ukraine. General scientific methods: system analysis, analogy, and comparison; general legal methods: comparative legal, formal legal, and logical legal methods were used in writing the article. The state of scientific research and the current legislation of Ukraine, which regulates the relevant legal relations, is analysed, and its individual norms are compared. The main legal terms on the topic under study are defined. A systematic analysis of the legal institution and legal relations of confidential cooperation is carried out both from a purely doctrinal position and on the example of the activities of a law enforcement agency. Some features and characteristics of the relevant institution and relations are determined. The results of the study are generalized, specified and presented in the form of statements and conclusions, and can therefore be used in other scientific studies, having both scientific and practical value. The scientific novelty of the study is that confidential cooperation is systematically considered in open sources as a separate legal institution and a type of legal relationship for the first time; the conceptual and categorical apparatus, principles, subjects, object and content are defined, in particular, the rights, duties, responsibilities and guarantees of both authorised employees and confidants are studied in detail. For the first time the issue of the functioning of the institution of confidential cooperation in the National Bureau, which has certain features and differences in comparison with other law enforcement agencies, was studied. The results of the study can also be used to raise awareness among practitioners, the legal community and the public on this issue, as well as in rule-making. The institution of confidential cooperation should be regulated in detail by law since it is associated with the law enforcement activities of state bodies and the risk of violation of constitutional human rights and interests. Regulation of the legal institution and legal relations does not pose a threat to the disclosure of forms and methods of conducting special investigative, intelligence and counterintelligence activities, at the same time provides legal certainty, as well as guarantees the state's compliance with the principles of legality, the rule of law, respect for human rights and freedoms. In general, the relevant legal relations should be regulated within the framework of the operative-search law and enshrined in one legislative act – the Law of Ukraine “On Operative-Search Activity”, which should define the basic concepts, subjects and their rights, duties, responsibilities and guarantees. It is also necessary to eliminate conflicts with other legal norms, in particular those regulating the whistle-blower institution

■ **Keywords:** confidential cooperation; covert cooperation; confidant; whistleblower; corruption; Covert Human Intelligence Sources (CHIS); Confidential Informant (CI)

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■ Introduction

Corruption as a social phenomenon is one of the main problems of modern Ukrainian society. This is evidenced by the increased attention of citizens to the process of fighting corruption in the government. International organisations also pay attention to Ukraine's progress in this direction: European

Commission, European Parliament, Council of the European Union, World Bank, International Monetary Fund, Organization for Economic Cooperation and Development, European Anti-Fraud Office, etc.

One of the most effective legal institutions in the fight against organised crime and combating corruption, given their hidden (latent) nature, is the Institution of confidential cooperation. The efficiency of using confidential services in combating crime is confirmed, in particular, by empirical studies conducted by M.L. Gribov & O.I. Kozachenko [1], according to the results of which 78.5% of the surveyed operational workers consider confidential cooperation to be the main tool for preventing and detecting crimes, and 71.5% and 68%, respectively, of operational workers and investigators – the investigation of crimes.

The importance of cooperation between law enforcement agencies and citizens in combating crime is confirmed by international experience, primarily of developed countries of North America and Europe, which was studied in the works of E.E. Grechyn, O.I. Kozachenko, V.V. Matviychuk, I.I. Musiyenko, D.I. Nikiforchuk & A.V. Savchenko [2-4] and others. This demonstrates the truly universal nature of such cooperation regardless of legal systems, national culture and political regimes. The differences lie in the definition of: the levels of legislative support for confidential cooperation (at the level of laws, codes of practice, bylaws); subjects who have the right to relevant activities; persons with whom it is possible or, conversely, forbidden to establish appropriate relations; the boundaries of confidential cooperation (depending on the permitted passive or active role of the confidant and the purpose of such cooperation); the specifics of documentation (granting permits to involve certain persons in general and to perform specific tasks, registration of the results of cooperation, procedural consolidation of evidence, etc.); the possibilities of using information obtained by the confidant as evidence.

Given the national and international experience proving the effectiveness of confidential cooperation, especially in combating latent types of crime, it is important to study this institution in the context of the National Bureau, which is responsible for preventing, detecting, disclosing, and investigating corruption crimes and preventing new ones. Such research should begin with a general legal analysis, that is, with the theoretical part, which is given insufficient attention, possibly due to the fact that operational search science focuses on its practical aspect.

The issue of confidential cooperation in the context of law enforcement and pre-trial investigation bodies has been previously addressed. In particular, in the work of D.V. Talalay & S.M. Saltykov [5]

considers the correlation of confidential cooperation with secret investigative (search) actions. It appears reasonable to conclude that confidential cooperation is not a separate investigative or procedural action, and the concept of confidential cooperation is much broader than the procedural activities of an investigator or operative officer. However, to identify the exact differences between confidential cooperation and procedural activities, it is necessary to clarify its legal content.

The CPC of Ukraine of 1960 [6] did not include provisions that would regulate confidential cooperation and covert investigative (detective) actions. These novels appeared in 2012 with the adoption of the new edition of the Code [7]. The issue of using confidential cooperation is regulated in Article 275 and partially in Article 272 of this Code. The legislator placed these articles in the third paragraph “Other types of covert investigative (detective) actions” of Chapter 21 “Covert investigative (detective) actions”. This is what caused some lawyers, judges, practitioners, lawyers to attribute confidential cooperation to a separate type of covert investigative (search) actions. Such a picture became possible, in particular, due to insufficient scientific research and, first of all, insufficient coverage of the legal content of confidential cooperation and relevant activities of law enforcement agencies, which traditionally had and still has a hidden nature, in open scientific sources.

It can be argued that excessive secrecy is gradually being removed from the institution of confidential (covert) cooperation, and some legislative acts contain provisions that partially regulate these and related legal relations. In addition, the legislation introduced the institution of anti-corruption whistleblowers, which is a step forward in ensuring the safety, legal and social protection of persons who report corruption and facilitate investigations. At the same time, the whistleblower institution does not account for certain key principles and foundations of the institution of confidential cooperation and operational and investigative activities, such as confidentiality, secrecy, expediency, planning, etc. This indicates a certain competition of institutions and requires separate research.

Due to the imperfection of the legislation governing the relations of confidential cooperation, the subject of the confidential cooperation institution actualises the need for additional study and development of proposals and recommendations for its regulatory improvement. The issue of the composition and principles of legal relations between confidential employees also remains relevant and requires additional analysis.

The purpose of this publication is a systematic general legal analysis and characterisation of legal relations arising from confidential cooperation between law enforcement officers and individuals, on the example of the National Bureau, and the legal institution that should regulate the relevant relations. Achieving this goal will be an important argument in the debate on the need for legislative regulation of these relations and will allow both lawmakers and practitioners to comprehend the scope of relations that need to be regulated.

To achieve this goal, the following tasks are set: 1) to analyse the current legislation of Ukraine and scientific works on the subject matter, primarily those in which international experience is studied; 2) to define the basic concepts, to characterise the legal institute of confidential cooperation and the relevant legal relations; 3) to define the principles, subjects, object and content of these legal relations; 4) to summarise the results of the study.

The scientific novelty of this study lies in the fact that confidential cooperation and the relevant legal institution, which are mostly of purely practical application and have been studied mainly using the inductive method, are examined through the prism of general legal theories, i.e., using the deductive method. Thus, the definition of legal terms, features and structure of the relevant legal institution and legal relations is carried out with the help of general legal ideas and concepts.

■ Results and Discussion

Legislation regulating the legal institution of confidential cooperation and relevant legal relations in the context of the National Bureau's activities contains certain provisions of the Constitution of Ukraine, the Convention for the Protection of Human Rights and Fundamental Freedoms, the CPC of Ukraine, the Criminal Code of Ukraine, the Laws of Ukraine "On the National Anti-Corruption Bureau of Ukraine" (hereinafter – the Law "On NABU"), "On Operational Investigative Activity" (hereinafter – the Law "On OIA"), "On Prevention of Corruption", "On Organisational and Legal Framework for Combating Organised Crime", "On Ensuring Security of Persons Participating in Criminal Proceedings", by-laws and departmental regulations.

In view of the above, the institute of confidential cooperation is an interdisciplinary legal institution, which is located at the intersection of such branches of law as: criminal and criminal procedural law, operational and investigative law and civil law (on material liability, compensation of expenses, etc.), labour (labour relations with confidants) and administrative (on the organisation of

activities and management of the relevant law enforcement units) law.

At the same time, there are no definitions of the terms "confidential" and "confidential cooperation" in any legislative act, they exist only in the legal doctrine.

Definition of the concepts of "confidential cooperation", "confidential" and "legal institution of confidential cooperation".

In a narrow sense, confidants are persons with whom confidential cooperation relations are established. The authors support the position of K.M. Olshesky & V.V. Dirman, which use a more detailed definition of confidants, formulated by V.B. Rus-hailo: "these are private individuals with whom operational units carrying out operational and investigative activities have established, on a paid or free of charge basis, relations of cooperation, which provide for the assistance of these persons on a confidential basis to the activities of operational units in the performance of their tasks" [8].

The proposed definition should be improved by adding such features as the legal capacity of a person, voluntary entry and maintenance of relations, and also delete the word "private", since the confidant may be, in particular, an employee, official or official of a legal entity of public law.

In addition, according to the provisions of Article 275 of the Criminal Procedure Code of Ukraine [7], the right to use confidential cooperation is also granted to the investigator.

Similar in content to the concept of "confidant" in the legislation and practice of foreign countries and law enforcement agencies are the concepts of "CHIS" (Covert Human Intelligence Sources – in the UK), "CI" (Confidential Informant – in the United States), "V-Personen" (Vertrauenspersonen, trusted person – in the Federal Republic of Germany).

According to § 26(8) of the Regulation of Investigatory Powers Act 2000 [9], a person is a "CHIS" if:

- it establishes or maintains a personal or other relationship with any person for the clandestine purpose of facilitating anything falling within paragraph (b) or (c);
- it secretly uses such relationship to obtain information or provide access to any information to another person; or
- it secretly discloses information obtained through the use of such relations or as a result of the existence of such relations.

In view of the above, in the context of criminal proceedings, confidants are individuals with legal capacity with whom law enforcement officers authorised to carry out operational and investigative activities and/or pre-trial investigation have

established and maintain relations that provide for the assistance of these persons to perform the tasks assigned to these bodies on a paid or unpaid basis and on the basis of confidentiality and voluntariness.

In this context, confidential cooperation is a relationship that is established and maintained by law enforcement officers (hereinafter referred to as authorised employees) authorised to carry out operational search activities and/or pre-trial investigation with individuals with the legal capacity to assist these persons in fulfilling the tasks assigned to these bodies, on a paid or gratuitous basis and on the basis of confidentiality and volunteerism.

It should be pointed out that lawmakers made several attempts to define the concepts of confidential and covert cooperation during the development of the new version of the Law "On OIA" in 2016 and 2019.

The draft law of September 2, 2019, No. 1229 [10] proposed to define confidential cooperation as the interaction of citizens with operational units of law enforcement or intelligence agencies of Ukraine, which consists in providing them with systematic, lawful assistance in performing operational and investigative tasks on a voluntary basis.

This definition corresponds to the essence of legal relations of confidential cooperation. However, it is necessary to clarify the subject composition by adding pre-trial investigation bodies, and instead of citizens to indicate physical capable persons, since the relevant relations can also be established with foreigners and stateless persons. Comparing the definitions of the concepts of confidential and covert cooperation contained in the draft law, it should be noted that the main difference is the sign of systematic confidential cooperation, the importance of which will be highlighted below.

Within the framework of this study, given these and other insignificant differences, the concepts of confidential and covert cooperation will be considered as almost identical, since the respective relations have identical subjects, objects and content.

Based on this definition, it is possible to conclude that the legal relations of confidential cooperation are distinguished by the fact that they are both regulatory and protective relative, bilateral, active, contractual, ongoing and procedural. The moment of origin of this relationship is the moment of reaching an oral or written agreement between the parties.

Confidential cooperation as an institution of law is a personified group of legal norms that regulate homogeneous social relations of a particular type [11], namely legal relations of confidential cooperation.

As an institution of law, confidential cooperation is characterized by the fact that it is an interdisciplinary legal institution (i.e., a set of rules of law of

different branches of law, which is aimed at regulating social relations of a certain type [11]; functions autonomously as a separate type of law enforcement activity; is complex in its composition since it simultaneously regulates both procedural and legal relations; is both regulatory (gives rights and obligations) and protective (establishes liability for misconduct). Principles of confidential cooperation.

Employees of the National Bureau carry out confidential cooperation on the basis of general legal principles: the rule of law, legality, and respect for human rights and freedoms, enshrined in Art. 4 of the Law "On OIA" [12] and Art. 7 of the CPC of Ukraine [7]; as well as sectoral principles of the science of operational and investigative activities related to confidential cooperation: confidentiality, voluntariness, security, legal and social protection, moral and material incentives, enshrined in Articles 7, 8, 13 of the Law "On OIA" [12] and in Articles 16, 17 of the Law "On NABU" [13], as well as the principles of secrecy, admissibility, systematicity and expediency [8], formulated by science and practice.

The listed principles are aimed at ensuring the rights and interests of confidants, which testifies to the special value of the institution of confidential cooperation for the state, and its compliance with the principle of the rule of law enshrined in Article 3 of the Constitution of Ukraine [14].

The principle of the rule of law in the institute of confidential cooperation is that human rights and freedoms (confidants; persons about whom information is collected; third parties) are of the highest value, and their provision is a priority for authorised employees of the National Bureau.

The principle of respect for human rights and freedoms is that authorised employees of the National Bureau apply confidential cooperation in a way that does not degrade human dignity and does not violate or restrict human rights and freedoms. In cases provided for by law, such rights and freedoms may be restricted, but in a manner that restricts them the least. Their arbitrary restriction or violation is unacceptable. Such rights and freedoms shall be restored in the event of unlawful violation of human rights and freedoms, the damage caused shall be compensated, and the information obtained that degrades the honour and dignity of an individual shall be destroyed.

The principle of legality is that confidential cooperation and certain procedures are carried out exclusively in accordance with, on the grounds, in the manner and in the manner prescribed by law, and exclusively by authorised entities.

The principle of confidentiality means that the fact of conclusion and maintenance of confidential

cooperation relations between a particular authorised employee of the National Bureau and a confidant must be kept secret. This principle imposes a corresponding obligation not to disclose the existence and results of such cooperation on both parties to these relations in order to ensure the effectiveness, efficiency and security of such cooperation. Disclosure of this secret entails liability under the current legislation, except in cases of disclosure of information about illegal actions that violate human rights.

The principle of voluntariness means that no one can be forced to enter into confidential cooperation with the National Bureau. The use of physical and psychological coercion is strictly prohibited.

Ensuring security, legal and social protection means that the law guarantees confidentials physical, legal and social protection, and for authorised employees of the National Bureau for Ensuring the Rights and Freedoms of Confidentials, their safety and well-being is a priority duty. The authorised employees of the National Bureau are obliged to ensure the safety, rights and freedoms, and property of the confidant, his close relatives and family members during and after the existence of confidential cooperation relations in case of a relevant threat caused by such cooperation.

The principle of moral and material encouragement is to approve and encourage the involvement of individuals in the fight against crime. Since entering into confidential cooperation is voluntary, the state should take care to create positive motivation for these persons. Such encouragement can be moral, i.e., recognition by the National Bureau and its authorised employees of the merits and efforts of confidants in cleansing the authorities from corruption for the establishment of the rule of law and civil society, elimination of threats to national security, as well as material, i.e., payment of monetary rewards, compensation for expenses, time and efforts, and other material and financial issues.

The principle of conspiracy, in turn, is determined by the principle of confidentiality and consists in the fact that in order to keep secret the fact, details and results of these relations, the authorised employee and the confidant agree on compliance and comply with a certain system of measures, use security, disguise, conspiracy during meetings, movement, communication, transfer and use of information, etc.

The principle of admissibility, which corresponds to the principles of the rule of law, legality and respect for human rights and freedoms, is that it is prohibited to involve in confidential cooperation persons whose professional activities are related to the preservation of professional secrets, namely: lawyers, notaries, medical workers, clergymen,

journalists, if such cooperation will be associated with the disclosure of confidential information of a professional nature.

The principle of expediency is that persons are involved in confidential cooperation, and confidential cooperation is applied only if it is impossible to perform the tasks assigned to the National Bureau in a particular situation or if their implementation is significantly complicated. Confidential cooperation involves only those persons who, by their moral, business and professional qualities, knowledge, skills and abilities, are able to perform the tasks entrusted to them, have or can get access to certain information, and are also able to keep the fact, details and results of such cooperation secret.

The importance of this principle is rightly emphasised by K.M. Olshevsky & V.V. Dirman, who call it the principle of expedient necessity (rationality). The formation of a network of confidants, which are a natural component of the criminal environment and criminal objects, should be carried out taking into account the operational situation, a specific operational and investigative situation, and in this regard, the interests of the relevant services that carry out operational and investigative activities, based on determining the optimal sufficiency of confidants. Their insufficient number will not provide the necessary information, and an excessive number of such persons does not always give a positive result, but, on the contrary, reduces the efficiency of their use [8].

The principle of systematicity is inextricably linked to the principle of expediency and qualitatively distinguishes confidential cooperation from covert cooperation as a type of involvement of citizens in the performance of certain short-term tasks of law enforcement agencies. The systematic principle consists in that the main purpose of confidential cooperation is mainly to involve persons in long-term cooperation with law enforcement agencies to counteract socially dangerous illegal behaviour in a particular area or object. Such objective may be conditioned by the complexity of studying the direction or object, the latency of criminal acts, "mutual responsibility", closeness and countermeasures of the criminal environment, etc.

Cooperation with law enforcement agencies in a normal society is an honourable civic duty for a law-abiding citizen, and even more so for a representative of state authorities and local self-government, as the person contributes to the performance of the state law enforcement function in the interests of society. Essentially, confidential cooperation provides an opportunity for citizens to join the cleansing of the authorities from corruption. However, in

modern Ukrainian society, the attitude to the institution of confidential cooperation is ambiguous.

The argument of K.M. Olshevsky & V.V. Dirman is worth consideration, as they cite E. Vydok & I. Karpets, regarding the thesis that one of the reasons for the negative perception of the confidential cooperation institution by individuals is not the best example of its application in the Soviet era when the information received from confidants was sometimes used in the criminal interests of the authorities [8].

It is also worth emphasising the high efficiency and public benefit of the use of covert cooperation with citizens by the criminal police, which solved the most complex crimes in the Soviet and post-Soviet years 1980-2000 and were able to restrain organised crime and banditry. Without the help of conscious citizens, this would hardly have been possible.

In this regard, it is important to note that the National Bureau is outside politics and is independent of politicians, representatives of state authorities and local self-government, legislative, executive and judicial branches of power, law enforcement agencies and is controlled and accountable to the public (Article 3 of the Law "On NABU" [13]. The National Bureau has a single goal – to eradicate corruption from Ukraine, as it is an attribute of dishonest government officials, to whom the National Bureau is in opposition.

The composition of relations arising from confidential cooperation: their subjects, object and content. Confidential cooperation, like any legal relationship, has subjects (parties), objects and content. The subjects of confidential cooperation, that is, the parties between which these legal relations arise, on the one hand, are authorised to conduct a pre-trial investigation and operational search activities.

Such persons are investigators of pre-trial investigation bodies; operational employees of operational units; detectives (combining the powers of an investigator and an operational employee); heads of operational units and pre-trial investigation bodies that have rights in relation to operational employees and investigators. On the other hand, the subject of confidential cooperation (confidant) is a natural person with legal capacity, that is, a person who has reached the age of majority (eighteen years) and has not been declared incapacitated or partially incapacitated by a court.

At the same time, not every natural person with legal capacity can be a confidant. A confidant can only be a person who, by his/her business, professional, moral qualities, skills, abilities and knowledge, is able to perform the assigned tasks and keep secret the fact of involvement in confidential cooperation, possesses or has access to information of operational interest.

A person whose professional activity is related to the preservation of professional secrets, namely: a lawyer, notary, medical worker, clergyman, or journalist, if such cooperation will be associated with the disclosure of confidential information of a professional nature, cannot be a confidant. It is important to consider the role of the prosecutor in the functioning of the institute of confidential cooperation, given that the legislator in Art. 272 of the CPC of Ukraine [7] granted, in particular, the prosecutor the right to decide on the conduct of such a type of covert investigative (search) action (operational search measure) as a special task to disclose the criminal activities of an organised group or criminal organization that is directly related to confidential cooperation. Such a decision is made in the form of a resolution with the confidentiality of reliable information about the person.

According to the CPC of Ukraine [6], the Laws of Ukraine "On Prosecutor's Office" [15] and "On Investigative Procedure" [12], the prosecutor is not authorised to establish or maintain confidential cooperation. Furthermore, in accordance with Part 4 of Article 14 of the Law "On Intelligence" [14], information about persons who confidentially cooperate or have cooperated with the intelligence agency of Ukraine, the affiliation of specific persons to the personnel of intelligence agencies, along with forms, methods and means of intelligence activities and the organisational and staffing structure of intelligence agencies are not subject to prosecutorial supervision. At the same time, it is necessary to emphasise the mistake made by the legislator, since it is obvious that the legislator in this article probably meant, in particular, operational units and counter-intelligence agencies of Ukraine.

A prosecutor who is not authorised to identify, study and engage candidates for a special task, and then develop a plan and directly introduce a person into the criminal environment, maintain appropriate confidential relations with them, ensure their safety and perform other related actions, in practice, will not be in a position to make an appropriate reasoned and motivated decision. If such a decision is made, the resolution will have the force of a permit and instructions for the pre-trial investigation body or operational unit to conduct such a covert investigative (detective) action (operational search operation).

In any case, the above shows that the prosecutor has the right only to authorise the relevant actions of authorised employees of operational units and pre-trial investigation bodies. However, this does not indicate the acquisition of legal personality by the prosecutor, that is, the ability (capacity) to

be a party to legal relations of confidential cooperation, primarily due to the lack of legal capacity, that is, the ability (capacity) to have subjective rights and perform subjective legal duties [16]. Consequently, the prosecutor is not a subject of confidential cooperation relations.

Determination of the object of legal relations is important for understanding the essence of the relationship, concerning what and for which purpose they arise between the parties. By definition, the object of legal relations is tangible or intangible goods, for the receipt, transfer or use of which the rights and obligations of the parties to legal relations arise. The objects of legal relations are specific and individualised, they are associated with the rights and obligations of the subjects of legal relations, the ability to use and dispose of anything and allow to claim certain actions of other persons [11]. Given the above, in the context of law enforcement activities, the object of legal relations of confidential cooperation is for the law enforcement agency to receive assistance from the confidant (in the form of providing information, taking certain actions, and making decisions) in the performance of tasks of prevention, detection, termination, investigation and disclosure of criminal offences, as well as prevention of new ones.

The content of legal relations of confidential cooperation consists of the powers, rights, obligations, responsibilities and guarantees of the subjects of these relations.

The employees of the National Bureau who are authorised to carry out operational and investigative activities and pre-trial investigations, in particular detectives and senior detectives of detective units, internal control, employees of the operational and technical unit and covert staff members, have the authority to carry out confidential cooperation in the National Bureau (part 4 of Article 5, part 1 of Article 10 of the Law "On NABU") [13].

The Director of the National Bureau has certain control and authorisation powers related to confidential cooperation, in particular the following: control over the legality of the operational and investigative measures carried out by the National Bureau, pre-trial investigation, observance of the rights and freedoms of persons, and granting permission to use the resources of the fund of special operational and investigative activities of the National Bureau (clause 1, clause 16 of part 1 of Article 8 of the Law "On NABU" [13]. Unlike the prosecutor, since the Director is an employee of the National Bureau, although not an investigator or operational officer, he, according to clause 7 of part 1 of Article 16, clause 12 of part 1 of Article 17 of the Law "On NABU" [13], is authorised to

confidentially cooperate on an equal footing with other authorised employees of the National Bureau.

A detailed list of authorised structural units and employees of the National Bureau, their rights, duties and responsibilities are defined in departmental acts of the National Bureau, which are documents with restricted access.

The authorised employees of the National Bureau have the following powers: to engage individuals in confidential cooperation and maintain appropriate relations with them in order to perform the tasks assigned to the National Bureau; to give confidential instructions and tasks; to receive the results of their implementation; to encourage confidentials morally and financially; to terminate confidential cooperation. They have the right to use the information received: as grounds and reasons for conducting operational and investigative activities (Article 6 of the Law "On OA") [12]; as reasons and grounds for initiating a pre-trial investigation; to obtain factual data that may be evidence in criminal proceedings; to prevent, detect, suppress and investigate criminal offences, search for persons who have committed a criminal offence; to ensure the safety of court officials, law enforcement agencies and persons involved in criminal proceedings (including confidants), their families and close relatives (Article 10 of the Law "On Investigative Procedure") [12]. According to the provisions of Article 275 of the Criminal Procedure Code of Ukraine [6], authorised employees of the National Bureau have the right to use information obtained as a result of confidential cooperation with other persons during covert investigative (detective) actions (operational search activities), or to involve these persons in conducting covert investigative (detective) actions (operational search activities) in cases provided for by this Code, as well as to involve confidants in the performance of a special task to prevent or detect criminal activities of organized crime.

Authorised employees of the National Bureau are obliged to carry out confidential cooperation only for the purpose of fulfilling the tasks assigned to the National Bureau, to respect the honour and dignity of the confidant, adhere to the principle of voluntariness in relations with the confidant; not to disclose the true identity of the confidant, the fact, purpose, results and other details of such cooperation; in cases provided for by law and at the request of the confidant, conclude an appropriate agreement with them; to independently comply with the rules, measures and apply means of conspiracy; to instruct and train the confidant of these rules and measures, and the methods and means of receiving and transmitting information; to instruct the confidant on the limits of permitted actions, behaviour and decisions,

as well as to prevent the commission of crimes, compromising, illegal and provocative actions; to explain to the confidant their rights and obligations, to warn of responsibility; in case of relevant threats, to ensure the safety of the confidant, his family members and close relatives and their property.

Authorised employees of the National Bureau bear criminal responsibility for disclosure of pre-trial investigation data, operational and investigative activities, in particular, confidential cooperation (Article 387 of the Criminal Code of Ukraine); state secrets (Article 328 of the Criminal Code of Ukraine); disclosure of information on security measures in respect of a person taken under protection (Article 381 of the Criminal Code of Ukraine); for failure to make a decision, untimely adoption or adoption of insufficiently substantiated decisions, and failure to take, untimely adoption of sufficient measures for security (Article 380 of the Criminal Code of Ukraine); and the responsibility for giving an unmistakably criminal order, task, instruction; arbitrary and unlawful violation of constitutional human rights and freedoms, causing damage to these rights and freedoms [17].

Confidants have corresponding rights: to respect for honour and dignity, to give voluntary consent to confidential cooperation or to refuse it; to terminate such relations; to conclude a corresponding written agreement; to receive sufficient information about their rights, obligations and legal responsibility for their actions and decisions, about the limits of permitted behaviour, actions and decisions, about the rules, measures and means of secrecy, about the existing risks and dangers, about behaviour, actions, decisions that should be refrained from; to refuse to execute an obviously criminal order, assignment, task; to compensation for expenses incurred in connection with the performance of tasks; to remuneration; to social and legal guarantees; to ensure their safety, the safety of close relatives and family members and their property.

Confidants are obliged not to disclose information about the fact, results and other details of confidential cooperation; conscientiously and professionally carry out instructions, instructions, assignments, and tasks of the authorised employee; during their implementation not to violate the rights and freedoms of third parties; comply with the rules and measures of secrecy, use appropriate means; not to go beyond the limits of behaviour, actions and decisions allowed by the authorized employee; not to commit crimes, illegal and provocative actions; keep confidential the information obtained as a result of confidential cooperation and communicate it only to a specific authorised employee; observe appropriate security measures.

Confidants are criminally liable for disclosure of information constituting a state secret (Article 328 of the Criminal Code of Ukraine); data of pre-trial investigation, operational and investigative activities, including confidential cooperation (Article 387 of the Criminal Code of Ukraine); disclosure of information about security measures in relation to a person taken under protection (Article 381 of the Criminal Code of Ukraine) [17]; material liability for unjustified loss of property issued for security, secrecy and performance of the task.

Guarantees of persons involved in confidential cooperation cover legal (juridical), social and guarantees of personal safety of the confidant, their family members and close relatives, as well as their property.

According to the provisions of Art. 13 of the Law "On the OIA" [10], social and legal protection of persons involved in the performance of tasks of operational and investigative activity provides that such persons are under the protection of the state; cooperation of persons with the operational unit is accounted in their total record of service in case of entering into an employment contract with them, and if in connection with the performance of such person's tasks of operational and investigative activity his disability or death occurred, he is entitled to the benefits provided in such cases for employees of operational and investigative activity. In the event of a threat to life, health or property of a person involved in the performance of tasks of operational and investigative activity, his/her protection shall be ensured in the manner prescribed by part three of Article 12 of this Law. Consequently, the state actually equates the rights and guarantees of their compliance with employees of operational units and persons who cooperate with them.

At the same time, the issue of applying these guarantees to confidants who cooperate with the pre-trial investigation body to perform the tasks of criminal proceedings is controversial, since Article 13 of the Law "On the OIA" [10] specifies confidants who are involved in the performance of tasks of operational and investigative activities. This is a clear disadvantage and a gap in the regulation of the legal status and guarantees of confidants.

The norms of the Law of Ukraine "On Ensuring the Security of Persons Participating in Criminal Proceedings" enforce the state security guarantees for persons who have reported a criminal offence to a law enforcement agency or otherwise participated or contributed to the detection, prevention, suppression or disclosure of criminal offences (effectively confidants), whistleblowers, victims, witnesses and others (Article 2) [18].

This Law defines the bodies authorised to make decisions on security measures and ensure their implementation (in particular, a special unit of the National Bureau) (Article 3); the rights and obligations of persons under protection (Article 5); the rights and obligations of bodies providing security (Article 6); types of security measures (Articles 7-19); the process of application and cancellation of security measures (Articles 20-23); liability for failure to fulfil the obligations established by this Law (Articles 24-26); financing and logistical support of security measures (Articles 27-28).

A special mention should be made of the security measures envisaged by this Law that can be applied to confidants: personal protection, protection of housing and property; issuance of special personal protective equipment and warning of danger; application of technical means of control and tapping of telephone and other communications, visual surveillance; replacement of documents and change of appearance; change of place of work or study; relocation to another place of residence; placement in a pre-school educational institution or institution of social protection bodies; ensuring the confidentiality of information about the person; closed trial.

Considering the nature and degree of danger to the life, health, housing and property of persons taken under protection, other security measures may be taken.

For military personnel and persons who are being held in custody, additional measures are applied due to the relevant factors.

An important legal guarantee for the protection of the rights of confidants who perform a special task to prevent or disclose the criminal activities of an organised group or criminal organisation is that, according to Art. 43 of the Criminal Code of Ukraine [17], it is not a criminal offence to cause forced harm to the law-protected interests of a person who, in accordance with the law, performed a special task, participating in an organised group or criminal organisation to prevent or disclose their criminal activities. Such a person shall be liable only for committing, as part of an organised group or criminal organisation, a particularly serious crime committed intentionally and combined with violence against the victim, or a serious crime committed intentionally and associated with causing grievous bodily harm to the victim or other grave or especially grave consequences. And even in this case, such a person cannot be sentenced to life imprisonment, and the penalty in the form of imprisonment cannot be imposed on him for a term greater than half of the maximum term of imprisonment provided for by law for this crime. In turn, in accordance with paragraph 9 of Part 1 of Article 66

of the Criminal Code of Ukraine [17], the execution of a special task to prevent or disclose the criminal activity of an organised group or criminal organisation, combined with the commission of a criminal offence in cases provided for by this Code, is recognised as a circumstance mitigating the punishment.

This legal guarantee of protection of persons who cooperate with the investigation on a confidential basis is also enshrined in Part 2 of Article 14 of the Law of Ukraine "On Organizational and Legal Framework for Combating Organized Crime", according to which a member of an organized criminal group may be partially or fully exempted from criminal liability and punishment in cases provided for by the Criminal Code of Ukraine, if in the process of operational and investigative activities, pre-trial investigation or judicial proceedings the member contributes to the exposure of organized criminal groups and criminal offences committed by them, bringing the perpetrators to justice, compensation for damage to individuals or legal entities or the state [19].

The procedure for mitigation of liability for such crimes is defined by Chapter 35 of the CPC of Ukraine (Criminal proceedings on the basis of agreements) [7].

In the science of operational and investigative law, primarily in the circles of scientists and practitioners, it is commonly believed that public disclosure of covert activities of law enforcement agencies harms the effectiveness of counteracting socially dangerous acts of individuals and groups of individuals. However, this approach is justified if it concerns the disclosure of forms and methods of work of law enforcement agencies and other information that may pose a threat to the effectiveness of the state's response to criminal encroachments and the safety of relevant law enforcement officers and persons cooperating with them.

Otherwise, excessive "secrecy" of established, stable, socially useful relations that law enforcement agencies have long maintained with citizens leads to insufficient legal regulation and poses a real danger of violation of constitutional rights and freedoms of man and citizen.

In this regard, the scientific study proved that the covert activities of law enforcement agencies related to confidential cooperation and the relevant legal relations can be investigated, and the findings of the study published in a publicly available source while not revealing state secrets, forms and methods of work. Therefore, such activities and legal relations can and should be regulated by law.

In this study confidential cooperation is systematically considered in open sources as a separate legal institution and a type of legal relationship for the first time; the conceptual and categorical apparatus,

principles, subjects, object and content are defined, in particular, the rights, duties, responsibilities and guarantees of both authorised employees and confidants are studied in detail. For the first time the issue of the functioning of the institution of confidential cooperation in the National Bureau, which has certain features and differences in comparison with other law enforcement agencies, was studied. The results of the study can be used for further elaboration on the topic, raising awareness of practitioners, the legal community and the public on this issue, and in rule-making.

■ Conclusions

The institution of confidential cooperation is an interdisciplinary procedural and legal institution. This institution regulates the covert activities of law enforcement agencies related to the involvement of individuals by authorised employees of these agencies to cooperate to fulfil the tasks of operational and investigative activities and criminal proceedings, and the relevant legal relations arising in this regard. Such activities are associated with the risk of restriction and violation of constitutional human rights and freedoms and the interests of legal entities and create a danger to the life, health and property of law enforcement officers and persons involved in cooperation. Therefore, this legal institution should be regulated in detail at the legislative level.

However, the legal framework for this institution is insufficient, and the existing legal norms are

scattered in a number of legislative acts that have different subjects of legal regulation. Therefore, there is a necessity to regulate the legal relations of confidential cooperation in one legislative act – the Law of Ukraine “On Operational and Investigative Activity”.

The new version of the Law of Ukraine “On Operational and Investigative Activity” should enshrine the basic concepts, principles, subjects and content of legal relations of confidential cooperation.

Particular attention should be paid to the issue of regulatory support of guarantees for the protection of life, health and property of confidants, their legal and social protection, in particular labour rights and the right to free legal aid. During the development of the relevant draft laws, it is necessary to eliminate the existing gaps, in particular, to provide appropriate guarantees for confidants involved and cooperating with operational units, with the investigation and the court at the stages of operational and investigative activities, criminal and judicial proceedings, and also after their completion. It is also necessary to eliminate the competition of norms governing the legal institutions of confidential cooperation and whistle-blowers if a person acquires both statuses at the same time.

Legislative regulation of the institution of confidential cooperation within the outlined limits regulates and therefore increases the effectiveness of covert activities of law enforcement agencies, without disclosing the forms and methods of such activities.

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Характеристика правового інституту та правовідносин конфіденційного співробітництва

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■ **Анотація.** Конфіденційне співробітництво є окремим міжгалузевим правовим інститутом й окремим видом процесуально-правових відносин між уповноваженими працівниками органів державної влади та фізичними особами, які з ними співпрацюють. Відповідно до ст. 19 Конституції України, такі відносини та діяльність цих органів повинні бути врегульовані законами України. Однак інститут конфіденційного співробітництва в законодавстві недостатньо унормований, немає визначення основних понять, а наявні норми права містяться в різних законах і лише фрагментарно регулюють відповідні правовідносини, що ускладнює їх розуміння, дослідження та використання. Метою статті є загальноправовий аналіз інституту конфіденційного співробітництва та відповідних правовідносин; визначення його понять, принципів, суб'єктів, об'єкта й змісту в контексті діяльності Національного антикорупційного бюро України. Під час написання статті застосовано загальнонаукові методи: системного аналізу, аналогії та порівняння; загальноправові методи: порівняльно-правовий, формально-юридичний, логіко-юридичний. Проаналізовано стан наукового дослідження та чинне законодавство України, яке регулює відповідні правовідносини, здійснено порівняння його окремих норм. Визначено основні юридичні терміни з досліджуваної тематики. Здійснено системний аналіз правового інституту та правовідносин конфіденційного співробітництва як із суто доктринальної позиції, так і на прикладі діяльності правоохоронного органу. З'ясовано окремі ознаки та характеристики відповідних інституту й відносин. Результати дослідження узагальнено, конкретизовано та викладено у формі тверджень та висновків, тому їх можна використовувати і в інших наукових дослідженнях, вони мають як наукову, так і практичну цінність. Наукова новизна дослідження полягає в тому, що у відкритих джерелах конфіденційне співробітництво вперше системно розглянуто як окремий правовий інститут і вид правовідносин; визначено понятійно-категоріальний апарат, принципи, суб'єкти, об'єкт та зміст, зокрема детально досліджено права, обов'язки, відповідальність і гарантії як уповноважених працівників, так і конфідентів. Уперше досліджено питання функціонування інституту конфіденційного співробітництва в Національному бюро, яке має певні особливості й відмінності, порівняно з іншими правоохоронними органами. Результати дослідження може бути використано також з метою підвищення рівня обізнаності практичних працівників, юридичної спільноти й населення з окресленого питання, а також у нормотворчості. Інститут конфіденційного співробітництва має бути детально законодавчо врегульований, оскільки він пов'язаний із правоохоронною діяльністю державних органів і ризиком порушення конституційних прав й інтересів людини. Унормування правового інституту та правовідносин не становить загрозу розкриття форм і методів проведення оперативно-розшукової, розвідувальної та контррозвідувальної діяльності, водночас надає правової визначеності, а також гарантує дотримання державою принципів законності, верховенства права, дотримання прав і свобод людини. Загалом відповідні правовідносини мають бути врегульовані в межах оперативно-розшукового права та закріплені в одному законодавчому акті – Законі України “Про оперативно-розшукову діяльність”, у якому повинні бути визначені основні поняття, суб'єкти та їхні права, обов'язки, відповідальність і гарантії. Також слід усунути колізії з іншими нормами права, зокрема тими, які регулюють інститут викривачів

■ **Ключові слова:** конфіденційне співробітництво; негласне співробітництво; конфідент; викривач; корупція; Covert Human Intelligence Sources (CHIS); Confidential Informant (CI)