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## Legal basis of confidential cooperation in the National Anti-Corruption Bureau of Ukraine

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■ **Abstract.** The relevance of this study is conditioned upon the fact that special legislation regulating investigative operations, combating organized crime, ensuring the security of people cooperating with law enforcement agencies, adopted in 1992–1994, does not meet the conditions of modern life (liberalization and digitalization of society; changes in the banking and financial sector; ease of crossing borders, etc.), and the challenges facing the law enforcement system (transnational crime; development of technologies that complicate the technical removal of information; use of cryptocurrencies and quasi-money, etc.). The main disadvantage of this legislation is the lack of regulation of confidential cooperation as the main tool for combating crime. The purpose of this study was to investigate the state of legal support for confidential cooperation using evidence from the activities of the National Anti-Corruption Bureau of Ukraine; to identify gaps, contradictions, and conflicts; to identify ways to improve legislation. General scientific, logical, and general legal methods were used. The paper analysed the state of scientific research on the subject under study, systematized the current legislation of Ukraine, and compared its individual norms. The main study results are that the legal basis of confidential cooperation is considered for the first time as a system of legal norms of an intersectoral legal institution, not limited exclusively to the procedural aspect or scope of application. The present study is the first to investigate the functioning of the institution of confidential cooperation in the National Anti-corruption Bureau of Ukraine. The paper stated that the absence of proper statutory regulation at the level of laws of Ukraine and the lack of systematization of existing norms, which creates risks of abuse, violation of citizens' rights and freedoms. It was noted that the gaps in the legislation are filled in by departmental regulations of the relevant law enforcement agencies with the appropriate classification of secrecy. The study covered the essence and purpose of confidential cooperation, the legal norms prescribed in various laws, the specifics of their application, the subject of their legal regulation, as well as analysed differences in the legal regulation of cooperation with confidants and whistle-blowers. The practical value of this study lies in the fact that its results can be used by practising lawyers, namely investigators, prosecutors, and barristers, for whom the institution of confidential cooperation is new considering the secret forms and methods of its functioning

■ **Keywords:** confidant; whistle-blower; informant; mentor; human intelligence

### ■ Introduction

Corruption has been one of the fundamental issues of Ukrainian society, despite Russia's full-scale war against Ukraine. Centralization and monopolization of power, censorship in the media, concealment of data on state funds and expenditures, secret and

non-competitive state purchases, reduction of financial control over representatives of state authorities and local self-government, etc. create a favourable environment for corruption. The same circumstances reduce the effectiveness of public methods of work of law enforcement agencies, including the National Anti-Corruption Bureau of Ukraine, in combating corruption, which is already hidden (latent) in nature. In this regard, more attention should be paid to covert methods, the main of which is the undercover method or human Intelligence, which in law enforcement activities is usually called confidential cooperation.

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Confidential cooperation is a relationship that is established and maintained by employees authorized to carry out investigative operations and/or pre-trial investigation (mentors or handlers) with physically capable individuals (confidants) to assist these individuals in the performance of the tasks assigned to them by these bodies, on a paid or free basis and based on confidentiality and voluntariness (Kateryniuk, 2021).

The definition of the terms “confidant” and “confidential cooperation” in the legislative acts of foreign countries is similar. The author of this study examines the UK practices in regulating confidential cooperation. According to § 26 (8) of the UK Regulation of Investigatory Powers Act 2000<sup>1</sup> “a person is a confidant (covert human intelligence source, CHIS) if: a) they establish or maintain a personal or other relationship with a person for the covert purpose of facilitating the doing of anything falling within paragraph (b) or (c) b) they covertly use such a relationship to obtain information or to provide access to any information to another person; or c) they covertly disclose information obtained by the use of such a relationship, or as a consequence of the existence of such a relationship”. (Kateryniuk, 2021).

Section 29(5a) of the UK Regulation of Investigatory Powers Act of 2000<sup>2</sup> implicitly defines a handler as an officer who is given dual responsibility by the police service for managing the day-to-day activities of CHIS (sources) and for CHIS’s security and welfare (Henry, 2022).

The principal issue, according to the author, which both scientists and practitioners face when investigating the legal basis of confidential cooperation is the lack of systematization of legislation regulating confidential cooperation. There is no special law that would govern these legal relations. None of the regulations defines the concept of confidential cooperation, subjects, and content of legal relations. Separate legal norms are found in the Law of Ukraine “On Investigative Operations”<sup>3</sup> and in the Criminal Procedural Code of Ukraine<sup>4</sup>, but in most cases, during scientific research and in law enforcement activities, scientists are forced to resort to the analogy of right and the analogy of law, which regulate cooperation and ensuring the security of individuals assisting in the detection, prevention, investigation, and solution of crimes.

The importance and universality of the tool of cooperation between law enforcement officers and citizens in the fight against crime is also confirmed by international practices, namely the practices of Western European countries, the United States of America,

and Canada, which were investigated by D.I. Nykyforchuk, V.V. Matviichuk and A.V. Savchenko (2004), as well as Ye.Ye. Hrechyn and I.I. Musiienko (2015). The main differences are related to the approach to legal support of confidential cooperation (in laws, sub-legislative acts, codes of practice); subjects authorized for confidential cooperation; persons with whom it is allowed to establish relevant relations; the limits of such cooperation; the procedure for registration of involving a person in cooperation, as well as the use of its results. The study and use of international practices began in the 2000s and continues today.

Foreign practices indicate that the cooperation of law enforcement officers with citizens is the most effective source of information in the fight against crime. For instance, in France, Spain, Germany, the United Kingdom, and the United States of America, over 85-90% of serious crimes are solved through cooperation with the population (Kozachenko, 2018). In addition, O.I. Kozachenko (2018), comparing the international and national practices of legal regulation of ensuring the security of confidants and confidential cooperation in general, gives arguments for the effectiveness of the institution of confidential cooperation in countering crime and connects it with the ability of states to really provide a prominent level of legal, social, and physical protection of confidants.

To develop a model of legislative regulation of confidential cooperation, which is the purpose of this study, it was necessary to analyse the current state of legal support, identify gaps, conflicts, and contradictions, investigate analogous studies, as well as consider the international practices of rationing this type of activity of law enforcement agencies.

## ■ Literature Review

The Ukrainian practices of using citizens’ assistance in the fight against crime indicate that despite significant achievements in science, the rapid development of information technologies, this type of activity is still the main means of preventing and detecting crimes, and in some cases – their investigation (Gribov & Kozachenko, 2019). M.L. Hribov and O.I. Kozachenko (2019) reveal some “secrets of success” of using confidential cooperation in developed Western democracies, which consist in the wide opportunities of authorized bodies to motivate people to cooperate, including those from the criminal environment, as well as in real opportunities to ensure their security. Furthermore, the said researchers investigate the approaches to the legal support of confidential cooper-

<sup>1</sup>Regulation of Investigatory Powers Act. (2000). Retrieved from <https://www.legislation.gov.uk/ukpga/2000/23/contents>.

<sup>2</sup>Ibidem, (2000).

<sup>3</sup>Law of Ukraine No. 2135-XII “On Investigative Operations”. (1992, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2135-12#Text>.

<sup>4</sup>Criminal Procedural Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

ation, specifically at the level of laws and departmental regulations. The researchers propose to regulate the rights, obligations, and legal guarantees of confidants at the legislative level, including those related to exemption from criminal liability and punishment.

K.V. Antonov also addressed the issues of statutory regulation of the use of confidential cooperation (Antonov, 2020). Antonov continued the discussion between practitioners and scientists about the expediency of authorizing confidential cooperation between an investigator who does not have an unspoken apparatus, since this is not one of the priorities of their activities. The researcher notes that criminal procedural activities are generally public, and issues of prevention, detection, and solving of crimes are included in the subject of investigative operations, which are covert.

V.M. Davydiuk investigated the issue of the legal grounds for ensuring the security of confidential cooperation. Davydiuk emphasizes that the risks taken by the confidant can be considered justified only if safety measures are observed, reliable regulatory provision of relevant guarantees and proper organization of operational and investigative measures, covert investigative (detective) operations and various combinations (Davydiuk, 2019).

In addition, the scientific community does not stop discussing the place and role of confidential cooperation in criminal proceedings. The position expressed by, among others, D.B. Serheieva, prevails, who does not include confidential cooperation in the list of separate covert investigative (detective) operations, but considers it as a security measure for their implementation (Serheieva, 2016).

This discussion is also supported by D.V. Talalai and S.M. Saltykov, who generally agree with D.B. Serheieva. However, these researchers provide arguments in favour of a certain similarity of confidential cooperation, if not with covert investigative (detective) operations, then with investigative and procedural actions. They address the common ultimate purpose – the search and recording of evidence, as well as the main difference – the lack of regulation of the procedural consolidation of the course and results of confidential cooperation (Saltykov and Talalay, 2020).

Continuing the research on the topic of procedural aspects of confidential cooperation, it must be noted that during the use of this institution within the framework of the criminal procedure, sufficient empirical material was developed, which was analysed by N.V. Nelevda, who investigated the issue of forms of registration of confidential cooperation (Nelevda, 2021). The author concluded that the current legislation does not clearly define the agreement on confidential cooperation, its terms and conditions, and procedure for execution.

The same subject was covered by Ya.O. Talyzina, who focused on the features of the procedural execution of involving a person in confidential cooperation

in criminal proceedings (Talyzina, 2020). Talyzina concluded that from a criminal-procedural standpoint, confidential cooperation is formalized by the written consent of the confidant, the resolution of the investigator on the involvement of the confidant in confidential cooperation, and the protocol/memorandum, which clarifies the rights, duties, and responsibilities of the confidant.

These publications indicate that most researchers investigate certain theoretical and practical aspects of confidential cooperation, while there are no scientific studies in the public domain that accumulate and systematize the norms of national legislation on confidential cooperation and the involvement of citizens in the detection, prevention, investigation, and solving of crimes. This is precisely the gap that the present paper intends to fill.

Among other things, a special feature of scientific research abroad is that confidential cooperation is also actively investigated as a tool for interaction of law enforcement officers with detainees, prisoners, prisoners, etc. As an example, we should cite the binary classification of informants proposed by S.M. Kleinman (2006), according to which the assigned source shares the purpose of his or her supervisor and maintains a cooperative relationship with them, while the detainee is more likely to perceive their interrogator as an enemy and will often try to withhold known information. In terms of the physical environment, S.M. Kleinman notes that the source being interviewed voluntarily communicates with their supervisor and can leave at any time. However, the detained source is in a detention centre, and their physical condition is under the control of the investigator. Thus, a secret source can be considered to exist in one of four possible categories (combinations) depending on the physical situation: prisoner or not, and access to information: active (actively received information, according to the given instruction) or passive (passively received target information without expecting that it will later have to be disclosed to the investigator).

The unipolarity of the study of confidential cooperation in the context of interaction with detainees, prisoners, and captives has led to a lack of research-to-practice studies on the use of confidential cooperation in criminal intelligence and criminal justice, which prompts scientists to actively fill these gaps (Moffett, 2022).

A common feature of Ukrainian and foreign studies is that they are primarily related to practical aspects of confidential cooperation. One of them is high-quality training of practitioners. Along with the special value of the information obtained from the informant, Pamela Henry, Nikki Rajakaruna, Charl Crous and John Buckley (2020) note the risks of confidential cooperation, which may consist of social and personal harm to a person if their identity becomes known; the risk for the authorized employee

(handler) regarding manipulation, misconduct/corruption, and personal safety; and the risk to the public body of organizational corruption and legal/regulatory responsibility to ensure the security of the confidant and handler.

Clive Harfield draws attention to the same risks. In his studies, he investigates legal regulation (2009), organization and management (2010), moral principles of confidential cooperation (2012), and also distinguishes such types of confidants as informants and infiltrated confidants (2009). On the one hand, confidants infiltrated into the criminal environment are the most valuable, and on the other hand, they carry the greatest risks both for the authorized person (handler) who cooperates with them and for the state body. Clive Harfield emphasizes that confidential cooperation relations should not only be sufficiently regulated at the legislative level, but also comply with moral and ethical principles, so that society trusts the activities of the relevant law enforcement agencies (2012). According to Harfield, confidential cooperation is most fully and consistently investigated.

## ■ Materials and Methods

During the preparation of this paper, several general scientific and general logical methods were used: description, analogy and comparison, analysis and synthesis, systematization; as well as general legal methods: logical legal, formal legal, and comparative legal.

During the study, the norms of the current legislation regulating investigative operations, confidential cooperation, and protection of individuals who assist law enforcement agencies in detecting, preventing, investigating, and solving crimes were described and compared; both differences and identical approaches to the statutory regulation of these relations were established. Using the analogy method, the authors of this study selected legal norms that are not included in the system of norms of special legislation but can be applied to regulate confidential cooperation relations.

The main methods used in this study were methods of analysis and synthesis, which consisted, respectively, in separating legislative acts into separate legal

norms to investigate them and combine them into a single whole. To combine the norms of law into a logical structure, the systematization method was used.

The use of the comparative legal method consisted in comparing different legal institutions and categories both within the framework of Ukrainian legislation, and considering the UK practices in regulating confidential cooperation, to determine their differences and common features. The formal legal method was used to cognize particular legal institutions, legal norms, establish their meaning, define concepts and terminology, classify and interpret individual legal norms, determine the structure and construction of individual legal norms and regulations. The logical legal method was used to explain the subject of legal regulation of individual legal norms and legislative acts, systematize and classify legal norms, and combine them into a single logical structure. Using this method, gaps were identified, the practices of overcoming them were investigated, and proposals for improving Ukrainian legislation were proposed.

In the preparation of this paper, the provisions of the following regulations were used: -the Constitution of Ukraine<sup>1</sup>; Convention on the Protection of Human Rights and Fundamental Freedoms<sup>2</sup>; Criminal Procedural Code of Ukraine<sup>3</sup>; Criminal Code of Ukraine<sup>4</sup>, Laws of Ukraine “On Investigative Operations”<sup>5</sup>; “On the National Anti-Corruption Bureau of Ukraine”<sup>6</sup>; “On the Legal Principles of Combating Organized Crime”<sup>7</sup>; “On Ensuring the Safety of Individuals Involved in Criminal Proceedings”<sup>8</sup>; “On Prevention of Corruption”<sup>9</sup>; sub-legislative acts and departmental regulations, draft regulations. This study also covered modern scientific sources with the results of research on legal regulation, usage practices and features of registration of confidential cooperation both in Ukraine and abroad.

## ■ Results and Discussion

The legal basis of confidential cooperation before the development of the Criminal Procedural Code of Ukraine<sup>10</sup> in the 2012 edition was mostly investigated separately as part of investigative operations.

<sup>1</sup>Constitution of Ukraine: Law of Ukraine No. 254k/96-BP. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254k/96-bp#Text>.

<sup>2</sup>Convention of the Council of Europe. (1950, November). Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_004#Text](https://zakon.rada.gov.ua/laws/show/995_004#Text).

<sup>3</sup>Criminal Procedural Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

<sup>4</sup>Criminal Code of Ukraine No. 2341-III. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

<sup>5</sup>Law of Ukraine No. 2135-XII “On Investigative Operations”. (1992, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2135-12#Text>.

<sup>6</sup>Law of Ukraine No. 1698-VII “On the National Anti-Corruption Bureau of Ukraine”. (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1698-18#Text>.

<sup>7</sup>Law of Ukraine No. 3341-XII “On the Legal Foundations of Combating Organized Crime”. (1993, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/3341-12#Text>.

<sup>8</sup>Law of Ukraine No. 3782-XII “On Ensuring the Safety of Persons Participating in Criminal Proceedings”. (1993, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/3782-12#Text>.

<sup>9</sup>Law of Ukraine No. 1700-VII “On Prevention of Corruption”. (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1700-18#Text>.

<sup>10</sup>Criminal Procedural Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

However, since its adoption and in connection with the inclusion in its text of “Chapter 21. Covert investigative (detective) operations”, where the investigators were first given the right to use confidential cooperation, this type of activity has also been considered as part of criminal procedural activity. Confidential cooperation is also investigated as a type of activity of individual law enforcement agencies. This can be explained by the fact that the lack of proper legislative support leads to a different understanding of the essence, role, and place of the institution of confidential cooperation in the legal system, and in this regard to different approaches to its research. Insufficient attention has also been paid to the general legal principles of confidential cooperation.

In terms of the state of scientific development of the topic concerning the use of confidential cooperation in pre-trial investigation, the results of research by O.O. Podobnyi & R.O. Belskyi (2021) should be noted, which state that so far in criminal procedural and forensic studies, the main ways of solving modern issues of the institution of covert investigative (detective) operations have been proposed at the level of doctoral theses and a fairly large number of individual scientific publications. The researchers continue that these studies did not reveal the main problematic aspects of the current theoretical and practical use of confidential cooperation in pre-trial investigations.

Thus, the proposed study is designed to cover not only the theoretical aspects of confidential cooperation, but also the possibility of using legal tools in practice.

The principle of confidentiality and the importance of keeping the informant’s personal data secret at the same level as the legal guarantees of a confidant for committing crimes during the performance of a special task to prevent or disclose the criminally illegal activities of an organized group or criminal organization, i.e., under control and undercover, are important elements of the institution of confidential cooperation, which are investigated by American and European scientists, as noted by J.E. Ross (2008) in his comparative study.

These relations arise in connection with the law enforcement activities of state law enforcement agencies and are associated with the risk of violation of the constitutional rights and interests of confidants, authorized employees, persons in respect of whom confidential cooperation is carried out, and others.

Therefore, such activities of law enforcement agencies and the National Anti-Corruption Bureau of

Ukraine should be legally and statutorily regulated and have a proper legal basis.

Notably, numerous attempts to adopt the Laws of Ukraine “On Investigative Operations”<sup>1</sup> and “On Legal Bases of Combating Organized Crime”<sup>2</sup> in the new wording, which propose to regulate the institution of confidential cooperation, are currently failing. Therewith, in the strategy for Combating Organized Crime, approved by the Cabinet of Ministers of Ukraine by Order No. 1126-p dated 16.09.2020<sup>3</sup>, a special place is occupied by the issues of regulatory support for confidential cooperation, protection, and encouragement of confidants.

The study of regulatory support for confidential cooperation in the National Anti-Corruption Bureau of Ukraine (the National Bureau) should begin with finding out its place among the authorities, status, and tasks.

The status of the National Bureau is determined by Article 1 of the Law of Ukraine “On the National Anti-Corruption Bureau of Ukraine”<sup>4</sup> (the Law of Ukraine “On NABU”), according to which “the National Bureau is a central body of executive power with a special status, which is entrusted with warning, detection, termination, investigation, and solving of corruption offences falling within its jurisdiction, as well as prevention of new ones”. The main task is “combating corruption and other criminal offences committed by high-ranking officials authorized to perform the functions of the state or local self-government, which pose a threat to national security”.

This norm is important from a theoretical and practical standpoint, as it specifies the particular tasks facing the National Bureau, and for the performance of which the authorized employees of the National Bureau establish confidential cooperation with citizens.

Investigative operations are an independent and strategic type of activity of the National Bureau, which often precedes pre-trial investigation and continues after bringing a person to criminal responsibility and is also aimed at constantly creating opportunities to obtain, record, and implement operationally significant information for effective crime prevention.

After the beginning of the pre-trial investigation, the investigative operations of detectives of the National Bureau do not essentially stop, but continue in the form of conducting procedural, investigative and covert investigative (detective) operations, including in the form of confidential cooperation. Such activities of detectives of the National Bureau in the regulations of the National Bureau are called covert

<sup>1</sup>Draft Law No. 1229 “On Investigative Operations”. (2019, September). Retrieved from <https://itd.rada.gov.ua/billInfo/Bills/Card/946>.

<sup>2</sup>Draft Law No. 7043 “On Amendments to the Law of Ukraine on Legal Bases of Combating Organized Crime”. (2022, February). Retrieved from <https://itd.rada.gov.ua/billInfo/Bills/Card/38967>.

<sup>3</sup>Order of the Cabinet of Ministers of Ukraine No. 1126-p. “On Strategy for the Fight Against Organized Crime”. (2020, September). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

<sup>4</sup>Law of Ukraine No. 1698-VII “On the National Anti-Corruption Bureau of Ukraine”. (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1698-18#Text>.

activities, i.e., covert, not subject to disclosure. Thus, investigative operations and pre-trial investigation are inextricably linked, as they are carried out by detectives who are authorized to carry out both types of operations. Detectives carry out covert operations in compliance with the principles of conspiracy to obtain factual data about the illegal actions of individuals and groups (gathering evidence), as well as establishing other information essential for criminal proceedings. In this regard, confidential cooperation should be considered in an indissoluble connection with both investigative operations and pre-trial investigation.

According to Article 2 of the Law of Ukraine “On NABU”, the legal basis of the National Bureau’s activity is the Constitution of Ukraine, international treaties of Ukraine, this and other laws of Ukraine.

And according to the provisions of Article 3 of the Law of Ukraine “On Investigative Operations”<sup>1</sup> (the Law of Ukraine “On IO”), the legal basis of investigative operations is the Constitution of Ukraine, this Law, the Criminal and Criminal Procedural Codes of Ukraine, the Law of Ukraine “On NABU”, on ensuring the safety of persons involved in criminal proceedings, on state protection of court employees and law enforcement agencies and other laws of Ukraine.

Considering the above, the sources of law that form the legal basis of the institution of confidential cooperation in the National Bureau should be classified, considering their legal force, as follows:

- 1) The Constitution of Ukraine<sup>2</sup>;
- 2) Convention on the Protection of Human Rights and Fundamental Freedoms<sup>3</sup>;
- 3) Criminal Procedural Code of Ukraine<sup>4</sup> (the CPCU);
- 4) Criminal Code of Ukraine<sup>5</sup> (the CCU);
- 5) The Law of Ukraine “On Investigative Operations”<sup>6</sup>;
- 6) The Law of Ukraine “On National Anti-corruption Bureau of Ukraine”<sup>7</sup>;

7) Law of Ukraine “On Legal Bases for Combating Organized Crime”<sup>8</sup>;

8) Law of Ukraine “On Ensuring the Safety of Persons Involved in Criminal Proceedings”<sup>9</sup>;

9) Law of Ukraine “On Prevention of Corruption”<sup>10</sup>;

10) Instructions on the organization of covert investigative (detective) operations and the use of their results in criminal proceedings<sup>11</sup>;

11) Other sub-legislative and departmental regulations.

The present study investigates these sources of law alternately in an indissoluble connection with each other.

When conducting confidential cooperation, the employees of the National Bureau are primarily guided by the *norms of the Constitution of Ukraine*, namely: the fundamental principle according to which a human, their life and health, honour and dignity, inviolability and security are recognized as the highest social value in Ukraine, and their observance is the main duty of the state (*Article 3*); the principle of the rule of law (*Article 8*); the principle of freedom and the inadmissibility of coercion, which includes the inadmissibility of coercion to enter into a relationship of confidential cooperation in general and to perform certain tasks (which is also manifested in the right of the confidant to withdraw from the relationship of confidential cooperation unilaterally), as well as the duty of employees National Bureau to act only on the basis, within the limits of authority and according to the procedure prescribed by the Constitution and laws of Ukraine (*Article 19*); principles of equality and inviolability of human rights (*Article 21*). This also includes the provisions of *Articles 27-34, 55-57, 60*, which guarantee a human’s inalienable rights: to life; on respect for human dignity, which cannot be violated or limited; as well as freedom, personal integrity and housing integrity;

<sup>1</sup>Law of Ukraine No. 2135-XII “On Investigative Operations”. (1992, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2135-12#Text>.

<sup>2</sup>Constitution of Ukraine: Law of Ukraine No. 254k/96-BP. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254k/96-bp#Text>.

<sup>3</sup>Convention of the Council of Europe. (1950, November). Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_004#Text](https://zakon.rada.gov.ua/laws/show/995_004#Text).

<sup>4</sup>Criminal Procedural Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

<sup>5</sup>Criminal Code of Ukraine No. 2341-III. (2001, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/2341-14#Text>.

<sup>6</sup>Law of Ukraine No. 2135-XII “On Investigative Operations”. (1992, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2135-12#Text>.

<sup>7</sup>Law of Ukraine No. 1698-VII “On the National Anti-Corruption Bureau of Ukraine”. (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1698-18#Text>.

<sup>8</sup>Law of Ukraine No. 3341-XII “On the Legal Foundations of Combating Organized Crime”. (1993, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/3341-12#Text>.

<sup>9</sup>Law of Ukraine No. 3782-XII “On Ensuring the Safety of Persons Participating in Criminal Proceedings”. (1993, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/3782-12#Text>.

<sup>10</sup>Law of Ukraine No. 1700-VII “On Prevention of Corruption”. (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1700-18#Text>.

<sup>11</sup>Instructions on the organization of covert investigative (detective) operations and the use of their results in criminal proceedings, approved by the Order of the Prosecutor General’s Office of Ukraine, the Ministry of Internal Affairs of Ukraine, the Security Service of Ukraine, the Administration of the State Border Service of Ukraine, the Ministry of Finance of Ukraine, the Ministry of Justice of Ukraine No. 114/1042/516/1199/936/1687/5. (2012, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/v0114900-12/page#Text>.

prohibition of interference in family and personal life; for free movement and choice of place of residence; on freedom of thought and speech; on the secrecy of private communication, which can be violated and limited only in exceptional cases prescribed by the Constitution and Laws of Ukraine; for legal protection and compensation for damage caused by the state; the right to know one's rights and obligations, not to carry out an obviously criminal order.

These rules of law, which oblige authorized employees of the National Bureau to respect and not violate the constitutional rights and guarantees of a human and a citizen, apply not only to these employees, but also to confidants, and should be explained to them to prevent the excess of the performer and other offences, as well as to ensure legal guarantees for the security of the confidant themselves.

Comparable legal norms are prescribed in *Articles 2-14* of Chapter I of the **Convention on the Protection of Human Rights and Fundamental Freedoms**<sup>1</sup>.

In the context of the subject under study, attention should be paid to the fact that the principle of voluntary confidential cooperation comes from the guarantee against forced labour prescribed in Article 43 of the Constitution of Ukraine<sup>2</sup> and Article 4 of the specified Convention, and lies in the fact that a person can enter into a relationship of confidential cooperation solely based on their own free expression of will. This question has not only a theoretical nature, but also an essential practical value, as it allows distinguishing coercion, threats, bribery, deception, and other manifestations of deviant behaviour from legal methods of involving individuals in confidential cooperation.

Furthermore, the specified norms of law limit the use of confidential cooperation, if it violates the constitutional rights and freedoms of a human and a citizen; obligate authorized employees to act within the limits and according to the procedure prescribed by the Law; provide legal guarantees to confidants. These norms make it impossible to use confidential cooperation to carry out visual surveillance, survey of publicly inaccessible places, review of correspondence and other actions related to interference in private communication, which require compliance with the relevant procedures prescribed by the CPCU<sup>3</sup> and the Law of Ukraine "On IO"<sup>4</sup>. Such legal norms prevent both operatives and confidants from interfering in the private and family life of persecuted persons.

For instance, when establishing confidential cooperation with a person who has access to the mail correspondence of the persecuted individual, and

also has the opportunity to secretly receive such correspondence. Pursuant to the norms of the Constitution of Ukraine and the Convention on the Protection of Human Rights and Fundamental Freedoms, the authorized employee of the National Bureau is prohibited, without appropriate court permission, to instruct a confidant to receive such correspondence, as this violates the human right to the secrecy of private communication and correspondence. The corresponding prohibition also applies to the confidant's actions. Therefore, during confidential cooperation, the authorized employee is responsible for explaining the rights, obligations, responsibilities of the confidant, the boundaries, and method of performing the assigned tasks.

The basis of the legal regulation of confidential cooperation, as well as of all investigative operations, are the norms of the **Law of Ukraine "On IO"**. Confidential cooperation is regulated by: *Article 1*, which defines the tasks of operational units, in the achievement of which confidential cooperation can be involved, specifically for searching and recording information about criminal offences; *Article 5*, which specifies that the following subdivisions of the National Bureau are authorized to carry out confidential cooperation: detective, operational and technical, internal control; *Item 6 of Article 7*, according to which the specified operational units shall be obliged to ensure the safety of confidants, as well as their family members and close relatives, independently and with the involvement of other units; *Article 8*, which defines the rights of operational units, namely: to interview individuals and use their assistance upon consent; to enter dwellings and other premises to perform the tasks specified in Article 1 upon consent of the owners and possessors; to collect information about the illegal activities of individuals who are being checked; to carry out a special task of uncovering the criminal activity of an organized group or criminal organization according to the provisions of Article 272 of the CCU; to use confidential cooperation pursuant to the provisions of Article 275 of the CPCU; to receive information from legal entities or individuals for free or for a fee about criminal offences that are being prepared or committed, and about threats to the security of society and the state; with consent to use office premises, housing, other premises, transport and other property of legal entities and individuals.

Having carefully examined the rights of operational units, the author determined the purposes of using confidential cooperation, namely for:

<sup>1</sup>Convention of the Council of Europe. (1950, November). Retrieved from [https://zakon.rada.gov.ua/laws/show/995\\_004#Text](https://zakon.rada.gov.ua/laws/show/995_004#Text).

<sup>2</sup>Constitution of Ukraine: Law of Ukraine No. 254k/96-BP. (1996, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/254k/96-bp#Text>.

<sup>3</sup>Criminal Procedural Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

<sup>4</sup>Law of Ukraine No. 2135-XII "On Investigative Operations". (1992, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2135-12#Text>.

- collecting information about criminal activities of individuals and groups;
- conducting investigative and covert investigative (detective) operations;
- performing a special task to uncover the criminal activities of an organized group or criminal organization;
- conspiratorial use of premises, housing, and vehicles;
- conspiratorial use of enterprises, institutions, and organizations, and their property.

Important from the standpoint of ensuring the human and citizen rights and freedoms are the guarantees prescribed in *Article 9* of the Law of Ukraine “On IO”<sup>1</sup>, regarding the ban on disclosure of information about security measures taken and persons taken under protection; information that may harm the investigation and national security; information regarding the conduct or non-conduct of investigative operations regarding a certain person before deciding based on the results of such activity; information related to the personal life, honour, dignity of a person, if they do not contain information about the commission of actions prohibited by law (such information must be destroyed). In addition, the results of investigative operations that constitute a state secret are not subject to disclosure. For the transfer and disclosure of this information, employees of operational units, as well as persons to whom this information was entrusted during the implementation of investigative operations or became known through service or work, shall be liable pursuant to current legislation, except in cases of disclosure of information about illegal actions that violate human rights. To obtain information, it is forbidden to use technical means, psychotropic, chemical, and other substances that suppress the will or harm human health and the environment.

These guarantees, prohibitions, and restrictions are mandatory not only for operational employees, but also for individuals involved in confidential cooperation, as explicitly stated in this study. Therefore, when involving an individual in confidential cooperation, these restrictions, duties, and responsibilities are explained to them. And that is why only those individuals who, based on their personal and moral qualities, personality, and level of education, can be involved in confidential cooperation.

This shows that confidential cooperation is a complex intellectual and procedural activity that must be carried out systematically and purposefully to perform tasks essential from the standpoint of countering crime. Confidential cooperation can only be assigned to operational employees with a sufficient level of

education, knowledge, skills, personal and moral qualities, and life experience.

According to *Article 10* of the Law of Ukraine “On IO”<sup>2</sup>, materials of investigative operations, including materials of confidential cooperation, may be used, namely:

- to start a pre-trial investigation;
- to obtain evidence in criminal proceedings;
- to prevent criminal offences;
- to search for individuals who have committed criminal offences;
- to ensure the safety of employees of the court, law enforcement agencies, confidants, and other individuals involved in criminal proceedings, their family members and close relatives.

The main obligations and prohibitions related to confidential cooperation, as well as the options for formalizing these relations, are defined by *Article 11* of the Law of Ukraine “On IO”. Confidants are required to keep a secret that has been entrusted to them or has become known. At their request, confidential cooperation can be formalized by a written agreement. Such an agreement can only be concluded with a legally capable individual. Operative workers and investigators have no right to involve in confidential cooperation those individuals who are entrusted with the duty of maintaining professional secrecy, namely clergymen, notaries, medical workers, journalists, lawyers, if such cooperation would be associated with the disclosure of confidential information of a professional nature.

Social and legal protection of confidants is defined in *Article 13* of the Law of Ukraine “On IO”, according to which such individuals are under the protection of the state; in case of concluding an employment agreement with them, the cooperation of individuals with the operative unit is counted towards their total length of service, and in case that in connection with the performance of the tasks of investigative operations by such an individual, their disability or death occurred, they are entitled to the benefits prescribed in such cases for employees of operational units (*Article 12*). In case of a threat to the life, health, or property of an individual involved in confidential cooperation, its protection is ensured according to the procedure prescribed in Part 3 of *Article 12* of this Law. Specifically, such individuals shall be subject to the guarantees of legal and social protection prescribed by the laws of Ukraine on the relevant bodies with which they cooperate. If such a threat arises in connection with the implementation of investigative operations by the confidant in the interests of the security of Ukraine, or to identify a

<sup>1</sup>Law of Ukraine No. 2135-XII “On Investigative Operations”. (1992, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2135-12#Text>.

<sup>2</sup>Ibidem, 1992.

grave or particularly grave crime, or to expose an organized criminal group or criminal organization, taking special measures to ensure the safety of the confidant and their close relatives is the responsibility of the operational unit. In this case, the operational unit takes the following specific measures: changing personal data, changing the place of residence, work, study, and other data pursuant to the procedure prescribed by the Cabinet of Ministers of Ukraine.

Important for confidants is the legal guarantee of non-liability in case the confidant damages the interests of the state, as well as human rights and freedoms during the performance of the relevant tasks of the operational unit in connection with the detention of an individual; suspected of committing a criminal offence, as well as in the state of extreme need, professional risk, necessary defence.

Thus, the state establishes virtually the same legal and social protection for both confidants and operative units.

A systematic analysis of the provisions of the Law of Ukraine "On IO"<sup>1</sup> shows that the institution of confidential cooperation is not sufficiently regulated in this law. Specifically, the terms "confidential cooperation" and "confidant" are not defined; rights, duties, and responsibilities of parties to confidential cooperation; the procedure for the emergence and termination of confidential cooperation relations, as well as their procedural design, the procedure for setting and performing tasks and assignments. Furthermore, the statement of certain norms on cooperation between operational units and individuals who contribute to the performance of the tasks of the IO causes certain contradictions, namely between the obligation to assist operational units and the voluntary nature of confidential cooperation.

The specified gaps and discrepancies cannot be corrected only by making editorial or minor amendments to the Law of Ukraine "On IO"<sup>1</sup>, but require the adoption of a new version of the law with a detailed regulation of the institution of confidential cooperation in a separate section of it, which would include the following articles: "Principles of confidential of cooperation", "Subjects of confidential cooperation", "Rights, duties, and responsibilities of the parties of confidential cooperation", "Conditions, purpose, and tasks of confidential cooperation", "Guarantees of security, legal and social status of confidants", "Execution of confidential cooperation", "Performance of a

special task to reveal the criminal activity of an organized group or criminal organization", "Involvement of individuals in the implementation of investigative operations, covert investigative (detective) operations", "Using materials of confidential cooperation".

Furthermore, the specified norms of the Law of Ukraine "On IO" regulate confidential cooperation relations that have arisen and are implemented within the scope of investigative operations, and therefore their application to legal relations of confidential cooperation that take place within the framework of criminal proceedings is problematic.

The Law of Ukraine "On IO" and the CPCU<sup>2</sup> lack the specific norms that regulate the rights, obligations, restrictions, prohibitions, responsibilities, legal and social guarantees of security and protection of the confidant, which complicates their application to confidential cooperation relations that are in force during criminal proceedings. This gap must be eliminated during the adoption of the Law of Ukraine "On IO" in a new wording or by amending the CPCU.

In practice, this gap has been eliminated by the relevant regulations of the National Bureau, which equally govern confidential cooperation both during investigative operations and during criminal proceedings.

Furthermore, this gap is compensated by the relevant provisions of the Law of Ukraine "On Ensuring the Safety of Individuals Involved in Criminal Proceedings"<sup>3</sup>, which provide guarantees of protection to individuals who contribute to the detection, prevention, termination, or solving of criminal offences.

At the same time, even if relevant changes are introduced to the legislation of Ukraine and the regulation of confidential cooperation at the level of the Law of Ukraine "On IO", the need for departmental regulation of these relations will not decrease because different law enforcement agencies have different organizational structures, tasks, numbers, etc., which leads to different approaches to determining priority areas of work, the need to use the capabilities of confidants, etc.

In this regard, the practices of Great Britain should be considered, where to clarify certain provisions of the UK Regulation of Investigatory Powers Act of 2000<sup>4</sup>, which prescribes the possibility of using confidential information, a Code of Practice on the Use of Secret Sources of Intelligence Information<sup>5</sup> was issued. The value of this Code lies in the detailed regulation of the procedure for granting

<sup>1</sup>Law of Ukraine No. 2135-XII On Investigative Operations. (1992, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/2135-12#Text>.

<sup>2</sup>Criminal Procedural Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

<sup>3</sup>Law of Ukraine No. 3782-XII "On Ensuring the Safety of Persons Participating in Criminal Proceedings". (1993, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/3782-12#Text>.

<sup>4</sup>Regulation of Investigatory Powers Act. (2000). Retrieved from <https://www.legislation.gov.uk/ukpga/2000/23/contents>.

<sup>5</sup>Covert Human Intelligence Sources code of practice. (2022). Retrieved from <https://www.gov.uk/government/publications/covert-human-intelligence-sources-code-of-practice-2022>.

permits for the involvement and use of confidants, the procedure for the activities of a confidant and an authorized employee (handler), performing tasks, monitoring the commission of a crime, investigative experiments, using results, etc.

According to Section 1 of this Code<sup>1</sup>, any state body authorized to carry out confidential cooperation shall be obliged to follow the provisions of the Code. To avoid doubt, the code should be followed regardless of any opposing content of the internal instructions of the state body. This code also allows other interested parties to understand the procedures followed by these state bodies. This code is publicly available and should be easily accessible to employees of any relevant public authority who intend to use confidential cooperation. The examples included in this code are intended to help illustrate and interpret certain provisions and are provided for reference only. Theoretical examples cannot reproduce the level of detail that can be found in real cases. Consequently, public authorities should avoid using superficial similarities with examples to make their decisions and should not attempt to justify their decisions only by referring to examples and not to the law, including the provisions of this code. Examples should not be taken as confirmation that any particular government agency is carrying out the described activities; examples are given for illustrative purposes only.

This Code of practice can also be used as a model for more detailed regulation of confidential cooperation in Ukraine.

By analogy with covert investigative (detective) operations, which, apart from Chapter 21 of the CPCU<sup>2</sup>, are regulated by the Instruction on the organization of covert investigative (detective) operations and the use of their results in criminal proceedings<sup>3</sup>, it is proposed to regulate confidential cooperation in detail in the same Instruction by setting it out in a new wording. This edition must be approved by the Office of the Prosecutor General of Ukraine, which carries out procedural management in all criminal proceedings and supervises the observance of laws during investigative operations in all investigative and detective cases, and which accumulates not only practical experience, but also judicial practice on this matter; all law enforcement agencies that carry out pre-trial investigation and investigative activities; the Ministry of Finance of Ukraine, which is

entrusted with the proper financial support of the relevant activities of the specified bodies; the Ministry of Justice of Ukraine, which takes part in ensuring legal guarantees for confidential informants, including in institutions where punishments are served; the Supreme Court of Ukraine, which ensures stability and unity of judicial practice.

This approach allows regulating the institution of confidential cooperation in the most balanced and unified way, while presented in detail in a non-secret regulation that will be made public and accessible to everyone. The author of this study believes that, among other things, it will increase the effectiveness of the fight against crime by involving individuals from the criminal environment in confidential cooperation, since the legislation on confidential cooperation will become known to a wide range of people.

During the study of the *Law of Ukraine "On NABU"*<sup>4</sup>, separate norms regulating confidential cooperation were singled out, namely: *Part 1 of Article 10*, which authorizes confidential cooperation of detectives and senior detectives of detective units, employees of operational and technical units and internal control units that carry out pre-trial investigation and investigative operations, as well as undercover full-time employees; *Item 7 of Part 1 of Article 16* and *Item 12 of Part 1 of Article 17*, which determine the basic principles and conditions of confidential cooperation, namely the voluntariness and confidentiality of such cooperation, the possibility of formalizing these relations by concluding an agreement, the possibility of paying the corresponding remuneration, and also determine the content of confidential cooperation, which lies in facilitating the performance of the tasks assigned to the National Bureau.

In the context of the subject under study, the legislator defined not only the right of authorized employees to confidentially cooperate with individuals, but also established the obligation of such cooperation with individuals who report corruption offences, while emphasizing that citizens enter into such relations exclusively voluntarily.

Furthermore, the Ukrainian legislators legislatively recognized the legality and permissibility of material incentives for confidants. This has an important legal, practical, and ethical significance, since confidential cooperation for a virtuous citizen is not only an honourable cause, but also moral, intellectual, and

<sup>1</sup>Covert Human Intelligence Sources code of practice. (2022). Retrieved from <https://www.gov.uk/government/publications/covert-human-intelligence-sources-code-of-practice-2022>.

<sup>2</sup>Criminal Procedural Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

<sup>3</sup>Instructions on the organization of covert investigative (detective) operations and the use of their results in criminal proceedings, approved by the Order of the Prosecutor General's Office of Ukraine, the Ministry of Internal Affairs of Ukraine, the Security Service of Ukraine, the Administration of the State Border Service of Ukraine, the Ministry of Finance of Ukraine, the Ministry of Justice of Ukraine No. 114/1042/516/1199/936/1687/5. (2012, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/v0114900-12/page#Text>.

<sup>4</sup>Law of Ukraine No. 1698-VII "On the National Anti-Corruption Bureau of Ukraine". (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1698-18#Text>.

temporary efforts that should be encouraged, including financially, which is the norm in modern society.

Thus, confidential cooperation is one of the important activities of the National Bureau and one of the principal methods (tools) for both investigative operations and pre-trial investigation.

The main norms of the *CPCU*<sup>1</sup>, which regulate the relations of confidential cooperation, are Articles 252, 256, 271, 272, and 275, which are located in Chapter 21 “Covert investigative (detective) operations”.

The placement of the norms governing the use of confidential cooperation in the chapter on covert investigative (detective) operations (CIDO) caused a lively discussion in the scientific community. Some researchers classify confidential cooperation as a separate type of CIDO (Korniienko, 2015), others (Serhieieva, 2016; Skulysh, 2012), whose position is more convincing, consider confidential cooperation as a certain tool and means of conducting CIDO, and not as a separate type of CIDO.

The most successful definition of the role of confidential cooperation in the criminal procedure appears to be the laconic definition formulated by L.V. Sydorenko (2020), who considers confidential cooperation as a means of achieving the objectives of criminal proceedings, defined in Article 2 of the CPCU.

In any case, the institution of confidential cooperation is close to the legal institution of covert investigative (detective) operations, while it has its differences.

The basis of practical and scientific discussions is the correlation of the principles of publicity of the criminal procedure and the confidentiality of the secret cooperation of citizens with the pre-trial investigation body, which affects the security guarantees of such individuals.

Separate general norms of Chapter 21 of the CPCU are intended to resolve this debate and ensure the safety of confidants. Specifically, *Part 1 of Article 246* of the CPCU specifies that information about the fact and methods of conducting CIDO are not subject to disclosure, *Part 1 of Article 252* of the CPCU – that information about individuals who conducted or were involved in the CIDO, and to which security measures were applied, can be noted to ensure the confidentiality of this information.

However, *Part 1 of Article 254* and *Article 290* of the CPCU prescribe the possibility of acquainting the defence party with information about the fact and methods of conducting CIDO, as well as about the individuals who conducted them. Therewith, obligating the defence party not to disclose this information is exclusively declarative and cannot really ensure the security of the confidant.

*Part 2 of Article 256* of the CPCU<sup>2</sup> makes provision for the possibility of questioning as a witness an individual who conducted or was involved in CIDO (including a confidant), even if security measures are taken against them. Therewith, there is no detailed mechanism for summoning such an individual. The summons of the confidant for questioning as a witness should be carried out through the relevant operational unit or pre-trial investigation body that involved the confidant.

The trend of transparency of the criminal procedure, disregard of the interests of the confidant, and unequal application of the criminal procedural law to such legal relations can be traced in *Parts 9 and 10 of Article 352* of the CPCU<sup>3</sup>, which regulate the questioning of a witness in court. In the specified norms, the questioning of the whistle-blower is imperatively conducted in a closed court session using measures that make it impossible to identify them, although in most cases the whistle-blower in criminal proceedings is known to everyone. As for the questioning of other witnesses (including confidants), their questioning in this mode is carried out in exceptional cases, considering the objections of the parties to the criminal proceedings. The author of the present study believes that such an approach is risky, since the security risks of confidants and other witnesses to whom security measures are applied, depend on the legal awareness of the particular composition of the court, and not on clear legal regulations. It is proposed to change the specified norm and introduce the questioning of witnesses (including confidants) to whom security measures have been applied by the relevant body, exclusively in a closed court session and using measures that make their identification impossible.

During the application of *Article 275* of the CPCU, which makes provision for the possibility of using information obtained as a result of confidential cooperation with other individuals during the CIDO, or the involvement of these individuals in the CIDO, the question of the operative’s possibility of using confidential cooperation during investigative (detective) operations and other procedural actions arises, since it refers only to the CIDO and the investigator, although the CIDO can be entrusted to the operative unit.

For instance, information about the location of important evidence or a criminal can be obtained from a confidant verbally or in writing without conducting any CIDO as an investigator and operational worker. Admittedly, such information can and should be used during a pre-trial investigation. However, the admitted legal gap, or rather the unsuccessful legal wording, creates reasons for discussions about the

<sup>1</sup>Criminal Procedural Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

<sup>2</sup>Ibidem, 2012.

<sup>3</sup>Ibidem, 2012.

legality of using information received from a confidant for gathering evidence and for purposes other than during the CIDO. This gap in the criminal procedural legislation should be filled by introducing relevant changes to the CPCU.

K.V. Antonov (2020) and other scientists also address this as a flaw in the current criminal procedural legislation.

*Part 1 of Article 272* of the CPCU stipulates that “during the pre-trial investigation of grave or particularly grave crimes, information, things, and documents that are essential for the pre-trial investigation may be obtained by an individual who, pursuant to the law, performs a special task by taking part in an organized group or a criminal organization, or is a member of the specified group or organization, who *cooperates with pre-trial investigation authorities on a confidential basis*”.

Given that the performance of a special task involves the introduction of an individual into a criminal environment, the Article emphasizes the need for detailed instruction of this individual and a clear delineation of the limits of the task and permissible behaviour to prevent illegal, compromising, or criminal actions. The same actions should be performed in all types of confidential cooperation, not just when performing a special task.

Thus, these norms make provision for the possibility of using confidential cooperation in criminal proceedings for:

- 1) obtaining information for conducting CIDO;
- 2) involvement of a confidant in conducting CIDO;
- 3) performing a special task to uncover the criminal activities of an organized group or criminal organization.

*Article 271* of the CPCU<sup>1</sup> regulates separate legal guarantees of confidants who take part in the control of the commission of a crime (namely not being held criminally liable for acts that formally contain signs of a crime and which are committed “under supervision”), as well as organizational aspects, such as determination of the limits of this CIDO and the assignment of the confidant, prohibitions (for provoking, inciting, committing encroachments on the lives of other individuals and actions that may lead to serious consequences). The specified CIDO is carried out with the permission of the prosecutor. Such involvement of the prosecutor in ensuring the legality and legal

guarantees of the confidant is considered substantiated. As for the involvement of the prosecutor during the implementation of confidential cooperation, on the one hand, the prosecutor should not have access to the covert apparatus of operational units and pre-trial investigation bodies, and on the other hand, they should ensure the legality of investigative operations and criminal proceedings and the observance of constitutional rights and freedoms of individuals whose rights, freedoms, and interests may be violated. At first glance, these theses are contradictory, but in practice, such a symbiosis of law enforcement agencies and prosecutorial supervision can ensure not only compliance with the principles of legality and the rule of law when carrying out covert activities involving confidants, but also ensure the effectiveness of pre-trial investigations, specifically by providing legal guarantees mitigation or even exemption from responsibility of individuals involved in confidential cooperation.

Control over the commission of a crime and the performance of a special task is not only successfully used in Ukraine, but also abroad. The main difference is that foreign countries regulate this mechanism in detail, while Ukrainian legislation allocates only 2 articles for this. Given the high risks of violation of citizens’ rights and freedoms, as well as the elevated level of danger to the confidant and authorized employees, these relations should be regulated more comprehensively.

For instance, in Great Britain, such investigative action is governed by the UK Regulation of Investigatory Powers Act of 2000<sup>2</sup>, the Code of Practice for the Covert Human Intelligence Sources<sup>3</sup>, the Regulation of Investigatory Powers (Covert Human Intelligence Sources: Relevant Sources) Order of 2013<sup>4</sup>, as well as the Covert Human Intelligence Sources (Criminal Conduct) of 2021<sup>5</sup>. These regulations thoroughly govern the actions of investigators and authorized persons, as well as confidants; cases when permission to commit a crime is an acceptable and comparable measure; who and how issues permission and controls the commission of a crime; issues of compensation for damage caused; legal guarantees of the confidant, etc. It is also proposed to regulate in detail the control over the commission of a crime and the performance of a special task in the new edition of the Law of Ukraine “On the Legal Bases of Combating Organized Crime”<sup>6</sup>.

<sup>1</sup>Criminal Procedural Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

<sup>2</sup>Regulation of Investigatory Powers Act. (2000). Retrieved from <https://www.legislation.gov.uk/ukpga/2000/23/contents>.

<sup>3</sup>Covert Human Intelligence Sources code of practice. (2022). Retrieved from <https://www.gov.uk/government/publications/covert-human-intelligence-sources-code-of-practice-2022>.

<sup>4</sup>The Regulation of Investigatory Powers (Covert Human Intelligence Sources: Relevant Sources). (2013). Retrieved from <https://www.legislation.gov.uk/uksi/2013/2788/contents/made>.

<sup>5</sup>Covert Human Intelligence Sources (Criminal Conduct). (2021). Retrieved from <https://www.legislation.gov.uk/ukpga/2021/4/contents/enacted>.

<sup>6</sup>Law of Ukraine No. 3341-XII “On the Legal Foundations of Combating Organized Crime”. (1993, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/3341-12#Text>.

It is also worth paying attention to *Item 16-2 of Article 1, Article 60 and Article 130-1* of the CPCU<sup>1</sup>, which define the concept of a whistle-blower and their rights, specifically the right to receive a reward.

The concepts of whistle-blower and confidant, although at first glance similar, are definitely not identical, since the whistle-blower is actually an applicant who reported the commission of a corruption crime and acquired the status automatically at the time of applying to the pre-trial investigation body. And this does not mean that a confidential cooperation relations have arisen between the whistle-blower and the investigator or detective, since certain conditions and free expression of the will of both parties are necessary for their occurrence. In this case, the investigator takes a passive position. Under certain conditions, the whistle-blower can still enter into a confidential cooperation relationship and become a confidant. For instance, if the investigator (detective) decides to involve them in conducting the CIDO or performing other tasks, and if the whistle-blower agrees to this. In this case, they assume the duties and responsibilities mentioned above, and can become a confidant.

Thus, a confidant in most cases is a person with whom the authorized employee (handler) has purposefully established a relevant relationship to perform the tasks assigned to them, and who mainly actively collects information and performs tasks set by the authorized employee (handler).

Touching on this topic, attention should be paid to the fact that the absence of the definition of the whistle-blower in the prosecutor's office as the addressee of a report on a corruption crime is a clear gap in the legislation. This gap can be a formal basis for refusing to grant the status of a whistle-blower, resolving the issue of paying them remuneration and ensuring other rights of the whistle-blower, since the whistle-blower can also apply with a corresponding application or message to the prosecutor who is authorized to start a pre-trial investigation.

Particular attention should be paid to Article 130-1 of the CPCU, which prescribes the procedure for paying a reward to a whistle-blower. Specifically, the reward to the whistle-blower is paid not only for reporting a corruption crime, but also for actively assisting in its disclosure, i.e., for assisting the pre-trial investigation body in the performance of the tasks of investigation and solving of crimes. Thus, the subject of confidential cooperation relations with the confidant and with the whistle-blower is still very comparable. The payment

of remuneration is an additional motive for the whistle-blower to promote anti-corruption, and the state encourages whistle-blowers to engage in such behaviour.

The norms of the *Law of Ukraine "On Ensuring the Safety of Individuals Involved in Criminal Proceedings"*<sup>2</sup> ensure compliance by the state with guarantees of the safety of individuals who reported a criminal offence to a law enforcement agency or otherwise took part in or contributed to the detection, prevention, termination, or solving of criminal offences (factually confidants), whistle-blowers, victims, witnesses, and others (*Article 2*).

The security measures prescribed by this Law, which may also be applied to confidants, are stipulated in Section III of this Law.

Therewith, the main security measure for both the confidant and the authorized employee is discipline in matters of confidentiality and conspiracy of relations between them.

The implementation of security measures in the National Anti-Corruption Bureau of Ukraine is entrusted to the Department of Special Operations of the National Anti-Corruption Bureau of Ukraine. Certain measures, such as ensuring the confidentiality of information about an individual, are also taken by detectives and operatives authorized to carry out pre-trial investigation and investigative operations.

It is absolutely impossible to disagree with the researchers who believe that ensuring the safety of individuals involved in the execution of tasks of investigative operations during covert and confidential cooperation is a primary task for the entire system of law enforcement agencies. However, the approach to improving the institution of ensuring the security of individuals involved in the performance of tasks of the investigative operations during covert and confidential cooperation, by changing and amending the CPCU<sup>3</sup> (Horbachov, 2017) is quite controversial, due to the different subject matter of legal regulation. Nevertheless, the Law of Ukraine "On Ensuring the Safety of Individuals Involved in Criminal Proceedings" should still be a special law<sup>4</sup>. Discussions about whether confidants are among the entities to which this law applies should be terminated by introducing appropriate changes to Article 2 of this Law.

Since, as stated above, a confidant may have the status of a whistle-blower in certain cases and conditions, it is advisable to investigate the protection and security guarantees provided to the whistle-blower by the *Law of Ukraine "On Prevention of Corruption"*<sup>5</sup>.

<sup>1</sup>Criminal Procedural Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

<sup>2</sup>Law of Ukraine No. 3782-XII "On Ensuring the Safety of Individuals Involved in Criminal Proceedings". (1993, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/3782-12#Text>.

<sup>3</sup>Criminal Procedural Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

<sup>4</sup>Law of Ukraine No. 3782-XII "On Ensuring the Safety of Persons Participating in Criminal Proceedings". (1993, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/3782-12#Text>.

<sup>5</sup>Law of Ukraine No. 1700-VII "On Prevention of Corruption". (2014, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/1700-18#Text>.

Item 20 of Part 1 of Article 1 of the Law of Ukraine “On the Prevention of Corruption” defines a broader concept of a whistle-blower, which does not require, to determine the status of a whistle-blower, to report corruption to a particular addressee, but requires that such information be known to the whistle-blower in connection with their labour, professional, economic, public, scientific activity, completion of service or training or involvement in procedures prescribed by law, which are mandatory for starting such activity, completion of service or training.

The concept of a whistle-blower defined by this law differs from that defined in the CPCU<sup>1</sup>. The principal differences are that the whistle-blower under the CPCU is an individual who reported a corruption crime and a pre-trial investigation body.

If the confidant proactively turned to an operational worker, investigator (detective) with a report on possible facts of corruption crimes, stated the circumstances known to them (in oral or written form), which became known to them under certain conditions, then they can acquire the status of a whistle-blower and relevant rights and guarantees of their safety stipulated by the Law of Ukraine “On Prevention of Corruption”.

Section VIII of this law stipulates that whistle-blowers and their relatives shall be protected by the state. In addition to the measures prescribed by the Law of Ukraine “On Ensuring the Safety of Individuals Involved in Criminal Proceedings”, legal guarantees may be applied to them, namely in the form of the right to free legal aid and representation in court, including for protecting labour rights; as well as the right to receive remuneration.

An essential legal guarantee for protecting the rights of whistle-blowers is to limit their legal liability for disclosing confidential information in reports and statements about known facts of corruption.

This guarantee is of great practical importance, since the whistle-blower faces a difficult choice when deciding on cooperation with a law enforcement agency: on the one hand, they do not agree with the violations that they witnessed, and on the other hand, their moral principles, and sometimes legal restrictions, do not allow them to violate their obligations concerning non-disclosure of certain information. The law removes this burden from the whistle-blower by recognizing their choice to report corruption and promote law enforcement as the only legitimate behaviour.

Therewith, a substantial disadvantage of protecting the rights of a whistle-blower in comparison with the protection of the rights of a confidant is

that the principle of confidentiality in relations with the confidant is absolute, and in the case of a whistle-blower, information about the whistle-blower can be disclosed in cases prescribed by law. Specifically, the pre-trial investigation body must inform the National Agency for the Prevention of Corruption about the identity of the whistle-blower. This is completely inappropriate in confidential cooperation relations. The specified norm must be excluded.

The norms of the *Criminal Code of Ukraine*<sup>1</sup> (the CCU) are applied to confidential cooperation relations as prohibition norms and as norms guaranteeing the rights of confidants, namely:

- *Article 172* guarantees compliance with the whistle-blower’s labour rights;

- *Article 328* prohibits disclosure of the fact and content of confidential cooperation, information about which constitutes a state secret, and ensures the principle of confidentiality;

- *Article 380* ensures the obligation of the relevant authority to take appropriate security measures against the confidant under the threat of criminal liability;

- *Article 381* guarantees compliance with security measures, ensures the principle of confidentiality;

- *Article 387* prohibits a confidant from disclosing data from pre-trial investigation and investigative operations under the threat of criminal liability and ensures the principle of confidentiality.

An essential legal guarantee of the protection of the rights of confidants involved in the performance of a special task pursuant to Article 272 of the CPCU<sup>2</sup> is the provisions of *Article 43* of the CCU<sup>1</sup>, which prescribe that an individual who performs a special task shall not be criminally liable for the forced commission of criminal offences, except for grave and especially serious crimes specified in Part 2 of this Article, for the commission of which this individual cannot be sentenced to life imprisonment, as well as to imprisonment for a term longer than half of the maximum term prescribed by the sanction of the Article of the special part of the CCU.

The specified legal guarantee of the protection of individuals who cooperate with the investigation on a confidential basis is also stipulated in *Part 2 of Article 14* of the *Law of Ukraine “On the Legal Bases of Combating Organized Crime”*<sup>3</sup>, which prescribes partial or full exemption from criminal liability and punishment of members of organized criminal groups, which contribute to exposing such groups and crimes committed by them, bringing the guilty to justice, and compensating for the damage caused.

These provisions of the law are also orienting for law enforcement officers, as they direct them to use

<sup>1</sup>Criminal Procedural Code of Ukraine No. 4651-VI. (2012, April). Retrieved from <https://zakon.rada.gov.ua/laws/show/4651-17#Text>.

<sup>2</sup>Ibidem, 2012.

<sup>3</sup>Law of Ukraine No. 3341-XII “On the Legal Foundations of Combating Organized Crime”. (1993, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/3341-12#Text>.

confidential cooperation to solve grave and especially grave crimes, as well as to counteract organized crime. This corresponds to the principle of expediency and consistency of confidential cooperation.

The procedure for mitigating liability for such crimes is defined by Chapter 35 of the Criminal Procedure Code of Ukraine (Criminal Proceedings Based on Agreements).

The specified norms of criminal and criminal procedural legislation are important from a practical standpoint because sometimes citizens, due to certain circumstances, make mistakes, establish contacts with dishonest citizens, and later become members of criminal groups and organizations. It is such individuals who need a way out of this inconvenient situation, when having committed an offence, being connected with criminals by common criminal experience, they cannot escape this trap and need the help of law enforcement officers. Such persons are the most valuable for law enforcement officers, who can offer a legal way out of a dire situation and a legal way of resocialization with the least legal consequences.

The practice of attracting confidants from the criminal environment is known to be widely used in the United States of America. M.L. Rich (2010) argues that individuals without a criminal past can still be informants, but the most effective is to involve confidants from among individuals who are not perceived as hostile by the criminal environment.

Notably, the practice of introducing “undercover agents” and conducting “special police operations” is widely used not only on the American continent, but also in Europe. Specifically, in his studies, E.W. Kruisbergen (2013) examines the practices of law enforcement agencies in the Netherlands in conducting “police special operations” to uncover the criminal activities of organized criminal groups by introducing (infiltrating) such groups of individuals who perform a special task. Therewith, the author emphasizes that this most effective, but risky method is used by law enforcement agencies in the Netherlands as an exceptional method when it is impossible to document and bring to justice the participants and leaders of organized criminal groups in other ways (Kruisbergen, 2017).

It should be noted separately that the conduct of covert investigative (detective) operations and the use of their results in criminal proceedings is regulated by the ***Instruction on the organization of the conduct of covert investigative (detective) operations and the use of their results in criminal proceedings***<sup>1</sup>.

Items 3.9.1., 3.12, 4.10 of this Instruction factor in the principle of confidentiality of covert cooperation and, in order not to disclose the confidant, provide that the use of information obtained as a result of confidential cooperation is carried out under the condition of guaranteeing the safety of the individual who provides such information; materials that can disclose confidential individuals receiving information are not provided together with the protocol on the results of covert investigative (detective) operations; in case of implementation of security measures against employees of operative units who conducted covert investigative (detective) operations or were involved in their implementation, information about these individuals is noted in the protocol with ensuring confidentiality according to the procedure specified by law.

As noted above, this Instruction, based on the example of the Code of Practice for the Covert Human Intelligence Sources<sup>2</sup>, can be a basic sub-legislative regulation, in which, apart from the CIDO, separate issues of organizing the implementation of confidential cooperation and the use of its results both in operational and investigative operations, and in criminal proceedings.

Apart from the specified regulations, the procedure for confidential cooperation is governed by the relevant internal regulations of the National Anti-Corruption Bureau of Ukraine, which, due to their limited access, are not covered in this paper. The specified regulations define the terminology, regulate the procedure and documentation of the involvement of individuals in confidential cooperation, determine the authorized individuals to carry out confidential cooperation, types of confidential cooperation and confidants, the procedure for carrying out confidential cooperation and the use of the results of confidential cooperation, etc. Comparing the departmental regulations of various law enforcement agencies that regulate confidential cooperation, it is established that in general they apply identical techniques and approaches to regulating these legal relations, while the main differences are in the classification of types of confidants, forms, and methods of agent activity, registration of confidential cooperation and its results, which are conditioned upon the specifics of these bodies.

During the comprehensive study and systematization of regulations that govern confidential cooperation in the field of such scientific subjects as criminal procedure, investigative activity, organization of the work of law enforcement, judicial bodies

<sup>1</sup>Instructions on the organization of covert investigative (detective) operations and the use of their results in criminal proceedings, approved by the Order of the Prosecutor General's Office of Ukraine, the Ministry of Internal Affairs of Ukraine, the Security Service of Ukraine, the Administration of the State Border Service of Ukraine, the Ministry of Finance of Ukraine, the Ministry of Justice of Ukraine No. 114/1042/516/1199/936/1687/5. (2012, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/v0114900-12/page#Text>.

<sup>2</sup>Covert Human Intelligence Sources code of practice. (2022). Retrieved from <https://www.gov.uk/government/publications/covert-human-intelligence-sources-code-of-practice-2022>.

and prosecutor's offices, not only gaps were found, but also areas that have relevant legal regulation and provoke further scientific research, specifically clarifying the role of the prosecutor in the implementation of confidential cooperation; comparison of the legal status of a whistle-blower and a confidant; research into the motives of confidential cooperation and the legal grounds and permissible limits of the use of "compromising" materials; interaction of law enforcement agencies, the prosecutor's office and the court in criminal proceedings based on agreements between the prosecutor and the suspect who is involved in confidential cooperation, including to perform a special task of uncovering the criminal activity of an organized group or criminal organization.

## ■ Conclusions

Thus, the article covered several theoretical approaches. The present study clarified the current state of regulatory support for confidential cooperation and established its insufficient regulation. The regulations governing these relations were systematized, and these acts were classified by legal force. It was established that the main regulation that governs confidential cooperation is the Law of Ukraine "On Investigative Operations", which is outdated and does not correspond to the real relations that have developed in society between authorized employees of law enforcement agencies and confidants, the challenges and threats that law enforcement officers face and society. The study identified gaps and discrepancies in the legislation, established the competition of norms governing the institute of whistle-blowers and the institution of confidential cooperation.

It is proposed to resolve these discrepancies and fill the gaps by adopting the Law of Ukraine "On Investigative Operations" and the Law of Ukraine "On Legal Bases of Combating Organized Crime" in new editions, as well as by introducing relevant changes to the Criminal Procedural Code of Ukraine. During the preparation of the specified draft laws, it is proposed to consider the practices of the legal regulation of confidential cooperation of Great Britain and to regulate confidential cooperation in more detail in the joint Instructions on the organization of covert investigative (detective) operations, investigative measures and confidential cooperation and the use of their results in criminal proceedings and investigative operations. The need for the same regulation of security issues and guarantees of protection of confidants both at the stage of operative and investigative activity and at the stage of criminal proceedings was emphasized. Despite the insufficient statutory regulation of confidential cooperation, this type of activity of the National Bureau has a suitable legal basis, as the gaps in the legislation are filled by analogy of right and analogy of law, as well as by relevant departmental regulations. Therewith, it was discovered that even the current legislation allows effectively applying confidential cooperation to counter crime, as well as to ensure proper legal, social, and physical protection of confidants. However, it is possible under the conditions of admission to confidential cooperation of operatives, investigators, and prosecutors who have the appropriate theoretical and practical training and relevant experience, as well as under the conditions of proper organizational and financial support for this type of activity.

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## Правова основа інституту конфіденційного співробітництва в Національному антикорупційному бюро України

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■ **Анотація.** Актуальність теми зумовлена тим, що спеціальне законодавство, яке регулює оперативно-розшукову діяльність, боротьбу з організованою злочинністю, забезпечення безпеки осіб, які співпрацюють з правоохоронними органами, прийняте у 1992–1994 роках, не відповідає умовам сучасного життя (лібералізації та цифровізації суспільства; змінам у банківському та фінансовому секторі; легкості перетину кордонів тощо) та викликам, які стоять перед правоохоронною системою (транснаціональна злочинність; розвиток технологій, які ускладнюють технічне зняття інформації; використання криптовалют і квазігрошей тощо). Основним недоліком цього законодавства є неврегульованість конфіденційного співробітництва як основного інструменту боротьби зі злочинністю. Метою роботи є дослідження стану правового забезпечення конфіденційного співробітництва на прикладі діяльності Національного антикорупційного бюро України; виявлення прогалин, суперечностей і колізій; визначення шляхів удосконалення законодавства. Використано загальнонаукові, логічні та загальноправові методи. У роботі проаналізовано стан наукового дослідження теми, систематизовано чинне законодавство України, здійснено зіставлення його окремих норм. Основні результати дослідження полягають у тому, що правову основу конфіденційного співробітництва вперше розглянуто як систему правових норм міжгалузевого правового інституту, не обмежуючись виключно процесуальним аспектом чи сферою застосування. Уперше досліджено функціонування інституту конфіденційного співробітництва в Національному антикорупційному бюро України. Констатовано відсутність належного нормативно-правового регулювання на рівні законів України та несистематизованість наявних норм, що створює ризики зловживань, порушення прав і свобод громадян. Зауважено, що прогалини в законодавстві заповнені відомчими нормативними актами відповідних правоохоронних органів з відповідним грифом секретності. Розкрито сутність і призначення конфіденційного співробітництва, проаналізовано норми права, закріплені в різних законах, особливості їх застосування, предмет їх правового регулювання, а також відмінності в правовому регулюванні співпраці з конфідентами та викривачами. Практична цінність результатів дослідження полягає в тому, що їх можуть використовувати юристи-практики, зокрема слідчі, прокурори й адвокати, для яких інститут конфіденційного співробітництва є новим з огляду на таємні форми й методи його функціонування

■ **Ключові слова:** конфідент; викривач; інформатор; наставник; агентурна розвідка