

# CHAPTER 1

## General Theoretical Principles of Confidential Cooperation

### 1.1 Doctrinal Analysis of the Application of Confidential Cooperation in Investigative Activities

Whenever authorised entities carry out any power-administrative activities, they do so for a specific purpose delegated to them by the state, including the use of coercion. Depending on the scope of their powers and the specifics of their tasks, such entities may use specific methods and forms of activity and, in some cases, choose the necessary line of conduct at their own discretion. Such broad competences primarily depend on the complexity of the legal relations to be regulated by the authority. Obviously, it is impossible to describe all potential situations that arise in the process of law enforcement, and therefore the legislator in some cases allows authorised participants in such legal relations to choose the best way to achieve the tasks assigned to them. Admittedly, in this case, the possibilities for controlling such an entity become much more complicated, but in most cases the social benefit is much greater than the potential complication of control. At the same time, such broad responsibilities should in any case be enshrined in the relevant regulations, since any lawlessness entails arbitrariness. The more powers the relevant authority has, the more severe the consequences of such arbitrariness will be. Evidently, this primarily concerns law enforcement

agencies. It is in the process of detecting and investigating criminal offences that a significant restriction of the rights and legitimate interests of individuals and legal entities is allowed, which is necessary for the effective operation of law enforcement agencies. However, such powers cannot be absolute, as the concentration of such powers within one or more bodies will undoubtedly lead to an imbalance in the system of checks and balances. At the same time, as already noted, in the case of complex legal relations (which undoubtedly include law enforcement), the legislator cannot foresee and describe every possible situation in the relevant legal act. In this regard, in some cases, regulations do not provide a clear list of competences, but rather certain limits of permissible activities for detecting and investigating criminal offences. At the same time, authorised law enforcement officers must choose the best way to exercise such powers, which would simultaneously comply with the requirements of the law and perform the task in the most efficient manner. The application of confidential cooperation in investigative and operational practice can be called one of the most striking examples of such a mechanism for detecting and investigating criminal offences.

In practice, confidential cooperation is often used by law enforcement agencies to obtain evidence that is subsequently used in court<sup>1</sup>, and confidants are often directly involved in investigative (detective) actions, including covert investigative (detective) actions<sup>2</sup>.

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<sup>1</sup> The Sentence of the Kyiv-Sviatoshyn Raion Court of Kyiv Oblast of July 17, 2023, case No. 369/9702/22. URL: <https://reyestr.court.gov.ua/Review/112239115>; The Sentence of the Kozelshchynskiy Raion Court of Poltava Oblast of September, 2 2014, case No. 533/971/14-k. URL: <https://reyestr.court.gov.ua/Review/40324771>

<sup>2</sup> The Sentence of the Boryspilskiy City-Raion Court of Kyiv Oblast of June, 19 2023, case No. 359/7158/17. URL: <https://reyestr.court.gov.ua/Review/111602644>; The Sentence of the Brodivskiy Raion Court of Lviv Oblast of May 10, 2022, case No. 439/1580/21. URL: <https://reyestr.court.gov.ua/Review/104228546>; The Sentence of the Holosiivskiy District Court of Kyiv City of May 26, 2021, case No. 752/581/20. URL: <https://reyestr.court.gov.ua/Review/97187999>; The Sentence of the Zhashkivskiy Raion Court of Cherkasy Oblast of November 23, 2020, case No. 693/145/20. URL: <https://reyestr.court.gov.ua/Review/93015627>; The Sentence of the Kyivskiy District Court of Kharkiv City of May 19, 2020, case No. 953/5489/20. URL: <https://reyestr.court.gov.ua/Review/89319432>; The Sentence of the Kyivskiy District Court of Kharkiv City

The complexity of using confidential cooperation in the process of detecting and investigating criminal offences is primarily related to the impossibility of developing a unified and complete regulatory and methodological framework for the use of such cooperation. Accordingly, persons who involve confidants in operational and search activities and investigative (detective) actions, or who use information received from confidants to establish the circumstances of a committed or pending criminal offence, should largely rely on their own skills as an operational or investigative unit employee, which will allow confidential cooperation to be implemented as efficiently as possible. At the same time, it would be incorrect to assert that only an investigator, operative or other authorised person should independently determine the scope, conditions and other key features of confidential cooperation, since this form of cooperation actually allows the use of extra-procedural means of influence on the

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of July 24, 2019, case No. 640/4100/17. URL: <https://reyestr.court.gov.ua/Review/83221404>; The Sentence of the Kozelshchynskyi Raion Court of Chernihiv Oblast of November 26, 2019, case No. 734/4157/19. URL: <https://reyestr.court.gov.ua/Review/85873420>; The Sentence of the Kozelshchynskyi Raion Court of Poltava Oblast of September, 2 2014, case No. 533/971/14-к. URL: <https://reyestr.court.gov.ua/Review/40324771>; The Sentence of the Kozelshchynskyi Raion Court of Poltava Oblast of February 26, 2015, case No. 533/110/15-к. URL: <https://reyestr.court.gov.ua/Review/42868247>; The Sentence of the Oleksandrivskyi Raion Court of Kirovohrad Oblast of May 14, 2021, case No. 398/1641/21. URL: <https://reyestr.court.gov.ua/Review/96952120>; The Sentence of the Ordzhonikidzevskyi District Court of Kharkiv City of December 19, 2016, case No. 644/324/15-к. URL: <https://reyestr.court.gov.ua/Review/63477284>; The Sentence of the Okhtyrskyi City-Raion Court of Sumy Oblast of July 28, 2023, case No. 583/1413/20. URL: <https://reyestr.court.gov.ua/Review/112475206>; The Sentence of the Sviatoshynskyi District Court of Kyiv City of July 28, 2022, case No. 759/7414/22. URL: <https://reyestr.court.gov.ua/Review/105474411>; The Sentence of the Sykhyivskyi District Court of Lviv City of June 5, 2023, case No. 464/1665/20. URL: <https://reyestr.court.gov.ua/Review/111327091>; The Sentence of the Slavutskyi City-Raion Court of Khmelnytskyi Oblast of May 16, 2019, case No. 682/824/18. URL: <https://reyestr.court.gov.ua/Review/81808576>; The Sentence of the Smilianskyi City-Raion Court of Cherkasy Oblast of August 3, 2023, case No. 703/2760/23. URL: <https://reyestr.court.gov.ua/Review/112608729>; The Sentence of the Sosnivskyi District Court of Cherkasy City of March 1, 2017, case No. 712/5348/16-к. URL: <https://reyestr.court.gov.ua/Review/65148202>; The Sentence of the Umanskyi City-Raion Court of Cherkasy Oblast of July 24, 2015, case No. 705/3759/15-к. URL: <https://reyestr.court.gov.ua/Review/47386137>; The Sentence of the Khmelnytskyi City-Raion Court of Khmelnytskyi Oblast of November 20, 2017, case No. 686/3881/17. URL: <https://reyestr.court.gov.ua/Review/71144717>

relevant persons, which in itself may be a separate criminal offence. Thus, at present, on the one hand, there is a certain legal vacuum in terms of regulatory framework for confidential cooperation, and on the other hand, there is an urgent need for law enforcement officers to have clear instructions and methodological recommendations on the use of such cooperation in the detection, disclosure and investigation of criminal offences. “Confidential work is a component of the operational and investigative activities of law enforcement units. It is based on covert cooperation with citizens or the use of the covert status of an operative and is carried out in order to prevent, detect, stop offences, search for and record factual data on illegal acts of individuals and groups, liability for which is provided for by the Criminal Code of Ukraine, in the interests of criminal proceedings and to obtain information to ensure the security of citizens, society and the state.”<sup>3</sup> Consequently, currently it is necessary to state the relevance of the doctrinal study of criminal procedural application of confidential cooperation in investigative and operational search activities.

Before analysing the ways and methods of involving confidants in the process of detecting and investigating criminal offences, however, it is first necessary to establish the legal nature of this provision. If to analyse legislative acts, it can be established that the key legislative acts in the study of this topic are the Law of Ukraine “On Operational and Investigative Activity” and the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC of Ukraine). In particular, the Law of Ukraine “On Operational and Investigative Activities” mentions several times the possibility of using confidential cooperation in operational and investigative activities. At the same time, such references can be divided into 2 groups: references to persons involved in confidential cooperation (“persons who have confidentially cooperated or are cooperating”) and references to confidential cooperation itself. Thus, in accordance

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<sup>3</sup> Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer (*Adopted by the Committee of Ministers on 25 October 2000 at the 727<sup>th</sup> meeting of the Ministers’ Deputies*). URL: <https://www.icj.org/wp-content/uploads/2014/10/CoE-rec200021-freedom-exercise-profession-lawyer.pdf>

with clause 14 of Article 8(1) of the Law of Ukraine “On Operational Investigative Activity”, operational units are entitled to use confidential cooperation in accordance with the provisions of Article 275 of the CPC of Ukraine to perform operational investigative tasks. Hence, this law refers to the CPC of Ukraine, which should be the main legal act in the process of analysing confidential cooperation. The problem is that the CPC of Ukraine does not provide all the answers as to the nature of such cooperation. Pursuant to Article 275 of the CPC of Ukraine (“Use of confidential cooperation”), when conducting covert investigative (detective) actions, the investigator has the right to use information obtained as a result of confidential cooperation with other persons or to involve such persons in covert investigative (detective) actions in cases provided for by the CPC of Ukraine. However, the CPC of Ukraine does not provide a list of “cases” when confidential cooperation in criminal proceedings is used, in fact limiting itself to Article 272 of the CPC of Ukraine, which states that “during the pre-trial investigation of grave or particularly grave crimes, information, things and documents relevant to the pre-trial investigation may be obtained by a person who, in accordance with the law, performs a special task while participating in an organised group or criminal organisation, or is a member of the said group or organisation who cooperates with the pre-trial investigation authorities on a confidential basis”<sup>4</sup>. Simultaneously, D. B. Sergeeva argues that confidential cooperation is not limited to those covert investigative (detective) actions in relation to which the legislator uses the wording “confidential cooperation”, because it “can be used in the course of such covert investigative (detective) actions as surveillance of a person, thing or place (Article 269 of the CPC of Ukraine); audio and video control of a place (Article 270 of the CPC of Ukraine) and a person (Article 260 of the CPC of Ukraine), control over the commission of a crime (Article 271

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<sup>4</sup> The Criminal Code of Ukraine: of 05 April 2001, No.2341-III. *The Official Bulletin of the Verkhovna Rada (BVR)*. 2001. No.21. Article 920. Amendment of August 8, 2022. URL: <https://zakon.rada.gov.ua/laws/show/2341-14#Text>

of the CPC of Ukraine), performance of a special task to disclose criminal activity of an organised group or criminal organisation (Article 272 of the CPC of Ukraine), covert obtaining of samples required for comparative research (Article 274 of the CPC of Ukraine)... In the course of other covert investigative (detective) actions, the use of confidential cooperation in the form of involvement of persons with whom such cooperation has been established is not appropriate.”<sup>5</sup> Furthermore, the doctrine has repeatedly stated that the legislation should be clearer in terms of the definition and rules for the application of confidential cooperation. Thus, O. V. Kyrychenko, analysing the possibility of confidential cooperation in the investigation of crimes against public security, noted that “firstly, legislative regulation of the use of confidential cooperation will provide an opportunity to systematise legal norms on such cooperation and will serve as a basis for the development (improvement) of modern departmental instructions of law enforcement agencies on the use of the covert apparatus in combating crime...; secondly, given that most crimes against public security are latent, their detection is usually possible only through the use of persons who cooperate confidentially with the criminal police and the public. Therefore, the legislative regulation of such cooperation will contribute to the improvement of legal relations arising between employees of operational units and covert agents in combating these crimes; thirdly, the legislative definition of confidential cooperation will also contribute to the development of regulatory and legal norms on social and legal protection of non-staff covert agents whose activities are aimed at exposing organised groups or criminal organisations.”<sup>6</sup>

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<sup>5</sup> Recommendation No. R(2000)21 of the Committee of Ministers to member States on the freedom of exercise of the profession of lawyer (*Adopted by the Committee of Ministers on 25 October 2000 at the 727<sup>th</sup> meeting of the Ministers’ Deputies*) URL: <https://www.icj.org/wp-content/uploads/2014/10/CoE-rec200021-freedom-exercise-profession-lawyer.pdf>

<sup>6</sup> Kyrychenko O. V. Legislative Definition of Confidential Cooperation in Ukraine as One of the Directions for Improving Operational and Investigative Counteraction to Crimes Against Public Security. *Operational and Investigative Activities of Internal Affairs Agencies: Problems of Theory and Practice* : Materials of the scientific and practical conference. (Dnipro, November 16, 2011). Dnipro : Dnipropetrovsk State University of Internal Affairs, 2012. P. 49–52.

Thus, the overwhelming majority of scholars note that the definition of confidential cooperation should be contained at least in the CPC of Ukraine. However, it should be noted that by analysing only legal acts, it is impossible to establish the essence of confidential cooperation as one of the ways to collect evidence for the investigation of criminal offences. Obviously, in the face of such legal uncertainty, it is advisable to turn to the criminal procedural doctrine.

From the moment of adoption of the CPC of Ukraine of 2012, scholars have been trying to provide a doctrinal interpretation of confidential cooperation with due regard to the provisions of the criminal procedure legislation. At the same time, there is currently no consensus among scholars on the use of such a conceptual apparatus. For example, scholars continue to debate the correlation between such concepts as “confidential cooperation” and “covert cooperation”.

In particular, L. M. Hribov and O. I. Kozachenko are convinced that the term “covert cooperation” is more correct when used in legal acts and investigative practice: “An analysis of the use of these words in various spheres of public life shows that the confidentiality of social interaction between different actors does not imply keeping its fact secret (but implies mutual trust of these actors and concealment of the content of the information exchanged). Instead, secrecy implies concealment of the very fact of social interaction, and, accordingly, its content... A person's covert cooperation with an operative also involves concealing the content of the information exchanged between the parties. But it also implies concealment of the very fact of social interaction (with the use of secrecy). Moreover, there can be no secrecy without confidentiality of information exchange. Hence, confidentiality is a necessary condition for covert cooperation, and secrecy is not a condition for confidential cooperation. Therefore, confidential cooperation with individuals can theoretically be carried out by any officials of law enforcement and other state bodies without the use of secrecy and without special legal regulation. Only the state bodies and their subdivisions defined by the CPC of Ukraine and the Law of Ukraine

‘On Operational and Investigative Activity’, which have the power, means and legal grounds to ensure the secrecy of such cooperation, can act as subjects of organising covert cooperation.”<sup>7</sup> The authors also provide a fairly thorough analysis of the provisions of various legal acts that use the term “confidential”, which also confirms that only information that is transmitted or planned to be transmitted (conversations, official correspondence, document flow, etc.) is concealed. “Thus, today there is a steady trend in lawmaking and scientific research to use the adjective confidential (confidential, confidential) to denote the property of information, and the adjective secret (nekhlashne, nekhlashna) to characterise certain activities or their elements.”<sup>8</sup>

In general, the authors' position is quite logical and well-reasoned, but it cannot be fully agreed with. Indeed, if one draws an analogy with other legal acts, the word “confidentiality” is primarily associated with restrictions on disclosure of the content of certain information. In this aspect, when analysing confidential cooperation in investigative and detective activities, “confidentiality” will only describe one aspect of the implementation of such cooperation. Nevertheless, the problem is that the legislator uses the concept of “covert investigative (detective) actions” quite actively in legal acts, providing the relevant definition in Article 246 of the CPC of Ukraine. Thus, using the term “covert cooperation” instead of “confidential cooperation”, the emphasis will be on the connection of such cooperation with covert investigative (detective) actions, which significantly limits the scope and possibilities of using such cooperation. In fact, from the point of view of linguistics, the word “covert” better reflects the essence of the relevant cooperation, but in this case, it is necessary to pay attention to the established form of use of the relevant phrases, and the word “covert” immediately indicates the identity between confidential cooperation and covert investigative (detective)

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<sup>7</sup> Hribov M., Kozachenko O. Correlation of the notions “confidential cooperation” and “tacit cooperation”. *Scientific – Practical Journal “Herald of Criminal Justice”*. 2019. No. 1. P. 8–17.

<sup>8</sup> Ibid.



actions. Therefore, primarily to ensure a sustainable approach to the use of special terminology, it is more practical to use the phrase “confidential cooperation”. Following up on this point, it should also be emphasised that the actual distinction between the concepts of “confidential cooperation” and “covert investigative (detective) actions” is not as clear-cut as it might seem at first glance.

1. If to analyse the criminal procedural doctrine on this issue, it is possible to distinguish several approaches when comparing these concepts. Therefore, one group of scholars considers confidential cooperation as a way to implement covert investigative (detective) actions (hereinafter referred to as CI(D)A). For example, Ye. D. Skulysh, studying CI(D)A, considers confidential relations with a person as an auxiliary means, the purpose of which is to ensure their organisation and implementation<sup>9</sup>. O. V. Muzychenko noted that the main task of confidential cooperation is to achieve the effectiveness of a specific CI(D)A, which may include encryption of law enforcement activities related to the preparation and conduct of CI(D)A, clarification of the content of information contained on technical means, and so forth<sup>10</sup>. Parashutin A. B. identifies three main blocks of means used by authorised law enforcement agencies to interfere with private communication: 1) pre-identified (marked) or false imitation means; 2) special technical means; 3) confidential cooperation<sup>11</sup>. Similar views are held by S. R. Tahiev, who believes that “confidential cooperation is rather a tool for conducting a particular CI(D)A (which most of all reveals the tacit quintessence of the actions under investigation) than

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<sup>9</sup> Recommendation No.R (2000) 7 of the Committee of Ministers to member states on the right of journalists not to disclose their sources of information, (*Adopted by the Committee of Ministers on 8 March 2000 at the 701<sup>st</sup> meeting of the Ministers' Deputies*). URL: <https://rm.coe.int/16805e2fd2>

<sup>10</sup> Moroz S. M. Problems of improvement of legal regulation of the use by investigator of confidential cooperation with other persons. *Scientific Bulletin of the Dnipropetrovsk State University of Internal Affairs*. 2015. No 1. P. 506–513.

<sup>11</sup> Parashutin A. B. Theoretical and legal substantiation of the means used in interference in private communication. *State and regions. Series: Law*, 2018. No. 3 (61). P. 170–176.

an independent CI(D)A”<sup>12</sup>. Another group of scholars, on the contrary, considers confidential cooperation as a type of covert investigative (detective) actions<sup>13</sup>.

“Involvement in confidential cooperation is not a type of CI(D)A, but only an integral element of its conduct, as can be seen from the provisions of Article 246(2) of the CPC of Ukraine, which lists the types of CI(D)A that may be conducted in cases of grave and especially grave crimes, among which there is no involvement in confidential cooperation. Involvement in confidential cooperation is only a means of conducting various types of CI(D)A.”<sup>14</sup> “Involvement in confidential cooperation is not an investigative or detective action, but one of the organisational conditions for conducting investigative or detective actions. Article 275 of the CPC, while allowing the use of confidential cooperation to

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<sup>12</sup> Tahiev S. R. Covert Investigative (Detective) Actions in the Criminal Proceedings of Ukraine : Monograph / Chernihiv Polytechnic National University. Kyiv : Publishing House “Dakor”, 2015. 440 p.

<sup>13</sup> Veprytskiy R. S. Application of Covert Investigative (Detective) Actions in Combating Crime in the Region. *Our Law*. 2015. No.2. P. 92–95. URL: [http://nbuv.gov.ua/UJRN/Nashp\\_2015\\_2\\_18](http://nbuv.gov.ua/UJRN/Nashp_2015_2_18); Maksymov V. I. Use of Confidential Cooperation in Criminal Proceedings : Dissertation ... Candidate of Juridical Sciences: 12.00.09 / Higher Education Institution 'Open International UNIVERSITY of Human Development 'UKRAINE'. Kyiv, 2014. 199 p.; Maksymov V.I. Use of Confidential Cooperation in Criminal Proceedings. *European Perspectives*. 2014.

№ 2. P. 30–34; Moroz S.M. Directions of improvement of legal regulation of organization of the use by investigator of confidential cooperation with other persons. *Scientific Bulletin of the Dnipropetrovsk State University of Internal Affairs*. 2017.

№ 1. P. 339–348; Moroz S.M. Problems of improvement of legal regulation of the use by investigator of confidential cooperation with other persons. *Scientific Bulletin of the Dnipropetrovsk State University of Internal Affairs*. 2015. No 1. P. 506–513; Covert Investigative (Detective) Actions: a course of lectures / D. Y. Nykyforchuk, S. I. Nikolaiuk, V. V. Polyvoda, et al. Kyiv : National Academy of Internal Affairs, 2012. 124 p.; Covert Investigative (Detective) Actions: a textbook / Yu. H. Sevruck, O. V. Shamara, A. V. Stolitnii, et al. Kyiv : National Academy of Prosecution of Ukraine, 2017. 110 p.; Gribov M. Supervision of the execution of orders to conduct covert investigative (detective) actions during the investigation of looting and robbery. *Scientific – Practical Journal “Herald of Criminal Justice”*. 2015. No. 1. P. 23–28.

<sup>14</sup> The Sentence of the Trostianetskyi Raion Court of Sumy Oblast of January 27, 2023, case No. 588/883/22. URL: <https://reestr.court.gov.ua/Review/108622209>

investigate crimes, does not provide for the form in which such persons should be involved. Considering the nature of confidential cooperation, the investigating body itself determines the forms and methods of its organisation, taking into account the needs of the investigation, the need to prevent disclosure of the fact and details of such cooperation, etc.”<sup>15</sup>

S. Saltykov and D. Talalai, having studied the positions of various scholars, conducted a fairly thorough comparison of CI(D)A and confidential cooperation according to 11 criteria: the degree of connection with operational and investigative activities (OIA), the subject of the initiation of the conduct, the legal basis for the conduct, the term of the conduct, the degree of legal regulation, recording of the conduct, notification of other persons about the conduct, the limits of use, evidentiary value, the degree of restriction of the rights (freedoms) of a person, the purpose of the conduct<sup>16</sup>. According to all criteria, scholars have established a discrepancy between confidential cooperation and covert investigative (detective) actions, noting that “the clear difference between the essential characteristics of the CI(D)A and confidential cooperation proves their different procedural and legal nature, and therefore a different procedural form, procedure and purpose of use. Thus, we support the position of procedural scholars on the definition of confidential cooperation as a procedural action that is not a CI(D)A, but is aimed at ensuring them and achieving maximum procedural efficiency of a particular CI(D)A in cases where information about the crime and the person who committed it cannot be obtained in any other way.”<sup>17</sup>

It should be noted that this paper fully supports this position. The argument of some scholars that Art. 275 of the CPC of Ukraine “Use of confidential cooperation” is located in the clause “Other types of covert

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<sup>15</sup> The Resolution of the First Judicial Chamber of the Supreme Court of Justice of the Supreme Court of May 23, 2023, case No. 758/5719/16-к. URL: <https://reyestr.court.gov.ua/Review/111251222>

<sup>16</sup> Saltykov S., Talalai D. Confidential cooperation and covert (investigative) activities. *Entrepreneurship, Economy and Law*. 2020. No. 8. P. 285–290.

<sup>17</sup> Ibid.

investigative (detective) actions” and therefore should also refer to the types of CI(D)A is obviously erroneous. Firstly, the same clause contains Article 273 “Means used during covert investigative (detective) actions”, but none of the scholars and practitioners include such means in the list of CI(D)A for obvious reasons, which do not make sense to dwell on separately. Secondly, as already noted, Article 275 of the CPC of Ukraine is not the only article that refers to confidential cooperation, as such an indication is also present in Article 272 of the CPC of Ukraine. Therefore, it seems rather strange that one separate covert investigative (detective) action is also an integral part of another covert investigative (detective) action. Indeed, the CPC of Ukraine has examples when several covert investigative (detective) actions are carried out within the framework of one set of procedural actions (e.g., inspection of publicly inaccessible places, housing or other property of a person in order to install technical controls that will allow audio and video recording of persons), but in any case, all CI(D)A are separate procedural actions that, if provided for by the applicable criminal procedural law, require separate authorisation by the investigating judge (or separate instructions for these actions within the same order). “Otherwise, a situation would arise when one investigative (detective) action is carried out during the conduct of another as its stage or structural element, which is unacceptable. These measures are by their very nature safeguarding measures, designed to facilitate the successful conduct of covert investigative (detective) actions during which they are used.”<sup>18</sup> “In other words, confidential cooperation in practice is carried out during the pre-trial investigation only to ensure the conduction of other CI(D)A and no separate protocol is drawn up on its results.”<sup>19</sup> Hence, it can be unequivocally concluded that the inclusion of Art. 275 of the CPC of Ukraine in the clause of the CPC of Ukraine entitled “Other types of covert investigative

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<sup>18</sup> Sergeeva D. Covert cooperation in criminal proceedings *Scientific – Practical Journal “Herald of Criminal Justice”*. 2016. No. 4. P. 47–54.

<sup>19</sup> Antonov K. V. Problems of legislative regulation of the use of confidential cooperation during investigation. *Juridical scientific and electronic journal*. 2020. No. 3. P. 369–371.

(detective) actions” does not mean that confidential cooperation is distinguished as a separate procedural action, because in this case, first of all, it is necessary to pay attention to the characteristics of such action, and not to the location of the article in the criminal procedure legislation, but S. Saltykov and D. Talalai have thoroughly proved the differences between confidential cooperation and covert investigative (detective) actions.

Thus, it is safe to conclude that CI(D)A and confidential cooperation are not identical concepts. Accordingly, the next logical task is to define the essence of confidential cooperation. And in this respect, it will also be advisable to refer to legal doctrine, because, as it has already been established, it is impossible to find a clear answer to this question in the legislation.

N. Goldberg notes that “confidential cooperation is a secret, unofficial relationship established by detectives of the National Anti-Corruption Bureau of Ukraine, operational units of the police, the Security Service of Ukraine and other authorised bodies with a citizen of Ukraine, a foreigner or a stateless person in order to obtain, on a voluntary and confidential basis, evidential, intelligence, counterintelligence, indicative and other information that can be used to solve the tasks of criminal proceedings”<sup>20</sup>. Other scholars note that confidential cooperation should be considered as “relations that determine mutual obligations and responsibilities of the subjects of operational and investigative activities represented by their employees with citizens who have agreed to assist in the detection, prevention and suppression of crimes, and to ensure the protection of law enforcement officers from unlawful encroachments in the performance of their duties. This cooperation is carried out on the principles of legality, secrecy, observance and respect for constitutional rights and freedoms of man and citizen, mutual agreement, responsibility and ensuring personal safety of the parties.”<sup>21</sup>

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<sup>20</sup> Goldberg N. Problems of Regulation of Confidential Cooperation in the Course of Covert Investigative (Detective) Actions. *Jurnalul juridic national: teorie și practică*. 2016. Februarie. P. 100–103.

<sup>21</sup> Usenko V. F., Nekrasov V. A., Matsiuk V. Ya. Application of Confidential Assistance of Citizens in Combating Crimes: Current Perspective : Monograph. Kyiv : PH “KNT”, 2007. 204 p.

K. V. Antonov, studying confidential cooperation as a way of obtaining evidentiary information in the course of covert investigative (detective) actions, noted that such cooperation is subject to the general requirements for CI(D)A: “a) information about the offence and the person who committed it cannot be obtained in any other way; b) the offence is a grave or particularly grave offence; c) conducted exclusively in criminal proceedings”<sup>22</sup>.

S. M. Saltykov, analysing confidential cooperation, identified the following characteristic features of this concept: “1. This is a legal relationship that arises between two entities endowed with mutual rights and obligations (for example, the right of a confidential person to his or her own security, as provided for by the Law of Ukraine 'On Ensuring the Security of Persons Participating in Criminal Proceedings', which is correlated with the obligation of a particular entity to ensure it, and so forth). 2. These relationships are of a tacit nature, i.e., they are subject to disclosure only under certain conditions determined by law. 3. The entity authorised to use confidants and involve them in the conduct of the CI(D)A in the context of the literal interpretation of Article 275 of the CPC of Ukraine is the investigator of the relevant pre-trial investigation body. 4. Only two forms of interaction with confidants within criminal proceedings are enshrined in law: the use of information obtained as a result of confidential cooperation; and the involvement of confidants in the conduct of the CI(D)A. 5. Only individuals are involved in confidential cooperation on an individual basis, regardless of citizenship (citizen of Ukraine, foreigner or stateless person permanently or temporarily residing in Ukraine), nationality, gender, property, official and social status, education, membership in public associations, attitude to religion and political beliefs”<sup>23</sup>. 6. Immunity

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<sup>22</sup> Antonov K. V. Problems of legislative regulation of the use of confidential cooperation during investigation. *Juridical scientific and electronic journal*. 2020. No. 3. P. 369–371.

<sup>23</sup> Scientific and practical commentary on the Criminal Procedure Code of Ukraine: in 4 volumes / edited by O. Stovba. Kharkiv : Publishing Agency APOSTYL, 2015. V. 2. 329 p.

from establishing confidential relations is granted to certain holders of professional secrets as defined in Article 275(2) of the CPC of Ukraine, namely: lawyers, notaries, medical professionals, clergy and journalists, if such cooperation is related to disclosure of confidential professional information. 7. Such cooperation shall be based on the voluntary consent of the confidant. 8. These legal relations should have a legal expression (procedural consolidation) to confirm the establishment of the legal status of a confidant in criminal proceedings, as well as to determine the moment when confidential cooperation begins. 9. Confidential cooperation in the context of Art. 275 of the CPC of Ukraine takes place only within the framework of pre-trial investigation of a specific criminal proceeding, which directly follows from the provisions of clause 5 of Art. 3(1), Art. 214(1-3) of the CPC of Ukraine. 10. The right to establish confidential relations arises only after a person reaches the age of majority. Such a provision is not directly provided for by the current CPC of Ukraine, but follows from the systemic connection of its provisions regulating the procedural status of a minor in criminal proceedings.”<sup>24</sup> Thus, the author argues that “confidential cooperation (within the meaning of Article 275 of the CPC of Ukraine) is a secret relationship that arises from the moment the investigator makes the relevant procedural decision with an adult person of legal capacity who has voluntarily expressed a desire to cooperate with the pre-trial investigation body within a particular criminal proceeding, in order to provide information and involve this person in conducting covert investigative (detective) actions in cases specified by the CPC.”<sup>25</sup>

According to the court practice, confidential cooperation should be understood as a covert relationship established by the authorised bodies with an adult person of legal capacity and used on the basis

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<sup>24</sup> Saltykov S. M. To the question of the definition of conceptual apparatus with the usage of the confidential cooperation during the criminal proceeding. *Law and Society*. 2020. No. 2. Vol. 3. P. 139–146.

<sup>25</sup> Ibid.

of voluntariness and confidentiality to solve the tasks of criminal proceedings. The investigator has the right to use information received from persons with whom confidential cooperation is established during the conduct of the CI(D)A, or to involve them in such actions<sup>26</sup>.

In general, it can be concluded that among scholars who do not include confidential cooperation in the list of covert investigative (detective) actions, similar views on this legal category are widespread, indicating that confidential cooperation is, first of all, a specific procedure for relations between special and authorised subjects. Nevertheless, the positions of scholars begin to differ further, as the definition includes key features of confidential cooperation, on which a significant number of scholars do not agree. In this regard, in order to formulate the author's own interpretation of confidential cooperation, it is proposed to analyse the key aspects of such cooperation, such as the form of implementation, persons involved in cooperation, persons who may implement cooperation during operational and investigative activities and in criminal proceedings, etc. It is worth starting with the forms of implementation.

The position that confidential cooperation can be implemented in two forms is relatively stable: as the use of confidential information obtained as a result of confidential cooperation, and as the involvement of persons in covert investigative (detective) actions. This unanimity of scholars is primarily explained by the legal definition contained in Article 275 of the CPC of Ukraine, as the legislator has clearly provided for such forms of confidential cooperation. Art. 11 of the Law of Ukraine “On Operational and Investigative Activities” also establishes the procedure for facilitating operational and investigative activities. Part 2 of this article states that at the request of the relevant persons, their cooperation with the operational unit may be formalised in a written agreement guaranteeing the confidentiality of cooperation. “The assistance of persons to law

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<sup>26</sup> The Sentence of the Trostianetskyi Raion Court of Sumy Oblast of January 27, 2023, case No. 588/883/22. URL: <https://reyestr.court.gov.ua/Review/108622209>



enforcement agencies on a confidential basis is the essence of the agent method, and it, in turn, constitutes the main content of both operational and investigative activities and criminal procedure activities in terms of covert investigative (detective) actions.”<sup>27</sup> However, it is difficult to consider such cooperation as a form of confidential cooperation, as these concepts are different in scope. Hence, assistance in carrying out operational and investigative activities is only a general duty to assist persons not directly involved in such activities, which may have a number of forms and methods of implementation. “In addition, it is possible to facilitate the conduct of operational and investigative activities on a non-confidential basis, in a completely open and public manner. Therefore, the media constantly contribute to the implementation of operational and investigative activities by disseminating information necessary to establish the location of wanted persons, prevent the commission of crimes, etc. Enterprises, institutions and organisations shall assist operational units by allocating specialists who can provide professional opinion in certain areas of human activity and provide them with the necessary means. Individuals may provide operational units with their own residential and commercial premises, vehicles and other technical means, etc. as part of their assistance to operational investigative activities.”<sup>28</sup> Thus, when analysing confidential cooperation in investigative and detective activities, it would be advisable to rely on the provisions of Article 275 of the CPC of Ukraine, which distinguishes two forms of confidential cooperation. At the same time, it is worth paying attention not only to retrospective, but also to prospective confidential cooperation, which became one of the conditions for concluding a plea agreement. As a result, the suspect, in addition to admitting guilt, also undertakes to cooperate with law enforcement agencies in exposing and

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<sup>27</sup> Goldberg N. Problems of Regulation of Confidential Cooperation in the Course of Covert Investigative (Detective) Actions. *Jurnalul juridic national: teorie și practică*. 2016. Februarie. P. 100–103.

<sup>28</sup> Hribov M., Kozachenko O. Correlation of the notions “confidential cooperation” and “tacit cooperation”. *Scientific – Practical Journal “Herald of Criminal Justice”*. 2019. No. 1. P. 8–17.

detecting criminal offences committed by others through confidential cooperation to document such illegal actions and persons in relation to certain types of criminal offences<sup>29</sup>.

First and foremost, it is necessary to analyse the possibilities of using confidential cooperation to obtain information in the establishment and detection of criminal offences. D. B. Sergeeva notes that this form of cooperation “is appropriate for use not only in the course of all covert investigative (detective) actions without exception, but also in the course of other procedural actions carried out within the framework of pre-trial investigation. In our opinion, in Article 275(1) of the CPC of Ukraine, the legislator unreasonably limited this possibility to covert investigative (detective) actions only.”<sup>30</sup> This position requires a more detailed analysis. In general, one should agree with the author that it is inexpedient to limit this method of information gathering to covert investigative (detective) actions. This is primarily due to the fact that confidential cooperation is also used in the course

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<sup>29</sup> The Sentence of the Bolhradskiy Raion Court of Odessa Oblast of November 24, 2015, case No. 497/1691/15-к. URL: <https://reyestr.court.gov.ua/Review/47917152>; The Sentence of the Bolhradskiy Raion Court of Odessa Oblast of July 13, 2016, case No. 497/1321/16-к. URL: <https://reyestr.court.gov.ua/Review/58963215>; The Sentence of the Bolhradskiy Raion Court of Odessa Oblast of August 27, 2015, case No. 497/2017/15-к. URL: <https://reyestr.court.gov.ua/Review/54620321>; The Sentence of the Borodianskiy Raion Court of Kyiv Oblast of January 12, 2015, case No. 360/2883/14-к. URL: <https://reyestr.court.gov.ua/Review/42250461>; The Sentence of the Borodianskiy Raion Court of Kyiv Oblast of January 13, 2015, case No. 360/2908/14-к. URL: <https://reyestr.court.gov.ua/Review/42266922>; The Sentence of the Haisynskiy Raion Court of Vinnytsia Oblast of April 22, 2022, case No. 129/684/22. URL: <https://reyestr.court.gov.ua/Review/104052027>; The Sentence of the Kozelshchynskiy Raion Court of Poltava Oblast of February 26, 2015, case No. 533/110/15-к. URL: <https://reyestr.court.gov.ua/Review/42868247>; The Sentence of the Liuboml'skiy Raion Court of Volyn Oblast of August 12, 2014, case No. 163/2051/14-к. URL: <https://reyestr.court.gov.ua/Review/40155499>; The Sentence of the Petrykivskiy District Court of Dnipropetrovsk Oblast of April 17, 2015, case No. 187/267/15-к. URL: <https://reyestr.court.gov.ua/Review/43629931>; The Sentence of the Yahotynskiy Raion Court of Kyiv Oblast of May 28, 2015, case No. 382/950/15-к. URL: <https://reyestr.court.gov.ua/Review/44412988>

<sup>30</sup> Sergeeva D. Covert cooperation in criminal proceedings *Scientific – Practical Journal “Herald of Criminal Justice”*. 2016. No. 4. P. 47–54.

of operational investigative activities prior to entering information into the Unified Register of Pre-trial Investigations outside criminal proceedings. Following the enactment of the new Criminal Procedure Code of Ukraine, significant amendments were also made to the Law of Ukraine “On Operational Investigative Activity”, and to a large extent this Law began to directly refer to the 2012 CPC of Ukraine. This was associated with the introduction of the institute of covert investigative (detective) actions in criminal proceedings, and in order to avoid contradictions and conflicts, the legislator chose the CPC of Ukraine as the main source for conducting covert procedural actions both within criminal proceedings and before they begin – in the course of conducting operational and investigative activities. However, as already noted, the Law of Ukraine “On Operational and Investigative Activities” mentions confidential cooperation as one of the methods of implementing operational and investigative measures, and therefore the position that confidential cooperation cannot be limited to covert investigative (detective) actions is absolutely correct. At the same time, it should be noted that the author of the article under review did not focus on operational and investigative activities, but on other procedural actions in the course of criminal investigation. Although in this aspect one should also agree with D. B. Sergeeva, the possibility of obtaining information as a result of confidential cooperation outside the procedure of covert investigative (detective) actions requires a deeper analysis.

In accordance with the concept of absolute binding force of law, authorised bodies and officials have the right to do only what is expressly provided for by law. The same is provided for in the CPC of Ukraine, where Article 9(1) of the CPC of Ukraine states that “during criminal proceedings, the court, investigating judge, prosecutor, head of the pre-trial investigation body, investigator, other officials of public authorities are obliged to strictly comply with the requirements of the Constitution of Ukraine, this Code, international treaties ratified by the Verkhovna Rada of Ukraine, and the requirements of other legislative

acts”<sup>31</sup>. Such obligations are of great importance for ensuring the rule of law throughout criminal proceedings. And given that the Constitution of Ukraine imposes the same obligation on authorised operational units, it can be firmly stated that they can also do only what is expressly provided for by law.

Continuing this analogy, it should be noted that the collection of evidence in criminal proceedings by authorised persons must also comply with strict legal requirements, as any evidence must be obtained in the manner prescribed by the criminal procedure law in order to be recognised as admissible. Assuming that in the course of confidential cooperation, information relevant to criminal proceedings is obtained, such information will be subject to the requirements for any evidence. In this case, first of all, it is necessary to refer to Article 93 of the CPC of Ukraine, which provides an exhaustive list of ways to collect evidence in criminal proceedings. Thus, in accordance with Article 93(2) of the CPC of Ukraine, the prosecution collects evidence by conducting investigative (detective) actions and covert investigative (detective) actions, requesting and receiving from public authorities, local governments, enterprises, institutions and organisations, officials and individuals, things, documents, information, expert opinions, audit reports and inspection acts, and other procedural actions provided for by the CPC of Ukraine. Therefore, if to consider confidential cooperation as a way of obtaining evidentiary information, Article 93 of the CPC of Ukraine allows receiving such information by “obtaining information from individuals and legal entities”. At the same time, this provision should be expanded by clarifying the possibility of using confidential cooperation. In this case, the wording “obtaining information” is too broad and cannot fully

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<sup>31</sup> The Criminal Procedure Code of Ukraine. *The Official Bulletin of the Verkhovna Rada (BVR)*. 2013, No. 9–10, No. 11–12, No. 13. Art. 88. URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text>; The Criminal Procedure Code of Ukraine : scientific and practical commentary : in 2 vols. Kharkiv : Pravo, 2012. Vol. 1. 768 p.; The Criminal Procedure Code of Ukraine with article-by-article materials of the European Court of Human Rights case law / edited by: Yu. H. Sevruck, A. V. Stolitsnii. Kyiv : National Academy of Prosecution of Ukraine, 2018. 924 p.

describe the specifics of confidential cooperation, as such cooperation between an authorised person and an informant is bilateral, as it implies rights and obligations for both parties. “Obtaining information”, in turn, provides only for a unilateral procedure for data transfer without creating obligations for persons involving confidants, although, as will be noted later in this study, confidential cooperation at least creates obligations to ensure the safety of persons involved in such cooperation.

In this regard, there is a conviction that receiving data as a result of confidential cooperation cannot be characterised only as “obtaining information” (although it is as close as possible to this method of evidence collection). Therefore, it is proposed to amend Article 93(2) of the CPC of Ukraine and to set it out in the following wording: “2. The prosecution shall collect evidence by conducting investigative (detective) actions and covert investigative (detective) actions, requesting and receiving (including as a result of confidential cooperation) from public authorities, local self-government bodies, enterprises, institutions and organisations, officials and individuals, things, documents, information, expert opinions, audit findings and inspection reports, and other procedural actions provided for by this Code.” This amendment will emphasise the similarity of obtaining information through confidential cooperation to the “ordinary” obtaining of information, while at the same time emphasising the specifics of this method of collecting evidence as opposed to those expressly provided for in Article 93 of the CPC of Ukraine.

However, this change does not resolve the issue of how to “introduce” information obtained as a result of confidential cooperation into criminal proceedings. To analyse this issue, it is first of all proposed to divide all information that may be obtained as a result of confidential cooperation into two groups: orientation (operational) information and evidentiary information. Orientation (operational) information is information that indicates the possible commission of a criminal offence, the persons involved in its commission, helps to formulate or revise versions, etc. In other words, this is information that helps the investigation to move forward in solving a criminal offence, indicating possible ways

of collecting evidence that will constitute the ultimate goal of proof, this is information that helps to formulate a certain position or version that will be further verified using other investigative and operational methods. Accordingly, such information will not be used in criminal proceedings in the process of proving, it will not be the subject of investigation in court, and in some cases will not even be reflected in the pre-trial investigation materials. Therefore, such orientation information does not need to be “introduced” into criminal proceedings by drafting separate procedural documents, which the defence will be able to review in accordance with Article 290 of the CPC of Ukraine, etc. Operational officers, inquirers, investigators and other authorised persons are to some extent free to collect and use such information, being guided primarily by departmental regulations and the requirement of expediency<sup>32</sup>.

The second group of information that can be obtained as a result of confidential cooperation is evidential information. This information is directly related to the subject matter of proof in criminal proceedings, and therefore it should be open to the defence at the end of the pre-trial investigation, and should also be the subject of investigation in court. Such information should be contained in certain sources defined by the criminal procedure legislation. Since obtaining information involves direct communication with the confidant, it can be concluded that in this particular case, an interrogation should be conducted, and the confidant will act as a witness. In general, such a procedure for implementing confidential cooperation does not contradict the requirements of criminal procedural law. The only important condition in this case will be the obligation of the authorised person to ensure the safety of such a confidant by, for example, withdrawing information about the person and conducting interrogations in court via video conference without the possibility of identification. Given that this specificity of interrogation is

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<sup>32</sup> However, it is obvious that any confidential cooperation must meet a number of regulatory requirements, which will be discussed below. In this case, it is only emphasised that the authorised persons are not limited to a strict procedural form, unlike in cases where they conduct, for example, public and covert investigative (detective) actions.

quite clearly spelled out in the criminal procedure legislation, it can be concluded that this form of cooperation is quite popular. Obviously, the application of security measures to witnesses is not always the result of confidential cooperation, but it is believed that this form of interaction is the only permissible form for “introducing” information received from a confidant into the criminal process.

Thus, the following provision can be formulated: if, as a result of confidential cooperation, an investigator or other authorised person has received information relevant to criminal proceedings, the confidant must be interrogated as a witness and his or her testimony must be recorded in accordance with the procedure provided for by criminal procedural law. At the same time, security measures must be applied to the confidant, which must include at least the removal of information about the confidant's identity and the impossibility of identifying the confidant in any way. Failure to comply with this condition means that such cooperation ceases to be confidential. The Law of Ukraine “On Ensuring the Security of Persons Participating in Criminal Proceedings” stipulates that persons entitled to security through the application of organisational, technical and other measures aimed at protecting the life, home, health and property of these persons from unlawful attacks, in order to create the necessary conditions for the proper administration of justice, if there are appropriate grounds, include persons who have reported a criminal offence to a law enforcement agency or otherwise participated or contributed to the detection of a criminal offence. “At the same time, it is worth bearing in mind a certain gap in the legislation. Since Article 8 of the Law of Ukraine ‘On State Secret’ and the Code of Information Constituting State Secrets do not provide that information about a person who gives consent to confidential cooperation with a pre-trial investigation body may be classified as information that may be defined as a state secret.”<sup>33</sup>

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<sup>33</sup> Goldberg N. Problems of Regulation of Confidential Cooperation in the Course of Covert Investigative (Detective) Actions. *Jurnalul juridic national: teorie și practică*. 2016. Februarie. P. 100–103.

This is not considered to be a significant problem, as such measures may be applied primarily to ensure the safety of persons involved in confidential cooperation, which is generally consistent with the actual circumstances, as any confidential cooperation involves a certain risk to the confidant.

The next form of confidential cooperation is the involvement of confidants in covert investigative (detective) actions in cases provided for by the CPC of Ukraine. It has already been noted that the legislator has not defined the list of CI(D)A in which confidants may be involved, and such a list should primarily depend on the specifics of the procedural action itself and the tasks set by the investigator or other authorised person. It should also be emphasised that the current criminal procedural legislation does not adequately regulate the possibility of engaging persons in confidential cooperation in the course of the necessary procedural actions. As O. I. Kozachenko rightly notes, “none of the articles regulating the conduct of SIDs contains an indication of the possibility of involving 'other persons' in their conduct on a confidential basis, except for the only case – Article 272(1) of the CPC of Ukraine... Hence, it would be logical to assume that it would be unlawful to involve 'other persons' on a confidential basis in all other CI(D)A. However, this conclusion contradicts the provision of Article 246(6) of the CPC of Ukraine, which states that other persons may also be involved in covert investigative (detective) actions by the decision of the investigator or prosecutor. In this provision, the legislator does not set any restrictions on the cases in which other persons may be involved in conducting the CI(D)A.”<sup>34</sup> It should be stressed once again that the use of confidential cooperation should not be limited to covert investigative (detective) actions, as confidential cooperation is primarily a tool, and the procedure for using such a tool should be decided by the person conducting the relevant procedural action. Consequently, the analysis

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<sup>34</sup> Shynkarenko I. R., Moroz S. M. Problems of legal regulation of the use by investigator of confidential collaboration with other persons. *Actual problems of native jurisprudence*. 2017. V. 1. P. 243–246.



of this form of cooperation should be inseparable from the analysis of the relevant procedural action or operational and investigative measure.

In the process of analysing the forms of confidential cooperation, it has been repeatedly mentioned that confidants are persons involved in such cooperation. Nevertheless, it should be emphasised that it is the procedural and legal status of such persons that determines the characteristics of confidential cooperation, and therefore such analysis is also a critical factor in assessing confidential cooperation as a legal phenomenon.

Bahrii M. V., Lutsyk V. V. note that persons involved in confidential cooperation have the following rights: “to receive explanations from law enforcement officers about their tasks, rights and obligations; to know the legal consequences of their actions in the course of performing tasks, including those provided for by criminal law; to know the circumstances that exclude the criminal nature of the act; to refuse to perform tasks that, in their opinion, are contrary to the law or may pose a threat to their health or life; to conclude a confidential cooperation contract, including one that provides for the possibility of including the period of their cooperation as the main occupation in the employment record giving the right to receive a pension; to use documents that encrypt the identity for the purpose of secrecy; to receive remuneration and other compensation, including those stipulated by the contract; to receive, in accordance with the established procedure, funds for reimbursement of material expenses incurred by them in the course of performing tasks, as well as compensation for damage caused to their health or property in connection with cooperation; to appeal against illegal actions of a law enforcement agency or its employees. The main duties are as follows: to fulfil (if they do not contradict the law) the tasks of the law enforcement agency to assist in combating crime; to comply with the terms of the contract or cooperation in the case of non-contractual form; not to disclose information that they have learned in the course of cooperation.”<sup>35</sup>

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<sup>35</sup> Bahrii M. V., Lutsyk V. V. Procedural Aspects of Covert Obtaining of Information: Domestic and Foreign Experience: Monograph. Kharkiv : Pravo, 2017. 376 p.

V. H. Uvarov differentiated the status of persons whose confidential cooperation may be used by an investigator into “persons who facilitate on a confidential basis the activities of authorised operational units, persons who cooperate on a one-time basis within a specific criminal proceeding (witnesses, specialists, and so forth)”<sup>36</sup>.

A. Savchenko, analysing the confidants in respect of whom Article 43 of the Criminal Code of Ukraine (“Performance of a special task to prevent or solve criminal activities of an organised group or criminal organisation”) may be applied, identified six groups of confidants:

“1) covert employees of operational units that perform operational and investigative activities;

2) employees of other subdivisions of the bodies carrying out operational and investigative activities, who, in accordance with Article 8(4) of the Law of Ukraine ‘On Operational and Investigative Activities’, are involved in the execution of certain instructions in the course of operational and investigative activities;

3) employees of the intelligence agencies of Ukraine, who, in accordance with the Law of Ukraine ‘On the Intelligence Agencies of Ukraine’, have the right to use methods and means of operational and investigative activities in accordance with the procedure established by the Law of Ukraine ‘On Operational and Investigative Activities’ to perform their tasks of obtaining intelligence and ensuring the safety of their employees;

4) full-time and part-time covert officers of special units for combating organised crime of the internal affairs agencies and the Security Service of Ukraine, who are embedded under a written order under the cover of organised criminal groups and criminal organisations to uncover organised crime and bring the perpetrators to justice;

5) members of organised criminal groups or criminal organisations who have agreed to cooperate with an employee of an operational unit;

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<sup>36</sup> Uvarov V. H. Covert Investigative (Detective) Actions: Problems of Legal Certainty and Efficiency. *Legal Position*. 2016. No. 2 (17). P. 163–170.

6) other persons who have agreed to infiltrate a criminal group to perform a special task.”<sup>37</sup>

N. Ya. Mankovskiy proposed to supplement Article 272 of the CPC of Ukraine with the following information: “5. The following persons may be involved in the performance of a special task to disclose the criminal activity of an organised group or criminal organisation:

- 1) Open and covert employees of operational units of the bodies conducting operational and investigative activities;
- 2) employees of the intelligence agencies of Ukraine;
- 3) members of an organised criminal group or criminal organisation who have agreed to cooperate with an employee of an operational unit;
- 4) other persons who have agreed to be infiltrated into an organised criminal group or criminal organisation to perform a special task.”<sup>38</sup>

According to the Law of Ukraine “On Operational and Investigative Activities”, in the process of carrying out operational and investigative activities, both public and private staff and non-staff employees may be involved. Obviously, for the purposes of this study, it is only covert non-staff employees who will be of interest as they are the ones involved in confidential cooperation. In this regard, V. P. Klymchuk notes that “unofficial non-staff employees of operational units are persons with whom operational employees have established confidential cooperation in accordance with the above-mentioned rules of law”<sup>39</sup>.

In general, it should be noted that at the moment there are no clear restrictions on the possibility or impossibility of engaging a certain

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<sup>37</sup> Savchenko A. V., Matviichuk V. V., Nykyforchuk D. Y. *International Experience in the Use of Law Enforcement Agents in Europe and the United States*; ed. Ya. Yu. Kondratiev. Kyiv : National Academy of Internal Affairs of Ukraine, 2004. 60 p.

<sup>38</sup> Mankovskiy N. Ya. *Theoretical and Legal Aspects of Performing a Special Task to Disclose an Organised Crime Group. Legislation of Ukraine and the EU in the Light of Modern Active Reform Processes: Proceedings of the International Scientific and Practical Conference (Kyiv, February 26, 2016)*. K., 2016. P. 38–42.

<sup>39</sup> Klymchuk V. P. Legal status introduced into the criminal environment by operational units of Ukraine, investigators and ensuring their safety in the criminal justice process. *Nauka i pravoohorona*. 2018. No. 1 (39). P. 328–336.

category of persons in confidential cooperation. In analysing this issue, it should be emphasised once again that the list of persons who may be involved in confidential cooperation will primarily depend on the form of such cooperation. Nevertheless, the fact of any cooperation must be properly recorded. Even the procedure for such recording is not defined by the criminal procedure legislation.

The procedural doctrine contains a position that in the process of conducting covert investigative (detective) actions there are three types of formalisation of such cooperation: “an oral agreement (used when obtaining consent to cooperate in writing is impossible or inappropriate); a receipt (subscription to cooperation) as an act of unilateral expression of the citizen's will; a contract”<sup>40</sup>. K. V. Antonov notes that “the list of conditions to be set out in the contract is determined individually and depends on the nature of the work performed, personal and business qualities of the person who undertakes to assist the pre-trial investigation authorities, his/her real capabilities to participate in certain activities. The contract may provide for special conditions related to the results of participation in covert investigative (detective) actions, in particular, the preservation of information constituting a state secret. In this connection, the contract may set requirements for the confidential, for example, related to the restriction of his/her right to travel abroad within a specified period after the expiry of the contract.”<sup>41</sup> S. M. Saltykov identifies the following “documents required to involve a person in confidential relations under Article 275 of the CPC of Ukraine:

- Written consent of the confidential person;
- the investigator's decision to engage in confidential cooperation;
- a protocol of warning about the inadmissibility of disclosure of pre-trial investigation information and/or a memo on the procedural rights and obligations of the confidant;

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<sup>40</sup> Antonov K., Goldberg N. Contract as a form of securing confidential cooperation of citizens in carrying out do not drop the investigators (search). *University of Customs and Finance*. 2016. P. 1–11.

<sup>41</sup> *Ibid.*

- the investigator's decision to provide confidential information about the person;
- notification of the prosecutor of the fact of involvement of a person in confidential cooperation.”<sup>42</sup>

H. V. Neledva, analysing the possible structure and terms of such a contract, refers to the following conditions as special terms of the contract:

1) Personal guarantee. “Information about the confidant must be kept confidential, due to the secretive nature of such work and the confidant's desire to ensure his or her own life and health and that of his or her immediate family. The contract may stipulate security conditions for the person providing assistance and his/her family members, including both general and individual conditions (change of appearance; issuance of new identity documents; relocation to another location, etc.”<sup>43</sup> The scholar agrees with K. V. Antonov, who notes that “when setting new priorities in criminal proceedings, the state should take into account the personal safety of the subjects of their provision, namely, persons rooted in the criminal environment, since their life and health are in particular danger. The need to ensure the safety of persons involved in the conduct of CI(D)A on a confidential basis has arisen for law enforcement agencies in recent years, when many participants in the process began to avoid participating in I(D)A during pre-trial investigations and court proceedings to give evidence. Such refusals were related to the fear of disclosure of the fact of confidential cooperation with law enforcement agencies and the emergence of a real threat to the life and health of both themselves and their close relatives.”<sup>44</sup>

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<sup>42</sup> Saltykov S. M. To the question of the procedural registration of the confidential relations by the investigator officer in the criminal proceeding. *Actual problems of native jurisprudence*. 2017. No. 6. Vol. 1. P. 128–132.

<sup>43</sup> Neledva N. V. Features of official formalization of relations on confidential cooperation according to the legislation of Ukraine. *Subcarpathian Law Herald*. 2021. Issue 5 (40). P. 138–143.

<sup>44</sup> Antonov K. V. Problems of legislative regulation of the use of confidential cooperation during investigation. *Juridical scientific and electronic journal*. 2020. No. 3. P. 369–371.

2) Confidentiality. “If a confidant receives information, including information not protected by law, as well as information that may be considered a state or commercial secret, he or she is not entitled to disclose it to third parties without the consent of the client. Specific restrictions may be imposed on certain types of information, including restrictions on his right to travel abroad.”<sup>45</sup>

3) Guidance. “The confidant must be aware not only of the possible scenarios during the performance of the subject matter of the contract, but also of the mechanisms and sustainable technologies for carrying out such activities, including all possible risks of such performance. In the process of establishing and maintaining confidential cooperation relations, the entities authorised by law should take into account not only the compliance of the person involved in covert cooperation with the requirements set forth in the relevant bylaws, but also some ethical and legal components of this activity.”<sup>46</sup>

4) Payment – “an oral or written agreement between a client and a confidant to transfer and receive an agreed amount of material or other personally defined benefits”.<sup>47</sup>

5) Force majeure – “the occurrence of circumstances for which neither party is responsible or, even if responsible, is unable to fulfil or bear responsibility for objective reasons”.<sup>48</sup>

6) Verification. “The client has the right to inspect the progress and quality of the work performed by the confidential at any time without interfering with the confidential's activities. Poor performance of tasks by the confidential is the basis for the client's sole and categorical refusal from the obligations assumed. Acceptance by the client of the work

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<sup>45</sup> Neledva N. V. Features of official formalization of relations on confidential cooperation according to the legislation of Ukraine. *Subcarpathian Law Herald*. 2021. Issue 5 (40). P. 138–143.

<sup>46</sup> Ibid.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

performed by the confidential is confirmed by entering the data received by the client into the criminal proceedings.”<sup>49</sup>

7) Individual conditions. “The contract contains both general and individual terms of cooperation. All individual terms and conditions of cooperation must be detailed, taking into account the requirements of the parties.”<sup>50</sup>

8) Refusal. “The client and the confidant may unilaterally withdraw from the agreement (contract). A unilateral withdrawal from the contract may be made at any time, except for the time of actual performance of confidential cooperation.”<sup>51</sup>

9) Terms. “The contract specifies only the initial period for the performance of works or services. The confidant shall not be liable for violation of both the initial and final deadlines. Interim deadlines for completion of certain tasks may be agreed upon by oral agreement between the parties.”<sup>52</sup>

This list of key terms of the contract is quite detailed and reasonable, but in this paper it is not the level of detail that needs to be considered. In this case, such a contract looks more like a job description than a legal formalisation of the relationship between an authorised law enforcement officer and a confidant. It is believed that the bureaucratisation of this document will not better ensure the rights of persons involved in confidential cooperation, but will only frighten a potential confidant into signing such a “complex” document in secrecy. Most of the issues proposed to be addressed in such a document should either be addressed by other regulatory documents or discussed verbally without being recorded. Evidently, the conclusion of a contract better ensures the rights of all participants in confidential cooperation, but such a contract cannot

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<sup>49</sup> Neledva N. V. Features of official formalization of relations on confidential cooperation according to the legislation of Ukraine. *Subcarpathian Law Herald*. 2021. Issue 5 (40). P. 138–143.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

regulate all issues related to confidential cooperation. In this regard, the following key terms should be included in such a document:

1) Parties. Obviously, the contract should be classified, and therefore it should contain information that will allow identification of the parties to the confidential cooperation. It is important that such information relates not only to the confidentiality of the confidentiality agreement, but also to the authorised person of the relevant law enforcement agency, who is also directly responsible for organising the confidential cooperation.

2) Subject of cooperation. It should describe what the confidentiality agreement requires the confidentiality officer to do in order for the cooperation to meet the purpose of the cooperation. This clause also serves primarily as a guarantee for the confidentiality of the confidentiality agreement that the confidentiality agreement will not require the confidentiality agreement to perform specific tasks that the confidentiality agreement did not agree to and that may jeopardise the confidentiality agreement. Apparently, it is impossible to fully describe all the details of such cooperation in the contract, but the key areas should be specified here: participation in certain procedural actions, transfer of information, etc.

3) Terms. N. V. Neledva is absolutely right that the term is an important condition of a confidentiality agreement. However, attention should be paid not to the beginning of confidential cooperation, but to the moment of its completion, which should be clearly stated in such a contract. Depending on the circumstances, the moment of termination of cooperation may be determined either by a certain date or by an event that may result in the termination of confidential cooperation (for example, notification of suspicion of persons involved in the activities of a criminal group or detention of a person in respect of whom the confidant provides information). In this case, it does not matter in what form the termination of the confidentiality agreement will be expressed, but it is extremely important that the agreement is not indefinite, as this will allow law enforcement officers to require the confidant to perform



duties even when the tasks that were originally set for the authorised person are actually achieved.

4) Remuneration. If the confidant agrees to enter into a contract, it means that such confidential cooperation will be as “official” as possible, and therefore it can be argued that such cooperation should be ensured by providing certain benefits to the person who has agreed to it. The remuneration may be expressed in monetary or any other form. In addition, the remuneration may be expressed in the form of performing (or not performing) certain actions in favour of the principal or other persons specified in the agreement. In this case, the form of remuneration does not matter, but there is a perception that the absence of any mention of any remuneration indicates that such an agreement is fictitious or signed under duress. In this regard, the remuneration is an important condition of the contract, without which such a document cannot exist.

5) Security measures for the confidant. The last key condition of a confidentiality agreement is a list of security measures that can and/or will be applied to the person who has agreed to confidential cooperation. It is difficult to overestimate the importance of this clause, as the confidentiality agreement is a risk to the confidentiality of the confidentiality agreement, including the confidentiality of the confidentiality of the confidentiality agreement, the confidentiality of the confidentiality agreement, and the confidentiality of the confidentiality agreement. In this regard, the person must be convinced that during the entire confidential cooperation, as well as upon its completion, during the entire criminal proceedings (and in some cases, for a certain period of time after its completion), appropriate measures will be taken to ensure the safety of the confidential person and his or her close relatives or family members (if necessary). The importance of this particular clause in the contract is also underlined by the considerable attention among scholars and practitioners to the issue of ensuring the security of persons involved in confidential cooperation. Thus, ensuring the safety of persons involved in the performance

of operational and investigative activities in the course of covert and confidential cooperation is considered as “a process in which law enforcement agencies carry out a set of legal, organisational, technical and other measures aimed at ensuring protection against unlawful attacks on the life and health, housing and property of these persons, in order to create the necessary conditions for the proper conduct of criminal proceedings”<sup>53</sup>.

Pursuant to Article 20 of the Law of Ukraine “On Ensuring the Security of Persons Participating in Criminal Proceedings”, the basis for the application of security measures is data indicating the existence of a real threat to the life, health, housing and property of the persons referred to in Article 2 of the Law. Assessing this normative construction, D. M. Tsenov states that “its content does not quite correspond to the realities of practice. Hence, the legislator's emphasis on the fact that security measures can be taken only if there is a ‘real threat’ to the person's benefits leads to the conclusion that the relevant decision can be made only if at the time of its adoption there is already some specific data on encroachment on the life, housing, property or health of the person.”<sup>54</sup> In this case, one should agree with B. Kachmar, who notes that “the purpose of applying security measures to persons involved in criminal proceedings, as provided for in the Law, indicates that the relevant measures should be preventive in nature, carried out in advance, and not in fact be a real obstacle to unlawful encroachment on the benefits of participants in criminal proceedings, and create the necessary conditions for the proper administration of justice”<sup>55</sup>. “Consequently,

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<sup>53</sup> Gordin L. Y. Procedural criminal problems of establishment and activity of investigating-operative teams. – Manuscript. Dissertation ... Candidate of Juridical Sciences: 12.00.09. V., 2008. 23 p.

<sup>54</sup> Tsenov D. Ensuring Security of Persons Involved in Confidential Cooperation During Pre-trial Investigation of Felonies of Selfish-Violent Direction. *Bulletin of Luhansk Scientific-Educational Institute named after E. O. Didorenko*. 2018. Iss. 4 (84). P. 287–295.

<sup>55</sup> Kachmar B. M. The security procedures of persons involved in criminal proceedings (criminal procedure aspects). – The manuscript.: A Thesis for a scientific degree of Candidate of Juridical Science, speciality 12.00.09 / Yaroslav Mudryi National Law University. Kharkiv, 2017. 198 p.

the influence of interested parties on witnesses, victims, persons with whom confidential cooperation has been established and other participants in criminal proceedings is aimed not only at causing any kind of harm to the latter, but is based on the achievement of the main goal – to persuade them to refuse to testify or otherwise assist justice, to stop assisting justice or to take revenge for the assistance already provided. That is, the influence can be expressed in various forms: both illegal and non-illegal, the influence can be expressed both directly and indirectly, but the main factor is the purpose for which it is exercised.”<sup>56</sup> This position once again confirms the need to include information on the application of security measures in the contract, since a person who agrees to confidential cooperation must be aware of the guarantees of his or her security before such cooperation begins.

If to analyse the Laws of Ukraine “On Ensuring the Security of Persons Participating in Criminal Proceedings” and “On State Protection of Judicial and Law Enforcement Officers”, V. Usenko identifies the following forms of security measures that can be applied to confidants: ensuring confidentiality of information about a person; placement in a pre-school educational institution or an institution of social protection bodies; replacement of documents and change of appearance; relocation to another place of residence; personal protection, protection of housing and property; issuance of special personal protective equipment and danger warnings; use of technical means of monitoring and listening to telephone and other communications, visual surveillance; change of place of work or study<sup>57</sup>.

In this case, it is believed that all security measures should be divided into two separate groups: those that should be applied from

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<sup>56</sup> Karpov N. S., Habro O. I. State Protection and Security of Persons Participating in Legal Proceedings under the Law of Ukraine. *Fighting Organised Crime and Corruption (Theory and Practice)*. 2007. Iss. 17. P. 254–266.

<sup>57</sup> Usenko V. F. Legal Protection of Confidential Employees as a Way to Improve Counteraction to Offences in the Field of Economic Activity. URL: <http://www.pravoznavec.com.ua/period/article/3179/%D3>

the very beginning of confidential cooperation, and those that can be applied to provide additional guarantees of confidentiality in case of a threat to the life or health of a person. The first group should include all security measures that ensure the confidentiality of persons involved in such cooperation: removal of information about confidants from criminal proceedings, conducting procedural actions with such persons outside of visual control, holding a closed court hearing, etc. Such measures should be applied from the very beginning of cooperation, regardless of whether a person is in danger. This requirement is primarily related to the very specifics of confidential cooperation, which provides for a tacit procedure for interaction between law enforcement officers and confidants. Thus, in this particular case, such measures can be considered not so much security measures in relation to a person as measures of secrecy in accordance with the requirements of operational search activities and covert investigative (detective) actions.

Accordingly, the second category of measures will relate to cases where the life or health of the confidant or his family members is threatened by a specific danger to which the authorised law enforcement agencies must respond accordingly. It would be advisable to specify in the contract what security measures may be applied to the confidants so that they can be sure that law enforcement officials will actively respond to any threats.

Consequently, it can be noted that confidential cooperation in investigative and detective activities is characterised by many features which, taken together, allow to establish the essence of this legal phenomenon. At the same time, it should be emphasised that the analysis of confidential cooperation provided here relates only to the legal doctrine and current criminal procedure legislation. At the same time, this form of interaction is widespread all over the world, and therefore it would be advisable to analyse international standards relating to the procedure for implementing confidential cooperation, which will be done in this study.

## **1.2 International Standards for the Application of Confidential Cooperation in the Practice of Investigative Units**

As has been repeatedly noted in this study, the use of confidential cooperation requires strict compliance with national legislation, as such cooperation may significantly restrict the rights and legitimate interests of both the confidentiality of the confidential and the persons in respect of whom confidential cooperation is conducted. Respectively, law enforcement officials must be aware of all legal provisions relating to confidential cooperation, as any violation of the law may not only restrict the rights of the parties to such legal relations, but also call into question the entire cooperation, which may result in the inadmissibility of the evidence obtained.

At the same time, it should be emphasised that this form of cooperation in the course of investigative and detective activities is universal in almost all countries of the world, not only in Ukraine. In this regard, it is considered correct to study not only national but also international standards of confidential cooperation, because, firstly, international legislation ratified by the Verkhovna Rada of Ukraine is part of national legislation, and secondly, the study of the rules of confidential cooperation in other countries will allow to adopt and apply the best practices that will significantly increase the effectiveness of this form of cooperation during investigative and detective activities.

First and foremost, the legal basis for covert and operational search activities is provided by international instruments that guarantee individuals non-interference in their private lives. For example, according to Article 12 of the Universal Declaration of Human Rights, adopted by UN General Assembly resolution 217A (III) on 10 December 1948, no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his

honour and reputation<sup>58</sup>. Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms states that everyone has the right to respect for his or her private and family life, home and correspondence. The public authorities may not interfere with the exercise of this right, except in cases where such interference is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others<sup>59</sup>.

Article 4 of the Code of Conduct for Law Enforcement Officials, adopted by UN General Assembly resolution 34/169 on 17 December 1979, sets out the general principle of maintaining the confidentiality of information received by officials: “information of a confidential nature received by law enforcement officials shall be kept confidential unless the performance of their duties or the requirements of justice otherwise require”<sup>60</sup>.

According to the UN Criminal Justice Assessment Toolkit, “the practice of using informants or human resources to gather information and data In some countries, the use and management of informants (i.e., the direction of their activities) is centralised, while in others informants are individuals who are contacted by individual staff members in the absence of any supervision. Informants may be motivated by a variety of different reasons. They can be either 'conscientious citizens' who provide information out of a sense of civic duty or hardened criminals seeking to eliminate competitors. Information can be provided during negotiations for any personal gain or, most commonly, sold for money. The secretive

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<sup>58</sup> The Universal Declaration of Human Rights Adopted and proclaimed by General Assembly resolution 217A (III) of December 10, 1948. URL: [https://zakon.rada.gov.ua/laws/show/995\\_015#Text](https://zakon.rada.gov.ua/laws/show/995_015#Text)

<sup>59</sup> The Convention for the Protection of Human Rights and Fundamental Freedoms, ratified by Law No. 475/97-VR of 17.07.97. URL: [https://zakon.rada.gov.ua/laws/show/995\\_004#Text](https://zakon.rada.gov.ua/laws/show/995_004#Text)

<sup>60</sup> The Law of Ukraine “On Ensuring Sanitary and Epidemiological Welfare of the Population” of 24.02.1994. URL: <https://zakon.rada.gov.ua/laws/show/4004-12>

nature of the work with informants and the use of significant financial sums pose significant risks of abuse. As such, the credibility and source of any information provided by an informant should be carefully assessed and, to the extent possible, corroborated by additional sources. At the same time, it should be recognised that the police are responsible for their informants and should protect them from any form of retaliation.”

There are a number of international legal instruments that explicitly provide for the use of covert capabilities in combating crime. The Convention against Transnational Organised Crime, adopted by UN General Assembly resolution 55/25 on 15 November 2000, includes among its special investigative techniques the use of undercover operations by competent authorities to effectively combat organised crime. The Convention also requires that appropriate measures be taken to protect witnesses (agents) in criminal proceedings<sup>61</sup>. At the same time, it is obvious that there is no single document at the international level that would establish requirements for specific forms of covert procedural actions, especially with regard to the implementation of confidential cooperation. In this regard, first of all, it is necessary to take into account the practice of the ECtHR, which analyses national legislation, but in accordance with the provisions of the European Convention.

Regarding the practice of using undercover agents, it can be noted that the ECtHR has a unified position: “While the Court has consistently recognised the use of undercover agents as a legitimate investigative technique to combat serious crime, this technique still requires that clear, appropriate and sufficient procedural safeguards distinguish permissible police conduct from provocation to commit a criminal offence, since the public interest cannot justify the use of evidence obtained through police instigation.”<sup>62</sup> A closer look reveals that the analysis of the legality

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<sup>61</sup> The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000. URL: [https://zakon.rada.gov.ua/laws/show/995\\_789#Text](https://zakon.rada.gov.ua/laws/show/995_789#Text)

<sup>62</sup> Case of Tchokhonelidze v. Georgia, Application No. 31536/07. URL: <https://www.echr.com.ua/translation/sprava-choxonelidze-proti-gruzii-povnij-tekst-rishennya/>

of the use of undercover agents in the ECtHR case-law is almost always associated with the distinction between control over the commission of a crime and provocation. For example, in the case of *Ramanauskas v. Lithuania*, the Court examined the existence of incitement in the actions of police officers in the process of handing over a bribe. The author analysed the decision of the Supreme Court of Lithuania, which stated that “individuals may act as undercover agents only after they have informed the authorities of a criminal act that is likely to be committed. The conclusion of incitement can be drawn even if the incitement actions of the officials were not intense or persistent, or if the suspect was contacted through third parties who did not suspect anything. The state authorities need to prove that no incitement took place. In case of incitement, all evidence obtained as a result of this case should have been excluded from the case.”<sup>63</sup> The Court generally recognised that the growth of organised crime and the difficulties faced by law enforcement agencies in detecting and investigating offences justified the adoption of appropriate measures. It emphasised that the police increasingly need to use undercover agents with an operational cover story, informants and covert operational methods, especially in the fight against organised crime and corruption. The Court recognises the use of covert investigative techniques in the fight against crime. It has repeatedly held that covert operations as such do not interfere with the right to a fair trial and that clear, adequate and sufficient procedural safeguards establish permissible police action that does not allow for provocation. “The Convention does not prohibit the use of sources such as anonymous informants at the preliminary investigation stage, if justified by the nature of the offence. However, the use of such sources of information by the court to substantiate a guilty verdict will be legitimate only if there are appropriate and sufficient guarantees to prevent abuse, in particular, when a clear and transparent procedure is established for authorising,

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<sup>63</sup> Case of *Ramanauskas v. Lithuania*, Application No. 55146/14. URL: [https://www.echr.com.ua/wp-content/uploads/2018/03/f5ef3ba52c4849ecd3ac\\_file.pdf](https://www.echr.com.ua/wp-content/uploads/2018/03/f5ef3ba52c4849ecd3ac_file.pdf)



implementing and monitoring such operational and investigative measures... In addition, if the activities of undercover agents are still possible, subject to clear restrictions and safeguards against abuse, the use of evidence obtained as a result of police instigation cannot be justified in the public interest, as in this case the accused may be deprived of the right to a fair trial from the outset.”<sup>64</sup> “In a democratic society, the right to due process of law is of such importance that it cannot be sacrificed for expediency. The Convention does not preclude the use of information provided by secret informants at the preliminary investigation stage, but the subsequent use of anonymous witnesses' testimony as evidence sufficient to support a conviction raises various problems.”<sup>65</sup> “The Convention does not preclude the use of sources such as confidential informants at the preliminary investigation stage, but the subsequent use of anonymous witness statements as evidence sufficient to support a conviction may raise problems from the point of view of the Convention (...). Such use is under no circumstances compatible with the Convention.”<sup>66</sup>

Defining the characteristic features of incitement by law enforcement officers or undercover agents, the Court noted that incitement by the police occurs when the relevant law enforcement officers or persons acting on their instructions do not limit themselves to passive investigation, but, in order to establish the crime, i.e., obtain evidence and initiate criminal proceedings, influence the subject, persuading him to commit a crime that would not otherwise have been committed. “The Court, in order to establish whether A.Z. and V.S. limited themselves to a 'passive investigation of illegal activities', must take into account that: there is no evidence in the case file to confirm that

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<sup>64</sup> Case of Ramanauskas v. Lithuania, Application No. 55146/14. URL: [https://www.echr.com.ua/wp-content/uploads/2018/03/f5ef3ba52c4849ecd3ac\\_file.pdf](https://www.echr.com.ua/wp-content/uploads/2018/03/f5ef3ba52c4849ecd3ac_file.pdf)

<sup>65</sup> Case of Kostovski v. the Netherlands, Application No. 11454/85. URL: <https://swarb.co.uk/kostovski-v-the-netherlands-echr-20-nov-1989/>

<sup>66</sup> Case of Doorson v. the Netherlands, Application No. 20524/92. URL: <https://www.hr-dp.org/contents/545>

the applicant had previously committed crimes, in particular those related to corruption; as the telephone records show, the applicant met with A.Z. on the latter's initiative (this fact obviously refutes the Government's arguments that the law enforcement authorities had never pressured or threatened the applicant). On the contrary, through contacts established at the initiative of A.Z. and V.S., the law enforcement authorities clearly persuaded the applicant to commit unlawful acts, although, apart from rumours, there was no objective evidence to suggest that the applicant was engaged in illegal activities.”<sup>67</sup>

In the case of *Teixeira de Castro v. Portugal*, it was stated that “the use of undercover agents must be limited and human rights must be respected, even in cases of drug trafficking. While the upsurge in organised crime undoubtedly necessitates adequate measures, the fair administration of justice is a principle that should not be compromised. The basic requirements of justice set out in Article 6 of the Convention apply to any type of crime, from the most minor to the most serious. The public interest cannot justify the use of evidence obtained through police provocations... In this case, it is necessary to find out whether the actions of the police fell within the definition of ‘undercover agents’. The Court notes that the Government did not confirm that the actions of the police officers were part of an operation to combat drug trafficking which had been authorised and supervised by a court. There was also no evidence that the law enforcement authorities had reasonable grounds to suspect the applicant of drug trafficking; on the contrary, the applicant had no criminal record and had never been prosecuted. The applicant was not known to the police officers and they had contact with the applicant only through V.S. and F.O. Furthermore, the drugs were not in the applicant's house; he had purchased them from a third person, who in turn had purchased them from yet another person. The Supreme Court's judgment of 5 May 1994 did not mention that at the time of his

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<sup>67</sup> Case of *Ramanauskas v. Lithuania*, Application No. 55146/14. URL: [https://www.echr.com.ua/wp-content/uploads/2018/03/f5ef3ba52c4849ecd3ac\\_file.pdf](https://www.echr.com.ua/wp-content/uploads/2018/03/f5ef3ba52c4849ecd3ac_file.pdf)

arrest the applicant had been in possession of more drugs than the ones the police officers had tried to buy in order to provoke him to commit a crime. There is no basis for the Government's contention that the applicant was predisposed to commit crimes. This leads to the conclusion that the police officers did not investigate (in an essentially passive manner) the applicant's criminal activity, but rather influenced him to commit a crime. Finally, the Court states that the acts of the Portuguese judicial authorities reveal that the applicant was convicted mainly on the basis of the testimony of two police officers.”<sup>68</sup>

A similar conclusion was reached in the case of *Vanyan v. Russia*: “The Convention does not prohibit the credibility of sources such as anonymous informants, in particular at the stage of investigation. However, the subsequent use of their testimony in court to justify a conviction is another matter. The use of undercover agents should be prohibited and preventive measures should be taken against them, even in cases involving the fight against drug trafficking. It follows from the fair trial requirements of Article 6 that the public interest in the fight against drug trafficking cannot justify the use of evidence obtained as a result of police provocation. When it happens that the actions of undercover agents are aimed at inciting a crime, and there is no reason to believe that it would have been committed without their intervention, this goes beyond the understanding of an undercover agent and can be called provocation. Such interference and its use in criminal proceedings can irreparably undermine the fairness of the trial.”<sup>69</sup>

One can continue to analyse other ECtHR judgements, but at this stage it is clear that in analysing the use of undercover agents, the ECtHR places a significant emphasis on national law, noting that such use must be “in accordance with the law”, a requirement that has been formulated

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<sup>68</sup> Case of *Teixeira de Castro v. Portugal*, Application No. 44/1997/828/1034. URL: [https://hudoc.echr.coe.int/rus#{"itemid":\["001-58193"\]}](https://hudoc.echr.coe.int/rus#{)

<sup>69</sup> Case of *Vanyan v. Russia*, Application No. 53203/99. URL: <https://www.srji.org/resources/search/27/>

as follows: “the impugned interference must have some basis in national law; this requirement also relates to the quality of the relevant legislation and requires that it be accessible to the person concerned, who must also foresee its consequences for himself, and that it be in accordance with the rule of law”<sup>70</sup>.

“The phrase 'in accordance with the law' requires that the challenged measure be both grounded in domestic law and comply with the rule of law.”<sup>71</sup>

Hence, for a better understanding of the standards for the use of undercover agents and confidential cooperation, it is also necessary to analyse the legislation of Western countries from which best practices can be borrowed.

The United States has developed a special instruction for prosecutors on the use of confidential cooperation<sup>72</sup>. Pursuant to this guidelines, a confidant is defined as any person who provides useful and reliable information to law enforcement agencies regarding serious crimes and from whom law enforcement agencies expect or plan to receive additional useful and reliable information about such activities in the future. When assessing a potential confidant, it is suggested to pay attention to the following factors: the age of the person; whether the person is a civil servant, a representative of a law enforcement agency, an employee of a financial or educational institution or school, a member of the military, an employee of the media, or has any other privileges in connection with the work or position performed (clergyman, doctor, lawyer, etc.); the level of assistance that the confidentiality will provide to law enforcement authorities and the ability to ensure that the information provided will lead to the detection of criminal offences; the relevance

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<sup>70</sup> Case of Mikhaylyuk and Petrov v. Ukraine, Application No. 11932/02. URL: [https://zakon.rada.gov.ua/laws/show/974\\_500#Text](https://zakon.rada.gov.ua/laws/show/974_500#Text)

<sup>71</sup> Case of Belousov v. Ukraine, Application No. 4494/07. URL: [https://zakon.rada.gov.ua/laws/show/974\\_989#Text](https://zakon.rada.gov.ua/laws/show/974_989#Text)

<sup>72</sup> The attorney general's guidelines regarding the use of confidential informants. Office of the Attorney General. URL: <https://irp.fas.org/agency/doj/fbi/dojguidelines.pdf>

of the information to be provided by the confidentiality to an ongoing or potential investigation or prosecution and the importance of such investigation or prosecution; the nature of any relationship between the confidant and the person in respect of whom the information will be provided, including, but not limited to, establishing the existence of family ties, current or previous employment relationships, joint financial relationships, and so forth; the risk that the person may adversely affect the current or future investigation; the ability to validate the information or assistance of the confidant; the reliability and truthfulness of the confidant; information about the confidant's participation in any proceedings as a witness; whether the confidant has a criminal record, is under arrest or is facing criminal charges; whether it is reasonably believed that the person poses a danger to society or another criminal threat, or whether it is reasonably believed that there is a risk of escape; whether the confidant is (was) abusing drugs; whether the confidant has relatives who are law enforcement officers; whether there is a risk that the confidant or their relatives may suffer health damage as a result of providing information or assistance to law enforcement agencies; whether the person has previously been involved as a confidant in cooperation with law enforcement agencies and whether there is information on the reasons for such cooperation.

An interesting approach to the conclusion of a contract (instruction) between law enforcement officers and the confidential in the United States is the approach to the conclusion of a contract (instruction). Such an instruction is concluded between the confidential, on the one hand, and a representative of a law enforcement agency with the mandatory participation of another representative of the law enforcement agency, who will act as a witness to the concluded instruction. This instruction shall include the following provisions: an undertaking that the information provided by the confidentiality will be truthful; such cooperation is entirely voluntary; the US Government will endeavour to ensure that the confidentiality of the confidentiality cannot be determined, but cannot guarantee that such information will not be disclosed; a law enforcement

agency may not guarantee immunity of a confidentiality from prosecution or other proceedings by the Federal Prosecutor's Office or a court in exchange for cooperation with a law enforcement agency, as the decision to grant such guarantees is within the exclusive competence of the Federal Prosecutor's Office or a court. However, the law enforcement authorities undertake to consider (but not necessarily act upon) requests from the Confidant for advice on the attention of the Federal Prosecutor's Office or the court in accordance with the scope of his assistance to law enforcement; the Confidant undertakes not to commit any crimes or be involved in any criminal activity; the confidant must comply with the instructions of law enforcement authorities and must not take any action on his or her own behalf on behalf of the U.S. Government; the confidant is not an official and may not act as such; the confidant may not enter into any agreements or undertake any obligations on behalf of the U.S. Government, except in specific situations determined by a law enforcement authority; and the law enforcement authority cannot guarantee any remuneration or other compensation to the confidant; if a remuneration is provided to a confidant, the law enforcement agency is not responsible for paying taxes on such remuneration; (if necessary) no promises or commitments may be made, other than by the Immigration and Naturalisation Service, regarding the alien's status in the United States, right to enter and remain in the United States.

According to the UK Confidentiality Code of Practice (2018)<sup>73</sup>, when deciding whether to use confidential information, the following circumstances should be taken into account: the balance between the cost and scale of potential activity, and the seriousness of the crime or harm caused by it; an explanation of how and why the methods to be used will result in the least intrusion into the legal relationship; whether the confidant's conduct will have any impact on the privacy of others;

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<sup>73</sup> Covert Human Intelligence Sources. Revised Code of Practice. August 2018. URL: [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/742042/20180802\\_CHIS\\_code\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/742042/20180802_CHIS_code_.pdf)

and an explanation of why such interference will be proportionate to the purpose of the cooperation; to the extent possible, explain whether other methods of obtaining information have been used and whether they have produced the required results; to establish whether such cooperation would be consistent with applicable law and whether other alternative methods of obtaining information have been considered.

However, confidential cooperation may take place both in a form clearly defined by law and in the form of providing information on a voluntary basis. Thus, in many cases of confidential cooperation, such cooperation can take place without concealing the real purpose. Many sources voluntarily provide information that they have witnessed or otherwise obtained without being induced by the state. This form of cooperation is not confidential cooperation and does not require any special authorisation. For example, a citizen provides information to a public authority about something he or she has witnessed. Such a citizen would not be treated as a confidentiality officer because he or she is not passing on information as a result of a relationship in which the purpose was concealed. An alternative example is when a person calls an anonymous hotline and reports a crime or terrorist activity. Such a person would also not be considered a confidential informant, as such information was not provided as a result of an established legal relationship with law enforcement for a specific purpose. But if such a person is asked to continue to provide information or to continue to interact with criminals, such a person will already be considered a confidentiality officer and will be subject to the relevant requirements. Law enforcement agencies should exercise strict control over individuals or members of organisations (e.g., travel agents, representatives of housing associations, taxi drivers, etc.) who, through their work or role in society, have access to personal information and who provide such information on a voluntary basis. Public authorities should continuously analyse such cooperation in terms of whether it meets the criteria of confidential cooperation.

In Switzerland, “the use of so-called undercover agents is not explicitly provided for in Swiss criminal procedure law, but the prevailing view is

that it is permissible in principle to the extent that the specific nature of the offence justifies covert investigative actions, and the undercover agent investigates criminal acts mostly in a passive manner, without using his or her own influence to stimulate the intention to commit an act and induce criminal behaviour... In Article 23(2) of the Federal Act on Narcotics and Psychotropic Substances, the federal legislature included a provision that expressly provides for the possibility of using an undercover agent in criminal investigations into drug trafficking. In a public law appeal, the admissibility of secret investigative actions from the standpoint of the rule of law is not generally excluded, but it is believed that the use of a secret agent constitutes a serious interference with the private life and personal liberty of the person concerned, and in a state that adheres to the rule of law, such interference is possible only if it is based on a sufficiently clear legal basis...

Such a requirement of a legal basis for the use of an undercover agent has not yet been considered in Swiss case law and legal literature, and it has not been explicitly recognised as a limitation from the standpoint of the rule of law. It will be in addition to the grounds on which the legislature bases the requirement to regulate telephone interceptions and related investigative actions by law. While coercive measures during criminal proceedings (such as arrest, search of a person's home, etc.) are a clear interference with the person's rights protected by law, and tapping a person's phone, monitoring correspondence and telegraphic messages without their knowledge is an interference carried out in the interests of prosecuting a crime, in areas whose confidentiality is protected by law, the use of undercover agents poses a different problem: the personal freedom of the person concerned is not restricted and no other coercive measures are applied to him/her, but he/she is in contact with a partner whom he/she does not know but with whom he/she would not have made such contact if he/she knew that he/she was working in the interests of a criminal investigation. If an undercover agent, with the help of his contacts, only detects criminal acts that would have occurred in the same or similar way even without his involvement,



such use of an undercover agent is, of course, not objectionable. On the other hand, it would be unacceptable if an undercover agent were to take the initiative, so to speak, and provoke criminal acts that would not have been committed at all without such inducement; for prosecuting authorities should not provoke criminal acts in order to be able to bring to justice criminals whose willingness to commit a crime – perhaps present but latent – would not have been revealed without such inducement. If the covert agent encourages the criminal acts of such a person without giving reason to believe that he/she directly initiates or encourages the criminal act, but at the same time does so in a way that suggests that the criminal act would have been less serious and serious without the 'participation' of the covert agent, this should be taken into account when sentencing.”<sup>74</sup>

Analysing the legislation of other countries, one can notice a huge block devoted exclusively to the legal protection of confidentiality<sup>75</sup>. For example, in Belgium, legal protection for whistleblowers at the federal level was introduced in 2014.

Belgium is the first country to have whistleblower protection at the regional level even before the adoption of a national law. In terms of reporting channels, employees can use various channels to report violations and contact authorised persons, management, etc., as well as Spreekbuis. The latter organisation is the main contact point established by the Flemish authorities, which, however, operates independently and focuses on employee welfare.

In the Czech Republic, whistleblower protection is seen as an important tool within the broader anti-corruption policy. However, the legislation only provides partial protection, as efforts to develop a specific law have been unsuccessful. In the period 2007–2010, the Ministry of the

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<sup>74</sup> Case of Lüdi v. Switzerland, Application No. 12433/86. URL: <http://eurocourt.in.ua/Article.asp?AIdx=433>

<sup>75</sup> Konov A. V., Maskaleva O. S., Gorbacheva N. S. Service Disclosures and Protection of Applicants: Experience of the USA, Great Britain and Canada. Report. M. : LLC “FTBS Consulting”, 2018. 228 p.

Interior, in cooperation with Transparency International CZ, initiated attempts to ensure the protection of whistleblowers. A problem arose in distinguishing between specialised advice required for whistleblower work and general legal services in accordance with the rules for the provision of services for public needs, which led to the abandonment of this initiative. In 2014, the Governmental Anti-Corruption Committee was established to play a coordinating and advisory role on this issue. Specific legislative proposals and debates have taken place since 2013, and a new proposal has been under development since 2015. However, a specific law on whistleblower protection has not yet been adopted. In the public sector, employees who report wrongdoing are protected by the 2014 Civil Service Act. This act provides legal protection and anonymity for civil servants who report corruption or illegal actions of their colleagues. There is a duty of silence for civil servants, and it is unclear how this is reconciled with whistleblower protection. This issue is, among other things, the reason why in practice very few civil servants report misconduct. In those cases where reporting does occur, the low level of institutional support forces people to look for alternative ways to report unethical and illegal behaviour.

In France, a new law providing for the protection of whistleblowers, known as Sapin II, has been adopted. This law is not entirely dedicated to whistleblower protection, but it does include provisions on the types of reports and issues that whistleblowers can report. It is noted that the law was a response to international criticism of France's alleged neglect of the need to ensure anti-corruption measures.

Prior to the adoption of Sapin II, whistleblower protection was scattered in various pieces of legislation. Statutory protection was provided for whistleblowers who reported cases of discrimination, harassment, corruption, serious risks to public health or the environment, and criminal offences. Thus, the Sapin II law seeks to normalise the regulatory framework for whistleblower protection. However, critics insist that the law does not cover disclosures of medical information, intelligence/national security, etc.

In terms of scope, Sapin II extends whistleblower protection to any “disinterested” person who reasonably reports a violation of the law to their employer or to the relevant judicial or administrative authorities. Experts also criticised the channels for providing information, as the law provides for the obligation to first provide information to one's immediate or superior management, and only if no action is taken on the report (either in case of serious and immediate danger or in case of irreversible risks), the report may be submitted to a judicial or administrative body or a representative of a professional association; in exceptional cases, the report may be provided to the media. It is important to note that the identity of the whistleblower will remain confidential, and disclosure of the whistleblower's identity against his or her will is punishable by up to two years' imprisonment and a fine of up to 30,000 EUR. This level of confidentiality protection is justified given that in order for a person to qualify for protection, he or she must first report the offence to his or her management. Unlike other whistleblower protection laws, Sapin II also provides for a penalty of up to one year in prison and a fine of up to 15,000 EUR for harassment of whistleblowers or attempts to prevent them from reporting wrongdoing.

In addition to the public sector, Sapin II also provides for protection in the private sector, requiring companies to develop internal rules for dealing with whistleblowers. For example, companies with more than 500 employees and revenues of at least 100 million EUR must develop policies and procedures to comply with the relevant requirements.

There is no general law in Germany that provides for whistleblower protection in all sectors. In 2013, proposals to adopt a whistleblower protection law were rejected because the government did not believe that the regulations were sufficient.

A number of provisions in the German Constitutional Law guarantee freedom of conscience, information and expression, the right to petition, which also includes the right to make requests or complaints to public authorities, and the right to report violations. Thus, the basic legal framework in Germany establishes conditions that ensure general

whistleblower protection. Certain bylaws also include provisions that provide for the protection of whistleblowers. In July 2016, new legislation relating to the Federal Financial Supervisory Authority was adopted to protect whistleblowers. Any person can provide information on violations of the rules under the jurisdiction of the Federal Financial Supervisory Authority through an online portal. It is important to note that such information may be provided anonymously, and if it is not provided anonymously, the Federal Financial Supervisory Authority is obliged to keep the identity of the informant confidential. Persons who provide information to this body are not protected from prosecution or dismissal. The main protection is to keep the identity of the whistleblower secret in order to protect him or her from negative consequences.

There is no general law in Germany that provides for whistleblower protection in all sectors. In 2013, proposals to adopt a whistleblower protection law were rejected as the government considered the existing fragmented rules to be sufficient. Since then, there have been no discussions on the possibility of adopting a specific law on whistleblower protection, although civil society remains active and is trying to get legislation passed on this issue.

A number of constitutional provisions in the German Constitutional Law guarantee freedom of conscience, information and expression, the right to petition, which also includes the right to make requests or complaints to public authorities, and the right to report violations. Therefore, Germany's basic legal framework sets out conditions that provide general protection for whistleblowers. Certain bylaws also include provisions that provide for whistleblower protection. In July 2016, new legislation relating to the Federal Financial Supervisory Authority was adopted to protect whistleblowers. Any person can provide information on violations of the rules under the jurisdiction of the Federal Financial Supervisory Authority through an online portal. It is important to note that such information may be provided anonymously, and if not, the Federal Financial Supervisory Authority is obliged to keep the identity of the whistleblower confidential. Persons who

provide information to this financial authority are not protected from prosecution or dismissal. The main protection is to keep the identity of the whistleblower confidential in order to protect them from negative personal consequences. The need for this law became clear after several German companies and authorities were fined for failing to take action after receiving whistleblowing reports.

In general, the analysis of the legislation on the protection of informants (confidants) in other countries leads to some interesting conclusions. Thus, in Western countries, it is not customary to draw a clear distinction between confidants (persons who cooperate with law enforcement agencies and report criminal offences) and informants (persons who report other non-criminal offences). This approach is quite successful, as a person reporting a criminal offence is not obliged to analyse the offence in terms of its possible qualification under the Criminal Code of Ukraine or the degree of severity. This task is assigned to the state representatives, who, when receiving information from confidential sources, must independently determine the degree of its significance and potential risks. It is also noteworthy that the legislation on whistleblower protection applies to any area, and therefore such regulations are communicated to a wide range of individuals. In other words, persons who are only planning to provide information to the relevant state authorities are already aware of possible protection, which obviously encourages them to cooperate more actively. It should also be noted that, according to Ukrainian law, security measures may be applied to confidants only when the confidant is in immediate danger. At the same time, the experience of foreign countries shows that such measures should be applied to persons regardless of whether something threatens their life or health, and the very fact of cooperation already allows for the implementation of appropriate measures.

Hence, this positive experience of working with confidants and informants in other countries can be implemented in Ukraine to more actively involve the public in providing confidential information, including information that can be used in investigative and detective activities.