

## **CHAPTER 2**

# **Criminal Procedural Characteristics of Confidential Cooperation**

### **2.1 Legal Regulation of Confidential Cooperation in Criminal Proceedings**

As already noted in this study, there is no single consistent understanding of “confidential cooperation” in the doctrine. Nevertheless, it should be recalled that the criminal procedure is quite “bureaucratized” compared to a number of other branches of Ukrainian law, as the clarity of the procedure primarily affects the provision of the criminal procedural form, which, in turn, is an important guarantee of the rights, freedoms and legitimate interests of participants in criminal proceedings. And given that confidential cooperation is used in the course of the CI(D)A, the state should exercise special control over such actions in view of the potential restriction of the rights of participants in criminal proceedings. In this case, there are attempts to emphasise the importance of legal regulation of confidential cooperation in criminal procedure legislation, since such regulation is one of the main guarantees, as mentioned above.

In the previous chapter, it was argued that Art. 275 of the CPC of Ukraine “Use of confidential cooperation” is not a type of UCID, and therefore it cannot be considered as a separate procedural action, but only as a specific procedure for relations between special subjects.

At the same time, although this wording is consistent with the legislator's position and is in line with legal doctrine, confidential cooperation should be assessed primarily as a legal and procedural category that has a certain regulation in the law. The specifics of this regulation will be the subject of this chapter.

The main legal source that sets out the basis for confidential cooperation is the CPC of Ukraine, which states in Article 275 that “during 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 these persons in covert investigative (detective) actions in cases provided for by this Code. It is prohibited to engage lawyers, notaries, medical professionals, clergy, and journalists in confidential cooperation during covert investigative actions if such cooperation would involve disclosure of confidential professional information.”<sup>76</sup>

When analysing this regulatory framework for confidential cooperation, several important aspects should be noted. Firstly, two forms of use of confidential cooperation in criminal proceedings are clearly enshrined in the legislation: the use of information obtained as a result of confidential cooperation and the involvement of confidants in procedural actions. In this case, the legislator does not specify how such persons should be involved in the CI(D)A or how evidential information can be obtained from them, leaving these issues to the discretion of the authorised persons. Thus, the CPC of Ukraine considers confidential cooperation to be an additional tool only when conducting the necessary procedural actions to collect evidence. Obviously, any criminal proceedings always boil down to the collection of evidence, as evidence is the key activity of authorised persons conducting pre-trial investigations. At the same time, the legislator

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<sup>76</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>

cannot describe all possible tools used in the process of collecting and verifying evidence.

It should be borne in mind that in order to use the results of confidential cooperation in criminal proceedings, such evidence must be recognised as admissible during its evaluation. The actual assessment of such evidence will be based on the criteria that apply regardless of the method of collecting evidence and the possibility (or impossibility) of disclosing its source. The criteria for assessing the admissibility of evidence have recently changed somewhat due to a change in the approach to their assessment in the practice of the Supreme Court, whose legal opinions are binding on other courts. Thus, M. M. Stoyanov and O. O. Torbas, having analysed a number of decisions of the Supreme Court, conclude that the list of criteria for assessing the admissibility of evidence should be updated and indicate that evidence in criminal proceedings is inadmissible if: 1) it was obtained by an unauthorised person, and such a violation is significant or significantly affects the reliability of the evidence; 2) it was obtained from an improper source, and such violation is material or significantly affects the reliability of the evidence; 3) the proper procedure for obtaining the evidence was not followed, and such violation is material or significantly affects the reliability of the evidence<sup>77</sup>. In fact, the same criteria will be applied in the process of assessing the admissibility of evidence obtained as a result of confidential cooperation. In addition to the fact that the court will check the proper source of obtaining the information in the conditions of impossibility (or limited possibility) of disclosure of information about the person involved in confidential cooperation, the court will also assess the potential risks of limiting the fundamental rights and freedoms of participants in criminal proceedings or doubts about the reliability of the evidence. Particular attention in this case will be paid to the reliability of evidence, since the specifics of the use of confidential cooperation

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<sup>77</sup> Stoyanov M. M., Torbas O. O. "New" criteria for the admissibility of evidence in criminal Proceedings. *Legal Novels*. 2021. No. 13. P. 125–130.

in criminal proceedings primarily manifests itself in concealing the source of information that will be used as evidence in criminal proceedings.

Pursuant to Article 93(2) of the CPC of Ukraine, the prosecution collects evidence by conducting investigative (search) actions and covert investigative (search) actions, requesting and receiving things, documents, information, expert opinions, audit reports and inspection reports from public authorities, local governments, enterprises, institutions and organisations, officials and individuals, and conducting other procedural actions provided for by the CPC of Ukraine. However, this provision lists only the methods of collecting evidence, but does not disclose the methodology and tools for obtaining it, which are quite diverse. Thus, confidential cooperation should be considered in this aspect – as a special way of collecting information (directly from confidants or by involving them in procedural actions). Accordingly, any assessment of the legal regulation of confidential cooperation should be carried out in a dynamic manner, since confidential cooperation involves the active involvement of the relevant participants in the investigation of a criminal offence.

Moreover, in Article 275(1) of the CPC of Ukraine, the legislator made a rather important clarification – the use of confidential cooperation is possible only in cases clearly provided for by the CPC of Ukraine. A more detailed analysis of this provision raises a number of issues that may complicate the application of Article 275 of the CPC of Ukraine in the process of collecting evidence. It has been repeatedly noted that confidential cooperation takes two forms: the use of information obtained from a confidant and the use of confidants in conducting CI(D)A. At the same time, the wording “in cases stipulated by this Code” does not allow to clearly establish when such a requirement should apply to all forms of confidential cooperation or only to the latter. It is worth recalling that Article 275(1) of the CPC of Ukraine reads as follows: “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 these persons

in conducting covert investigative (detective) actions in cases provided for by this Code.”<sup>78</sup> In fact, the most logical conclusion, taking into account similar wording in other articles of the CPC of Ukraine, would be that the use of confidential cooperation in any form is allowed only if it is expressly stated in the CPC of Ukraine, i.e., “in cases stipulated by this Code”. However, such a conclusion, although it seems to be the most logical, may be somewhat premature.

Therefore, analysing the text of the CPC of Ukraine, it can be seen that another reference to confidential cooperation is made in Article 272 of the CPC of Ukraine (“During the pre-trial investigation of grave or especially 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>79</sup>) and in Article 224(8) of the CPC of Ukraine (“A person has the right not to answer questions about those circumstances that are expressly prohibited by law (confession, medical confidentiality, professional secrecy of a defence counsel, secrecy of a meeting room, etc.) or that may give rise to suspicion, accusation of a criminal offence by him or her, close relatives or family members, as well as about officials performing covert investigative (detective) actions and persons who *confidentially cooperate* with pre-trial investigation authorities.”<sup>80</sup>). In all other cases, the word “confidential” is used by the legislator solely to identify confidential information in criminal proceedings.

Thus, there are only two provisions in the CPC of Ukraine that relate to the use of confidential cooperation and can be used to interpret

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<sup>78</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>

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

the wording “in cases stipulated by this Code” – Article 272 and Article 224(8) of the CPC of Ukraine. In fact, even a superficial analysis of these provisions of the criminal procedural legislation is enough to notice their conflict with each other. If one takes into account only Article 272 of the CPC of Ukraine, it can be concluded that confidential cooperation can only be used in the course of such an CI(D) A as a special task to uncover criminal activities of an organised group or criminal organisation. It is quite obvious that this particular procedural action will require substantial preparation and will almost never be carried out without the involvement of confidential cooperation. At the same time, would it be correct to say that other types of CI(D) A do not use confidential cooperation? There have already been mentioned examples of the use of confidential cooperation in the control of a crime. Clearly, confidants can also be involved in other types of CI(D)A activities: inspection of publicly inaccessible places, surveillance of an object, etc. In this case, it should be noted that Art. 272 of the CPC of Ukraine, although largely based on the assistance of confidants, cannot be considered the only procedural action in which confidential cooperation is used.

At the same time, such a conclusion contradicts Article 275(1) of the CPC of Ukraine, which states quite clearly that confidential cooperation may be used only in cases where there is a direct instruction of the legislator. In this regard, it is of interest to analyse Article 224(8) of the CPC of Ukraine, which states that confidants may cooperate with pre-trial investigation authorities without providing any other context or interpretation of such cooperation. This provision may indicate that the procedure for using confidential cooperation should be determined by a specific official and cannot be limited by individual regulations. Moreover, it should be emphasised that confidential cooperation may be used not only during pre-trial investigation, but also during operational and investigative activities, as evidenced by the analysis of the Law of Ukraine “On Operational and Investigative Activities”.

Pursuant to Article 6 of the Law, the grounds for conducting operational and investigative activities are the availability of sufficient information obtained in accordance with the procedure established by law, which requires verification through operational and investigative measures and means, about a real threat to the life, health, housing, property of court and law enforcement officers in connection with their official activities, as well as persons involved in criminal proceedings, members of their families and close relatives, in order to create the necessary conditions for the proper administration of justice; employees of the intelligence agencies of Ukraine in connection with the official activities of these persons, their close relatives, as well as persons who *confidentially cooperate* or have cooperated with the intelligence agencies of Ukraine, and members of their families for the purpose of proper conduct of intelligence activities; the need to verify persons in connection with their appointment to positions in the intelligence agencies of Ukraine or involvement in *confidential cooperation* with such agencies, and access to intelligence secrets. Pursuant to Article 8, operational units are entitled to use *confidential cooperation* in accordance with the provisions of Article 275 of the CPC of Ukraine to perform the tasks of operational and investigative activities, if there are grounds for doing so. According to Art. 9, no operational investigation file is opened when checking persons in connection with their access to state secrets, work with nuclear materials and nuclear facilities, appointment to positions in the intelligence agencies of Ukraine or involvement in *confidential cooperation* with such agencies, access to intelligence secrets, as well as persons who are granted permission to stay unaccompanied in controlled and sterile areas, restricted access areas, guarded areas and critical parts of such areas of airports. Such an inspection should last no more than two months. According to Article 10, materials of operational and investigative activities are used to ensure the security of court officials, law enforcement officers and persons involved in criminal proceedings, their family members and close relatives, as well as employees of the intelligence agencies of Ukraine and their close

relatives, persons who *confidentially cooperate* or have cooperated with the intelligence agencies of Ukraine, and their family members. As provided for in Article 11, at the request of individuals, their cooperation with an operational unit may be formalised in a written agreement guaranteeing *confidentiality of cooperation*. An agreement on assistance to operational units in detective and investigative activities may be concluded with a legally capable person. The procedure for concluding an agreement shall be determined by the Cabinet of Ministers of Ukraine. Pursuant to Article 14, information about persons who *confidentially cooperate* or have cooperated with the intelligence agency of Ukraine, the affiliation of specific persons with the staff of intelligence agencies, as well as forms, methods and means of intelligence activities and the organisational and staff structure of intelligence agencies are not subject to prosecutorial supervision.

Indeed, in most cases, references to the possibility of using confidential cooperation relate to certain procedural aspects, which are most often related to ensuring the safety of such persons. At the same time, Article 8 of the Law of Ukraine “On Operational and Investigative Activities” clearly states that confidential cooperation may be used in the course of operational and investigative activities. The only issue is that this Law directly refers to Article 275 of the CPC of Ukraine, which contains a regulatory restriction on the use of confidential cooperation only in those cases that are directly provided for by the criminal procedure legislation.

Hence, it can be concluded that the said clarification in Art. 275 of the CPC of Ukraine has no practical application, but may give rise to claims from the defence during the trial. It has been repeatedly emphasised that the use of confidential cooperation should be assessed primarily as a tool used by the investigator in the collection of evidence. Accordingly, the procedure for using such a tool should depend on the discretion of the authorised entity and cannot be clearly defined at the level of the CPC of Ukraine. The main requirements that should be set are that confidential cooperation should not violate fundamental rights



and freedoms of a person and citizen, and meet the requirements of legality in the sense that these requirements are laid down in criminal procedure legislation. Regarding the first requirement: the procedure for conducting all CI(D)A is prescribed in the criminal procedure legislation in such a way as to prevent violations of fundamental human rights and freedoms. Accordingly, confidential cooperation, being only a part of the relevant procedural actions, should also be applied in such a way that the relevant rights are not violated. In other words, when using confidential cooperation, the general procedure for conducting CI(D)A should be applied, which should guarantee the rights and legitimate interests of participants in criminal proceedings. As for the second requirement: all evidence is subject to the requirements for its admissibility and the assessment of information obtained as a result of confidential cooperation will also be assessed using such rules.

Consequently, it can be concluded that the legislator's clarification in Article 275(1) of the CPC of Ukraine “in cases stipulated by this Code” not only does not correspond to the logic of confidential cooperation, but also significantly limits the scope of its application in the course of conducting the CI(D)A. It is believed that the procedure for conducting the CI(D)A already contains the basic procedural guarantees for ensuring the rights of participants in criminal proceedings and there is no additional need to include procedural safeguards in Article 275 of the CPC of Ukraine. In this regard, there is a need to amend the CPC of Ukraine, namely, to set out Article 275(1) of the CPC of Ukraine in the following wording: “1. 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 these persons in conducting covert investigative (detective) actions.” In this way, the legislator allows authorised officials to choose the scope of confidential cooperation in criminal proceedings without violating the procedure for implementing such actions and without restricting the rights and freedoms of participants in criminal proceedings.

It is necessary to pay attention to the generalisations of the courts regarding the peculiarities of assessing the admissibility of evidence obtained as a result of confidential cooperation, and it is necessary to highlight a certain inconsistency that exists between the relevant generalisations. Thus, in the absence of confirmation of confidential cooperation with a person involved in the conduct of the CI(D)A in the case file, the court recognises that this does not entail the inadmissibility of evidence obtained as a result of such cooperation<sup>81</sup>.

If the prosecutor engages a person in confidential cooperation, the evidence is inadmissible, due to the violation of the requirement under Article 275 of the CPC – only the investigator has the right to engage in confidential cooperation<sup>82</sup>. Although there is an opposite opinion: “in the court's opinion, the decision of the prosecutor PERSON\_23 to engage PERSON\_24 in confidential cooperation was consistent with the objectives of the pre-trial investigation and is not a violation of the CPC that can be considered a significant violation that infringes on human rights and freedoms. In addition, according to the court, Article 246(6), Article 275(1) of the CPC allow, by the decision of the prosecutor, the investigator to involve persons in confidential cooperation during the CI(D)A.”<sup>83</sup>

It is also necessary to pay attention to the following position of the court: “a person involved in confidential cooperation with operational units of law enforcement agencies should have undergone an appropriate check in advance, assumed the obligations to keep state secrets provided

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<sup>81</sup> The Sentence of the KKaluskyi City-Raion Court of Ivano-Frankivsk Oblast of April 18, 2022, case No. 345/3807/21. URL: <https://reyestr.court.gov.ua/Review/103982867>; The Sentence of the Shevchenkivskyi District Court of Zaporizhzhia City of October 4, 2021, case No. 336/1929/19. URL: <https://reyestr.court.gov.ua/Review/100062222>

<sup>82</sup> The Sentence of the Shevchenkivskyi District Court of Chernivtsi City of December 22, 2021, case No. 727/6909/21. URL: <https://reyestr.court.gov.ua/Review/102266514>; The Sentence of the Volovetskyi Raion Court of Transcarpathian Oblast of October 7, 2022, case No. 936/108/21. URL: <https://reyestr.court.gov.ua/Review/106651259>

<sup>83</sup> The Sentence of the Uzhhorodskyi City-Raion Court of Transcarpathian Oblast of July 25, 2023, case No. 308/12495/19. URL: <https://reyestr.court.gov.ua/Review/112397169>

for by the Law and only then received access to state secrets. Failure to pass the relevant vetting; refusal to undertake obligations to keep secrets; refusal to restrict rights in connection with access to state secrets are grounds for refusing to grant a citizen access to state secrets. According to Article 517(3) of the CPC of Ukraine, such a person may not be allowed to participate in criminal proceedings containing information constituting a state secret.”<sup>84</sup>

Analysing the issues of legal regulation of confidential cooperation, one cannot but mention the Instruction on the organisation of covert investigative (detective) actions and the use of their results in criminal proceedings<sup>85</sup>, which states the following: “When conducting covert investigative (detective) actions, an investigator, an authorised operational unit that carries out an order of an investigator or prosecutor, has the right to use information obtained as a result of confidential cooperation with other persons or to involve these persons in conducting covert investigative (detective) actions in cases provided for by the Criminal Procedure Code (Article 275 of the CPC of Ukraine)” (clause 3.9); “The protocol and its annexes shall be provided to the prosecutor specified in the order no later than 24 hours after its preparation. Materials that may decipher the confidentiality of the persons receiving the information shall not be provided” (clause 3.12). Hence, the instruction (despite its practical orientation) provides only general provisions on the use of confidential cooperation, referring to Article 275 of the CPC of Ukraine.

Obviously, this Instruction cannot envisage all the key provisions of the use of confidential cooperation in criminal proceedings, as such

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<sup>84</sup> The Sentence of the Selydivskiyi Town Court of Donetsk Oblast of October 30, 2020, case No. 242/1449/18. URL: <https://reyestr.court.gov.ua/Review/92571614>

<sup>85</sup> Instruction “On organisation of covert investigative (detective) actions and use of their results in the criminal proceedings”, approved by the Prosecutor General of Ukraine, Ministry of Internal Affairs of Ukraine, Security Service of Ukraine, the State Border Service of Ukraine, Ministry of Finance of Ukraine, and Ministry of Justice of Ukraine on November 16, 2012 No. 114/1042/516/1199/936/1687/5 URL: <https://zakon.rada.gov.ua/laws/show/v0114900-12#Text>

information should be for official use only. At the same time, it is not agreed that the Instruction for law enforcement officers refers only to the CPC of Ukraine without providing any explanations on the specifics, or even the possibility of using confidential cooperation in relation to specific types of CI(D)A. It is considered that the competent state authorities should more clearly describe the specifics of the use of confidential cooperation in the course of various CI(D)A, and not just copy the provisions of the CPC of Ukraine.

In fact, in addition to the regulatory regulation of the use of confidential cooperation in criminal proceedings, it is also worth mentioning the possibility of entrusting investigative and covert investigative (detective) actions in criminal proceedings. Thus, in accordance with Article 36(2)(4) of the CPC of Ukraine, the prosecutor has the right to instruct the investigator, pre-trial investigation body to conduct investigative (detective) actions, covert investigative (detective) actions, other procedural actions or give instructions on their conduct or participate in them within the time limit set by the prosecutor, and, where necessary, to personally conduct investigative (detective) and procedural actions. Accordingly, the prosecutor may instruct the investigator, coroner, and employees of operational units to carry out certain procedural actions in the form of instructions and orders. Pursuant to Article 41(1) of the CPC of Ukraine, operational units of the National Police, security agencies, the National Anti-Corruption Bureau of Ukraine, the State Bureau of Investigation, bodies that control compliance with tax and customs legislation, and the State Border Guard Service of Ukraine carry out investigative (detective) actions and covert investigative (detective) actions in criminal proceedings upon a written order of the investigator, prosecutor, and the detective unit, operational and technical unit and internal control unit of the National Anti-Corruption Bureau of Ukraine – upon written instruction of a detective or prosecutor of the Specialised Anti-Corruption Prosecutor's Office. In this regard, O. O. Torbas makes a fairly reasonable conclusion that “the

prosecutor has the right to give instructions on conducting investigative (detective) actions and covert investigative (detective) actions only to the investigator, and operational units are given only instructions on conducting relevant procedural actions. Hence, the instruction provides for the type of response that is inherent only to the investigator, but not to the employees of operational units.”<sup>86</sup> This opinion raises questions regarding confidential cooperation. Specifically, it questions whether the prosecutor can instruct or order the engagement of confidential employees during CI(D)A.

This publication argues that he/she cannot. Indeed, the prosecutor during the pre-trial investigation is the procedural supervisor and is responsible for the completeness of the investigation. At the same time, in this publication, it has been repeatedly emphasised that the use of confidential cooperation is not a separate type of covert investigative (detective) action, but rather a tool used in other procedural actions or to collect evidence in other ways. The efficiency and effectiveness of covert investigative (detective) actions is primarily the responsibility of those who conduct them, i.e., the investigator or a representative of the operational unit. Therefore, it is they who will choose the scope of tools that will be used to achieve the desired result. Indeed, during consultations and/or discussions, the prosecutor may suggest that the said authorised persons engage confidential staff, but only as a recommendation, the failure to comply with which does not create any negative consequences.

Summarising all of the abovementioned, it is necessary to draw several conclusions. Firstly, the regulatory framework for the use of confidential cooperation in criminal proceedings is rather limited due to the specifics of the category of “confidential cooperation” itself, which should be specified in restricted documents. Secondly, the current criminal procedural legislation needs to be improved and provide a legal

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<sup>86</sup> Torbas O. Application of discretion by prosecutor in the process of issuing orders and instructions on conducting investigative actions. *Law Herald*. 2020. No. 2. P. 88–92.

opportunity to use confidential cooperation not only in those cases that are clearly enshrined in the CPC of Ukraine, but in any CI(D) A that actually require the involvement of confidential employees at the discretion of the authorised person.

## **2.2 Characteristics of Participants in Confidential Cooperation**

The previous section of the monograph analysed the rights and obligations of persons involved in confidential cooperation. However, such analysis was more concerned with the specifics of the analysis of the category of “confidential cooperation” itself and did not address the specifics of legal regulation of participants in such cooperation. At the same time, without a criminal procedural characterisation of the participants in confidential cooperation, it is impossible to determine the role of such participants and to carry out any other characterisation of confidential cooperation that may be used in criminal proceedings.

Obviously, any cooperation between persons has two sides. Confidential cooperation is no exception, as on the one hand, it is initiated and/or authorised by an authorised official, and on the other hand, confidential cooperation is impossible without a confidant who will provide the necessary information or participate in the necessary procedural actions.

The criminal procedure legislation provides only general clarifications regarding the persons who may be involved in confidential cooperation. Pursuant to Article 275(2) of the CPC of Ukraine, “it is prohibited to engage lawyers, notaries, medical workers, clergymen, and journalists in confidential cooperation during covert investigative actions if such cooperation will involve disclosure of confidential professional information”. In this way, the legislator ensures the observance of such secrets as attorney-client, notary, medical, journalistic and confidentiality.

The Large Explanatory Dictionary of the Contemporary Ukrainian Language defines secrecy as follows: “1) something that is hidden from others, known not to everyone, a secret; something that is not subject to disclosure; information, knowledge about something, ways of achieving something unknown to others; 2) something that is not known, has not become known or is not yet available to knowledge; the hidden inner essence of a phenomenon, object; a hidden cause”<sup>87</sup>. A more pragmatic definition is found in the legal encyclopedia, where “professional secret” is interpreted as a generalised name for information (mostly with limited access) that a person possesses in connection with his or her professional activities and whose disclosure is prohibited. According to the creators of the dictionary, in Ukraine, such information includes information constituting lawyer, banking, medical, commercial, notarial, official secrets, secrets of correspondence, telephone conversations, postal items and other communications, secrets of adoption, and so forth<sup>88</sup>.

One of the key international documents relating to the principle of confidentiality of the attorney-client privilege is the UN General Assembly Resolution No. 43/173 of 9.12.1988 on the Principles for the Protection of Persons under Detention. Specifically, Principle 18, as outlined in this document, provides for the right of a detained or imprisoned person to be visited, consulted and communicate with a lawyer without delay or censorship and in full confidentiality. The said right may not be temporarily cancelled or restricted, except in exceptional circumstances determined by law or rules established in accordance with the law, when, in the opinion of a judicial or other authority, there is a need to maintain security and order<sup>89</sup>.

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<sup>87</sup> Large Explanatory Dictionary of the Contemporary Ukrainian Language / ed. by V. T. Busel. Irpin : Perun, 2002. P. 1426.

<sup>88</sup> Legal Encyclopaedia: in 6 vols. S. Shemshuchenko (Chairman of the Editorial Board) et al. K. : Ukr. encyclopaedia, 1998. V. 2. 1999. 744 p.

<sup>89</sup> The Resolution of the UN General Assembly No.43/173 of 9.12.1988. URL: [https://zakon.cc/law/document/read/995\\_206](https://zakon.cc/law/document/read/995_206)

The Model Code of Conduct for European Lawyers also enshrines provisions on the confidentiality of the legal profession, in particular, that it “is a primary and fundamental right and duty of a lawyer”. In accordance with the General Code, the advocate is obliged to equally preserve both the information received during the consultation and the information about the client provided to him or her during the provision of services. The advocate is obliged to demand that assistants and other persons involved in the provision of services to the client observe the principle of professional secrecy (clause 2.3). It is prohibited to serve a new client if there is a possibility of violation of the attorney-client privilege (clause 3.2.3). In addition to the attorney-client privilege when advising and serving a client, the advocate is also obliged to ensure this principle when sending correspondence (clause 5.3.1)<sup>90</sup>. The Recommendation of the Committee of Ministers of the Council of Europe of 25 October 2000 on the freedom of the profession of lawyers emphasises the obligation of governments to ensure the proper confidentiality of the relationship between a lawyer and his or her client, and defines the obligation of lawyers to maintain professional secrecy in accordance with national legislation, internal regulations and professional standards, the breach of which should be duly punished<sup>91</sup>. The Standards of Independence of the Legal Profession of the International Bar Association in clause 13 indicate the need to ensure the confidentiality of the relationship between the lawyer and the client, including the protection of the conventional and electronic system of all lawyer's records and documents from seizure and inspection, as well as protection against interference with electronic means of communication and information systems,

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<sup>90</sup> Zaborovskyi V. V., Hechka K. V. Problematic issues of the definition of “lawyer confidentiality”. *Uzhhorod National University Herald. Series: Law*. 2014. Issue 25. P. 274–277.

<sup>91</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>



which is a prerequisite for the effective performance of professional duties by lawyers<sup>92</sup>.

According to Art. 22 of the Law of Ukraine “On the Bar and Practice of Law”, “the professional secrecy is any information that has become known to the advocate, advocate's assistant, trainee advocate, person who is in an employment relationship with the advocate, about the client, as well as the issues on which the client (a person who was denied the conclusion of the agreement for provision of legal aid on the grounds provided for by this Law) applied to the advocate, the law firm or law office, the content of the advocate's advice, consultations, explanations, documents drawn up by the advocate, information stored on electronic media, and other documents and information received by the advocate in the course of his or her practice of law”<sup>93</sup>.

In academic circles, the following sources of information constituting the attorney-client privilege are generally accepted: “the advocate himself or herself, to whom this information was communicated by the client or obtained in the course of providing legal aid; employees of the law firms, who became aware of such information in connection with the performance of their work duties; documents created by the advocate in the course of providing legal aid to the client (petitions, opinions, certificates, correspondence between the advocate and the client, other analytical documents prepared by the advocate); items and documents that were handed over by the principal to the advocate for their study for the purpose of developing a legal position and/or their submission to law enforcement agencies or the court to substantiate the position in the case”<sup>94</sup>.

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<sup>92</sup> Standards of Independence of the Legal Profession of the International Bar Association, adopted at the IBA Conference in September 1990 in New York. URL: <http://pravolib.pp.ua/ist-12--idz-ax247--nf-26.html>

<sup>93</sup> The Law of Ukraine “On the Bar and Practice of Law”. *The Official Bulletin of the Verkhovna Rada (BVR)*. 2013. No. 27. Art. 282. URL: <https://zakon.rada.gov.ua/laws/show/S076-17#Text>

<sup>94</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)

According to M. Pohoretskyi<sup>95</sup>, the subject of attorney-client privilege should be considered: “1) the fact of the client's appeal to the advocate, the nature and content of the legal aid provided to him or her; 2) information from the personal life, family, intimate, social, official, business and other spheres of the client's activity, communicated to the advocate (currently, the advocate may use such information in his or her activities only if the client consents to it); 3) personal records of the client, written documents, audio and video recordings, information on electronic media. All of this, as well as information obtained by the advocate as a result of his or her participation in closed court hearings, and any other information related to the provision of legal aid, the disclosure of which may harm the legally protected interests of the client, advocate or other persons, shall be the subject of the professional secrecy.”

The legal doctrine does not have a single position on the absolute nature of the attorney-client privilege. Hence, I. L. Petrukhin believes that “disclosure of the attorney-client privilege is permissible if the defence counsel has reported a possible dangerous crime that can be prevented”<sup>96</sup>. According to S. I. Ariia, “a lawyer who has received reliable information about a possible serious crime comes into conflict with his or her status as a citizen”<sup>97</sup>. Thus, “the disclosure of information necessary for the prevention of a crime will be lawful if the defence counsel has sufficient grounds to believe that there is a real possibility of a crime being committed and that a situation is inevitable when the prevention of a crime by disclosing information is the only way to prevent it. Therefore, it is proposed to oblige lawyers to disclose information received from clients if such information contains information about a crime being prepared.”<sup>98</sup>

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<sup>95</sup> Pohoretskyi M. M. Guarantees of Attorney-Client Privilege in Investigative (Detective) Actions. *Yuryst Ukrainy*. 2014. No. 4. P. 122–129.

<sup>96</sup> Petrukhin I. L. Attorney and Client: A Relationship of Trust. *Advokat*. 2013. No. 1. 112 p.

<sup>97</sup> Ariia S. I. On Attorney-Client Privilege. K. : Ukr. yustytisia, 2012. No. 2. 121 p.

<sup>98</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.

Other scholars disagree with this position. Therefore, T. M. Montian argues that “clients understand that it is unlikely to be possible to punish a lawyer for treason. This is not least because it is extremely difficult to prove the fact of disclosure of the attorney-client privilege, and even more difficult to prove that this disclosure led to any damage – moral or material.”<sup>99</sup> Yu. M. Polonskyi emphasises that “maintaining the attorney-client privilege is one of the principles of the bar, its disclosure is an extremely serious violation, and it can be disclosed only with the written consent of the client”<sup>100</sup>. Unlike Yu. M. Polonskyi, D. V. Kukhniuk considers disclosure of the attorney-client privilege inadmissible under any circumstances. He notes that “when obtaining a certificate of the right to practice law, an advocate takes an oath in which he or she undertakes to strictly keep the attorney-client privilege... Disclosure of the attorney-client privilege is a violation of the Law of Ukraine 'On the Bar and Practice of Law' and the Oath of the Ukrainian Attorney, therefore the attorney's practice of law may be terminated and the certificate issued to him or her may be revoked.”<sup>101</sup>

In fact, it is the possibility of disclosure of information constituting the attorney-client privilege that should be assessed first of all when examining advocates as potential participants in confidential cooperation. Indeed, Article 275(2) of the CPC of Ukraine contains a fairly clear prohibition on the involvement of advocates in confidential cooperation.

The only clarification provided by the legislator is the potential “subject” of such confidential cooperation – information relating to the attorney-client privilege. It should be noted that pursuant to Article 65 of the CPC of Ukraine, attorneys may not be interrogated as witnesses regarding information constituting attorney-client privilege, but at the same time, pursuant to Article 65(3) of the CPC of Ukraine, they may

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<sup>99</sup> Montian T. M. On Legal Privilege. *Ukrainskyi advokat*. 2013. No. 5. 67 p.

<sup>100</sup> Polonskyi Yu. M. On the Legal Profession's Secrecy. “*Law of Ukraine*” *Legal Journal*. 2012. No. 9. 87 p.

<sup>101</sup> Kukhniuk D. V. Secrets will not suffice. “*Law of Ukraine*” *Legal Journal*. 2012. No. 6. 103 p.

be released from the obligation to keep such information confidential if the person who provided the relevant information (client) consents to its disclosure. In this way, the legislator emphasises that the attorney-client privilege is not absolute and may be disclosed in certain cases. At the same time, this clarification applies only to the information that may be provided during the interrogation of the advocate. It is emphasized that Article 275(2) of the CPC of Ukraine does not contain any additional clarifications on the possibility of engaging an advocate in confidential cooperation. Obviously, in the process of secretly obtaining information, a lawyer cannot ask the client for permission to disclose confidential information, because in this case any logic of the relevant procedural actions is lost.

At the same time, it would be appropriate to draw attention to another problem. Indeed, Article 275(2) of the CPC of Ukraine does not generally prohibit the involvement of an advocate in confidential cooperation as long as it does not concern the attorney-client privilege. At the same time, the very possibility of engaging an advocate in confidential cooperation may pose a threat of accidental disclosure of confidential information in the future or of committing actions (sometimes accidental) that may be contrary to the interests of the advocate's client or the interests of his or her colleagues, which may be regarded as a violation of the Rules of Professional Conduct. That is, any involvement of a lawyer potentially creates a number of risks that cannot be taken into account at the initial stage of confidential cooperation for objective reasons due to the complexity of their identification.

In this regard, it is necessary to recall the dilemma of the possibility of disclosing the attorney-client privilege to report a criminal offence. In general, this problem can be extended to Art. 275 of the CPC of Ukraine, because the use of confidential cooperation is aimed at detecting criminal offences (as a rule, serious or especially serious crimes), and therefore, in theory, a lawyer, by assisting in the relevant procedural actions, helps to avoid the negative consequences of such

criminal offences. Simultaneously, it is obvious that such a conclusion is too generalised and completely negates the very concept of the Bar as an independent self-governing institution whose task is to protect the rights and legitimate interests of a person in a state governed by the rule of law. Accordingly, the involvement of an advocate in confidential cooperation with the disclosure of confidential information, even with the justification that such cooperation will help to prevent a “bigger trouble”, is obviously absurd and cannot be used in practice.

Nevertheless, the issue of engaging lawyers without the need to disclose confidential information remains, if such disclosure occurs by accident or if it somehow violates the rules of professional conduct. The simplest way to solve this problem would be to amend Article 275(2) of the CPC of Ukraine to exclude advocates from the list of persons whom authorised officials may engage in confidential cooperation. However, such changes are obviously premature, as there are a number of cases when a person provides assistance by participating in confidential cooperation on issues that are in no way related to his or her profession. Hence, it is impossible to clearly establish at the legislative level the possibility (or impossibility) of engaging an advocate in confidential cooperation. This issue should be resolved exclusively by the parties to such confidential cooperation after a detailed assessment of the consequences of such cooperation. A thorough study of the tasks that will be assigned to confidants, as well as an assessment of the entire criminal proceedings, can minimise cases of violation of the terms of Article 275(2) of the CPC of Ukraine.

The said provision of the CPC of Ukraine also states that in the course of confidential cooperation, notaries may not be involved in cases where it would involve disclosure of confidential professional information. According to Art. 8 of the Law of Ukraine “On Notaries”, notarial secrecy is a set of information obtained in the course of a notarial act or an application to a notary by an interested person,

including information about a person, his or her property, personal property and non-property rights and obligations, etc. A notary and a notary's assistant are obliged to keep notarial secrecy, even if their activities are limited to providing legal assistance or reviewing documents and no notarial act or act equivalent to a notarial act has been performed. The obligation to maintain notarial secrecy also applies to persons who became aware of the notarial acts performed in connection with the performance of their official duties or other work, to persons involved in the performance of notarial acts as witnesses, and to other persons who became aware of information that is the subject of notarial secrecy. Persons guilty of violation of notarial secrecy shall be liable in accordance with the procedure established by law. Certificates of notarial acts and copies of documents kept by a notary shall be issued by a notary exclusively to individuals and legal entities on whose behalf or in respect of whom notarial acts were performed. In case of death of a person or declaration of death, such certificates are issued to the heirs of the deceased. If a person is declared missing, the guardian appointed to protect the property of the missing person has the right to receive certificates of notarial acts if it is necessary to preserve the property over which the guardianship is established. Notaries shall provide certificates of notarial acts and other documents within ten business days upon a substantiated written request of a court, prosecutor's office, bodies conducting operational and investigative activities, pre-trial investigation bodies in connection with criminal proceedings, civil, commercial, administrative cases, cases of administrative offences under the jurisdiction of these bodies, with the obligatory indication of the case number and attachment of the seal of the relevant body, as well as at the substantiated written request of a state enforcement officer, private enforcement officer under enforcement proceedings with mandatory indication of the number of enforcement proceedings and details of the enforcement document on the basis of which enforcement proceedings are carried out to the National Agency for the Prevention of Corruption at its written request

made in order to exercise the powers defined by the Law of Ukraine “On Prevention of Corruption”<sup>102</sup>.

“As an exception, such certificates and information may be issued at the reasonable written request of a court, prosecutor's office, bodies conducting operational and investigative activities, pre-trial investigation bodies, subject to the following conditions: the existence of an open civil, criminal, commercial, administrative or administrative offence case; the request for information must be duly processed in accordance with the rules of the sectoral procedural law; the requirement to request information constituting notarial secrecy must be substantiated by reference to the circumstances of the case to be established; information constituting notarial secrecy must be transmitted in ways and means that make it impossible for unauthorised persons to get acquainted with it.”<sup>103</sup>

“Notarial secrecy is one of the elements of the notarial procedure, a component of the procedure regulated by law, consisting of successive actions of a notary aimed at achieving a certain legal result. The legal significance of notarial secrecy is extremely significant, as it has a direct impact on the conduct of notarial proceedings and the procedure for their organisation. Observance of notarial secrecy reinforces public confidence in the notary.”<sup>104</sup>

“Notarial secrecy should be viewed from two sides. On the one hand, it is the secrecy of the person who applied for a notarial act (the motive for applying and the fact of applying to a notary, the documents submitted for examination, the result achieved after applying to a notary, information about the person's personal life, and so forth). On the other hand, it is the secrecy of the notary as a specialist (information about the advice given,

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<sup>102</sup> The Law of Ukraine “On Notaries”. *The Official Bulletin of the Verkhovna Rada (BVR)*. 1993. No. 39. Art. 383. URL: <https://zakon.rada.gov.ua/laws/show/3425-12#Text>

<sup>103</sup> Barankova V. The Concept and Limits of Notarial Secrecy. *Mala entsyklopediia notariusua*. 2017. No. 4 (94), August. P. 192–219.

<sup>104</sup> Ustyenko N. Secrets of a Person's Private Life and Their Civil Legal Protection : Abstract Dissertation ... Candidate of Juridical Sciences. Kh., 2001. 20 p.

consultations, and the like). Both characteristics of the notion of secrecy of notarial acts are important, so both should be enshrined in law.”<sup>105</sup>

V. Chernysh rightly argues that “preservation of professional secrecy is a fundamental duty of a notary. Its observance ensures the trust in the notary of those interested in the legal formalisation of the will and, at the same time, is a condition for such trust... Violation of notarial secrecy is not only a violation of the law, but also an immoral act of a notary, because persons who have applied to a notary often reveal to him their most intimate, cherished secrets, confident that the secrecy of their conversation will be observed.”<sup>106</sup> It has been rightly noted in the literature that “preserving the secrecy of a notarial act as a principle of notarial procedural law is also formalised as an important duty of a notary, and this approach is traditional for the laws of most countries”<sup>107</sup>. “The obligation to maintain notarial secrecy must necessarily be consistent with other duties of a notary provided for by the notarial procedure, but quite often in court practice there are civil cases related to unfounded legal claims against notaries who, in compliance with the requirements of the law, did not disclose notarial secrecy to other persons than those provided for in Article 8 of the Law (for example, did not inform creditors of information about the heirs of a deceased debtor). At the same time, in violation of the rules of Article 50 of the Law, plaintiffs mostly do not even challenge the illegality of a particular notarial act or refusal to perform it, and the subject of litigation in such cases is the legality or illegality of the notary's actions due to his/her obligation to keep notarial secrecy.”<sup>108</sup>

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<sup>105</sup> Denysiak N. M. Secrecy of Notarial Acts and Liability for their Violation. *Uzhhorod National University Herald*. 2016. Issue 40. Volume 1. P. 62–65.

<sup>106</sup> Chernysh V. Notarial Secrecy: Concept and Limits. *Yurydychnyi zhurnal*. 2011. No. 3 (105). P. 84–85.

<sup>107</sup> Bondarieva M. V. The Principle of Secrecy of Notarial Acts. *Law Review of Kyiv University of Law*. 2009. No. 4. P. 198–202.

<sup>108</sup> Barankova V. The Concept and Limits of Notarial Secrecy. *Mala entsyklopediia notariusia*. 2017. No. 4 (94), August. P. 192–219.



In fact, analysing the possibility of engaging a notary in confidential cooperation, it should be noted that the possibility of “accidental” disclosure of notarial secrecy is not as significant as in the example with a lawyer. This conclusion can be explained by several aspects. Firstly, a notary can clearly define the range of clients to whom he/she provides the relevant legal services. Evidently, such a circle may be determined by an attorney, but at the same time, the attorney's activity is more “dynamic” and representation of the client's interests in one proceeding may cause a conflict of interest in another. The notary, in turn, performs only certain notarial acts, the impact of which, although extending to an indefinite number of participants, cannot cause an unforeseen conflict of interest. Secondly, an investigator or other authorised person can easily determine the importance of confidential cooperation with a notary and the potential for disclosure of notarial secrecy. Accordingly, if the notary's profession is in no way related to the information provided to authorised officials in the course of confidential cooperation, the involvement of a notary in such cooperation is relatively “safe” in the context of Article 275(2) of the CPC of Ukraine.

The next participant in confidential cooperation subject to restrictions in criminal procedural law is a medical professional, who, accordingly, must keep medical confidentiality.

Pursuant to Article 40 of the Fundamentals of Legislation of Ukraine on Healthcare, healthcare professionals and other persons who, in the course of their professional or official duties, become aware of an illness, medical examination, inspection and their results, intimate and family life of a citizen, are not entitled to disclose this information, except in cases provided for by law. When using information constituting a medical secret in the educational process, research work, including in cases of its publication in special literature, the patient's anonymity must be ensured<sup>109</sup>. “The subjects of medical secrecy include junior medical staff

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<sup>109</sup> The Law of Ukraine “Fundamentals of the Legislation of Ukraine on Healthcare”. *The Official Bulletin of the Verkhovna Rada of Ukraine (BVR)*. 1993. No. 4. Art. 19. URL: <https://zakon.rada.gov.ua/laws/show/2801-12#Text>

(nurses, nannies), administrative staff of healthcare facilities (employees of personnel, legal, financial, economic services, etc.), officials of healthcare authorities, employees of judicial and law enforcement agencies who have become aware of information constituting medical secrecy in connection with their professional duties.”<sup>110</sup>

However, medical confidentiality is not absolute, as Ukrainian legislation provides for a number of cases when such confidentiality may be disclosed:

1. “In the interests of national security, economic well-being or human rights, territorial integrity or public order, for the prevention of disorder or crime, for the protection of public health, for the protection of the reputation or rights of others, for the prevention of the disclosure of information received in confidence, or for the maintenance of the authority and impartiality of the judiciary.”<sup>111</sup>

2. The physician should inform parents (adoptive parents), custodians, trustees about the health status of minor children<sup>112</sup>.

3. Spouses have the right to be mutually aware of their health status (Article 30 of the Family Code of Ukraine).

4. In the event of a threat of the spread of infectious diseases, enterprises, institutions and organisations are obliged to immediately inform the state sanitary and epidemiological service of emergency events and situations that pose a threat to public health, sanitary and epidemiological well-being, patients who carry infectious diseases or persons who have been in contact with such patients<sup>113</sup>.

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<sup>110</sup> Slipchenko T. Medical secret – legal basis of protection. *Aktualni problemy pravoznavstva*. 2021. No. 2 (26). P. 91–96.

<sup>111</sup> The Constitution of Ukraine of 28.06.1996. URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>

<sup>112</sup> The Law of Ukraine “Fundamentals of the Legislation of Ukraine on Healthcare”. *The Official Bulletin of the Verkhovna Rada of Ukraine (BVR)*. 1993. No.4. Art. 19. URL: <https://zakon.rada.gov.ua/laws/show/2801-12#Text>

<sup>113</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>; The Law of Ukraine “On Protection of the Population from Infectious Diseases” of 06.04.2000. URL: <https://zakon.rada.gov.ua/laws/show/1645-14>

5. In case of emergencies that pose a threat to public health, sanitary and epidemiological well-being<sup>114</sup>.

6. To report domestic violence to the authorised units of the National Police and provide information on the prevention of domestic violence at the request of the authorised bodies (Article 9 of the Law of Ukraine “On Prevention of Domestic Violence”).

7. It is allowed to transfer information about the state of mental health of a person and provide him/her with psychiatric care without the consent of the person or without the consent of his/her legal representative<sup>115</sup>.

8. Information about HIV testing results, the presence or absence of HIV infection in a person is allowed only to: the person who was tested, parents or other legal representatives of such person; other medical workers and healthcare facilities – only in connection with the treatment of this person; other third parties – only by court decision in cases established by law (Article 13(4) of the Law of Ukraine “On Combating the Spread of Diseases Caused by the Human Immunodeficiency Virus (HIV) and Legal and Social Protection of People Living with HIV”).

9. Information about a person's treatment in a drug treatment facility may be provided only to law enforcement agencies in the event that the person is brought to criminal or administrative responsibility (Article 14(5) of the Law of Ukraine “On Counteraction Measures against Illegal Trafficking in Drugs, Psychotropic Substances and Precursors and Abuse of Them”).

10. “In case of release of a patient with tuberculosis from prison, the penitentiary institution where the patient served his sentence shall inform about his health condition and the need to continue treatment at

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<sup>114</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>

<sup>115</sup> The Law of Ukraine “On Psychiatric Care” of 09.12.2003. URL: <https://zakon.rada.gov.ua/laws/show/1489-14>

the chosen place of residence or stay, as well as inform the relevant TB institution about the clinical and dispensary category of his disease.”<sup>116</sup>

11. In addition, in the process of preparing a response to lawyers' requests, requests of law enforcement agencies (Article 93 of the CPC of Ukraine), according to a court ruling in criminal proceedings (Articles 132, 159 of the CPC of Ukraine), disclosure of medical confidentiality is allowed in legally established cases.

12. During court proceedings, when in order to exercise their rights (ensuring the rights of clients – for lawyers), information is required that is subject to medical confidentiality and is not subject to disclosure. Such information can be requested during the court proceedings by filing a motion to request evidence pursuant to Article 137 of the Civil Procedure Code of Ukraine.

It can be concluded that the need to investigate criminal offences (even serious or especially serious offences) is not a ground for disclosure of such information, and therefore the investigator or other authorised person should assess in detail the need to involve a doctor in confidential cooperation. In this case, the problems of involving such persons in confidential cooperation are similar to those with lawyers, because due to the specifics of their professional activities, doctors cannot know whether such cooperation will lead to the disclosure of medical secrets. In fact, the possibility of involving healthcare professionals in confidential cooperation should be assessed not only by authorised persons, but also by the employee themselves, who is better aware of the specifics of their activities and, having established their role in confidential cooperation, can foresee potential violations on their part.

Article 275(2) of the CPC of Ukraine also prohibits the involvement of clergy in confidential cooperation if it involves the disclosure of confidential professional information. In this case, first of all, it is the

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<sup>116</sup> The Law of Ukraine “On Combating Tuberculosis” of 05.07.2001. URL: <https://zakon.rada.gov.ua/laws/show/2586-14>

secret of confession, which is protected by law in accordance with the current legislation.

According to Article 3 of the Law of Ukraine “On Freedom of Conscience and Religious Organisations”, no one has the right to demand from clergymen information obtained by them during the confession of believers<sup>117</sup>. In general, it should be noted that the legislator does not provide clearer guidance on what information may be classified as information that cannot be disclosed in connection with confession. This regulatory approach is primarily explained by the existence of a huge number of different religious denominations, which may have their own rules and procedures for confession. Accordingly, the legislator provides quite broad possibilities for interpreting this concept in order to guarantee the right to free religion. It should be emphasised that this definition is sufficient for the analysis of Article 275(2) of the CPC of Ukraine, since the involvement of clergy in confidential cooperation is quite rare and almost never related to their professional activities.

Analysing the actual restrictions imposed on clergymen, it should be noted that the secrecy of confession applies to each specific case of confession and cannot restrict the rights of anyone in the future, provided that such information is not disclosed. Accordingly, it is quite easy for an investigator or other authorised person to establish whether the confidentiality of confession will be violated when a clergyman is involved in confidential cooperation, since confession is a specific action of a religious nature, and the assessment of the relevant information as a secret protected by law should be carried out directly by the clergyman directly, not by the content of the information received, but by the moment of its receipt. That is, any information that is communicated to the person concerned outside of confession (in accordance with the religious canons of each particular religious denomination) is not

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<sup>117</sup> The Law of Ukraine “On Freedom of Conscience and Religious Organisations”. *The Official Bulletin of the Verkhovna Rada (BVR)*. 1991. No. 25. Art. 283. URL: <https://zakon.rada.gov.ua/laws/show/987-12#Text>

protected by law and therefore may, for example, be the subject of confidential cooperation.

The last subject to restrictions on their involvement in confidential cooperation is journalists, who cannot disclose confidential information of a professional nature.

First of all, it should be emphasised that, unlike the previous examples, Ukrainian legislation does not have a single legal act regulating the activities of journalists. This situation is not surprising, as the forms of journalistic activity are extremely diverse, and access to information in the modern information world blurs even the legal boundaries of the profession. At the same time, it would be incorrect to say that there is no interpretation of this concept.

According to the Law of Ukraine “On State Support of the Media, Guarantees of Professional Activity and Social Protection of Journalists”, a journalist is a creative employee of a media entity who professionally collects, receives, creates, edits, distributes and prepares information for the media. The status of a journalist is confirmed by a document issued by a media entity, professional or creative union of journalists. A document confirming the status of a journalist must contain the name and type of media outlet, its identifier in the Register of Media Entities or the name of a professional or creative union, a photo, the journalist's surname, name and patronymic, the document number, the date of issue and its validity period, and the signature of the person who issued the document<sup>118</sup>.

There is no single interpretation of the concept of journalistic secrecy in the legislation. At the same time, even a superficial analysis of the legal doctrine is enough to see the unity of views of scholars and practitioners on this concept, since in most cases, the peculiarities of protecting journalistic sources of information are analysed at the level of scientific research.

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<sup>118</sup> The Law of Ukraine “On State Support of the Media, Guarantees of Professional Activity and Social Protection of Journalists”. *The Official Bulletin of the Verkhovna Rada (BVR)*. 1997. No. 50. Art. 302. URL: <https://zakon.rada.gov.ua/laws/show/540/97-бп#n17>

In this case, first of all, it should be emphasised that such protection is guaranteed at the level of international judicial institutions. Thus, the ECtHR in one of its judgements noted that “...the protection of journalistic sources is one of the cornerstones of press freedom... The absence of such protection could encourage journalistic 'sources' to refuse to assist the press in informing the public on matters of public interest. As a result, it would be more difficult for the press to play the watchdog role that society needs, and its ability to provide accurate and reliable information could be weakened. Taking into account the importance of the protection of journalistic 'sources' for the freedom of the press in a democratic society and the possible negative impact that a decree on disclosure of secrets could have on the exercise of this freedom, it can be considered that such a measure would be compatible with Article 10 of the Convention only if it were justified by a pressing public need.”<sup>119</sup> The right of journalists to keep their “sources” secret is also enshrined in the Recommendation No. R (2000) of the Committee of Ministers of the Council of Europe on the right of journalists not to disclose their sources of information, and in PACE Recommendation 1950 (2011) on the protection of journalists' sources. Therefore, in accordance with Recommendation No. 1950 (2011), disclosure of the source of information should be made only in exceptional situations where the public or private interest is at stake and the need for such disclosure is convincingly demonstrated. Competent authorities requiring the disclosure of a source should indicate which vital interests outweigh the source's right to remain confidential and that all alternative measures have been exhausted. If sources are protected from any disclosure under national law, the possibility of disclosure should not be considered<sup>120</sup>.

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<sup>119</sup> Opryshko L. The Right to Protection of Journalists' “Sources of Information”. Human Rights Platform NGO. URL: <https://www.ppl.org.ua/wp-content/uploads/2020/01/Journalistic-sources.pdf>

<sup>120</sup> The protection of journalists' sources: Recommendation 1950 (2011) Final version. Assembly debate on 25 January 2011 (4th Sitting) (see Doc. 12443, report of the Committee on Culture, Science and Education, rapporteur: Mr Johansson). Text adopted by the Assembly on 25 January 2011 (4th Sitting). URL: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17943&lang=en>

According to Recommendation No. R (2000) 7 of the Committee of Ministers of the Council of Europe on the right of journalists not to disclose their sources of information<sup>121</sup>, the following principles of journalistic secrecy are outlined:

“Principle 1. The right of journalists to non-disclosure. National legislation and practice in member States should provide clear and transparent protection for the right of journalists not to disclose source-identifying information, in line with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and the principles it sets out, which should be seen as minimum standards for respecting this right; Principle 2. The right of others to non-disclosure. Other persons who, by virtue of their professional relationship with journalists, become aware of source-identifying information in the course of gathering, editorialising or disseminating that information should be equally protected in accordance with the principles set out herewith; Principle 3. Restrictions on the right to non-disclosure: a. The right of journalists not to disclose information identifying a source shall not be subject to any restrictions other than those set out in Article 10(2) of the Convention. When deciding whether the interest in disclosure that falls within the scope of Article 10(2) of the Convention on non-disclosure of information identifying the source if the public interest prevails is legitimate, the competent authorities of the member States should pay particular attention to the importance of the right not to disclose sources and the preference given to it in the case law of the European Court of Human Rights. These authorities may decide to disclose only if, in accordance with clause b, there is a public interest of overriding importance and if the circumstances are of an extremely important and serious nature; b. Disclosure of information identifying

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<sup>121</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>



the source is deemed necessary if it can be convincingly demonstrated that: i) there are no reasonable alternatives to disclosure or they have been exhausted by the persons or public authorities who have sought to make the disclosure and their legitimate interest in disclosure clearly outweighs the public interest in non-disclosure, bearing in mind that a compelling need for disclosure has been demonstrated, the circumstances are of an extremely important and serious nature, the need for disclosure has been identified as meeting a pressing social need, and member States have a certain discretion in determining that need, but that discretion goes hand in hand with the control of the European Court of Human Rights; c. The above requirements apply at all stages of any process in which the right not to disclose sources of information may be invoked; Principle 4. Evidence alternative to journalistic sources. In proceedings against a journalist for allegedly violating the honour or reputation of a person, the authorities should consider, in order to establish the truth or, conversely, the falsity of the allegation, all evidence available to them under national procedural law and may not require disclosure of information identifying a journalistic source for this purpose.”<sup>122</sup>

“If to consider the standards developed by the European Court of Human Rights in its case law, we can conclude that disclosure of sources is acceptable only in exceptional cases when it comes to protecting vital interests. These include, for example, cases of sexual abuse of children, disclosure of particularly serious crimes, etc. However, the relevant decision must be made by an independent and impartial judicial authority and must contain a detailed justification why the disclosure of journalistic 'sources' of information outweighs the journalist's right to keep them secret.”<sup>123</sup>

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<sup>122</sup> Opryshko L. Presentation on protection of journalistic sources. URL: [https://www.ppl.org.ua/wp-content/uploads/2019/03/prez\\_B4GG\\_Opryshko.pdf](https://www.ppl.org.ua/wp-content/uploads/2019/03/prez_B4GG_Opryshko.pdf)

<sup>123</sup> Opryshko L. The Right to Protection of Journalists' "Sources of Information". Human Rights Platform NGO. URL: <https://www.ppl.org.ua/wp-content/uploads/2020/01/Journalistic-sources.pdf>

In fact, when studying the possibility of involving journalists in confidential cooperation, one can see similar problems that are associated with the involvement of lawyers. In connection with the dynamic nature of professional journalism and a number of difficulties in actually distinguishing between information that should be protected by law and other information that is simply of professional interest and/or used to cover certain events in the media. Therefore, although there is no direct prohibition in the criminal procedure legislation on engaging journalists in confidential cooperation, it is believed that an authorised official of the relevant law enforcement agency, when making such a decision in relation to a journalist, should assess in detail the importance of the information that may be obtained in the course of such confidential cooperation. If it is possible to obtain such evidence in another way, the authorised official should refuse such cooperation, taking into account the potential risks of accidental disclosure of journalistic secrets.

As already noted, confidential cooperation is bilateral, and therefore, when analysing its participants, it is also necessary to pay attention to the specifics of regulatory regulation of participants in such cooperation by law enforcement agencies.

In this publication, it has been repeatedly noted that authorised representatives of pre-trial investigation bodies may be involved in confidential cooperation. At the same time, such a wording is too broad and does not allow to fully explore the specifics of the powers of persons who implement such cooperation on behalf of the state. Thus, there is a need to study the entire range of participants and determine the possibility of their involvement in confidential cooperation.

First of all, it is necessary to pay attention to the wording of Article 275(1) of the CPC of Ukraine, which states that “during 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 these persons in covert investigative

(detective) actions in cases provided for by this Code”<sup>124</sup>. Actually, this wording already raises a lot of questions and comments. Pursuant to Article 246(6) of the CPC of Ukraine, “the investigator conducting the pre-trial investigation of a criminal offence or, on his/her behalf, the authorised operational units of the National Police, security agencies, the National Anti-Corruption Bureau of Ukraine, the State Bureau of Investigation, the Bureau of Economic Security of Ukraine, the bodies, penal institutions and detention centres of the State Criminal Executive Service of Ukraine, and the bodies of the State Border Guard Service of Ukraine are entitled to conduct covert investigative (detective) actions. By decision of the investigator or prosecutor, other persons may also be involved in covert investigative (detective) actions.”<sup>125</sup> Hence, the legislator emphasises that only the investigator can conduct the CI(D)A, although it is also possible to issue orders for such actions to operational officers. In this regard, the provisions of Article 275(2) of the CPC of Ukraine, which clearly states that only the investigator may engage persons in confidential cooperation during the conduct of the CI(D)A, is not entirely clear.

It is possible that the legislator is trying to unify the process of involving other persons in the CI(D)A, which is provided for in Article 246(6) of the CPC of Ukraine. However, this conclusion has several weak aspects. Firstly, 246(6) of the CPC of Ukraine states that other persons may be involved in conducting the CI(D)A by the decision of the investigator or prosecutor. Thus, the legislator takes into account the prosecutor as a subject who can involve other persons in the relevant procedural actions, including in the case of confidential cooperation. At the same time, the provision of Article 275(1) of the CPC of Ukraine

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<sup>124</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>

<sup>125</sup> *Ibid.*

refers only to the investigator. Consequently, given that this provision is special in relation to Article 246(6) of the CPC of Ukraine, it can be concluded that the reference to the prosecutor is erroneous, which generally calls into question the possibility of using Article 246(6) of the CPC of Ukraine as a certain legal basis in this matter.

Secondly, it has been repeatedly noted that it is often operatives who seek confidential cooperation. This is primarily due to the presence of informants who may be involved in the relevant procedural actions as confidants on one or another basis. In addition, criminal proceedings are often initiated on the basis of investigative cases. Hence, operatives, when carrying out the investigator's order to conduct the CI(D)A, may continue to involve confidants who assisted in the process of conducting the OIA.

Thirdly, in this study, it has already been emphasised several times that confidential cooperation is not a separate procedural action, but should be evaluated solely as a tool that allows achieving the necessary results in the course of conducting an CI(D)A. Accordingly, the artificial restriction of entities that can involve confidants only complicates the process of conducting relevant procedural actions, but does not affect the actual guarantee of the rights, freedoms and legitimate interests of participants in criminal proceedings. It has previously been mentioned that the rights and freedoms in the course of certain procedural actions involving confidential cooperation should be guaranteed precisely by fulfilling all legal requirements relating to the relevant covert investigative (detective) action.

Thus, this publication suggests that in Article 275(1) of the CPC of Ukraine, the legislator unreasonably limited the range of persons who may involve confidants in the CI(D)A, since such persons are primarily operatives who, in most cases, are the subjects of the CI(D)A. In this regard, it is proposed that Article 275(1) of the CPC of Ukraine be amended to read as follows: "1. During covert investigative (detective) actions, it is *allowed* to use information obtained as a result of confidential cooperation with other persons or to involve these persons in covert

investigative (detective) actions in cases provided for by this Code.” In this way, it will be possible to avoid artificially limiting the number of persons who can use this important tool for conducting CI(D)A.

### **2.3 Evidential Value of Information Obtained as a Result of Confidential Cooperation**

In this paper, it has already been pointed out that the involvement of confidants in the conduct of CI(D)A takes two forms: the use of confidential information obtained through confidential cooperation and the involvement of persons in covert investigative (detective) actions. In fact, such forms of participation of confidants are confirmed by a number of scientific studies discussed in Chapter 1 of this monograph, as well as by numerous materials of practice. It should also be borne in mind that these are the forms of confidential cooperation envisaged in Article 275(1) of the CPC of Ukraine. At the same time, it has been repeatedly stressed that confidential cooperation is not a separate procedural action in itself, but should be considered as a tool in the process of the CI(D)A. Although this approach to the interpretation of confidential cooperation is absolutely justified, this position somewhat complicates the understanding of the possibilities of using confidential cooperation in criminal proceedings. According to Article 246(2) of the CPC of Ukraine, CI(D)A are conducted in cases where information about a criminal offence and the person who committed it cannot be obtained in any other way.

According to Article 246(1) of the CPC of Ukraine, CI(D)A are a type of investigative (detective) actions, and therefore the purpose of their conduct is also provided for in Article 223(1) of the CPC of Ukraine – obtaining (collecting) evidence or verifying evidence already obtained in a particular criminal proceeding. Thus, it can be concluded that if the purpose of any CI(D)A is to collect or verify evidence, then confidential cooperation will also be used to collect

evidence. In this regard, to better understand the essence of confidential cooperation in criminal proceedings, it is necessary to assess the possibility of using the information obtained in the course of such cooperation as evidence.

In fact, such an analysis should be carried out in view of the existence of the already mentioned forms of confidential cooperation, since these forms will determine the specifics of the interaction between the confidant and the authorised person of the law enforcement agency, which will result in the receipt of evidence in criminal proceedings.

According to Article 275(1) of the CPC of Ukraine, the first form of using confidential cooperation in conducting the CI(D)A is “the use of information obtained as a result of confidential cooperation with other persons”. The legislator does not specify what kind of information should be and how it can be used, allowing authorised officials to determine the scope and specifics of such confidential cooperation on their own. At the same time, the wording “use of information” also does not allow to determine how such information can be obtained in the course of confidential cooperation.

It could be assumed that such information may be provided in accordance with Article 93 of the CPC of Ukraine, i.e., the confidant may voluntarily provide the law enforcement representative with information, documents, material evidence, etc. In general, the legislator does not explicitly prohibit this form of interaction. Nevertheless, it should be noted that according to the criminal procedure legislation, confidential cooperation is inextricably linked to the CI(D)A, and therefore any information provided in confidence must either relate to a specific type of CI(D)A or be used for the relevant procedural actions. The mere informing of persons who wish to remain anonymous about the circumstances of a criminal offence, persons involved in it, etc. does not relate to confidential cooperation within the meaning of Article 275 of the CPC of Ukraine and cannot be the subject of this paper. Therefore, the question arises: “How can information be obtained from confidants and how should it be used?”

It is considered that the best way to obtain orientation or other information from a confidant is to conduct an interrogation. In general, it can be noted that such an interrogation will not differ significantly from a regular interrogation, but several important aspects should be taken into account. First, according to Article 95(1) of the CPC of Ukraine, testimony is information provided orally or in writing during interrogation by a suspect, accused, witness, victim, or expert regarding circumstances known to them in criminal proceedings that are relevant to the criminal proceedings. Thus, the confidant in this particular case will be treated as a witness, since the current CPC does not provide for the interrogation of such a participant in criminal proceedings as a “confidant”. Second, such interrogation must be conducted with the mandatory use of security measures, which are primarily aimed at guaranteeing its confidentiality.

When assessing the specifics of interrogation with the use of security measures, it is advisable to recall the ECtHR judgment *Mirilashvili v. Russia*, where the Court set out the following criteria for assessing a national court's decision to withhold information about a deponent's identity from the defence:

“1) Whether the reasons for the concealment of information were proper and sufficient (clause 196);

2) whether the withheld materials had significant evidentiary value (clause 199);

3) whether there were significant procedural safeguards in the decision-making procedure to restrict access to information. In particular, it is important whether it was the court that made the decision to restrict access to information and whether the court had access to the materials that are not subject to disclosure, as well as how the court could investigate the correlation (balance) between the interests of the party to the proceedings in disclosing the materials and the public interest in non-disclosure of such data (clause 197). The possibility of the accused's participation in the decision on non-disclosure is also important (clause 198).

As a result of the case, the Court rebuked the national court of the Russian Federation for the fact that the decision to restrict access to the materials was based solely on the type of materials and legal restrictions on their disclosure. At the same time, the national court of the Russian Federation did not attempt to analyse the balance between the interests of the accused and the public interest in non-disclosure of such data (clauses 206–209).<sup>126</sup>

Subsequently, during the court hearing, such interrogation should also be conducted with the use of security measures without the possibility of identifying such a person. In this regard, Ya. O. Talyzina, I. A. Titko propose “to adopt as a basis the draft Model Instruction on conducting procedural actions in court with witnesses, victims and other participants of criminal proceedings in respect of whom security measures have been taken, but with certain amendments and additions. In particular, it should provide that:

1) If the prosecutor files a motion to summon a participant in criminal proceedings to participate in the proceedings to which confidentiality of personal data is applied, the court shall impose on the prosecution the obligation to summon and bring such person to court, including by issuing a ruling granting the prosecutor's motion and obliging the body ensuring the person's security to bring him/her to the court premises determined by the judge for remote proceedings;

2) when deciding on the determination of the court for remote proceedings, the court must take into account the availability of court reporters with at least the second form of access to state secrets (‘top secret’), as well as premises that meet the requirements of the classified department (these may be local courts that meet the stated requirements or courts of appeal, which in this case are involved only for certain procedural actions);

3) when opening a court hearing in which a person with changed personal data will participate, the presiding judge must explain to the

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<sup>126</sup> Case of *Mirilashvili v. Russia*, Application No. 6293/04. URL: <https://ips.ligazakon.net/document/SOO01114>



participants in the criminal proceedings that: a) such a person will be interrogated from another room using technical means; b) the identity of such a participant in the proceedings will be verified by the court clerk who has access to state secrets and access to material carriers of classified information that contain the real personal data of such a person; c) such a participant in the proceedings will be sworn in by the clerk in the cases and in the manner prescribed by the CPC of Ukraine; d) audio and video recording of events in the room where the procedural action will take place will be recorded on a separate optical disc, which, together with the person's signed oath, will be stored in the classified department of the said court;

4) the court secretary, who ensures participation in the procedural actions of the person taken under protection using technical means from another room, before the procedural action, must read the decision by which the person's real personal data was changed and establish their compliance with the data of the person brought to participate in the procedural actions; hand over a memo on his/her rights and obligations in accordance with the procedural status; and administer an oath in cases and in the manner prescribed by the CPC of Ukraine; explain to such a person that he/she should not answer questions that may harm his/her safety; the secretary shall report the above actions with such a person to the court before the person starts participating in the procedural actions during the court session, as well as provide information on the software and hardware to be used during this procedural action; the presence in the room from which the procedural action will be conducted remotely of any persons other than the participant in the criminal proceedings to whom security measures are applied and the secretary is prohibited;

5) an employee of the body that ensures the delivery of a person to the court from which participation in procedural actions will be carried out using technical means is obliged to check the validity of the relevant secretary's access to state secrets in the established form, the availability of access to material media containing information about the real data

of the person to whom security measures have been applied (according to Article 517(4) of the CPC of Ukraine, decisions on granting access to specific secret information and its material carriers are made in the form of an order or written instruction by the head of the pre-trial investigation body or the prosecutor); obliged to provide the secretary who will ensure the conduct of the procedural action with the specified material carriers of classified information to identify the person who will participate in the procedural actions in court”<sup>127</sup>.

The next form of involvement of confidants is their direct and immediate participation in the relevant covert investigative (detective) actions. In general, the CPC of Ukraine does not limit the list of CI(D) A in which a confidant may be involved, leaving the decision on this issue to the authorised persons. Indeed, this approach is the most successful, since “involvement of persons in their conduct”, as stated in Article 275 of the CPC of Ukraine, can take various forms. For example, such a person may be involved in the installation of audio or video monitoring equipment, as the confidant may know the person in whose home such equipment is to be installed. In this case, the confidant did not directly collect information, but acted as an important participant in the CI(D) A and ensured that it was possible to conduct it. It is believed that, although such confidential cooperation does not “generate” evidence, it is still covered by Article 275 of the CPC of Ukraine, as the legislator did not provide a list of actions in which a confidant may be involved. At the same time, it is suggested that a list of those CI(D)A in which a confidant is usually involved not as a specialist or consultant, but rather to assist in gathering evidence. The following actions are proposed:

– Surveillance of a person, thing or place (Article 269 of the CPC of Ukraine). The role of the confidant in this procedural action is

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<sup>127</sup> Talyzina Ya. O. Regulatory support and implementation of confidential cooperation in criminal proceedings. Qualifying scientific work on the rights of the manuscript. Thesis for the degree of Doctor of Philosophy. Kharkiv, 2022. 307 p.; Talyzina Ya. O., Titko I. A. Ensuring Confidentiality of Information about a Person Participating in Criminal Proceedings: Specific Problems and Solutions. *Problems of legality*. 2021. Iss. 153. P. 104–118.

rather limited, since the main activity will be carried out by persons (usually operatives) who will carry out the relevant procedural actions. Nevertheless, a confidant may be involved in the procedure as a person who may be familiar with the person under surveillance and who may detain the person or suggest that he or she choose, for example, another route that is more suitable for surveillance. Indeed, such a role is quite limited, while in some cases it is the confidant who can ensure the effectiveness of surveillance of a person;

- control over the commission of a crime (Article 271 of the CPC of Ukraine). In this publication, it has already been studied the role of a confidant in such an CI(D)A, as there are still quite serious problems with distinguishing between control over the commission of a crime and provocation. At the same time, these examples clearly demonstrate the role of the confidant in obtaining evidential information;

- performing a special task to uncover the criminal activity of an organised group or criminal organisation (Article 272 of the CPC of Ukraine). Pursuant to clause 1.13 of the Guidelines, the performance of a special task to disclose the criminal activity of an organised group or criminal organisation involves the organisation by the investigative and operational unit of the introduction of a person authorised by them, who performs a special task in accordance with the law, into an organised group or criminal organisation under cover to obtain things and documents, information about its structure, methods and techniques of criminal activity that are relevant to the investigation of a crime or crimes committed by these groups. The Law of Ukraine “On Organisational and Legal Framework for Combating Organised Crime” (Article 14) and the Law of Ukraine “On Operational and Investigative Activities” allow for the involvement of members of organised criminal groups on a confidential basis in the implementation of measures to combat organised crime in accordance with the requirements of Article 275 of the CPC of Ukraine. The tactics of establishing confidential cooperation and carrying out a special task to uncover the criminal activities of an organised group or criminal organisation are regulated by the relevant

departmental regulations of the internal affairs agencies and the Security Service of Ukraine. A person who, in accordance with the law, performs a special task on disclosure of criminal activity of an organised group or criminal organisation while keeping reliable information confidential, may be involved in the performance of 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>128</sup>.

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<sup>128</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.