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Legislative Regulation of Intelligence-Gathering Activities: Problems and Ways to Solve Them

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Abstract

It is proved that the main problem of legal regulation of the activities of operational units of law enforcement agencies of Ukraine is its unsystematic nature. Ensuring such consistency is quite possible by making changes and additions to the legislation. The concept of reforming the legislative regulation of the activities of operational units of law enforcement agencies of Ukraine should consist of interrelated elements that provide for changes and additions to the legislation in three areas of regulation of public relations: criminal procedure (detailed regulation of the activities of operational units in the Criminal Procedure Code with a substantial expansion of their powers, in particular, in terms of ensuring the safety of persons who cooperate confidentially with pre-trial investigation bodies); intelligence-gathering (legislative regulation of clear grounds for the initiative activities of operational units to detect the preparation and commission of crimes, and the independent, with a clear exhaustive legislative definition, system of intelligence-gathering activities with their differentiation depending on the subject of authorisation, considering those that an operational employee can conduct without any permits and approvals); in the field of state secret protection (comprehensive regulation in the Law of Ukraine "On state secret" of legal relations related to the conspiracy of the activities of operational units and other internal structural entities of those state bodies that need it). The purpose of the study is to make proposals for improving the legislative regulation of intelligence-gathering and other activities of operational units of law enforcement agencies of Ukraine. The methodological basis of the research is the dialectical-materialistic method of scientific knowledge of socio-legal phenomena, and general scientific and special methods of legal science, in particular: system-structural – to determine the content of the investigated categories and legal phenomena, the development of terminology, systematisation of scientific knowledge of the chosen area in general, a comprehensive analysis of the provisions of normative regulations and the development of a system of proposals for reforming legislation and using foreign experience in Ukraine; comparative-legal and comparative – for a comprehensive analysis of national legislation and subordinate normative regulations, norms of international law, which constitute the legal basis of operational law; logical-legal (dogmatic) – during the establishment of the conceptual framework, the formulation of proposals for amendments and additions to legislative acts; statistical – for the analysis of the investigated materials of intelligence-gathering cases, criminal proceedings, survey results; sociological (questionnaires, interviews, surveys) – for the examination of the opinions of practitioners, determining the effectiveness of the application of individual legal institutions. It is necessary to make changes and additions to the legislation to create a mechanism of legal regulation of intelligence-gathering activities of operational units of law enforcement agencies of Ukraine. The essence of these changes is determined by different approaches, distinguished by levels. At the highest, strategic level, a deep transformation is required for legislative regulation of the complex of public relations on countering crime by law enforcement agencies (intelligence-gathering activities, criminal proceedings, protection of state secret). The tactical level corresponds to the introduction of scientifically based proposals for the settlement of issues of intelligence-gathering activities. The best option for the scheme of improving the legislative regulation of the activities of operational units of law enforcement agencies of Ukraine is the introduction of a tactical level of reform with a gradual transition to a strategic one

Keywords:

operational units; intelligence-gathering activities; intelligence-gathering measures; law enforcement agencies; criminal process; pre-trial investigation; state secret

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Introduction

One of the conditions for the development of Ukraine as a democratic state governed by the rule of law of the European model is an extensive renewal of the criminal justice system, the institutions of which are able to ensure the protection of human rights and freedoms, counteraction to crime, protection of the interests of society and the state by means of an covert nature, in particular intelligence-gathering. The practical implementation of the Criminal Procedure Code (CPC) of Ukraine, in comparison with the CPC of the Ukrainian SSR, which was in force for over 50 years, demonstrated the importance of a radical change in the model of criminal proceedings, the legal status of its participants, the procedural form of pre-trial investigation and legal proceedings in general. In connection with the coordination of the criminal procedural legislation of Ukraine with international standards, a thorough study of the legal mechanisms of functioning of operational units of the National Police (NP) of Ukraine, which are entrusted with the task of identifying, documenting and disclosing the primary majority (over 95%) of all criminal offences registered in the state, preventing the most dangerous manifestations of organised and professional crime, becomes relevant.

Considering the tendency to increase in the number of registered applications and reports on criminal offences (from 3.2 million in 2012 to 7.2 million in 2019), and cases (proceedings) under investigation by the internal affairs bodies (NP), from 443.7 thousand in 2012 to 809.6 thousand in 2019, proper legislative and organisational support for the subjects of the intelligence-gathering activities (OSA) is recognised as one of the priorities. The functioning of criminal police units is affected, in particular, by such factors as an increase in the level of specific, latent, crimes related to human and arms trafficking, drug trafficking, mining, illegal financial and economic activities, etc. Along with the consistent capacity-building of the police and the effectiveness of its measures, its activities are also affected by influential deterrents. For example, at the end of 2019, there were over 600 proceedings sent by the police in the courts against members of organised groups and criminal organisations, but only 48 were considered during the year (that is, for every fourth proceeding, the trial lasts over three years). According to official reports of the NP, the rate of detection of grievous and extremely grievous crimes committed in qualified forms of complicity ranges from 30 to 50% with an annual increase in the balance of criminal proceedings of the corresponding category, in which the final procedural decision has not been made. Materials collected in the framework of intelligence-gathering cases (OSC) were used as evidence only in 31.4% (conducted secret investiga-

tive (search) actions (SISA) 34.3 %) of proceedings, which generally indicates an underestimation or inability to use the capabilities of operational units to ensure evidence in criminal proceedings.

In general, the reasons for the low performance of OSC work are deep and complex. However, almost the main one seems to be the uncertainty of the actual legal content of the OSA (so it is no coincidence that there are still disputes about whether the OSA is a science). After the adoption of the CPC of Ukraine, such activity (mentally it is still perceived as a separate form of countering crime) partially depends on rationing by criminal procedure legislation (for the first time in the history of lawmaking, the CPC of Ukraine highlighted an independent chapter 21 "Secret investigative (search) actions").

However, the introduction in Ukraine of a progressive modern model of adversarial criminal procedure (focused on Western European models) should not narrow (limit) the natural legal regulation of the initiative activities of operational units to combat crime (which fully corresponds to the established traditions of regulating covert work). Now, an unbalanced hybrid model of the activities of operational units with unclear content and criteria for the ratio of intelligence-gathering, criminal procedural, and search activities is present. This conceptual inconsistency permanently identifies existing gaps and causes new problems of legislative, departmental (interdepartmental) regulatory, and organisational nature, which in practice require urgent and effective solutions.

The purpose of the study is to make proposals for improving the legislative regulation of intelligence-gathering activities of operational units of law enforcement agencies of Ukraine.

The following tasks are set to achieve this goal:

- identify the main problems existing in the legislative regulation of intelligence-gathering and other activities of operational units of law enforcement agencies of Ukraine;
- give a general description of the current state of studies aimed at solving practical problems of the activities of operational units of law enforcement agencies of Ukraine;
- highlight the features and prospects of using international experience to improve OSA in Ukraine;
- form conceptual foundations for improving the system of legal regulation of secret cooperation in Ukraine;
- formulate specific proposals to the Law of Ukraine "On intelligence-gathering activities" and the CPC of Ukraine.

Results and Discussion

Based on a comprehensive analysis of the practice of applying the norms of the Constitution of Ukraine

(Art. 3, 31- 34, 55, 57, 59, 60, 62, 63), Criminal Code of Ukraine (Art. 11, 36, 38, 39, 42, 43, 45), CPC of Ukraine (par. 1, 2, 20, 21, 40, 42, 43; Art. 36, 40, 41, 84-94, 103-110, 159-156, 207-211, 214-216), a number of laws of Ukraine (on OSA, NP, prosecutor's office, organisational and legal grounds for combating organised crime, preventing corruption, information, Security Service of Ukraine, ensuring the security of persons taking part in criminal proceedings, state secret, execution of decisions and application of the practice of the European Court of Human Rights, etc.), a number of international treaties, the consent to be bound by the Verkhovna Rada of Ukraine, and bylaws, identified a number of conflicts, gaps, contradictions, and even systemic errors made by the legislator, which still negatively affect the effectiveness of tasks on prevention, detection, and investigation of crimes.

According to surveys, the imperfection of legislation regulating the criminal process (91.2%), OSA (91.1 %) and the protection of state secret (80.9%) are recognised as the main factors for weakening operational positions in the work of the relevant divisions of the NP of Ukraine. It is about:

- imperfection of the legislative definition of OSA, the concept and list of intelligence-gathering measures (OSM);
- absence of legal grounds for conducting OSM for the purpose of detecting and suppressing crimes that are prepared and committed in the context of conspiracy (part 1, 3 of Art. 6 and part 1, 3 of Art. 9 of the Law of Ukraine “On intelligence-gathering activities”);
- unclear criteria for sufficiency of information for the implementation of OSA;
- loss of initiative by operational units in criminal proceedings (Art. 41 of the CPC of Ukraine);
- lack of clear legislative regulation of the possibility of proceedings in the OSC in case of detection of signs of a crime (without entering information in the unified state register of legal entities);
- establishing by law a direct link between the procedure for conducting OSM and the norms of the CPC of Ukraine (instead of a separate independent regulation of their content and the procedure for conducting them);
- inability to conduct a number of important intelligence activities within the framework of operational development of persons involved in crimes (monitoring of bank accounts; special investigative experiment; imitation of the crime situation);
- insufficient regulation of assistance to the implementation of OSA, etc.

In the structure of modern studies on OSA issues and covert work, seven blocks should be distinguished, depending on the subject of research. From

general, fundamental to specialised (by the scope of the subject of research) works of the monographic level, the:

1. studies devoted to the general fundamental foundations of OSA and covert work should be considered. There has been a lack of such research over the past decade. These are individual monographs, doctoral and candidate theses prepared before the entry into force of the CPC of Ukraine and the introduction of appropriate amendments to the Law of Ukraine “On intelligence-gathering activities”.

2. Research devoted to certain principles of OSA and covert work. Among such studies, several groups can be distinguished:

a) studies of various aspects of OSA and covert work, including: legal regulation, organisation, tactics (tactical and psychological foundations), use of OSM. Conceptual scientific research, the subject of which is the use of OSM and the psychology of OSA, is now over ten years old. Studies of the organisation and tactics of OSA are even more outdated. The only dissertation that is an exception to this trend is devoted to the legal regulation of OSA, it was defended in 2013 in the specialty “Theory and history of state and law; history of political and legal doctrines”;

b) studies of the main categories of OSA and covert work, including: forms, forces, and means of OSA, and its methods or OSM. Over the past decade, only the funds of the OSA have been investigated at the monographic level (the results of the dissertation research for the doctor of the law were presented in 2018). Methods of OSA (operational search measures) were not investigated in the complex. The studies were conducted only in relation to some of them. Therewith, a number of monographic studies were conducted on the legal, organisational, and tactical principles of conducting SISA. Dissertations devoted to such an important category as the forms of OSA have not been prepared. At the monographic level, the problems of only one of these forms – intelligence-gathering were investigated. Operational development and operational prevention are also ignored by researchers;

c) certain areas (lines) of activity within the OSA and covert work: determining the location of persons put on the wanted list; execution by operational units of the investigator's and prosecutor's instructions to conduct the SISA; intelligence-gathering for the security of persons taking part in criminal proceedings; criminal intelligence on the Internet;

d) certain types of activities to ensure the effectiveness of OSA and covert work: information and analytical support (the last separate comprehensive study was completed in 2011 – at the level of a doctoral dissertation); ensuring the secrecy of the activities of operational units (2017); material, technical,

and financial support of OSA and covert work (during the last decade, it was not the subject of a separate comprehensive scientific study);

e) secret cooperation (as a special, separate, integral element of the content of the OSA) is constantly the subject of scientific research. Comprehensive studies were completed in the early 2010s. In 2019, a monograph was published that systematically addresses the issues of the institute of secret cooperation.

3. Studies devoted to the counteraction of operational units to crimes committed by a separate section of the special part of the Criminal Code of Ukraine, part of articles of such a section, a separate article, or part of an article, or crimes united in a separate group based on purely criminological features. Over the past decade, a substantial number of comprehensive scientific studies have been conducted in this area. The authors of such studies formulate their subject using three main forms.

The first form is the widest within the OSA, it is formulated as "counteraction by operational units" (afterwards, the type of crime is stated). Thus, the subject of the study covers intelligence-gathering and criminal procedural activities of operational units.

The second form is narrower than the previous one: "operational search counteraction" (afterwards, the type of crime is stated). With this formulation, the subject of research covers only the intelligence-gathering activities of operational units.

The third form – "detection and investigation (afterwards, the type of crime is stated)" covers not only the OSA and the covert work of operational units to counteract a specific type of crime, but also the procedural activities of an investigator, prosecutor, forensic tactics, and the use of special knowledge in criminal proceedings.

4. Research of intelligence-gathering criminal procedural activities of individual operational units of specific law enforcement agencies. Since the beginning of the current century, scientific intelligence in this area has been conducted only in relation to operational units: the penitentiary system; special units for combating organised crime of the Ministry of Internal Affairs of Ukraine; the operational service of the Ministry of Internal Affairs of Ukraine and operational and technical units of the NP.

5. Studies devoted to the problems of countering specific operational units (individual law enforcement agencies) of a certain type of crime. Such studies over the past decade have mainly been devoted to the activities of the internal affairs bodies (NP):

a) criminal investigation (countering mercenary and violent crimes; grievous and extremely grievous crimes of previous years; crimes in the field of illegal trafficking in synthetic narcotic drugs; crimes

against property committed by radical individuals; robberies on railway facilities, etc.);

b) protection of the economy, and in the past of the state service for combating economic crime (countering crimes that encroach on the external economic security of Ukraine; obtaining illegal benefits and other corruption crimes; criminal acts in the field of public utilities, etc.);

c) special units for combating organised crime, operational services (countering bribery in the Department of Internal Affairs system and obtaining illegal benefits in general; crimes in the public sector, etc.);

d) operational service units (countering drug crimes and obtaining illegal benefits).

6. Research of problems of conducting specific intelligence-gathering activities and secret investigative (search) actions. Such actions and activities that have been investigated at the dissertation level over the past decade include: operational survey; operational inspection; in-cell work; visual surveillance; audio and video control of a person and place; removal of information from transport telecommunications networks; performing a special task to solve the criminal activities of an organised group, operational combination, controlled delivery, prompt purchase, and monitoring the commission of a crime in general.

7. Studies devoted to the conduct of OSM (SISA): a) within the framework of countering a specific type of crime; b) separate operational unit of a particular law enforcement agency. Since the beginning of this century, less than ten dissertations on similar subjects have been defended. It is considered impractical to conduct these studies in the future (due to the narrow boundaries of the subject). Many of the papers related to this block are fundamental and contain provisions that can be used to improve various aspects of countering crime by the forces and means of operational units of various subjects of the OSA. However, in the context of radical changes in legislation and law enforcement practice, the legal foundations of the OSA have become particularly important and require a separate targeted comprehensive analysis.

The use of international experience is important. Based on the results of the analysis of modern models of the organisation of covert work of law enforcement agencies of other countries (criminal intelligence, detective activities, secret investigations, etc.), it can be concluded that Ukraine has introduced the main guarantees for ensuring the protection of human rights and freedoms during the implementation of secret activities in the process of pre-trial investigation at the level of standards of developed Western European countries, which primarily covers: judicial authorisation of secret measures (with

the possibility of full-fledged judicial control and prosecutor's supervision); the permissibility of secret procedural actions only in case of impossibility or substantial complication of obtaining the necessary data in another way; conducting such actions only within the framework of the investigation of particularly dangerous acts (under the CPC of Ukraine – grievous and extremely grievous crimes); establishing a procedure for notifying persons about conducting secret actions against them and their results; limiting the possibility of monitoring communication with certain categories of persons (close relatives, priests, helpline consultants, defender lawyers, and doctors); the duty of the investigative body to immediately destroy the results of secret actions that do not relate to specific proceedings and have no evidentiary value; minimising the possibility of interference in the private life of other (unrelated) persons. Therewith, the legal field of Ukraine does not sufficiently define precautions for possible abuse of its right by the defence party. Today, some such subjects of criminal proceedings, taking advantage of differences in the interpretation of the norms of the criminal procedure law (sometimes on far-fetched grounds that cannot be refuted in the process of public verification), require the court to recognise as inadmissible evidence collected tacitly with a substantial expenditure of time, human and material resources.

Notably, in the EU and US countries there are specific problems related to the secret activities of law enforcement agencies. In recent years, they have constantly become the subject of attention of researchers [1-6].

Based on the doctrinal provisions of the theory of OSA and criminal procedure, the latest studies of Ukrainian and foreign researchers, and the results of the analysis of international experience, and long-term practice, ways to solve the most fundamental problems that exist in the legislative regulation of the activities of operational units of law enforcement agencies of Ukraine are offered.

First of all, this concerns the problem of defining the concept of intelligence-gathering activity. It is interpreted as a system of public and secret search, intelligence and counterintelligence activities conducted using operational and operational-technical means (Art. 2 of the Law of Ukraine "On intelligence-gathering activities"). Such a definition cannot provide an unambiguous understanding of the concept of OSA, its legal content. This is due to limited information content. In addition, the legislator does not propose definitions of search, intelligence and counterintelligence measures, does not distinguish them into public and secret, and does not form a list of them. This applies to both operational and

operational-technical means. Except for the definition of OSA, the terms "operational means", "operational and technical means", "search measures", "intelligence measures", "counterintelligence measures", "public measures", "secret measures" are not used in the text of the Law [7]. An activity with indefinite content cannot be a tool for achieving a specific goal or completing tasks.

Taking this into account, researchers who investigated aspects of OSA were forced, first of all, to formulate their own definition of the concept of such activities, their content, and individual components. The most effective approaches were those that were based on an in-depth analysis of fundamental scientific works on the content of human activity in general and legal activity in particular.

In the opinion of this study, a universal "formula" for understanding the content and formulation of the definition of a certain type of legal activity, in particular the OSA, was proposed by M.A. Pogoretskyi. The researcher appropriately identifies such internal structural elements of the content of the OSA and criminal process as the purpose, tasks, actions, and subjects that form them as integral active systems and their external elements, which are stages and organisational-legal forms [8]. The application of this approach to clarifying the essence and formulation of concepts of certain subspecies of activity within the framework of OSA and criminal proceedings has always led to the development of definitions that were distinguished by the accuracy of determining the content of the concepts under study. It concerns primarily the monographic research of O.S. Starenkyi, O.O. Sukhachov, I.O. Sukhorada, O.Yu. Tatatrov, A.M. Chernyak, and others.

Within the framework of the doctrinal provisions of the OSA theory and based on many years of practice, it is proposed to interpret the OSA as a system of actions that:

- are conducted for the purpose of detecting and suppressing crimes, preventing criminal offences;
- consist in searching for and recording factual data on the criminal activities of individuals and groups, the location and fate of persons put on the wanted list;
- conduct operational units of legal protection bodies in accordance with the powers granted to them by law;
- they can be conducted both openly and secretly [8].

It is considered appropriate to choose these four components as the basis for the legislative definition of OSA.

One of the most pressing problems of the OSA is that the law does not provide grounds for operational units to work on the prevention of crimes. The

Law of Ukraine “On intelligence-gathering activities” obliges operational units to take the necessary OSM for the prevention, timely detection and suppression of crimes, exposing the causes and conditions that contribute to the commission of crimes, and conducting the prevention of offences practice (part 1 of Art. 7). However, by obliging to conduct crime prevention, identify, and stop them, the legislator did not give operational units the appropriate tools. Therefore, operational units do not actually have the legal authority to conduct such activities. Ultimately, Art. 6 of the Law of Ukraine “On intelligence-gathering activities” in the last paragraph prohibits making decisions on conducting intelligence-gathering activities in the absence of the grounds provided for in this article. The scope of such grounds includes “the availability of sufficient information obtained in accordance with the procedure established by law, which requires verification by means of intelligence-gathering measures and means, about: crimes that are being prepared; persons preparing to commit a crime; persons who are hiding from pre-trial investigation bodies, an investigating judge, a court, or evading serving a criminal sentence”.

Therewith, Art. 9 of this law provides that in each case there are grounds for conducting an OSA, an OSC is established. Therefore, any OSM for the prevention and detection of crimes is illegal. Thus, all activities of operational units to search for the facts of preparation and commission of crimes should be considered devoid of legal grounds. The prosecutor, within the framework of supervision over the activities of units authorised to conduct OSA, in case of detection of the facts of conducting OSM without establishing OSC, is obliged to give instructions on their immediate termination.

Ukrainian researchers who have investigated various aspects of the activities of operational units of law enforcement agencies have repeatedly focused on this problem. The analysis of recent works in this area [9] gives grounds for concluding that the best way to correct the situation is to supplement part one of Art. 6 of the Law of Ukraine “On intelligence-gathering activities” with paragraph five, which as one of the grounds for conducting an OSA would determine the implementation of prevention, timely detection, and suppression of crimes, and exposing the causes and conditions that contribute to their commission. Simultaneously with the introduction of this norm, it is necessary to provide operational units of law enforcement agencies with effective tools for its effective implementation. In the theory of OSA and the practice of rule-making activities of the National Police, such tools are defined as intelligence-gathering measures (or search measures or operational (initiative) search

measures. Their peculiarity (in comparison with other OSM and SISA) is the minimal risks of possible illegal restriction of the rights and freedoms of citizens and business entities. The purpose of conducting them is to obtain primary (intelligence) information about previously unknown facts of committing crimes or preparing for them (83.3%), and orientation of the investigator, prosecutor in the areas (means) of effective collection of evidence and tactics of pre-trial investigation (80.4%). The list of such measures (in various versions) is contained in each of the drafts of the Laws of Ukraine “On intelligence-gathering activities”, which were submitted to the Verkhovna Rada of Ukraine in 2008, 2009, 2016, 2017, and 2019. In the latter of them, search activities are defined as a set of public and secret actions, the purpose of which is to search and record factual data on the illegal activities of persons (groups of persons), identify, prevent, and stop criminal offences, establish the location of wanted persons in accordance with the current legislation. The project developers included the following to the list of these activities: operational installation; radio engineering survey; polygraph survey; intelligence survey; obtaining certificates; personal search; operational identification of persons, objects, and substances; determination of identification and technological features of a radio-electronic device; radio search; operational survey of persons with their consent.

In our opinion, such a definition does not allow discovering the ratio of OSA and intelligence-gathering, and the list of measures is unnecessarily narrowed.

Notably, when defining the concepts of these measures (Art. 1 of the draft law), the developers of the document:

- resorted to cumbersome and incorrect wording;
- did not offer a definition of an intelligence survey;
- used different names to refer to the same events (a survey using a computer polygraph instead of a polygraph-logical survey);
- submitted definitions of search activities that are not included in the list (information search);
- ignored the conventional search event for operational units, which in the theory and practice of the OSA was called “operational inspection”.

In addition, the analysis of these definitions gives grounds to assert that the content of the proposed measures is imposed, partially covering the content of other OSM and even certain areas of OPS. Thus, according to the definition of information search, its content includes: intelligence-gathering, secret surveillance, operational installation, and agent work. In turn, the content of the operational installation covers surveys and obtaining information, etc. All of the above indicates a lack of consistency in

the development of the institute of search activities.

Based on the analysis of the practice of operational units of law enforcement agencies of Ukraine and the achievements of the theory of OSA, it can be stated that search activities should not be separated from intelligence-gathering activities. They need to be normalised precisely as OSM, which operational units can conduct on their own initiative and without the consent of the prosecutor or obtaining court permission. The names of these measures should clearly reflect their content (so that the legislator does not have to formulate their definitions, burdening the perception and complicating legal practice). In particular, it is believed that it would be appropriate to introduce such a list of intelligence-gathering measures in the law:

- survey of individuals with their consent;
- survey of publicly available objects;
- survey of publicly inaccessible objects (with the consent of the persons in possession or use of whom they are);
- collecting publicly available information from any source;
- collection of restricted access information contained in law enforcement data banks;
- obtaining confidential information with the consent of persons who have access to it;
- short-term introduction to the criminal environment;
- visual surveillance in publicly accessible places (for the purpose of: recognising signs of committing a crime and establishing data that subsequently allow identifying persons involved in it; identifying unknown persons in the course of other OSM and secret investigative (search) actions);
- identification of radio-electronic equipment in a certain place and determination of their identification and/or technological features;
- comprehensive analysis of information obtained during other events.

This study suggests that the materials of intelligence-gathering activities conducted to detect crimes should be accumulated in intelligence-gathering cases. “Such cases should be initiated in certain areas of countering crime,” – from the notice. The procedure for conducting these cases should be determined by bylaws.

The actions of operational units included in the list proposed above should be legally fixed not only as intelligence-gathering measures but also as measures of operational support of criminal proceedings. In modern conditions, this institution is reflected only in bylaws and actually exists outside the law, which substantially reduces the effectiveness of operational units in the framework of pre-trial investigation.

Therefore, it is necessary to expand the powers of operational units in the field of criminal proceedings through the consolidation in the CPC of Ukraine

of their right to conduct a set of measures for operational support of criminal proceedings in agreement with the investigator and with the permission of the procedural manager. The relevant approval (permission) should relate to the implementation of the entire set of measures within the framework of the case of operational support of criminal proceedings (91.1 %).

Operational search measures and operational support measures for criminal proceedings should be considered specific types of OSM.

This study suggests that it is necessary to fix directly in the law the definition and an exhaustive list of OSM with their differentiation into groups depending on the subjects of authorisation (a specially appointed judge of the Court of Appeal, a prosecutor, the head of an operational unit), given that the decision to conduct certain OSM in the event that their implementation does not threaten substantial restrictions on the rights and freedoms of citizens, can be made by an operational employee (with possible options for their further approval in instances). During the legislative classification of OSM, the risks of possible interference in the private life of citizens and restrictions on their rights and freedoms should be considered. International legal standards and decisions of the European Court of Human Rights are mandatory for consideration.

Formulating the legislative definition of OSM, it is proposed to define them as measures conducted by operational units to perform the tasks of OSA, using the rights granted to these units by law. Therewith, organisational and security measures that operational units use without the purpose of obtaining information that is relevant for a specific OSM or a specific criminal proceeding should be clearly distinguished from OSC. First of all, this refers to measures to ensure secrecy (conspiracy).

In general, in the activities of operational units, three areas of legal relations should be distinguished, which are regulated by various legislative acts: first, the OSA (the Law of Ukraine “On intelligence-gathering activities”); second, the involvement of operational units (their employees) in criminal proceedings (the CPC of Ukraine); third, ensuring the conspiracy of forces and means (the Law of Ukraine “On state secret”).

Within the framework of the latter, it is necessary to recognise that legal relations connected to the conspiracy of operational units do not concern the OSA and the criminal process but belong to the field of ensuring the state secret. The ordering of these relations should be based on the following provisions.

First, the legal regulation of the conspiracy of operational units should be conducted in strict accordance with the Constitution of Ukraine, it should be based on the provisions of the Law of Ukraine “On state secret”, where a separate section should

regulate specific measures that can be applied to prevent the disclosure of classified information, including through disinformation. The CPC of Ukraine and the Law of Ukraine “On intelligence-gathering activities” should state that ensuring the secrecy of their own secret activities by operational units is conducted in accordance with the procedure and on the grounds provided for by the Law of Ukraine “On state secret”. The issue of financing the conspiracy of operational units and their interaction with other state structures to ensure the secrecy of their own activities should be regulated at the level of a resolution of the Cabinet of Ministers of Ukraine [10].

Secondly, at the level of legislation and by-laws, it is necessary to define the following: one of the principles of the OSA is secrecy – the rule of secret, hidden, unknown to anyone (except for their own subjects) implementation; the principle of secrecy applies not only to the OSA, but also to all the activities of operational units, in particular, the execution of orders of the investigator, prosecutor to conduct the SISA; conspiracy of the activities of operational units should be considered a system of measures aimed at ensuring the secrecy of this activity; the purpose of conspiracy of the activities of operational units is to keep secret information about facts, time, places, circle of objects and subjects of conducting OSM and SISA, belonging of their subjects, and the means used by them (premises, transport, equipment, etc.) to law enforcement agencies; the task of conspiracy of operational units is to create the false beliefs for objects of OSM and SISA about the lack of intent and any actions to search for and fix factual data on irregularities of individuals and groups, responsibility for which is provided for by the Criminal Code of Ukraine, intelligence and subversive activities of special services of foreign states and organisations to stop offences and in the interests of criminal proceedings [10].

Third, in terms of conducting specific OSC and SISA by operational units, the subject of classification should only be information about where, when, by whom, and with what disinformation (legends and means of disguise) specific OSC and SISA are conducted. Within the framework of strategic aspects of the activities of operational units, personal data of all secret employees (full-time and freelance), information about enterprises, institutions, organisations, premises, and vehicles created and used for the purpose of ensuring conspiracy are subject to classification. Protection of state secret regarding the activities of operational units is conducted through a system of measures that are established by legal provisions. These measures should be classified into organisational, technical, cryptographic, and verification measures for persons in connection with granting access to state secret [10].

A substantial problem of legislative regulation of the OSA is the imperfection of legislative norms on which its information-analytical support is based. Among the main problems of such provision, the lack of proper legal grounds and the uncertainty of the mechanism of legal regulation are highlighted, which requires a systematic update (addition of relevant provisions) of both the CPC of Ukraine and the laws of Ukraine “On intelligence-gathering activities”, “On state secret”, with the development of targeted bylaws of a departmental (interdepartmental) nature. The main context of the changes: providing operational units with sufficient rights and removing obstacles to the preservation, accumulation and processing of information obtained in the course of the OSA and fulfilling the instructions of the investigator, prosecutor to conduct the SISA (93.9%); obtaining by operational units the possibility of consolidating arrays of the specified information in a digital format with information that does not constitute a state secret (88.8%); simplifying the exchange of necessary information between various operational units of law enforcement agencies by converting requests to digital format and reducing the time for responses (requests) (90.4%); introducing legal and technical means to prevent illegal use of this information (67.9%).

Among the covert methods of work, it is necessary to focus on the use of the services of persons who, based on conspiracy, receive and provide law enforcement agencies with the necessary information, create conditions necessary for conducting certain actions, activities, operations, etc., that is, secret cooperation. This is one of the oldest means of obtaining information necessary for the fight against crime. Despite the rapid development of science and technology, informatisation of all fields of public life, it does not lose its relevance even now. Incomplete and imperfect legislative regulation of the use of secret cooperation in the framework of criminal proceedings and intelligence-gathering activities has led to a variety of problems for its organisation, the range of which was already wide. Due to the rapid changes taking place in the social and information fields of life of Ukrainian society, new approaches require solving tactical problems of secret cooperation [11].

The central link (basis) of the Institute of secret cooperation should be the interrelated provisions of the Law of Ukraine “On intelligence-gathering activities” and the CPC of Ukraine. These norms should disclose its content, tasks and establish the range of subjects. The legislative norms of the second level of the mechanism of legal regulation of secret cooperation (within the framework of the same legislative acts) should be related to these provisions, which establish the specific features of regulating

relations between operational units and their secret employees in terms of: specific features of engaging in secret cooperation; its registration (fixing the fact of secret cooperation); remuneration and considering the work experience of secret employees; their social and legal protection, ensuring confidentiality and security. These norms should refer to the norms of the third level – the provisions of civil, labour, tax, and other legislation [11].

The problems of legal regulation of secret cooperation are inherent not only in Ukraine. In recent years, they have been actively investigated by researchers from other countries [12-16]. In general, foreign specialists examine the problems of voluntary assistance provided by citizens to the police [17-25].

According to the examples of the FRG and the US in Ukraine, it is advisable to regulate the activities of persons who, on their own initiative, using legislative guarantees of confidentiality, provide law enforcement agencies (free of charge or for a fee) with reliable and up-to-date information about the preparation and commission of crimes (regardless of the object of encroachment). Therewith, it is necessary to consider the experience of the Russian Federation regarding the regulation of the appointment and payment by the police of rewards for assistance in solving crimes and detaining persons who committed them, ensuring the confidentiality of the provision of such information, and the security of those who reported it. These individuals cannot be considered covert employees (freelance covert employees), they are part of the social institution of covert cooperation. Their representatives can form a covert apparatus, and they should be considered potential candidates for such cooperation, as is practised in the US, the FRG, and other developed democratic countries. The experience of the US in engaging in cooperation of suspected, accused, and convicted (prisoners) persons is useful for implementation in Ukraine. On the grounds defined by law regarding the possibility of releasing them from serving a criminal sentence or mitigating it in the event of providing real assistance in identifying and (or) investigating the facts of preparation and (or) commission of a crime [26].

The main problem of legal regulation of the activities of operational units of the law enforce-

ment agencies of Ukraine is the lack of consistency. Ensuring such consistency is possible by making changes and additions to the legislation. The concept of reforming the legal regulation of intelligence-gathering and criminal procedural activities of operational units of law enforcement agencies of Ukraine should consist of interrelated elements that provide for changes and additions to the legislation in three areas of regulation of public relations:

- criminal procedure (detailed regulation of the activities of operational units in the CPC of Ukraine with a substantial expansion of their powers, in particular, to ensure the safety of persons who cooperate confidentially with pre-trial investigation bodies);
- operational-search (legislative rationing of clear grounds for the initiative activities of operational units to detect the preparation and commission of crimes, and an independent, with a clear exhaustive legislative definition, system of OSC with differentiation depending on the subject of authorisation, considering those that an operational employee can conduct without any permits and approvals);
- in the field of state secret protection (comprehensive regulation in the Law of Ukraine “On state secret” of legal relations related to the conspiracy of the activities of operational units and other internal structural findings of those state bodies that need it) [28-30].

Conclusions

It is necessary to make changes and additions to the legislation to make the mechanism of legal regulation of intelligence-gathering activities of operational units of law enforcement agencies of Ukraine systematic. The essence of these changes can be determined within different approaches, separated by their level. At the highest, strategic, deep transformation is subject to legislative regulation of the entire complex of public relations related to countering crime by law enforcement agencies, in particular the OSA, criminal proceedings, and the protection of state secret. The tactical level corresponds to the introduction of scientifically based proposals for the settlement of OSA issues. The best option for the scheme of improving the legislative regulation of the activities of operational units of law enforcement agencies of Ukraine is the introduction of a tactical level of reform with a gradual transition to a strategic one.

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Законодавче регулювання оперативно-розшукової діяльності: проблеми та шляхи їх розв'язання

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Анотація

Мета дослідження – внесення пропозицій з удосконалення законодавчого регулювання оперативно-розшукової та інших видів діяльності оперативних підрозділів правоохоронних органів України. Методологічною основою дослідження є діалектико-матеріалістичний метод наукового пізнання соціально-правових явищ, а також загальнонаукові та спеціальні методи юридичної науки, зокрема: системно-структурний – для визначення змісту досліджуваних категорій і правових явищ, зокрема формування понятійно-категорійного апарату, систематизації наукових знань обраного напрямку дослідження загалом, комплексного аналізу положень нормативно-правових актів та формування системи пропозицій щодо реформування законодавства й використання в Україні іноземного досвіду; порівняльно-правовий та компаративний – для комплексного аналізу національного законодавства й підзаконних нормативно-правових актів, норм міжнародного права, що становлять правову основу оперативно-розшукової діяльності; логіко-юридичний (догматичний) – під час розроблення понятійного апарату, формулювання пропозицій щодо внесення змін і доповнень до законодавчих актів; статистичний – для аналізу вивчених матеріалів оперативно-розшукових справ, кримінальних проваджень, результатів анкетування; соціологічні (анкетування, інтерв'ювання, опитування) – для дослідження думок практичних працівників, визначення ефективності застосування окремих правових інститутів. Наукова новизна. Обґрунтовано, що головною проблемою правового регулювання діяльності оперативних підрозділів правоохоронних органів України є її несистематизованість. Забезпечення такої системності цілком можливе за рахунок внесення змін і доповнень до законодавства. Концепція реформування законодавчого регулювання діяльності оперативних підрозділів правоохоронних органів України має складатися із взаємопов'язаних елементів, що передбачають зміни й доповнення до законодавства за трьома напрямками регулювання суспільних відносин: кримінально-процесуальним (детальна регламентація діяльності оперативних підрозділів у Кримінальному процесуальному кодексі зі значним розширенням їхніх повноважень, зокрема в частині забезпечення безпеки осіб, які конфіденційно співпрацюють з органами досудового розслідування); оперативно-розшуковим (законодавче унормування чітких підстав ініціативної діяльності оперативних підрозділів з виявлення підготовки та вчинення злочинів, а також самостійної, із чітким вичерпним законодавчим визначенням, системи оперативно-розшукових заходів з диференціацією їх залежно від суб'єкта санкціонування, що враховують і такі, які оперативний працівник може провести без жодних дозволів і погоджень); у сфері охорони державної таємниці (комплексне врегулювання в Законі України «Про державну таємницю» правовідносин, пов'язаних із конспірацією діяльності оперативних підрозділів та інших внутрішніх структурних утворень тих державних органів, які цього потребують). Висновки. З метою надання системності механізму правового регулювання оперативно-розшукової діяльності оперативних підрозділів правоохоронних органів України необхідно внести зміни й доповнення до законодавства. Сутність цих змін зумовлена різними підходами, що розмежовуються зарівнями. Найвищому, стратегічному, рівні глибокої трансформації потребує законодавче регулювання комплексу суспільних відносин, що пов'язані з протидією злочинності правоохоронними органами (зокрема оперативно-розшукова діяльність, кримінальний процес, захист державної таємниці). Тактичний рівень відповідає внесенню науково обґрунтованих пропозицій з урегулювання питань оперативно-розшукової діяльності. Оптимальним варіантом схеми вдосконалення законодавчого регулювання діяльності оперативних підрозділів правоохоронних органів України є запровадження тактичного рівня реформування з поступовим переходом до стратегічного

Ключові слова:

контроль за вчиненням злочину; спеціальний слідчий експеримент; провокація злочину; допустимість доказів; доказування