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# Balancing Interests: Criminal Proceedings & Private Life Interference Under Martial Law in Ukraine

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(Received 15 December 2022; accepted 05 December 2023; first published online 03 April 2024)

## Abstract

The purpose of the Article is to analyze and compare certain aspects which define the limits of permissible interference with a person's private life in the legislation of Ukraine and other countries of the world in terms of ensuring the balance of interests of participants in criminal proceedings during covert measures to obtain information related to interference with a person's private life. The Article uses general scientific and special research methods, in particular comparative legal, scientific categories, definitions and approaches, formal dogmatic (legal), dialectical. On the basis of the conducted research, generalized conclusions were made regarding general trends in the field of reforming the legal regulation of special measures for covertly obtaining information, and ways of their improvement. The forms and methods of departmental, judicial, and public control over the covert activities of law enforcement agencies have been determined separately, and the influence of terrorist threats and military actions on ensuring the balance of interests of participants in criminal proceedings has been investigated. According to the results of the research, ways of solving problematic issues of the regulation of criminal procedural legislation have been determined in order to ensure the balance of the interests of the participants in criminal proceedings during the organization, conduct, recording, storage, and use of the results of covert information-gathering activities. A comparative analysis of the ways of solving a number of legal regulation issues in the field of the use of informal forms of obtaining information, the determination of different approaches to the separation of departmental, judicial, and public control is being carried out for the first time and will provide a comprehensive and systematic approach to the improvement of legislation in the specified field in the conditions of martial law or during anti-terrorist activities.

**Keywords:** Secret investigative (research) actions; special investigative actions; undercover forms of obtaining information; martial law; anti-terrorist activity; permission to conduct undercover investigative (research) actions; guarantees of human and citizen rights and freedoms; judicial control; departmental control; public control; investigating judge; decision; interference in private communication; lawyer's secret

## A. Introduction

Effective counteraction to criminal offenses in the fields of national security, illicit trafficking in prohibited substances, weapons and ammunition, radioactive substances, human trafficking committed by members of organized groups and organizations, and detection of corruption offenses is impossible without the use of special covert techniques of gathering and recording information. At

the same time, the use of “special investigation methods” in the interests of criminal proceedings is not only difficult to apply, but also involves a significant restriction of human rights and freedoms, interference with their private lives, violation of the inviolability of the home, secrecy of correspondence, telephone conversations, and other forms of communication, and, accordingly, requires a balance between the interests of the parties to the criminal proceedings, the interests of society, and guarantees of human rights and freedoms.<sup>1</sup>

Despite the existence of significant risks in the use of covert methods of obtaining information, their effectiveness as evidence in criminal proceedings is also recognized by international organizations. The use of “special investigative techniques” for serious and particularly serious crimes is assessed in Recommendation Rec(2005)10 of the Committee of Ministers of the Council of Europe to member states, which recommends that they adopt appropriate legislative measures to permit the use of covert investigative techniques and make them available to the competent authorities to the extent necessary in a democratic society for effective investigation and prosecution.<sup>2</sup>

At the same time, the rapid development of information and communication technologies, special hardware and software, their distribution and availability, constant evolution, and the digitalization of various spheres of life require changes in approaches to understanding the place and importance of covert forms of obtaining information in the system of evidence; the introduction of appropriate and effective mechanisms for supervision and control over their conduct; and ensuring human and civil rights and freedoms during their conduct and use of the results.<sup>3</sup>

The introduction of various platforms that accumulate information about legal facts, personal data, events, decisions, and various private information opens up unprecedented opportunities for state authorities to conduct covert surveillance of a person, intercept information, establish their ties, routes of movement, daily routine, hobbies, political and religious views, etc.<sup>4</sup> The accumulation of such information can take place on a massive scale, significantly exceeding both the needs and capabilities of special services in data processing.

The uncontrolled spread and unrestricted use of information gave grounds to assert the particular relevance of the processes of searching, collecting and extracting information from open, relatively open, and closed electronic sources in the interests of law enforcement.<sup>5</sup>

This also requires a different approach to ensuring human rights, the development of clear and understandable principles and forms of control over the activities of bodies and officials authorized to conduct covert measures to obtain information, store it, and use it.

Legislation in different countries applies different approaches to the institutionalization of covert information gathering in criminal proceedings. Different views on their consideration as a type of investigative action or a type of operational search measures are due, among other things, to the determination of the approach to understanding the balance of interests of the state, criminal proceedings and human rights and freedoms.

Along with the principles that “[a] person, his/her life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value,”<sup>6</sup> there is also an

<sup>1</sup>T. P. Matiushkova, *Ensuring Sec. for the Participants of Crim. Proc.: Forensic Aspects*, 79 L. & SAFETY 73, 73–78 (2020).

<sup>2</sup>Recommendation Rec(2005)10 of the Committee of Ministers to Member States on “Special Investigation Techniques” in Relation to Serious Crimes Including Acts of Terrorism, at 3 (Apr. 20, 2005) [https://www.coe.int/t/dg1/legalcooperation/economiccrime/organisedcrime/Rec\\_2005\\_10.pdf](https://www.coe.int/t/dg1/legalcooperation/economiccrime/organisedcrime/Rec_2005_10.pdf).

<sup>3</sup>SECRET EVIDENCE IN CRIMINAL PROCEEDINGS: BALANCING PROCEDURAL FAIRNESS AND COVERT SURVEILLANCE 350 (Benjamin Vogel ed., 2022).

<sup>4</sup>Larysa Udalovala & Oksana Khablo, *Ensuring State, Public, and Personal Interests. in Criminal Proceedings Under Martial Law or a State of Emergency*, 12 L. J. NAT’L ACAD. INTERNAL AFFS. 17, 24 (2022).

<sup>5</sup>O. M. Dufeniuk, *Legal Mechanisms of Balance of Private and Public Interests in Criminal Proceedings*, 4 CARPATHIAN LEGAL GAZETTE 117, 117–22 (2022).

<sup>6</sup>UKR. CONST., art. 3.

approach of determining the dominance of national, state interests over human rights and interests.<sup>7</sup>

The opinion expressed by the Indian lawyer G.D. Deshmukh is interesting:

[T]he problem we need to solve is what is more important—the freedom of the individual or the strength of the state? When the threat reaches the foundations of statehood, the state is forced to act not on the side of the individual, but from the position of society. And I give priority to the state . . . .

Another Indian scientist, P.K. Sen, expressed a similar position:

[W]e may be forced to take some measures that will be against the fundamental freedoms of the individual. But the understanding of the danger of the situation, which concerns not only our country, still forces us to apply a set of special measures that protect the state. . . .<sup>8</sup>

This approach, when the state prioritizes the interests of society over the interests of individuals, is to some extent conditioned by the level of criminality or terrorist threat. After the events of September 11, 2001, due to the threat of terrorism, Western countries began to pay more attention to balancing the interests of the state with the rights and freedoms guaranteed by the European Convention.

The Secretary General of the Council of Europe, Walter Schwimmer, in his Guidelines on Human Rights<sup>9</sup> and the Fight against Terrorism, expressed the idea of balance and proportionality quite accurately: “Respect for human rights may in no way be seen as an obstacle to the effective fight against terrorism.”<sup>10</sup>

Thus, on the one hand, the prosecution aims to use all possible forms and means of covert information gathering to objectively investigate all circumstances and establish the circle of all persons involved in the commission of a criminal offense. On the other hand, ensuring fundamental human and civil rights and freedoms, guarantees of privacy, necessitates a balanced approach to the application of such measures, ensuring a balance of interests of a person and excluding unreasonable or trivial interference with private life.<sup>11</sup>

The study by Mikhaïlenko examines the experience of legal regulation of the order of organization, conduct and use of the results of special investigative actions—various secret forms of obtaining evidentiary information—in criminal proceedings. It gives grounds for the conclusion that the ways of improving legislation in this area have significant differences, depending on the system of criminal justice, legal traditions, the influence of international institutions and the state of law and order in the state.<sup>12</sup>

Therefore, when studying the general principles of organization of covert measures to obtain information, the author used the regulatory framework of Ukraine, Georgia, Estonia, Lithuania, Latvia, Moldova, and Kazakhstan that are countries of the former USSR, whose criminal procedure legislation has common features and general principles of regulation of activities in this

<sup>7</sup>S. E. Kucherina, V. V. Fedoseev, L. M. Lezhenina, O.V. Kosmin, & M. V. Chlenov, *Workshop on Covert Investigative (Detective) Actions in Criminal Proceedings 200* (Kharkiv: Law, Yaroslav Mudryi National Law University, Training Manual).

<sup>8</sup>CONSTITUENT ASSEMBLY OF INDIA, OFFICIAL REPORT, vol. IX (1949) (India).

<sup>9</sup>See Eur. Consult. Ass., *Council Guidelines H (2002) 4 of July 11, 2002, On Human Rights and the Fight against Terrorism*, 7–13 (2002).

<sup>10</sup>Walter Schwimmer, *Preface to Council Guidelines H (2002) 4 of July 11, 2002, On Human Rights and the Fight against Terrorism* 5, 5 (2002).

<sup>11</sup>Viktoriiia V. Haltsova, Sergiy O. Kharytonov, Oleksander M. Khramtsov, Oleksander O. Zhytynyi, & Andrii A. Vasylyev, *Criminal Law as a Means of Protecting Human Rights and Freedoms in the Modern World*, 28 J. NAT'L ACAD. LEGAL SCIS. UKRAINE 248, 254 (2021).

<sup>12</sup>V. V. Mikhaïlenko, *The Rule of Law as a Principle of Criminal Proceedings*, 4 PRIV. & PUB. L. 128, 128–33 (2017).

area. The author also considered certain regulatory acts of the legislation of the People's Republic of China, the Russian Federation, the Republic of India, the Kingdom of Saudi Arabia, and the Federal Republic of Germany, whose legal systems have significant differences and apply different approaches to regulating these activities.

The system of special investigative actions, which can be regulated both by a separate special chapter and contained in a significant number of normative acts, provides for three main directions of regulation: 1) Definition of general principles, content of a special measure, investigative action, conditions and grounds for its implementation, and use of the received results; 2) determination of the criteria by which the legitimate activities of law enforcement officers and their agents are distinguished from the provocation of a crime; 3) conditions of use of technical means of covertly obtaining information, order of storage of received information, primary media of information and other used technical means.<sup>13</sup>

The study delves into the distinct forms of departmental, judicial, and public control over covert law enforcement activities, focusing on the influence of terrorist threats and military actions on maintaining a balance between the interests of participants in criminal proceedings. The research also identifies problematic aspects in criminal procedural legislation and suggests potential solutions to ensure equilibrium among the participants throughout the covert information-gathering process.<sup>14</sup>

The article contributes to the field by conducting a comparative analysis of various approaches to addressing legal regulation issues concerning the use of covert information-gathering methods. This comparative approach takes into account the separation of departmental, judicial, and public control mechanisms, providing a comprehensive and systematic framework for enhancing legislation in this domain, particularly during periods of martial law or anti-terrorist operations.

The study emphasizes that the evolution of information and communication technologies has transformed the landscape of covert surveillance and information collection, necessitating adaptations in approaches to privacy safeguards and effective control mechanisms.<sup>15</sup> It argues that the spread of digital platforms facilitating data accumulation by state entities necessitates robust regulations to oversee their activities and ensure respect for human rights.<sup>16</sup> The research explores various countries' approaches to defining and regulating covert information-gathering activities.<sup>17</sup> The legislation of countries in the former USSR and beyond, such as Estonia, Kazakhstan, Lithuania, Latvia, Moldova, the Republic of China, Russia, India, Saudi Arabia, and Germany, exhibit distinct approaches to institutionalizing covert measures.<sup>18</sup> These differences stem from the balance between national interests and individual rights.<sup>19</sup>

The study examines the range of definitions and forms of special investigative actions across different legal systems. It underscores the need to harmonize definitions to ensure clarity and consistency. While legal terms may vary, the underlying essence and purpose of covert measures often remain consistent. The article identifies a trend of increasing use of covert measures due to technological advancements and growing concerns over national security. It highlights the need to address the potential misuse of these methods while maintaining transparency and accountability in their application. Overall, the article contributes to the field by providing an insightful analysis of the legal framework surrounding covert information-gathering methods, identifying

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<sup>13</sup>M. M. Pochtovyi, *On the Relationship Between Public and Private Interests in Criminal Judiciary*, 8 *LEGAL SCI.* 214, 214–20 (2020).

<sup>14</sup>Fedosova Olena, *The Current State and Ways of Optimizing the Legal Regulation of the Activities of the National Police of Ukraine Regarding the Investigation of Criminal Offenses Permitted by Minors*, 2 *Visegrad J. on Hum. Rts.* 33, 33–43 (2023).

<sup>15</sup>Pochtovyi, *supra* note 13, at 214–20.

<sup>16</sup>*Id.*

<sup>17</sup>*Id.*

<sup>18</sup>*Id.*

<sup>19</sup>*Id.*

commonalities and disparities among various legal systems, and proposing strategies to enhance legislation in this realm.

## B. Differences of Approaches to Define “Forms of Control over the Commission of a Crime” and “The Concept of Special Investigative Actions”

By researching the main trends, ways of reforming and improving the legislation regulating the clandestine obtaining of information in the interests of criminal justice and clarifying the general principles of the formation of a system of clandestine measures, we have analyzed the legislation regulating clandestine activities in the countries of the former USSR, the People's Republic of China, the Republic of India, and the Kingdom of Saudi Arabia.<sup>20</sup>

The regulation of the organization and conduct of clandestine measures of obtaining information in the countries of the former USSR indicates that two different approaches are used. In such countries as Armenia, Estonia, Kazakhstan, Lithuania, Latvia, Moldova, and Ukraine, special investigative actions are defined as a component of the criminal procedural law with detailed regulation of their forms and means. In Azerbaijan, Belarus, Kyrgyzstan, the Russian Federation, Tajikistan, Turkmenistan, and Uzbekistan, most informal forms of obtaining information are considered operational and investigative activities.

At the same time, in the legislation of such countries as Estonia, Kazakhstan, Lithuania, Latvia, and Moldova, despite the presence of many common features with covert measures of obtaining information, defined in the legislation of Ukraine as covert investigative actions, special investigative actions received other names and different forms of application. Thus, in the criminal procedural legislation of the Republic of Kazakhstan, they are defined as secret investigative actions; of the Republic of Lithuania, they are defined as procedural restrictive measures; of the Republic of Moldova, they are defined as special investigative activity; of the Republic of Estonia, they are defined as search activity; of the Republic of Latvia, they are defined as special investigative actions.

In contrast to the above-mentioned definitions of forms of control over the commission of a crime,<sup>21</sup> the legislation of the Republic of Lithuania distinguishes two forms: 1) A special investigative experiment, Article 225, as a measure during which “a situation or circumstances characteristic of a person's daily activities are created, which contribute to the detection of a criminal intent, and the actions of a person during such circumstances are recorded” and 2) control of criminal activity, Article 227, provides for control in cases where a separate episode of a single crime or interconnected criminal acts is established, but as a result of its immediate termination, the opportunity to prevent the commission of another criminal act or to establish all involved persons, especially the organizers and customers, or all the purposes of the criminal act.<sup>22</sup> As a result of the application in the legislation of these countries of different approaches to the definition and formulation of forms of special investigative actions, along with the fact that the subject of legal regulation coincides in its content, their number also differs significantly. Thus, the legislation of Lithuania provides 5 such forms, Kazakhstan provides 8, Estonia provides 10, Latvia provides 11, Ukraine provides 12, and Moldova provides 15.

The definition of the concept of special investigative actions also differs. The Criminal Procedure Code of the Republic of Estonia in paragraph 126 defines such activity as “the processing of personal data for the fulfillment of an obligation established by law, with the aim of

<sup>20</sup>Law of Criminal Procedure 16 Oct. 2001, 28 Rajab 1422 (2001) (Saudi Arabia).

<sup>21</sup>Serhii S. Cherniavskiy, Bohdan M. Holovkin, Yuliia M. Chornous, Vasyl Y. Bodnar, & Ilona V. Zhuk, *International Cooperation in the Field of Fighting Crime: Directions, Levels, and Forms of Realization*, 22 J. LEGAL, ETHICAL & REGUL. ISSUES 348, 348–59 (2019).

<sup>22</sup>O. A. Bilichak, *Control Over the Commission of a Crime: Concepts and Forms*, 28 SCI. NOTES V. I. VERNADSKY TAURIDA NAT'L U.: “LEGAL SCIENCES” SERIES 51, 51–55 (2017).

concealing the fact and content of data processing from the data subject.” In Article 13201 of the Criminal Procedure Code of the Republic of Moldova, it is defined as: “Special investigative activity is a set of overt and/or undercover criminal prosecution actions carried out by investigative officers within the framework of criminal prosecution and in the manner prescribed by the current code,” and Part 1 of Article 210 of the Criminal Procedure Law of the Republic of Latvia, special investigative actions are understood as actions that “are carried out if, in order to find out the circumstances to be proven in a criminal trial, information about the fact must be obtained without informing the persons involved in the criminal process and persons who could provide this information.” Similar wording appears in Article 232 of the Civil Procedure Code of the Republic of Kazakhstan.<sup>23</sup>

If compared with the definition applied by the Code of Criminal Procedure of Ukraine in Part 1 of Article 246, “Secret investigative (research) actions are a type of investigative (search) actions, information about the facts and methods of which are not subject to disclosure, except for the cases provided for by this Code,” it can be concluded that according to the above wording, different definitions of special investigative actions are united by such a main feature as concealment of the fact of receiving and processing information. At the same time, forms of covert obtaining of information are also considered as investigative action or special activity, procedural activity and data processing. The purpose and circle of subjects authorized to carry them out, the secrecy of the methods of carrying them out, the possibility of carrying out some of them openly are not always determined.<sup>24</sup>

In our opinion, the wide range of definitions of special investigative actions and significant differences in wording are primarily a problem of law-making technique, which does not affect their content and essence in the studied legal systems. This can be confirmed by an example of the use of such an attribute as “secrecy” in the terminology. Thus, in the definition of the Criminal Procedure Code of the Republic of Moldova, it is stated that special activities can be carried out openly and/or secretly. Another approach is used in the definition formulated in the Criminal Procedure Code of Ukraine, according to which SI(R)A actions are necessarily secret—information about the fact and methods of their conduct are not subject to disclosure. At the same time, a number of norms regulating the conduct of SI(R)A exclude the possibility of their secrecy.

The removal of information from electronic information systems or its parts, access to which is not limited by its owner, possessor or holder, or is not related to overcoming the logical protection system—Part 2 of Article 264 of the Code of Criminal Procedure—cannot be secret. In cases when it is carried out with the participation of such a person or with his consent. In addition, monitoring of the commission of a crime, if this action ends with an open recording—Part 4 of Article 271 of the Criminal Code—involves the implementation of procedural actions, including the drawing up of a protocol with the participation of this person, which also excludes the possibility of “secrecy” of such an action at a certain stage its implementation. Similarly, along with the definition in Article 210 of the Criminal Procedure Code of the Republic of Latvia “secrecy” as a criterion for special investigative actions, Part 2 of Article 212 of the said Law provides for the possibility of conducting activities without the permission of the investigating judge, if all persons who work or live in a publicly inaccessible place have given their consent to this activity.

In addition to the fact that the definition and number of special measures in the legislation of the specified countries are different, a comparison of the wording, their content and the system of special investigative actions gives grounds for the conclusion that along with the use of different approaches to combining or separating identical, similar in content or the focus of special investigative actions, their content largely coincides.<sup>25</sup>

<sup>23</sup>Civil Procedure Code art. 232 (Kaz.).

<sup>24</sup>D. O. Motsnyi & S. V. Davydenko, *Provocation of Committing a Crime During the Conduct of Covert Investigative Actions Concerning the Protection of Human Rights*, 2 L. F. 90, 90–97 (2018).

<sup>25</sup>O. B. Sybal, *Law Enforcement Control over the Commission of a Crime: Criminal Law Aspect*, 10 LEGAL SCI. ELEC. J. ZAPORIZHIA NAT'L U. 337, 337–42 (2020).



For example, in the Criminal Code of the Republic of Moldova, the inspection of housing and/or the installation of audio, video, photo and film equipment for monitoring and recording is regulated by one article, but it is considered as two types of special investigative actions, which differ both in terms of purpose and the entity authorized to make a decision on their implementation. The regulation of another special investigative action—surveillance of housing using technical means provides for surveillance from the outside, without the consent of the owner, but includes the recording of actions, conversations, other sounds or events occurring inside the premises. Interference with private communication in Article 132-8 of the Criminal Procedure Code is formulated without defining the method of access to such information and its fixation and covers the removal of information from electronic, transportation and telecommunication networks, audio monitoring of a person, place, as it is formulated in general terms as “listening and recording of conversations.”

Along with arrest, inspection and seizure of correspondence, monitoring of telegraphic and electronic messages containing signs of this action is included in special investigative actions, as well as a separate form of special investigative actions in Article 134-3 provides for “Documentation by means of technical methods and means, as well as localization or tracking through the global positioning system (GPS) or by means of other technical means”, which contains both signs of observation of a thing, a person and a place, and provides for a type of control by correspondence (equipment during inspection of correspondence with special technical means of control).<sup>26</sup> Also as a special investigative action in Article 134-4 provides for “[c]ollection of information from the provider of electronic communications services.” Obtaining such information under the Criminal Procedure Code of Ukraine is carried out by conducting temporary access to electronic documents, which is not an investigative action.

Forms of control over the commission of a crime are set out as “control over the transfer of money or other material values obtained by extortion,” Article 135; “Undercover investigative activity,” Article 136, which is formulated as a measure of “revealing the fact of the existence of a crime”; “cross-border supervision,” Article 138-1; “controlled delivery,” Article 138-2; “controlled procurement,” Article 138-3.

Currently, only controlled procurement remains among the known forms of control over the commission of a crime in the KPK of the Republic of Kazakhstan.<sup>27</sup> After the introduction of the specified changes, such forms of covert control are carried out in accordance with the procedure provided for in the law regulating operative investigative activity (On Operational and investigative activities, 1994) of Article 11 of which provides such measures as: 1) Introduction; 2) application of a model of behavior imitating criminal activity; 3) creation of conspiratorial enterprises and organizations; 4) controlled delivery; and 5) operational procurement. This fact indicates a reverse trend—the exclusion of measures that require agency work and long-term development from the number of special investigative actions and their return to the forms of operative and investigative activity.

### C. Differences of Approaches to Determine the Criteria for the Exclusivity of the Use of Special Investigative Actions

Different approaches are used to determine the criteria for the exclusivity of the use of special investigative actions. The most widely used criterion is dependence on the severity of the committed criminal offense. However, in the vast majority, as in the legislation of Ukraine, there are exceptions.

<sup>26</sup>Eugene Hladii, *Recognition of Inadmissibility of Evidence Obtained in the Course of Monitoring the Commission of an Offense in Criminal Proceedings in the Field of Official Activities*, 11 L.J. NAT'L ACAD. INTERNAL AFFS. 38, 38–44 (2021).

<sup>27</sup>О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам совершенствования уголовного, уголовно-процессуального законодательства и усиления защиты прав личности [On Amendments and Supplements to Some Legislative Acts of the Republic of Kazakhstan on Improving the Law Enforcement System], Уголовный кодекс [Criminal Procedure Code] No. 292-VI (Kaz.).

Thus, the Criminal Procedure Code of the Republic of Lithuania provides for the possibility of conducting special investigative actions, including those related to interference with private communication, in criminal proceedings on serious and especially serious crimes, as well as in other, specially defined criminal offenses, if there is a risk, that violence or other illegal actions will be applied to the victim or witness or other participant in the process, or to their close relatives.

In the Criminal Procedure Code of the Republic of Moldova, the principle of exclusivity is considered taking into account the type of special investigative action. Thus, conducting special investigative measures is possible under the following conditions: 1) It is not possible to achieve the goal in any other way; 2) such actions are necessary and commensurate with the restriction of human rights and freedoms; 3) there are grounds for the conclusion of preparation for the commission of serious and especially serious crimes, and with regard to the possibility of eavesdropping on conversations, the investigation of the crime directly provided for in Part 2 of Article 132-8 of the Criminal Procedure Code.

Also, the investigation of a certain category of crimes is limited to the possibility of carrying out such a special investigative action, provided for in Article 134-2 as “[m]onitoring or control of financial transactions and access to financial information.”

In order to provide additional opportunities for the prosecution, in addition to defining the list of specific types of criminal offenses during the investigation of which such measures can be carried out, the Criminal Procedure Code of the Republic of Estonia provides for the possibility of conducting them to search for persons, search for property for the purpose of its confiscation, and also in the presence of other grounds provided for by a number of laws: On the organization of the Defense Forces, On taxation, police and border protection, On weapons, On strategic goods, On customs, On witness protection, On security, On pre-trial detention, On foreigners, On the duties of traveling abroad and the ban on entry into the country.

The Criminal Procedure Law of the Republic of Latvia provides for the possibility of conducting special investigative actions, including during the investigation of crimes of medium severity. At the same time, the sign of “exceptionality” is formulated through such criteria as: 1) The information is necessary to clarify the circumstances to be proven in the criminal process; 2) it indicates the commission of another criminal act or the circumstances of its commission; 3) it is necessary for immediate prevention of a significant threat to public safety. In this case, it is possible to talk about sufficiently broad possibilities of applying special investigative measures both as a result of the introduction of the possibility of conducting them in cases of crimes of medium severity, and due to “blurred” requirements regarding the grounds for their use.

The Criminal Procedure Code of the Republic of Kazakhstan stipulates that special investigative actions may be conducted in cases of crimes: 1) For which punishment in the form of imprisonment for a term of more than one year is prescribed; 2) that are prepared and committed by a criminal group; 3) in other crimes that do not fall under the characteristics of para. 1, 2 only covert surveillance of a person or place or covert controlled purchase is allowed.

At the same time, in contrast to the Code of Criminal Procedure of Ukraine, the mentioned Law specifies a list of objects to which such measures can be applied. They include: 1) A person referred to in a statement or notification of a criminal offense as a person preparing, committing or having committed it, or regarding whom there are sufficient grounds to believe that he or she is related to the offense under investigation or has information about the preparation, committing or having committed a criminal offense; 2) the suspect; 3) the victim with his written consent; 4) of a third party, if there is information that a third party receives or transmits information relevant to the case; and 5) places, in cases where circumstances exist or are expected to occur, which may be of importance to the case.<sup>28</sup>

<sup>28</sup>Кримінальний процесуальни [Criminal Procedure Code] arts. 223–43 (Ukr.) (discussing articles under Chapter 20: Investigative (Detective) Actions); Кримінальний процесуальни [Criminal Procedure Code] arts. 246–75 (Ukr.) (discussing articles under Chapter 21: Covert Investigative (Detective) Actions).



The listed circumstances provide quite broad opportunities for the use of special investigative actions. However, the very fact of applying the criterion related to the object of control, surveillance, as well as the possibility of carrying out certain audio-video monitoring of a person, removing information from electronic information networks with the written consent of the victim, indicates the direction of further improvement of procedural legislation in this area.

#### D. Differences of Approaches to Define Forms and Demarcation of Spheres of Control Over the Conduct of Special Investigative Actions

Different approaches in the legislation of these countries are also applied to the definition of forms and demarcation of spheres of control over the conduct of special investigative actions. Thus, according to the legislation of the Republic of Lithuania, the involvement of a person—both from the number of authorized officers of the competent authorities and other persons—in confidential cooperation with the change—concealment—of personal data, in the case of involvement in the control of the commission of a crime—performance of a special task—is carried out exclusively on the basis of a resolution investigating judge. At the same time, interference in the private communication of a person—victim, witness, or other participants—without using the services and means of a communication operator, including wiretapping phones, control over electronic correspondence, can be carried out at their request without a judge's decision.<sup>29</sup>

The legislation of the Republic of Moldova extends the scope of judicial control not only to the consideration of requests for permission to conduct special investigative actions, but also provides for the provision of materials to the judge after the completion of measures for judicial control of the legality of their conduct. The judge is authorized to make decisions on granting permission for the vast majority of special investigative actions, however, Part 3 of Article 132-4 provides for the right of the prosecutor in exceptional urgent circumstances to conduct measures, the permission for which is given by the investigating judge. In such cases, the prosecutor is obliged to inform the judge within twenty-four hours by providing the materials of the measures taken for the judge to make a decision on confirming or rejecting the confirmed legality of the measures taken.

In the Republic of Estonia, decisions on permission for surveillance, obtaining samples for research, conducting preliminary examinations, secret inspection and exchange of things, use of confidential cooperation are made by the prosecutor, and with regard to wiretapping and secret control of information, arrest, inspection, seizure of correspondence, staging—imitation—of a criminal offense, the decision is taken by the court.

In addition, in Article 126 of the Criminal Procedure Code of the Republic of Estonia, along with traditional forms of supervision and control, the principles of public control over secret investigative activities have been introduced. In particular, the obligation of investigative bodies to provide quarterly reports on the application of investigative measures has been established. On the basis of reports and information from the prosecutor's office and the court, the Ministry of Justice annually publishes a report on: 1) The number and type of open investigative materials; 2) the number of granted permits for investigative activity by type of such activity—conducted measures; and 3) the number of persons who were notified of search operations and the number of persons for whom notification was delayed for more than a year. In addition, Estonian legislation provides for the possibility of appealing decisions on special investigative measures. Such an appeal is possible both in relation to the event being held and in the event of failure to provide information about its results.

The legislation of the Republic of Latvia places decision-making on the granting of permission for special investigative actions within the powers of a judge, however, in urgent cases, it is possible to make them on the basis of a decision of the prosecutor with further approval by the investigating judge. It is also provided that the inspection of publicly inaccessible places, audio

<sup>29</sup>O. V. Kovalova, *Theoretical and Legal Principles of Information Providing Pretrial Investigation of Criminal Offenses*, 1, 1–27 (Jan. 24, 2023) (Ph.D. dissertation, Donetsk State University).

monitoring of a person, with his written consent, if there are grounds to believe that a criminal act may be directed against this person or his close relatives, or that this person may be involved in the commission of a crime, covert measures are also may be conducted based on the decision of the prosecution. In addition, it is possible to observe a person who came into contact with a person for whom a permission to observe has been granted within forty-eight hours without issuing a corresponding decision—obtaining a permit.<sup>30</sup>

According to the legislation of the Republic of Kazakhstan, most special investigative actions are carried out on the basis of a judge's decision—exceptions being surveillance and controlled procurement—however, it is possible to carry out in urgent cases audio-video control of a person or place, as well as control and interception of information transmitted by means of electrical—telecommunication—communication, in the presence of a written request of a person in relation to whom there is a threat of harm to life, health, property, based on the resolution of the pre-trial investigation body.

In addition, in order to avoid unreasonable restrictions on human rights and freedoms, Part 2 of Article 234 provides for the right of the judge, if there are doubts about the authenticity of the information provided during the consideration of the issue of granting a permit to conduct special investigative actions, to initiate an appropriate inspection before the prosecutor.

#### E. Differences of Approaches to Notify About the Results of the Conducted Secret Event

Different approaches are also used with regard to the conditions and principles of notification of the results of secret measures to persons who were subject to special investigative actions. In Article 161 of the Criminal Procedure Code of the Republic of Lithuania establishes that the person in respect of whom special investigative measures were taken shall be notified of this after the completion of the measure, taking into account the interests of the investigation. At the same time, no specific terms or the stage of the pre-trial investigation, for which such a notification is made, have been determined.

According to the legislation of the Republic of Moldova, the notification of the results of the conducted secret event is sent by the judge or prosecutor after checking them for compliance with human rights and freedom. A reasoned decision is allowed to delay such informing. After receiving the notification, the person has the right—Part 8, Part 132-5—to familiarize himself with the materials, decisions of the judge and the prosecutor regarding the legality of such a measure.

According to the legislation of the Republic of Estonia, a person or persons whose rights were violated during the search operations against them should be immediately notified about the completion of such operations. These persons should be provided with information about the type and time of the search operations. However, there are cases, when the prosecutor, in the presence of relevant reasons, decides not to send such a notification. The person against whom covert measures were carried out, in accordance with Article 126 has the right to get acquainted with all materials collected about her, including audio, video recordings, and photographs.

The legislation of the Republic of Kazakhstan stipulates the duty of the pre-trial investigation body to notify the person against whom special investigative actions were carried out within six months from the date of adoption of the final decision, with the exception of certain cases related to the investigation of criminal proceedings about crimes related to terrorism, committed by organized criminal groups, related to the disclosure of state secrets, may create a threat to the security of confidants, where, based on the decision of the investigating judge, such information may not take place.

The criminal procedural legislation of the studied countries also establishes certain restrictions on the conduct of special investigative actions against certain persons, in cases where this is related

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<sup>30</sup>COUNCIL OF EUROPE, DEPLOYMENT OF SPECIAL INVESTIGATIVE MEANS 5–89 (2013).

to interference in private communication. According to the legislation of Lithuania, it is forbidden to interfere in the communication of the defense attorney with the suspect or the accused. In Moldova, any measures that involve interference in the legal relationship between the lawyer and the client are prohibited. In Estonia, such interference is not possible with respect to certain officials, judges, prosecutors, lawyers, and priests, with the introduction of the rule that these persons can be involved in secret activities only with the permission of the judge in cases where they are one of the parties or witnesses in the case, or if the crime was directed against them personally or their relatives. The legislation of the Republic of Kazakhstan prohibits the conduct of special investigative actions against lawyers—Article 232—who provide professional assistance, with the exception of cases of preparation or commission of crimes by them.

To understand different approaches and trends regarding the improvement and institution-ization of special investigative actions, there is the experience of Georgia which is appropriate to consider in the context of our study.

#### F. System of Special Investigative Actions in Georgia

The Criminal Procedure Code of Georgia, developed and adopted in 2009, provided for the introduction of secret forms of obtaining information as special investigative actions with the definition of their basic principles. However, before the entry into legal force of the said Criminal Procedure Code, all the mentioned innovations were excluded and only in 2014 the Criminal Procedure Code of Georgia was supplemented with Chapter XVI-1 “Secret investigative actions.”<sup>31</sup>

The draft Criminal Procedure Code of Georgia from 2009 in Chapter XVI “Secret investigative actions” defined a system of secret investigative actions, which provided for the following measures: 1) Visual or other control-observation secretly carried out directly by an authorized person or with the use of technical means; 2) control procurement; 3) controlled delivery; 4) covert listening and recording of communication, which is carried out using technical means, removing and recording information from communication channels—by connecting to means of communication, computer network, linear communication and stationary equipment; control, seizure and seizure of consignments carried out using technical means of communication—except for diplomatic mail; censorship of correspondence; 5) performance of a special task; 6) creation of a conspiratorial organization; and 7) other covert investigative action conducted for the purpose of obtaining evidence.<sup>32</sup>

In the current Criminal Procedure Code of Georgia, the system of special investigative actions is different. It consists of the measures defined in Chapter XVI-1, in Chapter XVI “Investigative actions related to computer data” for the conduct of which the provisions of the articles regulating the conduct of secret investigative actions and some others are spread.

Taking this into account, the system of secret investigative actions consists of: 1) Listening and recording of telephone communication; 2) removal and fixation of information from communication channels—by connecting to means of communication, computer networks, linear communications and station equipment—from the computer system and installation for the specified purpose into the computer system of the appropriate software; 3) determination of geolocation in real time; 4) control of postal shipments and telegraphic messages; hidden video recording or audio recording, photography; 5) electronic surveillance using technical means; 6) requesting, collecting, receiving electronic information—Articles 136–138 of the Code of Criminal Procedure; and 7) monitoring of bank accounts—Article 124-1.

<sup>31</sup>საქართველოს სისხლის სამართლის საპროცესო კოდექსში ცვლილების შეტანის შესახებ [Law on making changes to the Criminal Procedure Code of Georgia], რს [Rs] Aug. 1, 2014, No. 2634 (Geor.).

<sup>32</sup>Київський науково-дослідний інститут судових експертиз [KYIV RESEARCH INSTITUTE OF FORENSIC EXPERTISE], COMPUTER AND TECHNICAL EXAMINATION (2022).

A comparison of the content and forms of special investigative actions indicates that covert forms of obtaining evidence, which involve the control of criminal activity, such as: Control over the commission of a crime, performance of a special task, confidential cooperation, and the use of imitation means are not included in the list of investigative actions—voiced and unvoiced. Instead, the forms and methods of removing information from electronic information systems, electronic networks, and the use of technical means are more detailed.<sup>33</sup>

Such a trend indicates that the Georgian legislator<sup>34</sup> has deemed it more expedient to use special forms of covert information acquisition, in which the agency's operative work is of great importance, within the framework of operational investigative activities. Similar trends took place in the legislation of the Republic of Kazakhstan, in which also covert forms of control over criminal activity were gradually excluded from the covert investigative activities and currently they are considered operational and investigative measures.<sup>35</sup>

There are differences between the scope of application and limitations in the use of special investigative measures defined in the project and the principles implemented in the current Criminal Procedure Code.<sup>36</sup>

The draft law, Part 3, Article 136, provided for only one restriction—a ban on conducting them in relation to public, political, scientific, educational and religious organizations, mass media, publishing houses—which do not set as their goal the overthrow, violent change of the constitutional order Georgia, encroachment on independence, violation of territorial integrity of the country, or if such organization does not engage in propaganda of war or violence, does not incite national, township, religious or social enmity.

The current Code of Criminal Procedure, Article 143-2, provides for a number of conditions under which the following measures may be taken: 1) In a certain category of crimes; 2) such an action is formalized in the CCP; 3) if it is necessary to conduct it; 4) if it is impossible to obtain evidence in another way; and 5) the limits of the event are proportional to the purpose of their implementation.

First of all, it draws attention to the definition of the category of crimes, during the investigation of which it is possible to conduct special investigative actions. These include: 1) Intentional serious and especially serious crimes and 2) regardless of severity, if they are related to illegal transplantation, some sexual crimes, fraud, extortion, use of forged electronic cards, involvement in prostitution, all official crimes, and some others.

The differences between the draft and the current code indicate that the legislator of Georgia has defined clear grounds for conducting special investigative actions, which significantly limits their use in comparison with the draft, and along with this, it is taken into account that a number of criminal offenses related to crimes of medium severity are not can be documented without using covert methods.<sup>37</sup> First of all, this is indicative of the detection and exposure of official crimes related to corruption, illegal transplantology and other crimes, which, although not classified as serious, are important for society and cause public interest.

<sup>33</sup>RALF ALLEWELDT, OPERATIVE-INVESTIGATIVE WORK IN GEORGIA: A CRITICAL ANALYSIS IN THE LIGHT OF INTERNATIONAL HUMAN RIGHTS STANDARDS 1–40 (2019).

<sup>34</sup>See Oleksandr M. Bukhanevych, Serhii O. Kuznichenko & Anastasiia M. Mernyk, *Foreign Experience in Constitutional and Legal Regulation of Restrictions on Human Rights in Conditions of Emergency and Martial Law*, 28 J. NAT'L ACAD. LEGAL SCI. UKR. 55, 55–65 (2021). See also Bogdan Derevyanko, Liudmyla Nikolenko, Olha Turkot, Natalya Ivanyuta & Iryna Butyrska, *Mediation as an Alternative Form of Protection of Shareholders' Rights in Property Relations*, 8 INT'L J. PUB. L. & POL'Y 227, 227–41 (2022).

<sup>35</sup>Volodymyr O. Buryachok & Sergiy O. Gnatyuk, *Cybernetic Security of the State: Characteristic Features & Problem Aspects*, 19 UKRAINIAN SCI. J. INFO. SEC. 41, 41–44 (2013).

<sup>36</sup>Об оперативно-розыскной деятельности [Law on Operational and Investigative Activities] No. 154-XIII (Kaz.).

<sup>37</sup>See ALLEWELDT, *supra* note 33.

### G. Legal Regulation of Special Investigative Actions in Other Countries

In contrast to the balanced approach of the Georgian legislator, the Criminal Procedure Code of Ukraine does not provide for such a possibility. As a result of the lack of a systematic approach in the field of criminal justice, amendments and additions to the Criminal Code of Ukraine are not accompanied by amendments to the Criminal Procedural Code that would provide for a mechanism for obtaining evidence of a person's guilt in committing such criminal offenses. As an example, the Criminal Code of Ukraine<sup>38</sup> was supplemented with new categories of criminal offenses related to corruption by introducing in Part 1 of Article 368 of the Criminal Code of Ukraine establishes criminal responsibility for accepting an offer, promise or receiving an illegal benefit by an official. In accordance with Part 4 of Article 12 of the Criminal Code of Ukraine, the crime referred to is not serious. Accordingly, it is impossible to expose persons in the commission of the specified crime with the use of special investigative measures SI(R)A, as well as to obtain evidence of its commission in another way, which actually leads to the fact that according to this part of Article 368 of the Criminal Code of Ukraine, crimes are almost never investigated.

When distinguishing the powers of the court and the prosecutor in the field of granting permits for conducting special investigative actions, the project provided for assigning to the powers of the judge: 1) Visual and other control of the person; 2) covert listening and recording of communication carried out using technical means; 3) removal and recording of information from communication channels—by connecting to means of communication, computer network, linear communication and stationary equipment; 4) control, seizure and seizure of consignments carried out using technical means of communication, except for diplomatic mail; and 5) censorship of correspondence, as well as in relation to organizations.

The scope of powers of the prosecutor traditionally includes special investigative actions related to the control of criminal activity, and surveillance, if there is no interference in private life, as well as “other secret investigative actions”; however, Part 5 of Article 138, Part 5 of Article 112 provided for the conduct of special investigative actions in urgent cases before the decision of the investigating judge.

The current Code of Criminal Procedure provides for the conduct of special investigative actions based on a court order issued as a result of consideration of the prosecutor's petition. Along with this, Part 6 of Article 143-3 provides for the possibility of carrying out any special investigative action “upon a motivated resolution of the prosecutor . . . in urgent cases when the delay may lead to the destruction of factual information important for the case (investigation), or make it impossible to obtain such information.”

Analyzing the legal regulation of special investigative actions in the legislation of the Russian Federation, the People's Republic of China, the Republic of India, and the Kingdom of Saudi Arabia, it is possible to identify many common features, among which the main ones are the minimization of forms of covert obtaining of information in the criminal process, the classification of most of them in the sphere of regulation by special legislation—on operative investigative activity, which regulates the formation and activity of certain bodies or in a certain area—giving preference to departmental control over judicial control.

The Criminal Procedure Code of the Russian Federation<sup>39</sup> regulates the conduct of a number of special investigative actions involving interference in private communication, as well as the general principles of such interference. Article 13 defines secrecy of correspondence, telephone and other conversations, postal, telegraphic, and other communications as one of the principles of criminal proceedings, the restriction of which is possible only on the basis of a court decision.

<sup>38</sup>Viacheslav V. Vapniarchuk, Oksana V. Kaplina, Mykolo Ye Shumylo & Anush R. Tumanyanc, *Proof in the Science of the Criminal Process in Ukraine: Conceptual Approaches to Understanding the Essence*, 65 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 205, 205–20 (2021).

<sup>39</sup>UGOLOVNO-PROTSESSUAL'NYĬ KODEKS ROSSIĀSKOĬ FEDERATSII [UPK RF] [Criminal Procedural Code] art. 13 (Russ.).

There is no institute of secret investigative actions in the Criminal Procedure Code of the Russian Federation, however, Chapter VIII “Pre-trial investigation” provides for a number of investigative actions that involve obtaining information secretly: 1) Seizure of postal and telegraphic dispatches, their inspection and seizure; 2) monitoring and recording conversations; and 3) obtaining information about connections between subscribers and/or subscriber devices.

According to Article 185, seizure and inspection of postal and telegraphic dispatches should be carried out as per the following basic principles: 1) exclusively on the basis of a court decision; 2) in cases of the severity and category of the criminal offense; 3) a report is drawn up on each fact of arrest, inspection, and seizure of correspondence; 4) the duration of the event is not determined, but it should not exceed the pre-trial investigation period and can be canceled by the decision of the investigator; 5) the investigator's decision to cancel the event is sent to the court that made the decision; 6) the object of surveillance is not only physical media—letters, parcels, etc.—but also electronic messages transmitted by the telecommunications network; 7) is conducted by an investigator.

Control and recording of conversations are conducted on the basis of a court decision, and the object of control may be the conversations of the suspect, the accused, and other persons, with or without means of communication. These measures are allowed during the investigation of crimes of medium severity, serious and especially serious crimes. In cases of threats, committing violence, extortion or other crimes against the victim, witness or their close relatives, control and recording of conversations are allowed with the written permission of the specified persons without a court decision. In the resolution on control and recording of conversations, the term of its implementation is determined, which should not exceed 6 months. These measures are carried out by a specially authorized body and terminated by the decision of the investigator before the completion of the pre-trial investigation. Information carriers with recorded conversations are handed over to the investigator for drawing up a report. The protocol is drawn up with the participation of persons whose conversations were recorded, who can provide their explanations and objections. The phonogram of the conversation in its entirety is recognized as material evidence and is attached to the proceedings.

Despite the fact that under the Criminal Procedure Code of the Russian Federation these forms of obtaining information are formulated as two investigative actions, their content indicates that they cover actions that correspond to certain secret investigative—search—actions in the Criminal Code of Ukraine, such as: 1) Arrest, inspection, extract of correspondence; 2) removal of information from electronic information systems; 3) removal of information from electronic communication networks; 4) audio and video control of the person; and 5) audio and video control of the place.<sup>40</sup>

Taking into account the fact that these investigative actions significantly limit the rights and freedoms of a person, permission to conduct them is granted by the court, and the possibility of conducting measures in urgent cases by the decision of the investigator or prosecutor is not provided for. An exception is control of conversations based on the written statement of the person who will participate in the conversation.

The following should be noted among the main elements of control over the implementation of the mentioned measures: 1) Judicial control is carried out by judges of the district court or military court; 2) the basis for making a decision is the request of the investigator, agreed with the head of the investigative body, or the request of the inquirer, agreed by the prosecutor; and 3) the possibility of carrying out the specified measures on the basis of the decision of the investigator, the prosecutor, before the decision is made by the court, with its subsequent approval or authorization is not provided.

Other measures of obtaining information secretly are: 1) Obtaining information; 2) collection of samples for comparative research; 3) verification purchase; 5) study of objects and documents; 6) observation); 7) identification of the person; 8) inspection of premises; 9) operational input,

<sup>40</sup>Кримінальний процесуальний кодекс України [Criminal Procedure Code of Ukraine] Ch. 21 §§ 1–3 (Ukr.).



execution of a special task; 10) controlled delivery; 11) operational experiment; and 12) obtaining computer information, as well as control of sent postal, telegraphic and other messages, listening to telephone conversations, is regulated by the legislation on operative investigative activity.<sup>41</sup>

The Criminal Procedure Code of the People's Republic of China regulates the seizure of postal and telegraphic correspondence and the monitoring of bank accounts of a suspect of a crime as investigative actions. Seizure of correspondence is carried out with the sanction of public security bodies or the prosecutor's office, and information about operations on accounts and the imposition of a seizure on them—by the decision of the investigator.<sup>42</sup>

The Criminal Procedure Code of India, the Law on Evidence, which regulates the procedure for collecting and evaluating evidence, do not distinguish special, secret, forms of obtaining evidence in criminal proceedings. A number of norms in the field of clandestine information collection are provided for in the laws “On the Prevention of Terrorist and Subversive Activities” of 1987; “On Religious Organizations” of 1988; “On the Protection of Human Rights” of 1993; “On the prevention of Terrorism” of 2002; “On Weapons of Mass Effect and Methods of Their Delivery” on banning circulation of 2005; and many others that regulate the activities of individual law enforcement agencies.

The regulation of individual forms of covert information gathering, the basic principles of organization, implementation, recording and use of the results of the said measures are established in the laws regulating a certain area in which the information is obtained. Thus, the Law “On Information Technologies” of 2000, Information Technology Act, ITA, the scope of which is related to electronic document circulation, digital signatures, exchange of information using the Internet, ensuring the preservation of personal data, provides for the principles of obtaining and recording the relevant electronic information in the interests of criminal justice. The said Law is extraterritorial, and its application extends to the investigation of crimes in the field of high technologies, committed both on the territory of India and outside its borders. The interception of information transmitted by electronic communication channels is regulated by the Indian Telegraph Act of 1885, taking into account separate rules, amendments, which provide for the possibility of secretly conducting the specified measure based on the order of the Secretary to the Government of India in the Ministry of Home Affairs, and the Secretary to the State Government. On the basis of the mentioned Law, a centralized monitoring system was created to automate the process of legal interception and monitoring of telecommunication technologies. In order to ensure “the balance of national security, privacy on the Internet and freedom of speech,” the said law was supplemented in 2007 with provisions providing for the formation of an oversight mechanism by the establishment of a Review Committee under the chairmanship of the Cabinet Secretary at the Central Government level and the Chief Secretary of State at the State Government level.

The given examples of institutionalization in the criminal process of only certain forms of covert obtaining of information, taking into account the conditions and grounds for their application, content and level of control, attribution of measures related to the control of criminal activity and confidential cooperation to the sphere of operational activity of law enforcement agencies indicate a slightly different approach to understanding the balance of the interests of the state, criminal justice and human rights and freedoms, determining other priorities and the principles of “comparability” of the investigated act with the applied restriction of rights. This is also reflected in the legal positions of the leading scientists in the field of law of these countries.

<sup>41</sup>Об оперативно-розыскной деятельности [Federal Law of the Russian Federation on Operational Search Activity], SOBRANIE ZAKONODATEL'STVA ROSSIĬSKOĬ FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 1995, No. 144-FZ (Russ.).

<sup>42</sup>[Decision on Amending the Criminal Procedure Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, rev'd Mar. 17, 1996), arts. 116–118 1996 P.R.C. LAWS (referring to paragraph 6 on the “Imposition of arrest on material and written evidence” in chapter 2 “Pre-trial investigation”) (China), <https://www.lehmanlaw.com/resource-centre/laws-and-regulations/general/criminal-procedure-law-of-the-peoples-republic-of-china-1996.html>.

Thus, unlike the legislation of Ukraine, Lithuania, Latvia, Estonia, Moldova, the legislation of the Russian Federation, China, Kazakhstan, India, and Saudi Arabia is characterized by a preference for covert information gathering as a form of operational and investigative activity.<sup>43</sup>

A balanced approach to the distinction between covert measures of obtaining information with their separation as criminal procedural and administrative is applied in the Criminal Procedure Code of Germany.

Special investigative actions in the Criminal Procedure Code of Germany are formed in Chapter VIII “Seizure, control of telecommunications, computer search of possible criminals on the basis of common features, use of technical means, use of covert investigators and search” and constitute a system that includes: 1) Seizure, which also includes computer files and electronic messages; 2) automatic comparison and transfer of personal data; 3) comparison of information for the investigation of a criminal act; 4) seizure of postal and telegraphic items; 5) control of telecommunications; 6) measures applied without the knowledge of the person concerned, recording of conversations in publicly inaccessible places; 7) statements made in private outside the home; 8) obtaining information about telecommunications; 9) other measures applied without the knowledge of the person concerned, surveillance; and 10) measures applied to mobile phones.<sup>44</sup>

It should be noted that the Criminal Procedure Code of Germany, along with the detailed regulation of the use of covert officers, 110a, the possibility of creating imitation means to provide a cover story, and the system of special investigative actions, does not include covert measures to obtain information similar to control over the commission of a crime, the performance of a special task to disclose the criminal activities of an organized group or criminal organization.<sup>45</sup> These measures, and some others, such as online searches using special software or optical surveillance of homes, are not elements of criminal proceedings, but are regulated by the laws of the Federal Criminal Police Office, the Customs Investigation Service, the Federal Office for the Protection of the Constitution and other regulations. In the Criminal Procedure Code of Germany, the grounds and conditions for the use of special investigative actions are defined directly in the articles regulating their conduct and have significant differences depending on the degree of interference with the private life of a person, restriction of his or her rights and freedoms. Thus, the seizure—in its content, which can be identified with the removal of information from electronic information systems—is not limited by other criteria than “proportionality of the gravity of the act and the level of suspicion.”<sup>46</sup>

Automatic comparison and transfer of personal data, which involves the collection and analysis of information about a person from various databases, may be carried out in cases where there are grounds to believe that a “significant criminal act” has been committed in the field of drug trafficking, against state security, a generally dangerous crime, against life, health, sexual self-determination or personal freedom, in the form of a trade or repeatedly, or by a person prone to commit crimes or a member of a gang or other form of organization. As with seizures, the principle of proportionality is used as a universal means of determining whether there are grounds for covert measures in each case.

The seizure of postal and telegraphic items is allowed only in cases where the addressee is the accused; no other restrictions on the grounds for its conduct are established. Control of telecommunications, which involves monitoring and recording conversations without the

<sup>43</sup>Olena Latysheva, Victoriia Rovenska, Iryna Smyrnova, Vitalii Nitsenko, Tomas Balezentis, & Dalia Streimikiene, *Management of the Sustainable Development of Machine-Building Enterprises: A Sustainable Development Space Approach*, 34 J. ENTER. INFO. MGMT. 328, 328–42 (2020).

<sup>44</sup>Cherepii Petro Mykolaiovych, *Criminal Court of Germany: General Characteristics*, 90 L. BULL. KROK U. 182, 182–87 (2017).

<sup>45</sup>Philip Maximilian Bender, *Same Ends, Different Means: Truth and Fairness in Criminal Procedure of the United States and Germany* 1–25 (Max Planck Inst. for Tax Law & Public Finance, Working Paper No. 2022-14, 2022).

<sup>46</sup>*Deployment of Special Investigative Means*, Council of Europe (2013), <https://rm.coe.int/deployment-of-special-investigative-means-eng/16807828fa>.

person's knowledge, is carried out in criminal proceedings on serious and especially serious crimes as defined in the Law, "if the establishment of the circumstances of the case or the location of the accused would otherwise be significantly complicated or unlikely to succeed" and is applied exclusively to the accused or persons in respect of whom, based on specific facts, there are grounds to believe that they transmit or receive messages intended for the accused or that the accused uses them.<sup>47</sup>

Measures applied without the knowledge of the person concerned—recording of conversations in publicly inaccessible places—may be carried out only in cases of particularly serious crimes, determined by certain criteria, if there are grounds to believe that data relevant to establishing the actual circumstances of the case or the location of another defendant in the same criminal proceedings may be recorded, and it is not possible to obtain such data in any other way. The peculiarity is that this measure can be applied only to the accused, in his/her personal residence or in the place in which he or she lives.

Statements made non-publicly outside the home may be listened to and recorded with the use of technical means, without the knowledge of these persons, is subject to the following conditions: 1) It may be carried out in relation to the accused or other persons; 2) if there are specific facts regarding the preparation or commission of serious crimes; and 3) if the attempt is criminal and it is not possible to obtain the necessary information in any other way. It is also permitted in cases where the restriction of the rights and freedoms will affect other people during its implementation.

Obtaining information about telecommunications as a covert form of evidence is carried out if there is relevant information that a certain person has committed either serious crimes, crimes similar to those defined as grounds for control of telecommunications, or a crime with the use of telecommunications—using a telephone, telefax, or the Internet.

Other measures applied without the knowledge of the person concerned outside the home include taking photos, videos, films, as well as satellite images, using technical surveillance equipment: Direction finders, GNSS transmitters, motion sensors, use of electronic message confirmation services to establish the user's location, night vision devices, etc. The use of such data is possible under the following conditions: 1) If it is not possible to obtain information about the fact of the crime and the location of the accused in any other way; 2) in criminal proceedings on significant acts; and 3) only in relation to the accused or persons with whom such a person maintains contact.

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Measures applied to mobile phones are carried out with the aim of establishing, with the help of technical means, the identification number of the IMSI phone and its location under the following condition: 1) There are reasonable suspicions, based on specific facts, of the involvement of a certain person in the commission of serious acts or acts with the use of technical means.

It should be noted that the German Criminal Procedure Code does not use a generalized approach to establishing the grounds and conditions for the use of special investigative actions to

<sup>47</sup>OPEN SOC'Y JUST. INITIATIVE & TRIAL INT'L, UNIVERSAL JURISDICTION LAW AND PRACTICE IN GERMANY 1–35 (2019).

determine the criteria applicable to all forms of covert information obtaining, as is done in the countries of the former Soviet Union. Instead, it is detailed and specific for each covert action separately, which makes it possible to more effectively use the principle of “proportionality,” which determines the conditions for the gravity of the crime under investigation, its types, the authority authorized to make a decision on its conduct, the level of control over its conduct and evaluation of the results obtained, and the possibility of using them for evidence and in other criminal proceedings, depending on the degree of interference with private life, measures to inform about the results of the investigation.<sup>48</sup>

The forms of control established in the Criminal Procedure Code of Germany depend on the degree of interference with private life. Seizure, which provides for the possibility of removing information from electronic information systems or parts thereof, is carried out by a court decision, and in urgent cases, on the basis of a decision of the prosecutor or a person conducting a pre-trial investigation on behalf of the prosecutor.<sup>49</sup>

At the same time, some restrictions are established. For example, a seizure of the editorial office, publishing house, printing house, television station, or radio station may be carried out only on the basis of a court decision, and if the seizure concerns the Bundeswehr, the request is sent to the Bundeswehr, which takes part in the seizure. In addition, an additional measure of judicial control has been established, which consists of the obligation to provide the court with the seizure materials within three days in criminal cases where there is an accused. The decision to conduct a seizure and its results can be appealed if they are conducted in a significant violation of fundamental constitutional rights and freedoms.

Automatic comparison and transfer of personal data, seizure of postal and telegraphic items, control of telecommunications, and obtaining information about communication within telecommunications may be carried out on the basis of a court decision or, in urgent cases, on the basis of a prosecutor's decision with further appeal to the court. The results of telecommunication control are submitted to the court that authorized them.<sup>50</sup>

In addition, the Criminal Procedure Code of Germany also establishes the principles of public, civil, control in the application of telecommunications surveillance and some other covert measures. In particular, it is stipulated that the Federal States and the Federal Attorney General annually, by June 30 following the reporting year, submit a report to the Federal Ministry of Justice, which compiles an overview of the measures taken and publishes it on the Internet. The report includes: 1) The number of criminal proceedings in which measures were ordered; 2) the number of orders for the control of communications, including initial and renewal orders, orders for the control of conversations on landline or mobile phones, or telecommunications via the Internet; and 3) the criminal acts for which the measure was used to investigate.<sup>51</sup>

A special approach is introduced in the Criminal Procedure Code of Germany to control the implementation of measures related to interference with private communication in a person's home. The decision to apply measures that are applied without the knowledge of the person concerned, recording conversations in publicly inaccessible places, is made by a panel of judges, and in urgent cases—by the presiding judge, which loses legal force if it is not confirmed by the panel within three days. The court that decided to give permission is informed of the results of the measure, and in cases where the grounds for holding the measure have disappeared, it is also terminated by a decision of the panel of judges.<sup>52</sup>

<sup>48</sup>OPEN SOC'Y JUST. INITIATIVE & TRIAL INT'L, *supra* note 47.

<sup>49</sup>See Bender, *supra* note 45.

<sup>50</sup>MICHAEL BOHLANDER, PRINCIPLES OF GERMAN CRIMINAL LAW 7–223 (Mohammed Ayat et al. eds., 2009).

<sup>51</sup>John H. Langbein, *The Turn to Confession Bargaining in German Criminal Procedure: Causes and Comparisons with American Plea Bargaining*, 70 AM. J. COMPAR. L. 139, 139–61 (2022).

<sup>52</sup>See BOHLANDER, *supra* note 50.

In addition, the application of this measure, as well as the receipt of information on telecommunications, is subject to public control in a form similar to that applied to the control of telecommunications.

In the area of the division of powers to determine the entity authorized to make a decision on granting permission to conduct covert actions, a number of features are noteworthy: 1) Introduction of a collegial form of judicial control by another court; 2) obtaining information that may constitute a military secret, which is carried out by the decision of the military service and is carried out with their participation; 3) the prosecutor's obligation to inform the court that granted permission about the results of certain covert measures; 4) introduction of the institute of civilian control in the field of special investigative actions involving the removal of information from electronic networks, wiretapping, and audio and video monitoring of a person in his/her home.

The requirements of the Criminal Procedure Code of Germany regarding the conduct and recording of the results of special investigative actions primarily relate to restrictions on access to certain information. For example, it is prohibited to seize documents, including electronic documents, that are subject to the right to refuse to testify, as well as those related to the provision of legal, medical, psychological, and psychiatric assistance to the said person, except for certain exceptions if they were used to commit a criminal act or were the subject of a crime. The seizure may be carried out on the basis of a court decision within six months.

The seizure of postal and telegraphic communications provides that the contents of such communications shall be examined by a court, but it is possible to delegate this power to the prosecutor.<sup>53</sup>

Telecommunication control may be applied for a period of three months and may not be applied if the measure results in the receipt of information relating exclusively to the private sphere.

Measures applied without the knowledge of the person concerned, recording of conversations in publicly inaccessible places, are carried out for a month with the possibility of extension for a total of up to six months, and further extension is carried out on the basis of a decision of the Land Supreme Court.

Recording of statements made by a defense counsel in private outside the home is prohibited, while other persons who are holders of professional secrets are subject to partial restrictions.

The characteristic features of the regulation in the Criminal Procedure Code of Germany in the field of the organization of special investigative actions are a differentiated approach to setting the time limits for their conduct, which depend primarily on the degree of interference with the private life of a person.

Information and materials obtained during special investigative actions are subject to use as other evidence in criminal proceedings, taking into account certain restrictions on their use in other criminal proceedings. Thus, materials of seizure, removal of information from electronic information systems, may be used as evidence, but only in the criminal proceedings in which they were seized.<sup>54</sup>

The use of the results of telecommunication control in another criminal proceeding, including measures applied without the knowledge of the person concerned, recording of conversations in publicly inaccessible places, is possible only if such an act corresponds to certain crimes defined in the relevant paragraph.

In addition, with regard to the use of information obtained as a result of covert measures, the procedural legislation of Germany has developed criteria of "absolute" and "relative" prohibition.<sup>55</sup> Their distinction depends on whether the recorded conversation relates to the internal sphere of private life, intimate, or communication with a representative, lawyer, or close

<sup>53</sup>Roman Ostapenko, Yuliia Herasymenko, Vitalii Nitsenko, Svitlana Koliadenko, Tomas Balezentis & Dalia Streimikiene, *Analysis of Production and Sales of Organic Products in Ukrainian Agricultural Enterprises*, 12 SUSTAINABILITY 1, 1–13 (2020).

<sup>54</sup>Svitlana Bondarenko, Iryna Liganenko, Olga Kalamann & Liubov Niekrasova, *Comparison of Methods for Determining the Competitiveness of Enterprises to Determine Market Strategy*, 9 INT'L J. CIV. ENG'G & TECH. 890, 890–98 (2018).

<sup>55</sup>See Langbein, *supra* note 51, at 147.

relatives. In this case, there is an absolute prohibition on the use of the information obtained. In other cases, in order to decide on the possibility of using the information received, including information containing professional secrets, the issue is resolved on the basis of the principle of “proportionality” of the restriction of human rights and freedoms to the crime under investigation.

The application of measures in the form of automatic comparison and transfer of personal data; seizure of postal and telegraphic items; control of telecommunications; and measures applied without the knowledge of the person concerned, recording of conversations in publicly inaccessible places, is reported to 1) the accused against whom the measure was directed; 2) other persons whose conversations were monitored; and 3) persons who owned or lived in the housing under control.

The person in respect of whom the authorization was granted, as well as other persons whose interests were significantly affected, are informed of the measures in the form of a statement made non-publicly outside the home.

On obtaining information about telecommunications—participants in the controlled telecommunications process. On other measures applied without the knowledge of the person concerned, surveillance—the object of surveillance and persons whose interests were affected by the application of the measure. On the application of measures applied to mobile phones - the object of the measure.

In addition, there is an obligation to inform the target of the measure, persons whose interests were affected by the measure, and persons whose homes, inaccessible to the public, were visited by the covert agent.

The notification is sent by the prosecutor and provides for an explanation of the possibility of protecting their rights. The legislation also provides that in some cases, in particular if it contradicts the legitimate priority interests of the person whose interests were affected by the measures or if the restriction of his or her rights was insignificant, notification may not be made. In addition to the regulation of special investigative actions, the Criminal Procedure Code of Germany regulates the basic principles of using covert officers. Paragraph 110a provides for the possibility of their use in the investigation of criminal offenses, including: 1) Trafficking in narcotic drugs, weapons, and making counterfeit money and banknotes; 2) crimes against state security; 3) crimes in the form of an enterprise or their repeated commission; and 4) crimes committed by a member of a gang or other form of organization.

The same article provides for the creation of a cover legend, the production of false, imitation, documents. The use of a full-time undercover employee is possible with the written permission of the prosecutor's office. The use of undercover full-time employees against a specific accused, or if it is anticipated that he will break into a dwelling that is not publicly accessible, with the written permission of the court, and in urgent cases, by the decision of the prosecutor with further approval by his court.

Therefore, Criminal Procedure Code of the Federal Republic of Germany has numerous peculiarities. First, special investigative actions are not institutionally separated from other investigative or procedural actions, and the legal regulation of some of them, such as seizure, covers actions inherent in investigative and secret investigative actions. Second, a number of measures to obtain information secretly are not regulated and remain within the scope of other measures—preventive, administrative, and agency—regulated by other normative acts. Third, determining the grounds and conditions for conducting special investigative actions is not limited by the severity of crimes or the impossibility of obtaining evidence in another way, but thanks to the systematic application of criteria: Severity, type of crime, its specialization, the person, his previous behavior, the type of crime under investigation, the principle of “proportionality” is regulated for each type of special investigative action separately. Fourth, in the field of control over the conduct of special investigative measures, the powers of the court prevail, but in the vast majority, in urgent cases, the prosecutor has the right to make a decision on their conduct with



further approval in court. Fifth, the field of judicial control is complex, it involves the granting of permission by a judge and, in some cases, by a panel of judges; the possibility of judicial control after conducting the event through research and evaluation of the received materials; and an appeal. Sixth, introduction of civil control with informing society about the effectiveness of the application of special measures that most affect the private sphere. Seventh, the timing of the measure depends on the degree of interference in the private sphere and the technical features of its implementation. Eighth, introduction of criteria of “absolute” and “relative” prohibition of interference in the communication of certain persons. Finally, informing about the fact of carrying out special investigative actions not only to persons for whom permission was obtained but also to others whose interests were affected during their conduct.

#### H. Issue of Distinguishing Between Legitimate Activity and Provocation

Along with the legal regulation of the basic principles of the organization and the conduct of covert information-gathering activities, special investigative actions, one of the most important is the issue of distinguishing the legitimate activities of law enforcement agencies in the detection and investigation of criminal offenses from the provocation of a crime.

The criminal and criminal procedural legislation of Ukraine does not contain clear criteria, signs of provocation, incitement, however, the specified issue was thoroughly investigated, and a legal assessment was provided in the decisions of the ECtHR, in particular in the cases *Bannikov v. Russian Federation*, *Veselov and Others v. Russian Federation*, *Ramanauskas v. Lithuania*, *Teixeiro de Castro v. Portugal*, and many others.

In distinguishing legitimate activity and provocation, these decisions considered the following issues: 1) Whether the actions of law enforcement agencies were active; 2) whether they encouraged the person to commit a crime, for example, taking the initiative in contacting the person, making repeated offers, or raising the price above the average; 3) whether the crime would have been committed without the intervention of law enforcement agencies; 4) the importance of the reasons for conducting the operational procurement; and 5) whether the law enforcement agencies had objective data that the person was involved in criminal activity and the probability of his committing a crime was significant.<sup>56</sup>

Circumstances that exclude provoking a person to commit a crime must be ascertained during the pre-trial investigation, contained in the relevant procedural documents and reflected in the prosecutor's resolution on control over the commission of the crime. Such circumstances must disprove any doubts about incitement, provocation, contain information that gives reasons to believe that the person in respect of whom the decision to conduct control is made is engaged in illegal activities, and his actions fall under the signs of a serious or particularly serious crime and are confirmed by appropriate and admissible evidence received before the decision to conduct control.

#### I. Issue of Documentation, Recording of Information Obtained During Special Investigative Actions

Along with this, one of the most important issues remains the issue of documentation, recording of information obtained during special investigative actions. The ability to check evidence for its admissibility, including involving specialists and experts, remains a determining criterion for evaluating evidence and using it to prove a person's guilt. In such circumstances, the regulation of the procedure for drawing up protocols on the results of special investigative actions, requirements for the preservation of physical information carriers on which the progress and results of the specified measures are recorded, ensuring the preservation of technical means necessary during

<sup>56</sup>Larysa Arkusha & Oleksandr Torbas, *Provocation and Control Over the Commission of a Crime: Significance and Correlation*, 170 ADVANCES ECON., BUS. & MGMT. RSCH. 141, 141–45 (2021).

the investigation of information carriers and records on them regarding authenticity or the presence of signs of mounting or other forms of forgery, remains extremely relevant.<sup>57</sup>

In the Republic of Moldova, as a result of special investigative actions, a report is drawn up, which, among other things, displays information about the technical means used, the conditions and methods of their use, the objects for which they were used, and the results obtained. The law also expressly provides that the information carrier is attached to the protocol in a sealed form.

The Criminal Procedure Code of Ukraine in the previous edition also provided for rather strict requirements for ensuring the preservation of primary information carriers and technical means used during covert investigative, research actions, however, after the introduction of martial law, the legislation underwent changes only in the part related to application and preservation material carriers of information and technical means used during covert investigative, research, actions.

Adopted on March 15, 2022, the Law of Ukraine 2137-IX “On Amendments to the Criminal Procedure Code of Ukraine and the Law of Ukraine ‘On Electronic Communications’ on Improving the Effectiveness of Pretrial Investigations ‘on Hot Tracks’ and Combating Cyber Attacks,”<sup>58</sup> along with changes in terminology, related to the unification of the approach to the formulation of definitions in the field of electronic communications, significant changes were introduced in the provisions of the Criminal Procedure Code of Ukraine relating to the regulation of the use of the results of secret investigative actions.

In particular, Part 2 and 3 of Article 266 of the Criminal Procedure Code of Ukraine provides:

2. Information carriers on which the information obtained as a result of the said secret investigative (research) actions are recorded must be kept in a condition suitable for their research until the court verdict becomes legal.
3. Carriers of information, on which information obtained as a result of conducting the specified secret investigative (research) actions is recorded, may be the subject of research by relevant specialists or experts in the manner prescribed by this Code.

The previous version of Parts 2 and 3 of this article provided that:

2. The technical means used during the said secret investigative (research) actions, as well as the primary media of the obtained information, must be kept until the court verdict enters into force.
3. Carriers of information and technical means by means of which information is obtained may be the subject of research by relevant specialists or experts in the manner prescribed by this Code.<sup>59</sup>

There are five significant differences between the editions above in regulating the use of the results obtained during the SI(R)A, which directly affect their evaluation and use as evidence. First, the prosecuting party has a duty to ensure the preservation of the technical means used during the execution of the Emergency (R)A before the court verdict becomes legally binding has been cancelled. Second, instead of the term “primary carrier of information” used in the previous

<sup>57</sup>Viacheslav V. Vapniarchuk, Inna L. Bepalko & Maryna G. Motoryhina, *Specific Features of Criminal Proceeding Regarding Criminal Misdemeanours*, 43 STATUTE L. REV. 198, 198–208 (2022).

<sup>58</sup>Про внесення змін до Кримінального процесуального кодексу України та Закону України “Про електронні комунікації” щодо підвищення ефективності досудового розслідування “за гарячими слідами” та протидії кібератакам [Law on making changes to the Criminal Procedure Code of Ukraine and the Law of Ukraine “On Electronic Communications” regarding increasing the effectiveness of pre-trial investigation “on hot tracks” and countering cyberattacks], Верховна Рада України [VERKHOVNA RADA OF UKRAINE] 2022, No. 2137-IX (Ukr.).

<sup>59</sup>Ministry of Internal Affairs of Ukraine, On Amendments to The Instructions On The Appointment And Conduct Of Forensic Examinations And Expert Studies, No. 53/5, P. 20.3 (2023) [hereinafter “On Amendments to the Instructions”].

edition, the new wording “carrier of information” is applied, which gives the prosecution the right to destroy primary, original carriers, or information on them, and to provide their copies to the court and for research by specialists and experts. Third, the media on which the information obtained as a result of the SI(R)A is recorded must be kept in a condition suitable for their research. Fourth, the technical means used during the SI(R)A may not be the subject of research by relevant specialists or experts. Lastly, the obligation to ensure the preservation of the primary information carriers used during the conduct of the Emergency (R)A—if the information obtained as a result of the Emergency (R)A is not recorded on them—has been abolished.

The originality of the information carrier or its copy, the availability of technical means, with the help of which the information was received, transferred, recorded, and stored, is essential for evaluating the evidence for its admissibility and proving the person's guilt.

It should be noted that the interdisciplinary principle of proven guilt, *indubioproreo*, as one of the most important principles of criminal and criminal procedural law is that punishment for committing a socially dangerous act can be imposed only on the condition of proven guilty behavior and follows from the provisions of Part 3 of Article 62 of the Constitution of Ukraine,<sup>60</sup> which stipulates that the prosecution cannot be based on assumptions, and all doubts regarding the proof of a person's guilt are interpreted in his favor.<sup>61</sup>

The implementation of this principle involves the use of evidence to prove guilt only that was obtained in a legal way and under the condition of being able to verify them in order to refute any doubts about their authenticity.

This is due to the fact that, for example, making a recording of a conversation, recording its content in a protocol and on an information, medium cannot be considered as an accurate reflection of actual events, if such recordings cannot be checked for signs of editing, making other changes to the content of conversations, time and conditions of fixation, etc.

At the same time, the method of conducting a computer-technical examination, the subject of which can be computer media, including such as memory cards, servers, USB flash drives, provides for the provision of original media, and if necessary, also a complex computer means, which included an information carrier or which was used for recording, Computer and technical examination, 2022. Conducting a high-quality and effective phonoscopic examination also involves providing the original information carrier and technical means, devices, with the help of which the file was created. It is the study of the characteristics of the technical recording equipment that makes it possible to compare the sound recording with other files and to confirm or deny its originality, the presence of editing and other changes.<sup>62</sup>

The examination of the audio-video recording, which may be considered for the identification of a person based on the physical parameters of the voice, the identification of a person based on the linguistic features of oral speech, the presence of changes in the video phonogram, regarding signs of deletion of information from it, the possibility of restoring the video phonogram in its entirety, also involves the provision of the original phonogram, primary information carrier, the original device with which the phonogram was recorded and the additional equipment used to record the phonogram, in its entirety: Microphone, power source, control devices, etc.<sup>63</sup>

Given the fact that one of the stages of determining the reliability of factual data is the determination of the reliability of the method of obtaining factual data, the study of technical

<sup>60</sup>КОНСТИТУЦІЯ УКРАЇНИ [CONSTITUTION] art. 62 (Ukr.).

<sup>61</sup>Olena Serhiivna Oliinyk, Principles of Criminal Law: Concept, System, and Meaning 1–22 (Dec. 12, 2020) (DSc thesis, Dnipropetrovsk State University of Internal Affairs) (2020).

<sup>62</sup>МЯХАЙЛО КЛЫМЧУК, Y. A. КОМИССАРЧУК, SERGIJ MARKO & BOHDANA STETSYK, FORENSIC COMPUTER-TECHNICAL EXPERTISE IN CRIMINAL PROCEEDINGS 112 (2022).

<sup>63</sup>On Amendments to the Instructions (1998).

means, the comparison of the obtained technical data with the technical data of video phonograms, must be considered as a mandatory stage of proof verification.<sup>64</sup>

In the absence of the primary, original carrier of information, technical means of recording information, the parties to the criminal proceedings, the court are deprived of the opportunity to verify the correspondence of the received information about the facts to the real events that took place. In turn, the lack of an obligation to ensure the preservation of the original carrier of information, technical means, the study of which can establish signs of editing, the removal of certain fragments of linguistic information, especially in the conditions of martial law, when a number of powers of the investigating judge are assigned to the competence of prosecutors, violates the balance of interests of the parties in criminal proceedings due to the deprivation of the opportunity of the defense side to check such records, information carriers, for their originality and the presence of signs of forgery, and the court to critically assess the evidence provided by the prosecution side.<sup>65</sup>

In our opinion, during the research and evaluation of the evidence obtained as a result of the SI(R)A, it is necessary to take into account the provisions of Article 58 of the Constitution of Ukraine<sup>66</sup>, which enshrines one of the most important universally recognized principles of modern law—laws and other legal acts that worsen the situation persons do not have retroactive effect in time.<sup>67</sup> This means that the specified changes apply only to those relations that arose after the entry into force of laws or other normative legal acts, that is, regarding secret measures that were carried out in criminal proceedings after the introduction of changes to the Criminal Procedure Code of Ukraine due to the introduction of martial law.

## J. Conclusions

Ensuring the balance between the interests of the state, society, and human rights and freedoms during covert information-gathering measures in criminal proceedings requires the introduction of a flexible approach to the division of such activities into investigative and operational-search activities, the development of “proportionality” criteria, and the replacement of formal judicial control with real control, which will combine assessment of not only the grounds for the measure, but also the result of its implementation.

In view of the above, it is advisable to propose the following measures to improve the criminal procedure legislation in terms of regulating the organization, conduct, recording, use of covert information recording measures and control over their conduct. Introduction of the principle of “proportionality” of covert measures to obtain information instead of the formal feature—the possibility of conducting them only in criminal proceedings on serious and especially serious crimes. The degree of interference with private life may be justified not only by the gravity of the act under investigation, but also by other circumstances that exclude the possibility of obtaining and recording information in any other way. The criteria for determining “proportionality” can be applied both to a group of covert measures and to their individual types.

Permission to conduct covert information gathering before the decision of the investigating judge may be granted by the prosecutor if there are grounds that prevent the prosecution from timely applying for such permission to the investigating judge and there is a threat of losing evidence.

<sup>64</sup>R. I. Blahuta, Y.V. Hutsuliak, O. M. Dufeniuk, O. V. Zakharova, Y. A. Komissarchuk, S. A. Kudinov, A. I. Kuntii, O. V. Riashko, A. Y. Khytra, & R. M. Shekhavtsov, *Evidence and Proof in Criminal Proceedings*, LVIV STATE UNIV. OF INTERNAL AFF. INSTITUTIONAL REPOSITORY (2018).

<sup>65</sup>See Vapniarchuk, *supra* note 57.

<sup>66</sup>КОНСТИТУЦІЯ УКРАЇНИ [CONSTITUTION] art. 58 (Ukr.).

<sup>67</sup>*Effect of the Normative Legal Act in Time*, CONST. CT. UKR. (2022), <https://ccu.gov.ua/storinka-knygy/35-diya-normatyvno-pravovogo-akta-v-chasi> (last visited Feb. 8, 2024).

The use of databases, special search engines, obtaining information from mobile devices, social networks, means of communication about the content of conversations and correspondence, sent SMS, MMS, and the analysis of such information should be considered as a form of interference with private communication and a form of covert information obtaining.

Judicial control may not be limited to consideration of applications for permission to conduct covert measures and use of their results in other criminal proceedings but should include assessment by such a judge of the results of the measure authorized by him or the prosecutor, and informing the person whose interests were restricted about the granting of such permission.

Lastly, ensuring public control over the legality of covert information-gathering measures may consist of the public receiving impersonal information about the number of permits granted for such measures, their effectiveness, their use in criminal proceedings, and cases of unjustified restriction of rights and freedoms, including when the unlawful activity of a person was not confirmed.

**Acknowledgements.** The authors' contributions are equal.

**Funding Statement.** The authors did not receive support from any organization for the submitted work. No funding was received to assist with the preparation of this manuscript. No funding was received for conducting this study. No funds, grants, or other support was received.

**Competing Interests.** The authors declare they have no financial and competing interests.