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Proportionality of Intervention and the Balance of Public and Private Interests in Covert Evidence Collection in Criminal Proceedings

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Abstract
The Article addresses problematic issues of proportionality of interference and the balance of public and private interests during covert evidence collection in criminal proceedings. The relevance of this topic is driven by the fact that, in the context of contemporary challenges related to security, digitalization, and globalization, covert investigative (search) actions should be considered indicators of adherence to the balance of public and private interests during criminal procedural activities. The aim of the Article is to provide a scholarly understanding of ensuring proportionality of interference and balance of public and private interests in criminal proceedings during covert evidence collection. The following scientific methods were used to achieve this purpose and accomplish the related objectives: dialectical, formal-legal, formal-logical, analysis and synthesis, and inductive. The empirical basis of the research comprises the most relevant and significant positions of the cassation court concerning covert evidence collection, which are perceived as guidelines and, consequently, as indicators of trends in the national law enforcement system. The authors examine the Supreme Court's positions on specific procedural issues related to interference with private communication, identifying a trend toward emphasizing public interest. Analyzing critical decisions of the cassation court on the appropriate limits of procedural confidentiality allows the authors to conclude that protecting the confidentiality (secrecy) of the technical component in covert investigative (search) actions, though justified for specialized technical means, cannot be considered proportionate concerning the carriers of obtained results. The procedural analysis of issues related to crime provocation highlights the cassation court's practice of using a comprehensive approach to consider the circumstances of covert operations and the diligence and fairness of the prosecution's procedural conduct within

the adversarial court process, which is actively used to assess the presence or absence of elements indicating crime provocation. Based on the analyzed material, the study identifies procedurally significant trends and prospective directions for further research.

Keywords: *proportionality of interference; pre-trial investigation; covert investigative actions; crime provocation.*

Пропорційність втручання та баланс публічних і приватних інтересів під час негласного збирання доказової інформації у кримінальному провадженні

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Анотація
У статті розглянуто проблемні питання пропорційності втручання та балансу публічних і приватних інтересів під час негласного збирання доказової інформації у кримінальному провадженні. Актуальність теми зумовлена тим, що в контексті сучасних викликів з питань безпеки, цифровізації та глобалізації індикатором дотримання балансу публічного й приватного інтересу під час кримінальної процесуальної діяльності варто визнати негласні слідчі (розшукові) дії. Мета статті – наукове осмислення дотримання пропорційності втручання та балансу публічних і приватних інтересів у кримінальному провадженні під час негласного збирання доказової інформації. Для досягнення зазначеної мети та виконання завдань, що з неї випливають, використовувались такі наукові методи: діалектичний, формально-юридичний, формально-логічний, метод аналізу і синтезу, а також індуктивний метод. Емпіричну основу проведеного дослідження склали найбільш актуальні і вагомі в контексті негласного збирання доказової інформації позиції суду касаційної інстанції, які в національній правозастосовній системі сприймаються як орієнтири, а відтак – й індикатори тенденцій. Досліджено позиції Верховного Суду щодо окремих процесуальних питань втручання у приватне спілку-

вання, в результаті чого констатовано тенденцію до зміщення акценту на користь публічного інтересу. Авторське осмислення ключових рішень суду касаційної інстанції щодо визначення належних меж процесуальної прихованості дій дозволяє стверджувати, що охорона негласності (таємності) технічного компоненту негласних слідчих (розшукових) дій, будучи виправданою щодо спеціальних технічних засобів, не може вважатися пропорційною щодо носіїв отриманих результатів. Дослідницьке звернення до процесуального осмислення питань провокації злочину дозволило виокремити у практиці суду касаційної інстанції застосування комплексного підходу до врахування обставин проведення негласної операції, а також активність й добросовісність процесуальної поведінки сторони обвинувачення в контексті судової змагальності, які активно використовуються з метою оцінки наявності або відсутності ознак провокації вчинення злочину. На основі опрацьованого матеріалу визначено процесуально значущі тенденції та перспективні напрямки подальших наукових пошуків.

Ключові слова: *пропорційність втручання; публічні та приватні інтереси; негласне збирання доказів; приватність; провокація.*

Introduction

Modern realities bring forth several pressing issues for Ukrainian society, particularly security, digitalization, and globalization. According to the State Security Strategy, approved by the Presidential Decree of Ukraine on February 16, 2022, No. 56/2022, it identifies actual and potential threats to Ukraine's national security. It defines the directions and objectives of state policy in national security. Among the priorities outlined is intensifying efforts against terrorism and organized crime, counteracting the degradation of the state apparatus and local governance due to widespread systemic corruption within state agencies (Para 24, Part III of the Strategy). It is evident that effective state counteraction to these criminal activities is impossible without law enforcement agencies' operational and covert efforts, which must employ the most advanced digital technologies and leverage them in a globalized world (including efforts to combat organized cross-border cybercrime). This highlights a clear and pressing public interest.

In turn, the digital space, having become an integral part of human life, is characterized by vulnerabilities in law enforcement's adherence to fundamental rights and freedoms. Furthermore, given the absence of "virtual boundaries" between states, the vulnerability of rights and freedoms can expand beyond sovereign borders, lending the issue an interstate (universal) significance.

This brings to the forefront the need to maintain a reasonable balance between public and private interests in criminal procedural activities, a pressing issue when determining the proportionality of interference with

fundamental human rights and freedoms during covert evidence collection in criminal proceedings. Covert investigative (search) actions serve as a "litmus test" for these aspects of the issue, as they: a) represent some of the most technically advanced procedural tools for gathering evidence; b) can simultaneously impact several fundamental human rights and freedoms (in particular, the right to respect for private and family life, and the right to confidentiality of communication); and c) due to their latent and secret nature, carry a significant risk of arbitrariness by law enforcement agencies.

Therefore, covert investigative (search) actions should be recognized as an indicator of adherence to the balance between public and private interests in criminal procedural activities.

Scholars who have dedicated their work to the study of covert investigative (search) actions in the context of maintaining proportionality of interference and safeguarding fundamental human rights and freedoms include O. Kaplina, A. Tumanyants, I. Krytska [1–3], O. Panasiuk, L. Grynko, A. Prokhazka [4], O. Babikov, V. Bozhyk, O. Bugera, S. Kyrenko, M. Viunyk [5], A. Koval [6]. The legal foundations for restricting human rights and freedoms during pre-trial investigations have been explored in the research Art. by I. Hloviuk, V. Zavtur, I. Zinkovskyy, L. Pavlyk [7]. At the same time, current issues regarding their adherence in criminal proceedings in the context of digitalization have been addressed in the works of Y. Razmetaeva, Y. Barabash, D. Lukianov [8], O. Kaplina, A. Tumanyants, I. Krytska, O. Verkhoglyad-Gerasymenko [9], Y. Razmetaeva, S. Razmetaev [10]. The legal aspects of incitement to commit a crime have been developed by M. Zubrytska [11], O. Hura [12], I. Berdnik, S. Tagiev [13]. However, despite the exploration of critical aspects of the raised issues in scientific works (adherence to rights and freedoms during covert activities in pre-trial investigations, ensuring a balance of the rights and liberties in the context of digitalization, crime provocation), there is currently a lack of comprehensive work dedicated to understanding the proportionality of intervention and the balance of rights and freedoms from a synthesizing perspective, taking into account current law enforcement trends.

Thus, the aim of this work is to provide a scholarly understanding of the proportionality of interference and the balance of public and private interests in criminal proceedings during covert evidence collection. To achieve this goal, the following research objectives need to be addressed:
– find and organize judicial and practical guidelines regarding the proportionality of intervention and the balance of public and private interests during the covert collection of evidence;
– during the covert evidence collection, identify key trends regarding the proportionality of intervention and the balance of public and private interests.

Materials and Methods

Without a method, there is neither researcher nor research – this statement can be perceived as axiomatic for scientific investigation. The author's proficiency in utilizing the method reveals the level of their competencies and skills. In contrast, for the results of scientific work, a properly chosen method guarantees reliable and well-founded conclusions. Therefore, in order to ensure a maximally objective assessment of the balance between public and private interests during covert investigative (search) activities, there is a need for scientific reflection on such a phenomenon in domestic state-legal reality, which, *on the one hand*, accumulates widespread trends in understanding at the level of law enforcement, and *on the other hand*, reflects the implemented legal standards in the field of human rights.

Justitia est fundamentum regni – based on this ancient Roman statement, it is quite appropriate to recognize the judicial practice of the Supreme Court as such a phenomenon, which, being the highest court in the judicial system of Ukraine, ensures the stability and unity of judicial practice in the manner and way defined by procedural law (Part 1 of Art. 36 of the Law of Ukraine *"On the Judicial System and Status of Judges"*). Therefore, the scientific reflection on the judicial practice of the court of cassation, formed as a result of assessing the legality of covert evidence collection, should be the focus of research efforts within this work. At the same time, to ensure the relevance of the identified trends, it is worth analyzing the court decisions made after the onset of Russia's full-scale military aggression against Ukraine and the introduction of martial law in Ukraine on February 24, 2022, the implementation of which has influenced, among other things, trends in criminal justice.

The following methods of scientific research will serve as "assistants" in studying judicial practice:
– the dialectical method, which will allow for a comprehensive understanding of the positions developed by the cassation court's judicial practice regarding covert evidence activities in their entirety and concerning public and private interests;
– the formal-legal method, which will serve as a means of understanding the content of categories enshrined in legislation and forming conclusions regarding appropriate procedural algorithms;
– the formal-logical method, which will enable a critical reflection on the arguments expressed in domestic judicial practice to find the most well-founded answers to the questions being studied;
– the analysis method, which will serve as a practical tool for highlighting the critical arguments of the positions of the cassation court;

– the synthesis method, which will help formulate mainstream vectors implemented regarding human rights standards in covert activities of law enforcement agencies;
– based on critical arguments of the cassation court's positions, the inductive method will facilitate the formulation of trends in maintaining the proportionality of intervention and a reasonable balance between public and private interests during covert evidence collection in criminal proceedings.

The first stage of the work involves identifying the object and subject of the research, formulating problem questions, and selecting theoretical and empirical material.

In the second stage of the research, it is planned to process the collected material using the methods mentioned above to form a comprehensive understanding of the vectors of proportionality of intervention and ensure a balance between public and private interests presented in the domestic law enforcement space.

In the third stage of the scientific work, there is a need to systematize the processed material to formulate conclusions and outline prospective directions for further research.

The authors of the work believe that the structure for presenting the material should be based on two criteria: a) thematic, which will allow for grouping the positions of the cassation court depending on the essence of the issues being resolved; b) chronological, which will enable the organization of positions within each thematic subgroup and track the dynamics of trend formation.

Results and Discussion

Interference in private communication

An analytical review of the legal positions of the Cassation Criminal Court within the Supreme Court should begin with a court decision that is valuable primarily from the perspective of a negative finding: the Cassation Court recognized the absence of interference in private communication under conditions where "access to the files was not restricted by their owner or possessor, and such actions were not related to overcoming any logical protection systems" [14]. Such an assessment was made by the court of cassation regarding the admissibility as evidence of information obtained as a result of the actions of the employees of the "Cybercrime Countermeasures Department, who monitored the worldwide network "Internet", during which a file containing signs of pornography was freely downloaded" [14]. Despite the additional expression by the court of

cassation of an indisputable argument regarding the assessment of the admissibility of such actions before the start of the pre-trial investigation, the primary analytical attention will be focused on the understanding of the criterion used to establish the presence or absence of interference with private communication. Such, as follows from the text of the resolution mentioned above, is the mode of access to information content. If access to files is not limited to their owner and is not related to overcoming any logical protection systems, then, according to the logic of the court of cassation, there is no interference with private communication.

It is worth noting that a similar course of reasoning was already embodied in the practice of the Criminal Court of Cassation as part of the Supreme Court. Still, then it was accompanied by a somewhat different technical emphasis. Thus, in the decision of the Supreme Court dated April 9, 2020 (case No. 727/6578/17), the argument of the defense "that during the pre-trial investigation, illegal (without a decision of the investigating judge) access to information from electronic information systems was found to be groundless of networks, which is designed as a protocol for the examination of the object – the phone", the motivation of which was indicated as follows: "As for the information that was available in the person's mobile phone, it was examined by turning on the phone and examining the text messages that were in it and accessing which was not related to the provision by the owner of the corresponding server (mobile operator) of access to electronic information systems. In this case, the body of the pre-trial investigation conducted an inspection of the object – the phone..." [15]. One of the critical theses that preceded the quoted conclusion was the regulatory consolidation of the mode of access to electronic information systems depending on the mode of access to the systems: obtaining information from electronic information systems or its part, access to which is not limited to its owner, does not require the permission of the investigating judge or by the holder or is not related to overcoming the logical protection system (Part 2 of Art. 264 of the CPC).

It is worth agreeing that by virtue of Part 2 of Art. 264 of the CPC, obtaining information from electronic information systems cannot be considered as removal of information from electronic information systems (as one of the types of interference in private communication – paragraph 4 of Part 4 of Art. 258 of the CPC) or its parts, the access to which is not limited by its owner, possessor or holder or is not related to overcoming the logical protection system. It can be assumed that the logic of the legislator was as follows: a person who does not limit access to digital devices, presuming the possibility of access to them by other persons (for example, family members or close relatives, roommates in a dormitory, colleagues at work), knowingly

and voluntarily waives the privacy of information stored in this manner. The definition of private communication also confirms the given vector of reasoning: communication is private if the information is transmitted and stored under such physical or legal conditions under which the participants of the communication can count on the protection of information from the interference of other persons (Part 3 of Art. 258 of the CPC). In addition, the given logic fits into the concept of "reasonable expectation of privacy" formed in the precedent practice of the courts of the United States of America (see the decision of the Supreme Court of the United States in the cases Katz v. United States [16], Carpenter v. United States [17] and the European Court of Human Rights (Halford v. United Kingdom, Application No. 20605/92) [18], Case of Peev v. Bulgaria, Application No. 64209/01 [19], Case of Benedik v. Slovenia, Application No. 62357/14 [20] [for more details, see 21].

However, it should be noted that in the absence of clear criteria for qualifying the access regime to an electronic information system or its part, the understanding mentioned above of the provisions of Part 2 of Art. 264 of the CPC may lead to unlawful and disproportionate interference in the sphere of human rights and freedoms. Moreover, defining the access regime solely based on the presence or absence of a logical protection system (such as a graphical key, digital code, password, biometric identification tools, etc.) can result in a purely formal assessment of the openness of access to information stored on a digital device, which would not align with several constitutional and criminal procedural guarantees that will be discussed further. Therefore, to establish a lawful procedural method for accessing information stored on a digital device, judicial practice uses the access regime to its carrier: open access (public placement of the device or information) excludes the possibility of recognizing it as private and requiring prior judicial permission for review within the framework of covert extraction of information from electronic information systems. However, without the development and implementation of clear criteria to distinguish between open and restricted access to an electronic information system and its part, there is a risk of unlawful and disproportionate covert interference in privacy.

Similar to the position mentioned above, a court decision where the cassation court established the absence of covert interference in private communication during the examination of a detainee's phone holds research value [see 22]. The discussion concerned the protocol for examining the seized mobile phone, Samsung J5, from the detainee, on which photos and videos of the torture of victims were stored. According to the court's conclusion of the first instance, there was no significant violation of human

rights and freedoms (Art. 87 of the CPC) during its examination [23]. The defense's argument was that "during the examination, there was interference with their (*the convicted person's* – author's note – *I.T., A.S.*) right to privacy in the absence of prior consent from the phone's owner or a judge" [22].

Critically evaluating the arguments of the defense side, from which it was not clear what kind of authorization was in question, the court of cassation concluded that there was no need to obtain the prior consent of the owner of the phone or judicial authorization, referring to two fundamental theses: 1) "such a review of information that contained in the phone, obviously does not constitute tacit interference in private communication, provided for in § 2 of Chapter 21 of the CPC"; 2) the obligation of the prosecuting party to obtain court permission in accordance with the procedure defined by Chapter 15 of the CPC (temporary access to things and documents) is groundless, because "in this case, the phone had the prosecuting party after it was seized; therefore the requirement to give oneself access to it would contradict common sense" [22]. The above-described issue, while not directly related to conducting covert investigative (search) actions, remains of research interest within this work due to the problematic questions it raises: a) whether covert interference in private communication occurs during the examination of information from a phone; b) whether permission (from the owner or judicial authorization) is required when it is necessary to examine the content of information stored on the phone.

Analytical reflection on the conclusions formulated by the cassation court allows us to assert that their application, without regard to the circumstances of the case, carries the risk of legitimizing arbitrary interference by law enforcement authorities in a person's private life. It is reasonable to agree that examining photos and videos stored on a smartphone, conducted without concealment from its owner, in form does not constitute a covert investigative (search) action. One of the essential features of such actions is indeed missing: their covert nature, secrecy, and concealment from the individuals to whom they pertain. Thus, these procedural actions genuinely lack secrecy. However, does this automatically mean that the absence of covertness legitimizes such interference with rights and freedoms without permission from the owner or a judge?

In the authors' opinion, the answer to this question is negative for the following reasons. *Firstly,* modern mobile phones (smartphones) store various types of information, from private correspondence to personal information. Thus, it can be argued that digital devices should be recognized as a 'concentration point' for several fundamental human rights and freedoms: for example, the right to secrecy of correspondence, telephone

conversations, telegraph, and other communications (the right to privacy of communication) (Art. 31 of the Constitution of Ukraine), and the right to respect for personal and family life (the right to privacy) (Art. 32 of the Constitution of Ukraine). Therefore, a generalized conclusion about the lawfulness or unlawfulness of examining the content of a mobile phone (smartphone) detached from the nature of the information being reviewed, in the authors' view, does not align with the essence of specific human rights guarantees, which are interfered with in this manner. It is not the storage medium (mobile phone, smartphone, tablet, portable computer, etc.). Still, the nature of the information being examined that is decisive in determining whether permission is required for examination and, if so, what kind. Otherwise, uncontrolled restrictions on several human rights and freedoms are legitimized, for which, in the absence of a digital "concentration point", prior permission (from the owner or an investigating judge, or court) would unquestionably be required[1].

The following should be noted regarding the guarantees accompanying the collection of private information. In criminal proceedings, everyone is guaranteed protection against interference with private (personal and family) life (Part 1, Art. 15 of the CPC). Additionally, no one may collect, store, use, or disseminate information about a person's private life without their consent, except in cases provided by this Code (Part 2, Art. 15 of the CPC. Access to private information, in the absence of covert means of obtaining it, is accompanied by the following procedural safeguards: (a) personal correspondence and other personal records (Para 6, Part 1, Art. 162 of the CPC), as well as a person's data (Para 8, Part 1, Art. 162 of the CPC), are classified as legally protected secrets contained in items and documents; (b) obtaining a court or investigating judge's authorization for temporary access to such items and documents is accompanied by a particular burden of proof (Part 6, Art. 163 of the CPC): additionally, the possibility of using the information contained in these items and documents as evidence must be demonstrated, as well as the impossibility of proving the circumstances in question by other means. Given the open (public) nature of obtaining information from a phone, the guarantees above serve as effective safeguards against disproportionate or unwarranted interference with a person's privacy and, therefore, should accompany any procedural action aimed at obtaining personal information.

[1] It is worth noting that covert extraction of information from electronic information systems or their parts, access to which is not restricted by the owner, possessor, or holder or is not associated with overcoming logical security systems, as previously mentioned, does not require prior judicial authorization due to the direct provision of procedural law (Part 2 of Art. 264 of the CPC).

The argument of the cassation court that "the requirement to grant oneself (*the prosecution* – the author's note – *I.T., A.S.*) access to it would contradict common sense", while logical in the context of the provisional nature of temporary access to items and documents, fails to consider its judicial oversight component: the granting of an order for temporary access to items and documents by an investigating judge is the result of their assessment of the proportionality of the interference with rights and freedoms, which inevitably accompanies access to items and documents containing personal information. Therefore, the primary purpose of the authorization for temporary access to items and documents in this situation is not to facilitate access but to ensure control over its legality and proportionality, which is impossible without such authorization. However, it is reasonable to agree with an exception to this rule, which implicitly follows from the cassation court's argument: voluntary consent from the holder of the item or document, if the requested information pertains to their private life, enables access without prior judicial oversight. This is because the individual, as the bearer of the right to privacy, is free to exercise it in favor of the public interest, represented in this case by the prosecution.

In the framework of protecting information of a private nature, it is essential to distinguish procedural access to the results of private communication, which, in addition to the right to respect for personal and family life (Art. 32 of the Constitution of Ukraine), is also protected by the right to confidentiality of correspondence, telephone conversations, telegraph, and other communications (Art. 31 of the Constitution of Ukraine). According to constitutional guarantees, exceptions can only be established by a court in cases provided by law to prevent a crime or ascertain the truth in a criminal investigation if the information cannot be obtained by other means (Part 1 of Art. 31 of the Basic Law). This exception enshrined in the Constitution of Ukraine is also implemented procedurally in criminal procedural law. In criminal proceedings, everyone is guaranteed the confidentiality of correspondence, telephone conversations, telegraph, and other forms of communication (Part 1 of Art. 14 of the CPC). In turn, interference with the confidentiality of communication is possible only based on a court decision in cases provided by this Code to detect and prevent a serious or especially serious crime, establish its circumstances, and identify the perpetrator if this goal cannot be achieved by other means (Part 2 of Art. 14 of the CPC). Thus, the legal basis for interfering with private communication (both as an exchange of information through messengers and its results in the form of correspondence, message threads, etc.) is a court decision. Its proportionality is determined by considering the gravity of the offense committed, the purposes pursued (detection and prevention of a serious or especially serious crime, establishing its circumstances, and identifying

the offender), and the condition (if the goal cannot be achieved by other means).

At the institution of covert evidence collection level, the aforementioned constitutional guarantee has found its implementation in the requirement to obtain prior (Articles 260–264 of the CPC) or, in exceptional cases, subsequent judicial authorization for such interference (Art. 250 of the CPC). However, the law provides an appropriate algorithm if interference with private communication accompanies another investigative (search) action that is not covert and, thus, is not listed in Articles 260–264 of the CPC. In such cases, the prosecutor or investigator, with the prosecutor's approval, is required to file a motion with the investigating judge for authorization to interfere with private communication under the procedures outlined in Articles 246, 248, and 249 of this Code, if any investigative (search) action will include such interference. From the above, it follows that the legislator does not provide exceptions to the general rule that interference with private communication requires judicial authorization, regardless of whether access to the relevant information is obtained openly or covertly.

Thus, the material presented above allows us to assert that: (a) maintaining the proportionality of interference and the balance between public and private interests is of particular importance in the context of both overt and covert information retrieval from digital devices (mobile phones, smartphones, tablets, laptops, etc.); (b) procedural methods for obtaining information from these devices should be accompanied by guarantees of respect for rights and freedoms (the right to respect for private and family life, the right to communication secrecy), with the specific set of guarantees determined based on the nature of the information obtained, as well as the access regime defined by the owner, holder, or custodian (including, but not limited to, the presence or absence of logical protection systems); (c) in the absence of the voluntary consent of the bearer of the relevant rights and freedoms, interference with these rights should be preceded by a judicial assessment of the proportionality and legality of such interference, which equates these procedural actions with covert interference in private communication in terms of the level of protection of rights and freedoms; (d) the above-analyzed positions of the court of cassation reflect a tendency to shift procedural emphasis in favor of public interests at the expense of private ones, which should be compensated by the development of procedural algorithms at the enforcement level aimed at implementing the established guarantees of human rights and freedoms, as well as an impartial assessment of the appropriate access regime to the electronic information system and its components.

Procedural concealment of actions

According to the traditional understanding of the admissibility of evidence, the critical criteria that influence its definition are proper procedural source, proper subject, and proper procedural order. Within the latter, particular attention is paid to the completeness and correctness of reflecting the data in one of the legally prescribed forms for recording criminal proceedings.

Thus, according to Part 2 of Art. 104 of the CPC, if a procedural action is recorded during a pre-trial investigation using technical means, this must be indicated in the protocol. Additionally, the introductory part of the protocol must include, among other things, the characteristics of the technical recording devices and information carriers used during the procedural action, as well as the conditions and procedures for their use (§ 1 of Part 3 of Art. 104 of the CPC). According to Part 1 of Art. 252 of the CPC, recording the course and results of covert investigative (search) actions must comply with the general rules for recording criminal proceedings as provided by this Code.

Considering that the overwhelming majority of covert investigative (search) actions are conducted exclusively using technical recording means, the question arises regarding how the requirement to reflect the technical component of covert activities in the protocol should be fulfilled. The problem with this issue is based on the fact that information about the fact or methods of conducting a covert investigative (search) action (Art. 4.12.3 of Part II of the Compendium of Information Constituting State Secrets, approved by order of the Central Directorate of the Security Service of Ukraine on December 23, 2020, No. 383 (hereinafter referred to as the Compendium), as well as information on specific indicators about the external appearance, tactical and technical characteristics of special technical means that reveal the organization, methodology, and tactics of their covert application in solving operational and investigative tasks (Art. 4.4.15 of Part II of the Compendium), constitute state secrets. Therefore, their complete recording in procedural documents may lead to disclosure. Consequently, the question arises as to how a reasonable balance should be ensured between maintaining state secrets (public interest) and allowing private participants in criminal proceedings to verify the proper order and accuracy of the recording made (private interest).

Its own vision of a reasonable balance of interests on this issue was expressed by the court of cassation in the resolution dated November 16, 2023 (case No. 629/4665/15-k), where, concerning the systematic interpretation of Articles 4.5.1, 4.5.6 of the covert investigative (search) actions formulated the following conclusion: "It does not contradict the

provisions of the CPC not to specify information about the name of special equipment and the procedure for its use during the covert investigative (search) actions, taking into account that such information is intended for obtaining information secretly, is a state secret and concerns not only of this criminal proceeding, their disclosure without proper and substantiated grounds threatens national interests and security, the concepts and signs of which are defined in the Law of Ukraine *On National Security of Ukraine*" [24]. It is worth noting the consistency of the Court of Cassation in implementing the above conclusion into judicial practice: the Court of Cassation reached a similar conclusion in the resolution of January 26, 2022 (case No. 677/450/18), adopted even before the introduction of martial law on the territory of Ukraine. Thus, the court of cassation stated: "The name and serial number of the special equipment, its characteristics, and information carriers intended for obtaining information secretly are not specified in the protocol drawn up as a result of the secret investigative (search) action (audio, video monitoring of a person) on the admissibility as evidence of the technical record recording the conduct of this covert investigative (search) action, as well as the specified protocol" [25].

Therefore, as follows from the above, the balance of public and private interests in the issue of the completeness of the display of the "technical component" of covert investigative (search) actions is shifted in favor of keeping secret the data that characterize the relevant special technical means. However, it should be noted that the above does not cover information carriers on which the results of secret investigative (search) actions are stored and which are attached to the relevant protocols. In the opposite case, there are no guarantees that the data carrier attached to the protocol of an undercover investigative (search) action is exactly the one that was created after it was carried out and was not subjected to any operations other than writing the corresponding files to it. It is in this way that it is possible to ensure the confirmation of the proper procedural source of the data contained in it (the document is an appendix to the protocol), as well as the observance of the procedure for recording an undisclosed investigative (search) action. Therefore, hiding the technical features of the used equipment, which constitute a state secret (public interest), must be accompanied by a proper recording of the characteristics of the medium on which the files are copied and which is added to the protocol in order to prevent any unauthorized operations with it in the future (private interest).

Provocation of a crime

One of the vivid examples of how, on the one hand, it is difficult and, on the other hand, how important it is to observe the proportionality of the

intervention and a reasonable balance of public and private interests is the prohibition during the monitoring of the commission of a crime to provoke a person to commit it. Thus, according to Part 3 of Art. 271 of the CPC, during the preparation and implementation of measures to control the commission of a crime, it is prohibited to provoke (incite) a person to commit this crime to further expose it, helping a person to commit a crime that he would not have committed if the investigator did not contribute to this, or for the same purpose to influence her behavior with violence, threats, blackmail. In addition, the legislator defined quite radical consequences that should follow the provocative behavior of law enforcement agencies: things and documents obtained in this way cannot be used in criminal proceedings. It is obvious that there are permanent procedural battles between the parties to the process around the presence or absence of signs of provocation, the judicial decision of which outlines the "red lines" for the law enforcement system. It is worth going further to consider the trends in the practice of the court of cassation in terms of assessing signs of provocation while using the chronological criterion outlined at the beginning of the work to organize the conclusions.

A kind of "checklist" of circumstances that must be checked by the court in the framework of establishing the presence or absence of provocation was once again given in the decision of the Criminal Court of Cassation as part of the Supreme Court dated October 19, 2022 (case No. 728/1614/17): "In order to establish the fact of provocation of a crime, it is decisive to find out the following questions: were the actions of law enforcement agencies active, did they encourage a person to commit a crime, for example, initiative in contacts with a person, repeated offers, despite the person's initial refusal, persistent reminders; whether the crime would have been committed without the intervention of law enforcement agencies; 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" [26]. The research value within the mentioned decision is, firstly, the adaptation of the "checklist" to the specifics of committing the crime provided for in Art. 368 of the Criminal Code: "... it is necessary to check who initiated the meetings, whether there were facts of refusal by the accused to receive an illegal benefit, whether there were persistent actions on the part of the witness, or whether the crime would have been committed without the intervention of law enforcement officers" [26], *secondly,* ascertaining the distribution of the burden of proof in relation to the given circumstances: "...in the context of the prescriptions of Art. 92 of the CPC, if the defense claims clearly not groundless arguments about the presence of provocation, the prosecution must prove that there was no incitement" [26]. Placing on the prosecution the burden of proving

the absence of signs of provocation, if the defense reasonably claims their presence, reflects the vector of "equalization of forces" of the parties introduced by the Court of Cassation in proving one of the key issues within the framework of covert crime detection activities.

In the context of the law enforcement interpretation of certain signs of provocation, the following positions of the Court of Cassation are worthy of attention:
a) a negative statement that "the gap in time between the entry of information into the Unified Register of Pretrial Investigations and the direct receipt of an unlawful benefit cannot by itself indicate that it is a provocation of a crime since the pretrial investigation body cannot clearly predict the specific date of the commission of the crime", because its task is "only the recording of such illegal activity, which sometimes takes place for a long period of time due to the specifics of the crime committed" [27];
b) emphasizing the need to carefully check the activity of a law enforcement agent during operational procurement: "In order to establish the presence or absence of provocation of a crime, it is important to examine the information by the court based on the results of such an undercover investigative (search) action, such as the removal of information from transport telecommunication networks, the materials of which were not disclosed to the defense, were not attached to the court case materials and, accordingly, were not examined by the court. During a new trial in the court of appeals, it is necessary to investigate, in particular, the testimony of a person who was involved by law enforcement agencies in cooperation, according to which it was he who called the accused regarding the purchase of a narcotic drug and a powerful medicinal product, statements of the accused about repeated calls to a stranger's mobile phone with an offer to sell her a narcotic drug, the content of the conversations, which were recorded as a result of the removal of information from transport telecommunications networks, which was carried out before the operational purchase" [28].

Thus, from the positions outlined above, it is unequivocally evident that the careful and comprehensive verification of the activities of law enforcement agencies or their agents during the control of criminal offenses is crucial, as is establishing sufficient grounds to consider the individual subject to such covert investigative (search) actions involved in illegal activities. *On the one hand*, such verification contributes to the realization of the defense's right to a fair trial (the right to be heard and to receive judicial responses to the arguments presented), which undoubtedly supports private interests. *On the other hand*, it disciplines the prosecution, which must provide clear answers to key questions regarding the prohibition of provocation even

before conducting a covert operation, thereby serving the public interest in the proper functioning of the law enforcement system.

A particularly illustrative example in the context of seeking a reasonable balance between public and private interests when assessing the presence or absence of signs of crime provocation is the compensatory mechanism mentioned in the ruling of the Cassation Criminal Court within the Supreme Court on November 21, 2023 (case No. 991/722/21) [see 29]. Thus, while evaluating the arguments presented by the defense regarding the claim that the prosecution's "correspondence was not limited to this fragment and contained information that, when combined with other circumstances of the case, proved incitement to conversations concerning the receipt of a bribe from the convicted individual", the court reached the following conclusions:
a) "The prosecution, by failing to document complete information about this correspondence, also did not ensure the preservation of this information in any other way, for example, by seizing the phone and securing it from access by third parties. ... Thus, through its actions, the prosecution created and/or contributed to the creation of circumstances under which the exchange of messages between the convicted individual and another person became completely inaccessible to the defense" [29];
b) "The court previously noted that in cases where it is impossible to question a witness, courts must provide the party with adequate opportunities that could compensate for the disadvantageous position in which it finds itself due to such complications. The court believes that this principle should also be applied, mutatis mutandis, to other situations where a party is restricted in utilizing opportunities to clarify important circumstances of the case due to various reasons. The consequences of the actions of a party that has made it impossible or significantly complicated the examination of important evidence by the court should be interpreted in favor of the opposing party so as not to encourage the party to use such tactics (see, for example, Part 5 of Art. 97 of the CPC)" [29].

Thus, the creation of artificial barriers by the prosecution that restrict the defense's access to the full extent of materials that may indicate provocation of a crime is qualified by the court as improper conduct, which can be presumed to constitute reasonable doubt regarding the person's guilt, interpreted in favor of the defense (Part 3 of Art. 62 of the Constitution of Ukraine). This compensatory approach aims to "balance" the power dynamics between the prosecution and the defense in adversarial judicial proceedings, countering the "monopoly" on covert activities by law enforcement agencies that exists at the pre-trial stage of the process. Therefore, such a direction in applying and interpreting procedural law provisions in establishing the presence or absence of signs of crime provocation should be welcomed.

Conclusions

The conducted research on the proportionality of intervention and the balance of public and private interests during the covert collection of evidential information in criminal proceedings allows for the identification of the following law enforcement trends:

1) adhering to the proportionality of intervention and balancing public and private interests is particularly challenging during procedural operations involving digital data carriers, which serve as 'concentration points' for several fundamental human rights and freedoms. Effective safeguards against abuse must accompany any interference in these rights. Law enforcement practice demonstrates a tendency to shift the emphasis in favor of the public interest, which, considering the risk of uncontrolled and arbitrary intrusion into privacy, is difficult to justify;

2) the protection of the confidentiality (secrecy) of the technical component of covert investigative (search) actions, which is not fully reflected in the relevant protocols contrary to several procedural law requirements, is justified concerning special technical means but cannot be considered proportional regarding the carriers of the obtained results. Judicial practice, while recognizing the possibility of not reflecting such data in the protocol, does not demonstrate an adequate level of requirements for the documentation of its appendices;

3) the assessment of the presence or absence of signs of crime provocation, as practiced by the court of cassation, reflects a comprehensive approach to considering the circumstances of conducting a covert operation, as well as the activity and good faith of the prosecution's procedural conduct in the context of judicial adversariality.

Promising directions for further scientific research may include: a) the development and scientific justification of appropriate procedural algorithms for both overt and covert collection of evidential information from digital devices, which would ensure the proportionality of intervention and a reasonable balance between public and private interests; b) the formulation of amendments to legislation concerning the establishment of limits on reflecting the technical component of covert investigative (search) actions; c) the formation and scientific-practical provision of compensatory mechanisms that follow covert activities (proper documentation and recording of covert investigative (search) actions, ensuring the accessibility of all materials for verifying the presence or absence of crime provocation).

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