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## DISTINCTION BETWEEN COVERT INVESTIGATIVE (SEARCH) ACTIONS AND OPERATIONAL-TECHNICAL MEASURES AND SEARCH OPERATIONS (PART 1)

**Abstract. Purpose.** The aim of the article is to analyse and distinguish between operational and technical measures, covert investigative (search) actions and search operations, and to reveal their role and significance in criminal proceedings.

**Results.** The article studies general theoretical and problematic issues of distinguishing between covert investigative (search) actions and search operations, operational and technical measures, intelligence and counter-intelligence operations. The genesis of covert investigative (search) actions, the regulatory framework for forms of covert collection of information and the possibility of its use in criminal proceedings are reviewed. The general features and differences in the manner of collecting and using information collected from covert actions, the procedure and use in criminal proceedings are analysed. The author makes conclusions on the scope of application of search operations (operational and technical measures), which is broader than and not limited to criminal proceedings, although the results of such measures may be used in criminal proceedings. Emphasis is on the fact that the objective of search operations is to seek information on illegal activities and to detect criminal offences, while the objective of covert investigation (search) actions is to collect and verify evidence in a specific criminal proceeding in connection with a specific commission of a crime, an attempt or preparations. The objectives of counter-intelligence activities are analysed as a form of operative-search activities under part 2 of art. 2 of the Law of Ukraine “On counter intelligence activities,” such as collecting, analytical processing and use of information; counteracting intelligence, terrorist and other activities of the special services of foreign States, as well as those of organizations, individual groups and individuals, aimed at the detriment of the State security of Ukraine; developing and implementing measures related to prevention, elimination and deactivation of threats to the interests of the State, society and the rights of citizens. The evaluation of the results of such activities for the admissibility of evidence is emphasised.

**Conclusions.** The study determines the main criteria for distinguishing covert investigative (search) actions from search operations and operational and technical measures according to the objective, aim, legal grounds and actors of conduct, forms of monitoring and supervision of compliance with the law during their conduct, enabling conditions for violation (restriction) of rights and freedoms of individual and legal entities. The need to respect fundamental human and civil rights and freedoms while covertly collecting information and interfering in private communication is emphasised.

**Key words:** covert investigative (search) actions, operative-search activities, operational and technical measures, documents in criminal proceedings, evidence, admissibility of evidence, investigative actions.

### 1. Introduction

Before the adoption of the new version of the CPC in 2012, the criminal procedural legislation of Ukraine did not contain such a concept as CI(S)A. Instead, the form of covert collecting of information related

to criminal activity was search operations, including operational and technical ones, regulated by the Law of Ukraine “On operative-search activities,” by other laws, orders, instructions classified restricted, “secret” and “top secret.”

The regulatory framework for forms of covert information-gathering in criminal procedure legislation was long overdue and was necessitated by the need to establish clear and understandable rules for the conduct of such actions in order to safeguard human and civil rights, establishment of more effective judicial control over the restriction of such rights, especially in cases of interference with private communications or interference with the inviolability of the home, and introduction of a mechanism for the restoration of violated rights, freedoms and the introduction of a mechanism for State compensation for damage caused by interference with private life.

## 2. Analysis of legal regulations

As a result, CI(S)A have involved both elements of investigative (search) actions and search operations (hereinafter referred to as SO), operational and technical measures (hereinafter referred to as OTM).

When the 2012 CPC was being developed and adopted, scientists and practitioners discussed the further existence of SO and OTM, the significance and applicability of which essentially diminished after the introduction of CI(S)A. The proponents of the abolition of operative-search activities (hereinafter referred to as OSA) insisted on the need to prevent operational units from carrying out any actions aimed at collecting evidence, information-gathering without entering the URPI and beyond criminal proceedings. Contrary to this position, the representatives of the special services and operational units argued for the advisability and necessity of retaining this form of exercising powers by operational units, due to the specificity of the operational, operative-search activities, the impossibility of carrying out all operational measures solely within criminal proceedings.

Finally, the Law of Ukraine "On operative-search activities," like others regulating some aspects of the organization and conduct of intelligence and counter-intelligence operations, has not been repealed, and despite a significant decrease in the scope of SO and OTM, they are carried out, as well as the results of criminal proceedings are used in order to achieve the goal and objectives of OSA.

The issues of CI(S)A, OSA, the problems of their application, use and delimitation were under study by O.A. Bilichak, Yu.Yu. Brazhnik, O.M. Drozdov, O.V. Kaplina, S.S. Kudinov, V.D. Pcholkin, O.P. Sniherov, A.M. Tytov, O.H. Shylo, and others.

The possibility of assessing the results of operative-search activities in criminal proceedings through the compliance with the provisions of the principle of the rule of law and the princi-

ple of legality was studied by O.S. Oliinyk (Oliinyk, 2021).

The aim of the article is to analyse and distinguish between SO, OTM and CI(S)A, and to cover their role and significance in criminal proceedings.

## 3. Control and supervision in case of violation (restriction) of human rights and freedoms and rights and freedoms of legal entities

The analysis of the provisions of the CPC of Ukraine, the laws of Ukraine "On operative-search activities," "On intelligence," "On counter-intelligence activities" allows defining the following basic criteria for the delineation of CI(S)A and SO, OTM:

1. *With regard to objective (purpose).* In accordance with Art. 1 of the Law of Ukraine "On operative-search activities" (hereinafter referred to as the LoU on OSA) (Law of Ukraine "On operative-search activity", 1992), the objective of operative-search activities is to search for and record actual data on the unlawful acts of individuals and groups for which the CC provides liability, intelligence and subversive activities of the special services of foreign States and organizations in order to suppress offences and in the interests of criminal proceedings, as well as to collect information in the interests of the security of citizens, society and the State.

The objective of CI(S)A, which is a form of investigative actions under articles 223, 246 of the CPC of Ukraine, is the gathering (collecting) of evidence or the verification of evidence already collected in a particular criminal proceeding.

The following conclusions can be drawn from the wording. The scope of application of SO (OTM) is broader than and not limited to criminal proceedings, although the results of such measures may be used in criminal proceedings. The objective of SO is to seek information on illegal activities and to detect criminal offences, while the objective of CI(S)A is to collect and verify evidence in a specific criminal proceeding in connection with a specific commission of a crime, an attempt or preparations. The objectives of counter-intelligence activities as a form of operative-search activities, under part 2 of art. 2 of the Law of Ukraine "On counterintelligence activities" (here and after referred to as the LoU on CA) are collecting, analytical processing and use of information that implies signs or facts of the intelligence, terrorist and other activities of the special services of foreign States, as well as those of organizations, individual groups and individuals, aimed at the detriment of the State security of Ukraine; developing and implementing measures related to prevention, elimination and deactivation

of threats to the interests of the State, society and the rights of citizens.

2. *With regard to the aim.* The aim of the application of CI(S)A is solely to safeguard the interests of criminal proceedings, to identify the perpetrators of specific criminal offences recorded in the URPI and investigated, and to prove their guilt. Instead, the aim of operative-search, intelligence and counter-intelligence activities is to prevent, promptly detect and prevent external and internal threats to the security of Ukraine and to cease intelligence, terrorist and other unlawful attacks by the special services of foreign States, as well as by organizations, groups and individuals, against the State security of Ukraine, and the elimination of an enabling environment for them and the reasons for their occurrence.

Therefore, the aim of SO is precisely to cease and prevent offences. The interests of criminal proceedings are considered as an additional (secondary) task. Operative-search activities in connection with intelligence activities or the detection and cessation of intelligence and subversive activities may not always involve the commission of an act, a doing, liable under the CC, but be required by the general interests of the security of citizens, society and the State.

3. *With regard to causes and grounds for conducting OSA.* According to art. 6 of the LoU on OSA, grounds for OSA are:

1) Sufficient information collected in the manner established by law, which requires verification by means of search operations on: criminal offences being prepared; persons who prepare the commission of a criminal offence; fugitives from pre-trial investigation bodies, the investigating judge, the court or evaders from serving their sentences; persons missing; intelligence and subversive activities of the special services of foreign States, organizations and individuals against Ukraine; the real threat to the life, health, housing and property of judicial and law enforcement personnel in connection with their official activities; as well as persons participating in criminal proceedings, members of their families and close relatives, with a view to creating the necessary conditions for the proper administration of justice; officers of the Ukrainian intelligence agencies in connection with the official activities of these persons, their close relatives and persons who cooperate or have cooperated in confidence with the intelligence agencies of Ukraine, as well as their family members for the purpose of appropriate intelligence activities;

2) Requests of competent State bodies, institutions and organizations for the screening of persons in connection with their access to State secrets and to work with nuclear materials

and nuclear facilities; as well as persons granted permission to stay unaccompanied in controlled and sterile areas, restricted areas, protected areas and critical sectors of such airports areas;

3) The need to verify persons in connection with their appointment to posts in the Ukrainian intelligence agencies or their involvement in confidential cooperation with such bodies, and the access of persons to intelligence secrets;

4) Search and counter-intelligence operations (Law of Ukraine on Intelligence, 2020);

5) Availability of consolidated materials from the central executive authority implementing public policy on preventing and combating the legalization (laundering) of proceeds from crime or the financing of terrorism (SCFM) collected in the manner prescribed by law.

The cause (the form containing the grounds for OSA (establishment of the OPC)) under part 6 of Art. 2 of the LoU on OSA may be applications, reports of citizens, officials, public organizations, mass media, in written assignments and decisions of the investigator, instructions from the prosecutor, rulings of the investigating judge or court, materials of law enforcement agencies, requests and communications from law enforcement bodies of other States and international law enforcement organizations, as well as requests by authorized State bodies, institutions and organizations designated by the CMU to inspect persons in connection with their access to State secrets, work with nuclear materials and nuclear facilities.

With regard to counter-intelligence activities as a form of operative-search activities, the causes and the grounds on which it is conducted are provided for in article 6 of LoU on CA and have certain specificities.

Grounds for counter-intelligence activities are:

1) Sufficient information, which should be verified by means of special forms and methods, on: intelligence activities against Ukraine by the special services of foreign States, as well as by organizations, individual groups and individuals; infringement of the State sovereignty, constitutional order and territorial integrity of Ukraine; terrorist attacks or activities; criminal offences against peace, the security of mankind and the international legal order;

2) Execution of the tasks defined by law regarding: counter-intelligence support for economic, information, scientific and technological potential, defence and industrial, transport complexes and their facilities, and the national communications system, the Armed Forces of Ukraine and other military formations established in accordance with the laws of Ukraine, military and technical cooperation, compliance

with international non-proliferation regimes; the counter-intelligence support for Ukrainian diplomatic establishments abroad and the security of staff of such establishments and members of their families in the host State, and of Ukrainian citizens who are sent abroad and who are aware of information constituting a State secret, and the protection of State secrets in these establishments; counter-intelligence protection of State authorities, law enforcement and intelligence agencies, protection of State secrets; protection of embassies and missions of foreign States in Ukraine and their personnel against terrorist attacks; examination and verification of persons to be administered for access to State secrets, to work with nuclear materials and to nuclear facilities or to confidential cooperation; ensuring own security, including members of agencies and units engaged in counter-intelligence activities, members of their families and persons who assist and support in counter-intelligence activities; information and analytical support for State authorities (regarding threats to State security of Ukraine);

3) The need to detect by technical means and to shut down radio-electronic and other devices whose operation poses a threat to the State security of Ukraine or a precondition for leaking information with restricted access, as well as radiation from radio-electronic media used for illegal purposes.

The focus should be on certain specificities and differences in the grounds for operative-search and counter-intelligence activities. According to LoU on OSA, the basis for OSA can only be sufficient information, which needs to be verified, *collected in the manner prescribed by law*. Instead, the ground for CIA is any sufficient information, which needs to be verified by special forms, methods, means, regardless of legality of its origin. Counter-intelligence activities require neither the source nor the conditions and manner of collecting information, the main point is that it would be considered sufficient to trigger CIA and would require special forms, methods, means to be verified, while a violation of the procedure for gathering information to be verified by SO could entail admitting such information from OSA useless for achieving the goal and objectives of OSA.

Furthermore, certain differences in the causes of counter-intelligence activities exist. In addition to the ones mentioned in article 6 of the LoU on OSA, the cause for conducting CIA can also be: the fact that the units of internal security of the State Border Service of Ukraine perform tasks of ensuring safeguard (protection) of the State border of Ukraine; the performance by the State Protection Service Department of the tasks of protecting officials

for whom State protection is provided; intelligence activities by the intelligence agencies on the basis of article 17 of the Law of Ukraine "On Intelligence" (Law of Ukraine on Intelligence, 2020); information of persons involved in confidential cooperation; materials of the SSU on organization, implementation, forms and methods of terrorism, intelligence and other activities to the detriment of State security in Ukraine.

With regard to CI(S)A, in accordance with the requirements of articles 214, 223 and 246 of the CPC of Ukraine, the ground for their conduct is a decision by the investigator, the prosecutor or the investigating judge, at the request of the investigator, with the consent of the prosecutor, made in criminal proceedings in cases where the information on a criminal offence and the offender cannot be collected otherwise. According to articles 260-264 (in so far as conduct on the ground of a decision of the investigating judge), 267, 269, 269, 269-1, 270, 271, 272 and 274 of the CC of Ukraine, CI(S)A are conducted exclusively in criminal proceedings in connection with grave and exceptionally grave crimes.

Therefore, according to legislation, a ground for conducting CI(S)A is a set of requirements, such as: a registered criminal proceeding; the investigation of a criminal offence, which meets certain requirements of gravity, depending on the type of CI(S)A; the adoption (issuance) of a procedural decision by an authorized entity; the impossibility of collecting otherwise information on the criminal offence and the offender.

The cause for conducting CI(S)A is information collected during the pre-trial investigation on the facts of the criminal offence, the offender(s) and the impossibility to collect otherwise the necessary information. Such information may be contained in procedural instruments, such as investigation reports, media, documents and the like.

4. *With regard to the actors of the conduct.* In accordance with article 5 of the LoU on OSA, the actor of operative-search activities is operational units: the National Police, the State Bureau of Investigation, the Security Service of Ukraine, the Foreign Intelligence Service, the State Border Service of Ukraine, the State Protection Department, the Tax Police, penal enforcement bodies and institutions; intelligence bodies of the Ministry of Defence, the National Anti-Corruption Bureau of Ukraine, while article 5 of the LoU on CA defines actors of counter-intelligence activities, such as: specially authorized operational units of the SSU, the SBSU, the SPD.

The actors of CI(S)A are the investigators and, at their request, operational units,

and of CI(S)A in the form of the withdrawal of information from the transport telecommunication networks are authorized units of the SSU, the NP, the NABU and the SBI.

5. *With regard to forms of control and supervision of compliance with the law in their implementation.* Operative-search activities are subject to departmental control. The Chief of the Operative unit is responsible for the legality of measures.

The supervision of OSA is exercised by the Prosecutor-General, his deputies, the heads of regional prosecutors, their first deputies and deputies, as well as by the relevant regional prosecutor's offices authorized by an order of the Prosecutor-General's Office and by an order of the Head of the Region Prosecutor's Office. The Head of the District Prosecutor's Office, as well as the prosecutors of the District Prosecutor's Office, authorized by his order, supervise the observance of the law in the course of operative-search activities in operative-search cases instituted by local operational units of law enforcement bodies under their supervision (Law of Ukraine On operative-search activity, 1992).

The above-mentioned requirements of LoU on OSA provide for the exercise of supervisory functions by prosecutors in a specific sector or in a specific operational unit and the ground for their execution is an order of the Head of the Prosecutor's Office, which authorizes the prosecutor to supervise not a specific operative-search case but operative-search activities in a certain operational unit(s). As a rule, individual orders are issued to supervise departments.

In criminal proceedings related to CI(S)A the functions of departmental supervision are exercised by the head of the pre-trial investigation body within the powers defined in article 39 of the CPC of Ukraine, as well as in so far the extension of CI(S)A, initiated by his or the investigator's decision, up to six months, approval of the use of previously identified (marked) or false (simulation) means, approval of the decision on disclosure, before the completion of the pre-trial investigation, the real information about specially formed business entities or about a person, acting without revealing his/her true identity.

In addition, it is provided that the departmental control can imply the right of the heads of autonomous structural units of authorized law enforcement bodies to decide on the extension of CI(S)A, initiated by the decision of the investigator, up to twelve months, and of the heads of departments, up to eighteen months.

With regard to the exercise of supervisory functions by prosecutors, the main powers are

granted to prosecutors, as they are procedural controllers, who agree on the request of investigators or make decisions in cases prescribed by law on CI(S)A, organise them, give instructions, decide on the classification of secrecy, their removal, etc. in specific criminal proceedings, where they are determined as procedural controllers or included in the group of prosecutors of procedural controllers. The powers of the heads of the Public Prosecutor's Offices related to organisation and conduct of CI(S)A are limited to ensuring secrecy.

6. *With regard to enabling conditions for violation (restriction) of rights and freedoms of individual and legal entities.* According to part 5 of art. 9 LoU on OSA, an individual restriction of rights and freedoms in the course of operative-search activities is possible, provided: such violations are temporary and exceptional; they are applied by decision of a judge; the purpose of such restriction is to detect, prevent or cease a grave or exceptionally grave crime, to search for persons who evade serving a sentence or missing persons, and to protect life, health, housing and property of court and law enforcement personnel and persons participating in criminal proceedings, and to terminate intelligence and subversive activities against Ukraine; operational and technical means may be only applied to persons in respect of whom an operative-search case is initiated (registered); in other cases provided for by Ukrainian law, in order to protect the rights and freedoms of other persons and the security of society, a person whose rights have been violated during OSA, has the right to a written explanation of the restriction of his/her rights and freedoms and to an appeal.

#### 4. Conclusions

The procedure for CI(S)A, in so far the restriction of human rights and freedoms in the conduct of criminal proceedings, provides for: CI(S)A in exceptional cases when information cannot be collected otherwise; application according to decision of the investigating judge; possibility of conduct in respect of not only grave and exceptionally grave crimes; CI(S)A not only in respect of the suspect, but in respect of any person; the exhaustive list of grounds for the restriction of constitutional human and civil rights in the CPC; no additional grounds for CI(S)A provided for by other laws and by-laws; notification of the person whose rights are to be restricted.

However, counter-intelligence activities, as a form of operative-search activities, have their own characteristics and specificities that also influence the assessment of their use in criminal proceedings. These issues will be addressed in the second part of the article.

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## ВІДМІННІСТЬ НЕГЛАСНИХ СЛІДЧИХ (РОЗШУКОВИХ) ДІЙ ВІД ОПЕРАТИВНО-ТЕХНІЧНИХ ТА ОПЕРАТИВНО-РОЗШУКОВИХ ЗАХОДІВ (ЧАСТИНА 1)

**Анотація.** *Метою статті* є аналіз та розмежування негласних слідчих (розшукових) дій та оперативно-розшукових, оперативно-технічних заходів, а також з'ясування їх ролі й значення у кримінальному провадженні.

**Результати.** Статтю присвячено загальнотеоретичним та проблемним питанням розмежування негласних слідчих (розшукових) дій та оперативно-розшукових, оперативно-технічних, розвідувальних і контррозвідувальних заходів. Досліджено генезис негласних слідчих (розшукових) дій, регламентацію форм негласного збирання інформації, можливості її використання у кримінальному судочинстві. Проаналізовано спільні риси та відмінності щодо порядку одержання й використання у кримінальному провадженні інформації, одержаної за наслідками проведення негласних заходів. Сформульовано висновки щодо сфери застосування оперативно-розшукових заходів (оперативно-технічних заходів), яка є ширшою та не обмежується кримінальними провадженнями, хоча результати таких заходів можуть використовуватися у кримінальному судочинстві. Акцентовано на тому, що завданням оперативно-розшукових заходів є пошук інформації про протиправну діяльність, виявлення кримінальних правопорушень, тоді як завданням негласних слідчих (розшукових) дій є збирання доказів і їх перевірка в конкретному кримінальному провадженні за конкретним фактом вчинення злочину, замаху на нього чи готування. Проаналізовано завдання контррозвідувальної діяльності як різновиду оперативно-розшукової діяльності відповідно до ч. 2 ст. 2 Закону України «Про контррозвідувальну діяльність», якими є добування, аналітична обробка та використання інформації; протидія розвідувальній, терористичній та іншій діяльності спеціальних служб іноземних держав, а також організацій, окремих груп та осіб на шкоду державній безпеці України; розроблення й реалізація заходів щодо запобігання, усунення та нейтралізації загроз інтересам держави, суспільства і правам громадян. Особливо приділено увагу оцінці результатів такої діяльності стосовно допустимості доказів.

**Висновки.** Визначено основні критерії розмежування негласних слідчих (розшукових) дій та оперативно-розшукових, оперативно-технічних заходів за завданням, метою, правовими підставами, суб'єктами проведення, формами контролю й нагляду за додержанням законодавства під час їх проведення, умовами, за яких допускається порушення (обмеження) прав і свобод людини та юридичних осіб. Особливо зосереджено увагу на необхідності дотримання основоположних прав і свобод людини та громадянина під час негласного збирання інформації та втручання у приватне спілкування.

**Ключові слова:** негласні слідчі (розшукові) дії, оперативно-розшукова діяльність, оперативно-технічні заходи, документи у кримінальному провадженні, докази, допустимість доказів, слідчі дії.

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