OPERATIVE-INVESTIGATION WORK IN LAW ENFORCEMENT AGENCIES

Operative-Investigation work in Law Enforcement Agencies

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Introduction

The use of operative-investigative activities by law enforcement agencies with the purpose of opening the cases and preventing crime is largely related to the establishment and development stages of general crime preventive and investigative tactics in the country.

In Georgia operative activity in law enforcement agencies, as a method for investigating and preventing crime, originated during the Soviet era. At an early stage, operative activity was a somewhat informal method of investigating a crime. Over time it became the main, indivisible method of activity and investigation conducted by the relevant bodies.[1]

For a long period of time, the tactic of operative activity and its implementation method were not regulated at the legislative level and they were directly determined by the police officers or officials on a case by case basis. Over time, the police operative activity became methodically diverse. Institute of internal and external surveillance of the police intelligence was established and the involvement of secret officers (agents) in the investigation process was instigated. Operative work in the member states was interpreted as a system of surveillance activities, which, based on law and other normative acts, was directed at preventing crime and opening cases using special tactical, technical methods or means. The law of that period differentiated two main functions of operative work and read as follows: "*…operative work serves the interests of the preliminary investigation, ensures its opening, … it is of prophylactic nature and is aimed at preventing possible crime*".[2]

The functioning of operative activity in the existing form was largely driven by then established attitude towards avoidance and prevention of a crime. The understanding of crime prevention during that time was based not on the interdisciplinary analysis of the crime. It was instead explicitly thought of as a part of the work of a judge and investigator only.[3]

As of today, the purpose and form of operative activity in almost every post-Soviet country are alike. It should be noted, that acts regulating operative work in these countries are absolutely analogous on both conceptual and structural levels. Specifically, these countries share a similar purpose of the operative activity, the method of its implementation, and principles of operative activity. Legislations of almost all countries define types of

1 A.S. Bazarbayev, Forensic fundamentals of operational investigative activities, Bulletin of KazNPU, 2011, https://articlekz.com/article/10356

2 A. Bakradze, Soviet Law, 1986, N2, p. 19

3 Bezhan Kharazishvili, Criminology, Tbilisi, 1969

activities, rules of its implementation and the human rights standards in a similar manner. The system and supervision mechanisms of the bodies conducting operative-investigative activities are also somewhat identical.[4]

During the period of political-legal transformation, despite the recognition of the human rights' primacy by the states, all the operative legislations of the former members states largely shared the spirit of operative activity as presented during the Soviet period. Although a provision regarding human rights protection appeared in a special law regulating operative activity, the regulations obtained formal nature. This was due to the failure of the guarantees for human rights protection determined by the law failed to be a counterbalancing mechanism for this type of operative measures and their implementation methods.

On the other hand, the tendency of unlimited use of covert methods in police activity significantly determines the overall attitude of the country towards the police activity. It determines the quality of the relationship between the police and public. In the setting where the system is locked down and the secrecy of activity is maximized, it is difficult for law enforcement agencies to build their activity on public trust.

Throughout the years, research on law enforcement agencies' activity clearly highlighted the gaps and approaches that exist in regard to the operative activity of law enforcement agencies in the country. In this context, it is necessary for the state to take specific steps to fundamentally reform operative activity. Replacing operative activity with human rights-based mechanisms should become an indivisible part of the police reform in the country.

4 See: Georgian, Lithuanian, Moldovan, Armenian, Azerbaijani, Kyrgyz, Russian law on "Operative-Investigative Measures"

Importance and Methodology of Research

The present study addresses the operative activity of law enforcement bodies. The work on this study was mostly conditioned by the fact that since the country's recognition of its independence to this day, the operative work of law enforcement agencies in this country has been the main tool for crime prevention, detection, and eradication at the same time.

Operative work is based on the principle of strict confidentiality, which, due to its legal nature, has not been the subject of in-depth research and discussion so far. However, the knowledge and experience accumulated in society over the years clearly indicate that this mechanism is one of the problematic and less controlled parts of law enforcement activities.

Initially, it was not the purpose of the presented report to conduct thorough research on operative-investigative activity. The report generally outlines the course of establishment and development of the operative-investigative activity, the specifics of conducting operative activity by relevant agencies, the degree of public control of covert police activity and quality of human rights protection within the framework of operative activity; it also shows shortcomings of legislation and practice. The document generally analyses the situation in the country in this regard and presents relevant recommendations.

While working on the research, the Organization mainly relied on analysis of legislation and practice, workshops with various thematic groups, and individual interviews with investigators and prosecutors who had direct practical contact with operative measures. In the course of conducting the research, the Organization analysed public information and statistical data of various agencies. The overview of specific sections of this study is based on the decisions of the Constitutional Court of Georgia and secondary analysis of the studies existing in this field.

Analysis of Legislation

All relevant legislative acts regulating issues of general criminal justice and operative activities in law enforcement bodies were thoroughly analysed while working on the study.

Considering that in parallel with the basic law, operative-investigative activity is also subjected to detailed regulation by individual acts of agencies, the Organization attempted

to conduct a comprehensive study of regulations adopted by specific agencies in regard to operative activity. For this purpose, the Organization requested public information from each of the bodies authorized by law to carry out the operative activity. However, each agency refrained from issuing their internal acts and in doing so they, by default, referred to the provision of the law on State Secrets.

In general, the following normative acts were reviewed in the course of the research:

- Constitution of Georgia;
- Law of Georgia on Operative-Investigative Activities;
- Law of Georgia on Police;
- Criminal Procedural Code of Georgia;
- Law of Georgia on State Secrets;
- Law of Georgia on State Security;
- Law of Georgia on Counter-Intelligence Activities;
- Law of Georgia on the Georgian Intelligence Service;
- Law of Georgia on the Special State Protection Service of Georgia;
- Law of Georgia on the State Inspector Service;
- Law of Georgian on the Investigation Service of the Ministry of Finance
- Law of Georgia on Prosecutor's Office;
- Law of Georgia on Electronic Communications;
- Imprisonment Code.

In the course of the research, the bylaws (regulations determining authority) regulating the activities of each of the agencies that have the authority to carry out operative activity, were also analysed in detail.

Analysis of Public Information Received from Relevant Agencies and Courts

As mentioned above, during this research, the project team applied to various agencies several times and requested different information related to operative-investigative activity. First and foremost, the project team requested each body authorized to conduct operative activity to issue internal regulations and bylaws of the body related to the operative activity, which cover funds allocated directly for implementation of the operative-investigative activity within the scope of this body; bylaws defining the qualifications of persons employed in this field of the body; data on statistical amount of persons employed in the operative field and those who under the Law of Georgia on

Operative-Investigative Activity, voluntarily cooperate with the operative agencies on the basis of a relevant contract.

Research on Practice of Operative Activity

Considering that operative activity is mostly confidential, the study of special law alone does not provide for a thorough analysis of the specifics of this work. In addition, in many cases, the practice of investigative bodies goes beyond the theoretical scope of existing regulations. Consequently, the project team found it important to conduct interviews directly with people, who have practical contact with operative work and whose main component of authorisation is to conduct the operative-investigative activity.

During the research, the project team had in total of 25 individual interviews with prosecutors, investigators, and operative staff of various level. More specifically, interviews were conducted with prosecutors, (Main Prosecutor's Office of Georgia, Tbilisi Prosecutor's Office, and Rustavi Prosecutor's Office) investigators and operative staff of the Ministry of Internal Affairs and the Investigation Service of the Ministry of Finance.

The information obtained during the interviews ultimately played an important role in identifying the practical analysis of operative activity, within the framework of this research and the associated problems, shortcomings existing on practical and legislative levels.

The Main Obstacles to Research

Operative activity in its essence is one of the most closed and confidential parts of law enforcement bodies. This consideration was one of the main obstacles to the research. The project team did not receive from the relevant offices comprehensive information on almost any important issue of the research. In many cases, the offices avoided not only providing information that is legally recognized as a state secret, but they shunned from disclosing any information related to operative work whether or not it was subject to a special regime of protection. Despite the complexity and confidentiality of the issue, the specific agencies expressed their readiness to conduct interviews with relevant staff, which was significant support for the project team in researching about operative work. The only office that refrained from engaging in the process was the Investigative Department of the Penitentiary Service. Notwithstanding the openness of the agencies, prior agreement with them regarding the interviewing process, sharing of questionnaires, the

respondents of the interview were particularly cautious about this process and in certain cases shunned from answering questions whether or not that question was related to a part of operative activity, that was classified by law and protected from revealing.

One of the major obstacles for the project team turned out to be the research on the international part of the operative activity. This is a particularly specific form of activity of law enforcement agencies, the absolute consistent practice and mechanism of which is not precisely well employed by the legislation of other countries. However, within the scope of available resources, the project team analysed the relevant practices and regulations in this area. This included overviewing developing tendencies and existing regulations of operative activity within post-Soviet countries.

Key Findings and Recommendations

The analysis of the current legislation and practice has identified the main problems associated with the operative activity in law enforcement agencies. In light of overwhelming and uncontrollable power of law enforcement agencies, working on crime prevention, detection and eradication with an operative activity using same standards, endangers the protection of fundamental human rights and increases the risk of applying this mechanism for social control.

More specifically, the following problematic issues were identified in the study:

- Within the existing legislative order, it is unclear exactly what the purpose of the operative activity has and what kind of action does it represent – a procedural or preventive mechanism;

- The attitude towards objectives and goals of operative activity of relevant agencies is not coherent either. In many cases, it is used as a preventive or crime detection tool, and in most cases, it is used as an auxiliary mechanism for investigation;

- From a practical point of view, assignment of the status of auxiliary investigative mechanism to the operative activity is related not so much to the shortcomings of the Criminal Procedural Code or lack of appropriate mechanisms, but to the "flexibility" of operative activity;

- The practical "flexibility" of the operative activity, in contrast to procedural acts, is expressed in the simplicity of its implementation and less procedural constraints, which makes work of investigative bodies easier;

- In practice, operative activity artificially and along with Procedural Code, establishes mechanism responding to the received crime-related information. It also forms the information verification stage, the so-called pre-investigation phase, which contradicts the Procedural Code;

- Several legislative measures are operative, police and investigative acts at the same time. Consequently, in a specific case, it is impossible to determine under what law and under what conditions the relevant person is taking certain measures (for example, questioning, identifying a person);

- The country lacks a unified, interdisciplinary strategy that ensures equal involvement of different actors at the crime prevention stage;

- The lack of unified prevention strategy largely results in the intensive involvement of law enforcement agencies in the process of crime prevention, the use of mechanisms incompatible with crime prevention, including operative activity;

- Public openness towards investigators is low, which in turn impedes their communication with members of society and access to information relevant to the circumstances of the case within the scope of the investigation;

- "Extracting" important information from the public with operative work is done easily, which encourages investigative bodies to take operative measures and involve confidants even during the course of an investigation;

- The principles set out at the legislative level for operative activity, are inconsistent with their use in practice. Operative measures are often used not only in cases directly defined by the law but without appropriate grounds as well, to avoid potential, abstract danger, and possible criminal activity;

- The legislation does not contain a unified standard regarding the timeframe of operative measures and time limitation for each measure depends on its ground of application;

- Only operative activity conducted by a prosecutor or investigator with the prosecutor's consent is limited in time. In other cases, it may be carried out indefinitely on the basis of the discretion of the agencies concerned;

- Operative activity is carried out only on a formal basis. Unlawful behaviour is not differentiated by its severity or nature. Therefore, the operative activity of any degree/severity, is used simultaneously to prevent and detect crime and administrative misconduct;

- Despite implemented legislative changes, the Law on Operative-Investigative Activity still contains measures that are characterized by a high risk of violating the right to privacy and is conducted without proper judicial authorization;

- The law does not include detailed procedural regulation for implementing covert activities within the scope of operative activity. The law does not specify person/authority conducting these activities and the person/authority issuing the permit for it, it does not directly define the object of a specific activity (controlled delivery /controlling purchase);

- Within the scope of an operative activity, the legislation does not hedge the risks of provoking a crime. The Procedural Code does not directly consist the mechanisms affecting the provocation risk assessment and outcome of the criminal case;

- Law enforcement agencies are actively using informants, so-called confidants while conducting the operative activity. The legislation does not foresee the control of confidants' activities. Therefore, the risk of abusing authority or provoking a crime within the scope of operative activity by such person is not hedged;

- Almost all investigative bodies and law enforcement agencies have operative authority; including bodies wherein activity and specifics of the operative power are not primarily related to the matters of investigation and/or public safety;

- Investigative and operative powers of the relevant bodies are not clearly differentiated neither on the structural, nor on the official level, which leads to overlapping and duplication of competence;

- Prosecutorial and judicial supervision mechanisms are weak and mostly of fictitious nature;

- The right to plan, execute and supervise operative activity is at the same time directly placed under the mandate of agency implementing the measure.

Specific Recommendations

Last year the state began active work on reforming the investigative system and some steps have already been taken in this aspect. The concept of the reform has been developed and the Venice Commission has been involved in the evaluation of the process, which is clearly a significant process and should be positively assessed. Changes have also been introduced to and implemented within the specific agencies to differentiate operative and investigative powers, which, is important but not sufficient component of reform.

Clearly, in law enforcement agencies, maintaining current regulations of operative activity and practice is incompatible with a human rights-based view of policing and democratic principles. In a situation like this, it is important the government to start a discussion and puts forward a fundamental reform of the operative activity, which should become an associative process of the large-scale reform of the investigative system.

It is advisable to carry out the operative work reform in stages, with the vision and approach that at the final stage of the reform, it is possible to change the strategy of the law enforcement agencies' work and to replace the operative work with a modern mechanism in compliance with international standards. Over time, the Law on Operative-Investigative Activity should be repealed and activities existing today within the scope of operative activity should be incorporated into the Law on Police and Criminal Procedural Code.

At the transitional stage, it will be important to make specific changes in the legislation. Changes should facilitate the changes of the established practice of the law enforcement system and create the possibility of a new vision, adaptation of agencies to work strategies.

The project team has following recommendations on how to build the initial foundation for large scale changes:

- The state should take timely steps to fundamentally change the crime prevention policy. Crime prevention, regardless of the level of prevention, should not only be part of police activity. The operative activity should not be the main method of police preventive work;

- Operative, police preventive, investigative and operative-search measures should be clearly differentiated in legislation;

- A different regime should be assigned by legislation for measures that are used for searching on one hand, and for investigative purposes on the other hand;

- For operative-searching activity, a procedure should be designed to enable the authorities to identify the whereabouts of the wanted person not only during the course of the criminal proceedings but also after the final judgment of the court. In doing so this process should be protected from disproportionate interference with one's personal life;

- The basis for implementing operative measures should be thoroughly reviewed. The law should abolish the provision, which puts the pre-investigative stage into practice and allows the so-called verification of information outside the scope of criminal proceedings, bypassing the investigation;

- Duplication in the Criminal Procedural Code and Law on Operative-Investigative Activities in relation to specific measures must be corrected;

- Regulations as to the rules and conditions of the conduct of investigative actions should be included only in the Procedural Code. Legislation should avoid parallel, contradictory regulations;

- During the transitioning period, until specific measure remains within the scope of the operative legislation, the actions that are at high risk of interference with the right (e.g. visual control) should be reasonably limited in time, subjected to judicial authorization prior to implementation, and monitor during its course;

- Legislation should set out a limited range of offenses, where it will be possible to use high-risk interference measures;

- The implementation of operative activities in practice should be based on the principles established by law for this purpose. The use of operative measures to prevent abstract threats should be restricted to reference to formal grounds only;

- In order to uphold the principle of proportionality, the law should severely restrict the use of heavy measures with high-risk of interference in the human rights, for revealing administrative misconduct;

- Legislation should clearly define the timeframes for carrying out operative measures. Operative measures should be limited for a period of time, despite the ground of its conducting;

- For a specific operative measure, the term specified by law must be proportionate to the type of measure;

- Operative measures, which include the risks of provoking a crime, should fall within the scope of the Procedural Code (controlling purchase, controlled delivery);

- The Code shall hedge the risks of provocation in relation to controlled delivery and controlling purchase;

- Legislation should make it possible to raise and discuss the issue of crime provocation when examining evidence obtained on the basis of the aforementioned measures at the trial stage. The discovery of provocative elements in an action should be the basis for termination of the case, mitigation of penalty or acquittal;

- The state should take effective steps to improve interdependence between the police and society and build public trust in the police sector. Lack of trust is largely due to the intensity of covert police activity carried out on the basis of its incorrect, disproportionate mechanisms. The regulation of this issue will be an important prerequisite for a speedy and efficient conduct of investigation process;

- It must be established by the law guarantees for the protection of the confidant, on the one hand and the monitoring of his/her activities on the other;

- Within the scope of the reform the agencies with operative authorities should be scrutinized. As the very least, those powers shall not be exercised by authorities whose activities are not directly related to the investigation and / or provision of public order and safety. The same applies to the bodies that, under the mandate, have alternative mechanisms prescribed by the law to identify internal and external threats;

- Operative and investigative powers should be clearly distributed among the relevant authorities and structures. In this context, the process of rigorous differentiation of operative and investigative powers initiated by Tbilisi Police Department under the auspice of the Ministry of Internal Affairs shall not be terminated and should continue equally across all territorial bodies of the Ministry;

- Legislation should create solid safeguards for operative oversight. An effective control mechanism for operative activities should not be confined to only the implementing agency;

- Legislation should also establish effective judicial mechanisms oversighting operative activities. For specific operative measures, which are characterized by a high risk of interference with the right, specific pre-judicial permission and post-implementation monitoring mechanism must be established.

1. Establishment and Development of Operative Activity in Georgia

Following the restoration of independence, Georgia adopted the Law on Operative-Investigative Activity in 1999. The law has undergone significant changes since its adoption. The list of bodies with operative powers, the range of persons that could be subjected to operative-investigative measures, the type and nature of the operative measure, the term of conducting the operative measure and the grounds for its prolongation were often changed by the law.

The purpose and role of operative activities in securing public order were unclear and vague from the outset. The legislator turned the operative activity into a means of achieving various ends, and simultaneously included identification, eradication, and prevention of crime and other unlawful acts into it.[5]

It is noteworthy that the adoption of this law preceded by, firstly, the adoption of the Law of Republic of Georgia on Police in 1993 and then the adoption of the Criminal Procedural Code in 1998. Under then applicable Law on Police, the prevention of crime was considered part of the activities of the police authorities,[6] and the investigation of the crime and the identification of the perpetrator were defined as the goal of the preliminary investigation conducted within the scope of the criminal process.

The state took the obligation to develop a legislative act regulating operative activities based on the 1993 Law of the Republic of Georgia on Police.[7] At the same time, the operative activities of the police became part of the aforementioned law,[8] which allowed the police to carry out operative activities in specific cases. However, this law did not specify what specific actions other than those provided for in the Law on Police the police could take in the course of operative activities.

During this period, by virtue of regulations included in the Law on Police and Criminal Procedural Code, the legislator in various respects established all mechanisms for combating crime, both by preventing it in the context of police activity and by responding through procedural tools to already committed crim. In these circumstances, the

5 See: Law of Georgia on Operative-Investigative Activities, Article 2, as amended on 30 April 1999

6 See: Law of the Republic of Georgia on Police, Article 2 2

7 See: Decree of the Parliament of Georgia on the Law of the Republic of Georgia on Police, paragraph 3, subparagraph 1

8 See: Law of the Republic of Georgia on Police, 1993

function of operative activity has become even more vague in terms of responding to behaviour conflicting with the law. Later, within the scope of the reform of the Criminal Procedural Code of 2009, discussions as to the fundamental transformation of operative activities have started.

The initial version of the Criminal Procedural Code of 2009 contained a chapter on covert investigative actions. This edition of the Code considered covert investigative action to be almost all conspiratorial measures that were part of operative activities at that time. Within this scope of this edition of the Code, investigative actions included visual and other forms of control, controlling purchase and controllable supply, and covert communication surveillance.[9] According to the same version of the Code, the Government was obliged to develop a special draft law on Covert Investigations, while the Law of Georgia on Operative-Investigative Activities would be declared repealed.[10] However, with the first amendment to the Code, this provision was removed. It is unknown what this decision was based upon and what was the political-legal argument of the Parliament.

The fact that there is no mentioning of the amendments made to the article in the Explanatory Note to the Draft Law on the Criminal Procedural Code of 24 March 2009 makes it even more unclear as to what specific purposes this amendment served in the Procedural Code and what became the basis for its implementation.

After the removal of the above article from the Procedural Code, law enforcement systems continued their operative activities in accordance with the established practice. With contradictory legal regulations, the role of operative activity has become even more unclear over time. In this legal context, operative activity has lost all legitimate function and remained only a mechanism for mass social control.

1.1. Case Law of Constitutional Court on Operative Activities

The case law of Constitutional Court has played an important role in establishing human rights safeguards within operative activities. The provisions of the Georgian Law on Operative-Investigative Activities have been discussed by the Constitutional Court mainly in terms of inviolability of personal life, right to personal development and a fair trial.

9 See: Criminal Procedural Code as amended on 9 October 2009

10 See: Criminal Procedural Code Georgia, Article 333, Section 4, as amended on 9 October 2009

Georgian Young Lawyers' Association and Georgian citizen Ekaterine Lomtatidze v. Parliament is one of the first decisions of the Constitutional Court addressing the operative-investigating activities. Subsequently, it became an important basis for constitutional clarification of the right to privacy in the country.[11] In this case, the Constitutional Court discussed the constitutionality of the grounds for restricting communication by various technical means within the scope of operative activities.

The edition of the law applicable prior to the 2007 legislative amendments allowed monitoring of telephone and other means of communications on several grounds. These grounds included a decision of the court or prosecutor, or a written statement of the victim of an unlawful act. If the issue concerned an action for which a sentence of imprisonment of more than 2 years was to be imposed, the monitoring of communication through technical means for operative purposes was carried out automatically, that is by the decision of the relevant persons.[12] The list of authorized officials was defined by the department normative act, which in its turn remains secret information.

The Constitutional Court itself did not criticize the use of covert measures in this case. However, the legal basis for the use of covert measures became the subject of the Court's criticism. On the one hand, the Court in its decision considered the state's ability to use the covert mechanisms to avoid significant public danger to be legitimate. However, on the other hand, it highlighted the dangers that a state might face while citing the defence of democracy, and by virtue of unlimited power and unbalanced legislation. The Constitutional Court found the above-mentioned regulation unconstitutional because it did not explicitly state the need for judicial control over the monitoring of communications through various technical means. The unconstitutionality of this regulation was triggered by the fact that the law also provided for alternative mechanisms to restrict freedom of communication.[13]

In the case of *Georgian Young Lawyer's Association and citizen of Georgia Tamar Chugoshvili v Parliament of Georgia*, the Court discussed the possibility of open and closed internet surveillance on the internet relationship, participation in it and conduct of this measure without a court decision. In this case, the Court analysed the act regulating the operative activity in a systemic manner. It was done to establish whether the law required the court permit for any type of operative measure which was characterized by a high risk of interference with the right. In light of inconsistent entries in the law, the

11 See: Decision of Constitutional Court of Georgia, N1 / 3/407, dated 26 December 2007 in the case Georgian Young Lawyer's Association and Citizen of Georgia – Ekaterine Lomtatidze v Parliament of Georgia

12 See: Law of Georgia on Operative-Investigative Activities, Article 2, Section 9, edition applicable up to 2007

13 See: Decision of the Constitutional Court of Georgia, N1 / 3/407, dated 26 December 2007 in the case Georgian Young Lawyer's Association and Citizen of Georgia – Ekaterine Lomtatidze v Parliament of Georgia

Court pointed out that the existing regulation does not explicitly consider the need for judicial authorization to monitor close internet communication.[14] In view of the above, surveillance and participation in closed internet communication without the Court's permission was declared unconstitutional.

The Constitutional Court, in its case law, paid particular attention to the need to limit the control of personal space by means of operative-investigative measures for a reasonable period and the judicial control of the same period. Regarding the term of operative activities, the Court also discussed the provision of the law, which in the specific case allowed the extension of the term of 6 months for operative activity by virtue of the motivated decision of the head of the operative-investigative body and with the consent of a prosecutor.[15]

According to the Constitutional Court, the term of an operative-investigative measure is directly related to the severity of the interference with personal life. The Court opined that the intensity of the interference increases as the term of the interference measure increases. If a judge issues an operative-investigative measure for a specified period of time, there is no presumption that the need for an operative-investigative measure will remain even after the expiry of that period. In the event that a judge issues an order for operative-investigative measure for a certain period of time, the continuation of the operative-investigative measure after the expiry of that period is an additional interference with the right. According to the disputed norm, it was a prosecutor's discretion to decide as to the necessity to extend the term of the operative-investigative measure.[16]

The Constitutional Court indicated that the impugned provision placed an additional burden on the exercise of the right to personal activity and freedom of communication. The norm used to establish an independent case of restriction of rights outside judicial control. On the basis of this argument, the Court ruled the said regulation unconstitutional.

The aforementioned decision of the Constitutional Court became the basis for a legislative review of the terms of the operative measure. The law was amended based on this decision[17] and it separated the grounds for extending the operative measures by the

14 See: Decision of the Constitutional Court of Georgia, №1/2/519, dated 24 October 2012, in the case Georgian Young Lawyers' Association and citizen of Georgia Tamar Chugoshvili v. Parliament of Georgia, para 29

15 See: Decision of the Constitutional Court of Georgia, N2/1/484, dated 29 February 2012, in the case Georgian Young Lawyer's Association and Citizen of Georgia Tamar Khidasheli v. Parliament of Georgia

16 Ibid: II, 21

17 See: Draft Law of Georgia No. 6060-I, dated 24 April 2012, on Amendments to the Law on Operative-Investigative Activities

types of operative measures. This amendment preserved authorities of the head of the operative body to decide upon extension of the operative measure with a prosecutor's consent. However, the extension of the term for the measure that required judicial permit became possible only with a special judicial decision. It is true that legislator did not manage to grant the court full power for regulating the extension of the terms of operative activities. Nevertheless, under this amendment, the intensity of interference with the constitutionally protected right has decreased more or less.

In turn, the quality of human rights protection in conducting an operative measure depends on the terms of such operative measures. As the practice of operative activities demonstrates, investigative bodies, in case of being tasked by a prosecutor or investigator, usually carry out an operative measure within seven days and they rarely need to extend the term.[18] Nevertheless, the mentioned decision of the Constitutional Court did not completely eliminate the problem related to the term of the operative activities. As a rule, the implementation of operative measures is limited in time only when a task is ordered by a prosecutor or investigator. Otherwise, the operative measure initiated by the investigative body is not limited in time and in practice is continued until the goal is achieved.[19]

This regulation is problematic in relation to the practice established by the Constitutional Court. The purpose of limiting particular measure in time is to hedge the risks of restricting the right originating from the measure and not to be unambiguously dependent on the specific ground for interference with the right. The current legislative regulation creates a double standard. It imposes specific time limitation only upon operative measures ordered by a prosecutor or investigator, while the mechanism controlling the timeframe is not set forth for operative measures conducted on different ground.

Undoubtedly, the decision of the Constitutional Court plaid an important role in establishing and developing human rights protection standards in specific cases of operative activity. However, controlling the constitutionality of specific regulations of law, without a political will for further comprehensive and proper amendments, was an insufficient mechanism for fundamental reform of operative activity.

18 It is noteworthy that the practice of extending the term is not identical for the activities of the investigative bodies. As a rule, the initiative to extension comes from an operative worker and a prosecutor makes the final decision; but an application for extension is to be submitted in writing and it forms part of a case, though not always

19 Law of Georgia on Operative-Investigative Activities, Article 8; this approach was also identified during the interviews with the relevant authorities

1.2. Covert Investigative Measures within the Scope of the Criminal Procedural Code

The next phase of development of operative activities is related to the 2014 legislative amendments. By incorporating some types of operative-investigative measures in the Criminal Code, the Institute of Covert Investigative Activities was established. The main purpose of the change was to extend procedural oversight to a high-risk operative measure.

After the year of 2009, the issue of legislative changes regarding the covert investigative activities was first raised in 2013 under the Presidential Legislative initiative. The initiated change was aimed at eliminating the shortcomings of operative-investigative measures by enhancing safeguards for the protection of privacy and judicial control over specific measures.

To achieve these goals, the initiated project envisages repeal of the Law of Georgia on Operative-Investigative Activities and the inclusion of specific operative measures within the Criminal Procedure Code. Under the draft law, the covert telephone and video-audio control would only apply when directly determined by the law and to the limited range of offences.[20]

Although the Parliament did not fully share the mentioned project, certain amendments were still reflected in the legislation. To be specific, under the 2014 legislative amendments, the majority of operative measures that required juridical consent became part of covert investigative activities. The Procedural Code strictly determined the circle of offences, the timeframe for conducting a covert investigative activity, and the rules for storing and destroying information obtained under this activity. These changes made the sphere of human life more protected from arbitrary and uncontrolled interference by law enforcement bodies.

Despite several attempts, the state has so far failed to reject the use of mass social control mechanisms under the auspices of public safety. Since reclaiming independence, no government has succeeded in replacing covert crime-prevention methods with an analysis-based, interdisciplinary policy.

> According to the current situation, it is important for the state to begin a timely discussion of a fundamental reform of operative activities and take steps to replace operative activities of law enforcement system with democratic mechanisms of police activities.

20 See: Draft Law of Georgia on Amendments to the Criminal Procedural Code of Georgia, submitted as the Presidential Legislative Initiative dated 30 May 2013

2. Objectives and Goals of Operative Activities, Principles of Operative Activities

2.1. General Overview of the Main Objectives of Operative Activities

As mentioned above, operative activity is a complex mechanism available to law enforcement agencies, which by virtue of similar methods is used to simultaneously prevent future crime and eliminate already committed ones.

The dual nature of operative activities is also recognized in practice. Interviews with investigative bodies have made it clear that defining the purpose of these measures is difficult, even with practical experience. However, the law enforcement vision is not uniform in this regard. Interviews with relevant individuals revealed that operative activities are typically used more in the investigation process than for preventive purposes prior to the investigation. However, on the other hand, under the current practices and beliefs, operative activities also play an important role in obtaining primary information. One example of the practice in this area is the automatic launch of an operative measure in specific circumstances. For example, for preventive purposes, to avoid a potential crime operative measures are used in the mass public places (a different types of festival) where according to the pre-existing experience of the relevant bodies, an "abstract possibility" of committing a specific crime is high (often conducts related to drugs and otherwise prohibited substances).[21]

Operative activity is also actively used at the crime detection stage. In practice, this direction of operative activity is determined with particular cautious, as in this case, the risk of provoking a crime is high. It is noteworthy that this threat is not only related to the current regulations. It is also affected by the state of affairs in the country in terms of crime statistics.

The impact of statistics on the activities of investigative bodies remains high. As practitioners point out, operative workers are often tasked with avoiding several offences, in order to maintain or improve statistics. Such an approach to these activities, in turn, increases the risk of crime provocation by operative activities.[22]

21 The information is based on the results of interviews with law enforcement officers

22 The information is based on the results of interviews with law enforcement officers

2.1.1. Use of Operative Activities in Relation to Administrative Misconduct

Under existing law, law enforcement agencies have the opportunity to act within the scope of the operative activity not only when reacting to criminal activity but also when responding to other unlawful conduct.[23] The law does not distinguish between the dangers posed by crime and administrative offences and allows similar mechanisms to detect or prevent all conduct which is in conflict with the law.

Particularly problematic in this respect is the fact that there is no differentiation in the legislation as to what specific operative measure is to be applied to which action (crime or misconduct). Accordingly, any operative measure, including those interfering with the right with high intensity, may be used to respond to any kind of non-criminal unlawful act.

Response to other unlawful actions in parallel with a crime is one of the starting points for assessing the purpose of operative activity in a practical sense. Within the scope of the survey, in the course of the interview with the relevant persons, it was repeatedly stated that the preventive nature of the operative activities underscored by the legal possibility of its dissemination to the prevention of any unlawful acts other than crime. The aforementioned component of this activity is another factor, which is why operative activities should not be regarded as a merely auxiliary mechanism to the investigation.[24]

The application of criminal justice mechanisms to the administrative offences completely removes the boundary between crime and misconduct and the dangers contained in these two acts. Such an approach enables the state to respond with disproportionate mechanisms concentrated in the hands of law enforcement bodies to any kind of unlawful action, regardless of the severity of the threat. However, the dissemination of operative measures to other unlawful activities goes against fundamental international principles.

According to the internationally recognized approach, the use of covert measures by the state can be applied only in exceptional cases, on the basis of a pre-existing fact or relevant suspicion, to severe offences clearly defined by law.[25] The law of some countries explicitly defines a specific category of crime against which covert police activity may be

23 Law of Georgia on Operative-Investigative Activities, Article 3

24 The information is based on the results of interviews with law enforcement officers

25 Roman Zakharov v. Russia, § 231; Amann v. Switzerland [GC], §§ 56-58; Valenzuela Contreras v. Spain, § 46; Prado Bugallo v. Spain, § 30, 18 February 2003; Weber and Saravia v. Germany, § 95; and Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria, § 76

used. In many cases the list is not narrow. Yet there are cases where, according to the experience of specific countries, the covert measures regulated by operative law in Georgia can be applied only to a particular type of crime. For example, under the ruling of the German Constitutional Court, heavy covert police activity that contains a particularly high risk of interfering with rights (surveillance of persons, involvement of agents / confidants, photo-video recording, listening to telephone and other means of communication, etc.) may be justified when used for prevention and investigation of international terrorism.[26] An international tendency of using these types of measures clearly shows that they can only be based on high public necessity.

Legislation should create safeguards to protect the principle of proportionality in the use of operative measures. The use of severe operative measure associated with high-risk interference with the right for revealing illegal actions of any gravity, especially administrative misconduct, shall be strictly limited.

2.1.2. Prevention of Crime within the Framework of Operative Activities

As mentioned, crime prevention is one of the main areas of operative activity. According to the law, the main crime prevention measure within the scope of an operative activity, is the activity of the operative units of law enforcement body, which is linked in various manner with conducting joint inspection, a complex operative and preventive activities, police raids; application of individual preventive measures to persons whose antisocial behaviour is likely to result in crime; organization and implementation of operative measures to prevent planned or already committed crimes, as well as prevention by operative measure of an attempt of specific criminal activity. By the same concept, the preventive mechanism for operative measures includes the collection, verification, sorting of public and secret information for special purposes.

In this context, one should assess whether the operative activity has a preventive nature. In light with the existing international standards on prevention, crime prevention is a set of specific strategy-based measures aimed at reducing the risk of committing a crime and risk of potential threat to the entire public and specific individuals posed by such crime.[27] For this purpose, crime prevention should promote the development of public

26 Judgment of the Federal Constitutional Court of 20 April 2016 on the Law on the Federal Criminal Office (Bundeskriminalamtgesetz–BKAG), Case no. 1 BvR 966/09, 1 BvR 1140/09, available at www.bverfg.de

27 ECOSOC Resolution 2002/13, annexe

welfare in the country and encourage pro-social behaviour by activating economic, educational, health and other measures in the state.[28]

A narrow understanding of crime prevention is mainly aimed at preventing criminal activity that is already planned or in the process of implementation. This part of crime prevention can be considered a stage in which the contribution of police activities is particularly high. At first glance, the nature of the operative activity is most consistent with this understanding of crime prevention. However, it should be noted that the nature of operative activities is primarily determined by the nature of the operative measure. Each measure will be discussed in more detail below, but before that, it must be said that operative measures are set out in the law so that each serves the purpose of revealing the crime rather than preventing it.

The incompatibility of the preventive nature with the operative activity is revealed in terms of crime prevention standards as most of the operative activity is covert. Existing international approaches, given the level of technological development, certainly do not exclude the possibility of using covert measures not only for investigation but also for crime prevention and detection. However, it sets a particularly high standard for this. Existing standards hedge the risk of interference with human rights by the state's use of covert measures with effective control and right to a fair trial. As a rule, these guarantees operate under specific charges and, consequently, under investigation.[29]

The Recommendation of the Committee of Ministers of the Council of Europe in exceptional cases allows the use of special investigative techniques at the crime prevention and revealing stages.[30] Yet, the use of such mechanisms must be strictly guaranteed by a number of conditions, including clear legislative regulations that are in line with the requirements of the Convention and the case-law of the European Court of Human Rights. The application of the mechanisms mentioned in the legislation should only be based on the principle of "a necessity in a democratic society." Legislation should also provide sufficient safeguards to guarantee the right to a fair trial, privacy and communication, and the right to data protection in the course of these actions. The regulations shall restrain the use of specific measures on the basis of the strictly defined crime categories. Yet, this

28 United Nations Guidelines on Crime Prevention, ECOSOC Resolution 2002/13, 24 June 2002, Annex. Printed in United Nations Office on Drugs and Crime (UNODC) (ed.), Compendium of United Nations standards and norms in crime prevention and criminal justice, New York 2016
https://www.unodc.org/pdf/criminal_justice/Compendium_UN_Standards_and_Norms_CP_and_CJ_English.pdf

29 Deweer v. Belgium, §§ 42, 46; Eckle v. Germany, § 73

30 Council of Europe, Committee of Ministers, Recommendation CM/Rec(2017)6 of 5 July 2017 on "special investigation techniques" in relation to serious crimes including acts of terrorism, Appendix § 2, and Preamble

type of measure should envisage several stages of court control and, where appropriate, compensation for damages.

As noted above, operative measures do not only apply to strictly identified and specific categories of offences but apply equally to both offences and misconduct. In the light of the amendments, none of the types of operative measures provides for the necessity of judicial control, nor do they specify the rules and standards for damages in particular cases. In these circumstances, it is difficult to question the compatibility of operative activities in general and part of its preventive activities with basic international standards.

Prevention in operative activity is based not on investigating and analysing grounds for possible crime, but on surveillance, assessing the behaviour of individuals with subjective beliefs, identifying them as potential perpetrators based on specific behaviour, and preventing future potential abstract threats coming from them. That is not the purpose of crime prevention. The concept of crime avoidance within operative activities largely exceeds the nature of prevention and enters the category of crime control.

Crime prevention in general, unlike crime control, involves an attempt to eliminate even the abstract threat of crime in within its source. The purpose of crime control, in contrast, is to maintain the existing criminal environment in the country or in a particular territory by managing deviant behaviour.[31]

Out of the crime prevention levels, the special function of law enforcement agencies is revealed at the stage of situational prevention, where the police play a leading role. Preventive powers of the police are also recognized by Georgian legislation. According to the Law of Georgia on Police, the combination of systematic measures emphasizes that prevention is one of the key areas of the police. The police have the opportunity to, among others, carry out operative-investigative activities to prevent crime.[32]

Inclusion of the operative activities within the sphere of the police powers is problematic in itself. Operative-investigative activities associated with secrecy and direct contact with citizens within its scope are minimal while preventive police measures directly imply openness and direct contact / communication with citizens. It is quite the opposite for crime prevention as due to the objectives it implies the maximum openness of the relevant authorities and the direct involvement of different groups of citizens in the activities. By all means, in the exceptional case, the covert mechanisms may be used for situational prevention, however, this measure must

31 Steven P.lab, "Crime prevention approaches, practice, and evaluations"

32 Law of Georgia on Police, Article 18

be regulated in national law to maximally safeguard standards of privacy in such circumstances.[33]

It is also noteworthy that the Law of Georgia on Police and the Law on Operative-Detective Activities contain the same mechanisms for preventive purposes. For example, under both laws, a person may be identified, interviewed to prevent crime. It is unclear why the same means of achieving the same goal are regulated differently in legislation. This provision clearly indicates that the police, even without operative activities, have the resources to effectively prevent crime in the country within its authorisations. However, it is unequivocal that the ineffectiveness of crime prevention in the country is not only due to the operative activities of law enforcement agencies.

The preventive nature of operative activities is not uniformly assessed in practice either. Law enforcement agencies place a great deal of importance on prevention as well as crime detection and investigation. Yet in terms of practicality, preventive objectives for operative activities are deemed problematic. Crime prevention cannot be the authority of an operative worker, as the operative activity is, in its essence, a system of measures aimed at identifying crime rather than avoiding it.

In order to detect the crime, an operative measure uses methods and techniques that may not correspond to crime prevention. For example, the crime detection process may start with information received from various sources. The source of information about a possible crime may be confidential, information obtained from monitoring the special bases, which is subject to analytical processing.[34]

A major obstacle to crime prevention is the fact that the state's view on crime prevention does not exceed the scope of criminal justice. The country does not have a unified, interdisciplinary crime prevention strategy for crime prevention that would analyse the underlying causes of crime and based on these analyses would find the ways for effective responses by involving different individuals, groups, public and the private sector in this process.

> The state should take timely steps to fundamentally change the crime prevention policy. Equal crime prevention at all prevention stages should not be part of the police activities solely based on operative measures; the state must have a preventive system that by wide involvement of different agencies, interested groups and the public will make the prevention of crime possible and in the course of this process will strengthen approaches focused on care and protection of human rights.

33 United Nations Standards and Norms in Crime Prevention

34 The information is based on the results of interviews with law enforcement officers

2.1.3. Operative-Investigative Activities and Investigation

The prevention of crime is only one component of operative activity. Operative-investigative activities, along with crime prevention, aim at preventing already committed criminal act, by having a tailored respond to a crime, its planning or attempt.[35]

The legislation applicable during the Soviet era used to provide a direct possibility to react to the already committed crime. According to it, investigative bodies were assigned to conduct necessary operative-investigative measures in order to reveal the signs of an offence and a person committing it.[36] The main purpose of operative activities was to verify the accuracy of the information concerning a crime. This obligation was expressly provided for in the Criminal Procedural Code of that period. Specifically, the relevant official of the investigating body when receiving a notification containing elements of a crime, was entitled to verify the authenticity of the notification by means of operative measures. The "verification of the authenticity" of information concerning a crime should have been backed up by procedural documents, but in any case, verification should have taken place without launching an investigation. After verification of the authenticity of the notification, a criminal case would have been launched or a decision to drop the case would have been made.[37] It is important to note that this approach is largely maintained in the current legislation.

Despite major changes in criminal legislation over this period, the scale of operative activity remained unchanged. Even more so, it can be said that the past regulation has left a significant footprint both in terms of legislative regulation of investigations and operative activities and their practical implementation. The result of the Soviet understanding of investigative and operative activities may be a firmly established approach of the current practice towards so-called pre-investigative activities.

A pre-investigative stage will be discussed below, but beforehand, it should be noted that from practical assessment, the operative measure is not an activity that can only be carried out prior to launching an investigation. Operative-investigative activities may be conducted in parallel with an investigation. As far as practitioners are concerned, it is difficult to act only within the scope of investigation without the use of operative measures. However, this is not unequivocally due to the fact that the Criminal Procedural Code does not contain relevant, effective investigative actions. From a practical view-

35 Law of Georgia on Operative-Investigative Activities, Article 3

36 Officials of the Supreme Soviet Council of the USSR, 1950, No. 1, Article 15

37 See: A. Bakradze; „"Once Again on Operative-Investigative Activities in Criminal Court Proceedings", Journal of Soviet Law, p. 45

point, the intensity of the use of operative activities during the course of an investigation in comparison with the investigative measures is related to the effectiveness of the methods of the operative activities. In practice, it is often the case that investigative actions on the case is to be exhausted, but no results have been achieved. In such circumstances, specific operative measures (such as confidant's involvement in the case) are the only real opportunity for identifying, verifying, or confirming offences.[38]

In practice, the importance of using operative activities in parallel with investigations is also explained by the fact that operative work is much more flexible and efficient in comparison to investigations, as it requires a lower standard of performance than procedural action. However, the effectiveness of the use of operative activity at an investigation stage is mostly conditioned by specifics of how the police generally work with public. An investigator may not always establish a good relationship with all circles of society and receive information. In such cases, the only effective mechanism available to the investigating authority is operative activity.[39] In this setting, the function of receiving an information will be transferred to a confidant replacing the investigator, who will be selected by the authorities with particular caution. As a rule, the confidant has an action area and information about the narrow group of society. It allows the confidant to, as a result of gaining trust and establishing direct communication with the member of this society, receive the necessary information and forward it to the investigating authorities. Accordingly, the use of operative measures reduces the risk that the investigation will not manage to receive the necessary information from the public. In turn, however, the activities of a confidante, as discussed in more detail below, pose a particular risk without proper control and authorization.

Under the current legislation, it is possible to react to a criminal case under two separate legal acts in different ways. The general rules on how to react to an offence are established by the Criminal Procedural Code, according to which investigation is the only responsive mechanism.[40] The Criminal Procedural Code obliges the relevant persons to, when notified of the commission of an offence, react to information in terms of investigation and collect evidence in light of such investigation.[41]

The Code does not envisage any additional actions outside the scope of procedural actions, including the "verification" of the authenticity of crime-related information as allowed by earlier legislation. The Code perfectly covers all the stages that may be required

38 The information is based on the results of the interviews conducted with law enforcement officers

39 The information is based on the results of the interviews conducted with law enforcement officers

40 Criminal Procedural Code, Article 3, Section 10

41 Criminal Procedural Code, Article 100

from receiving information on the crime to making a final decision on such information. However, in parallel with the Criminal Procedural Code, the legislation also provides for the possibility of responding to criminal activity within the scope of operative activities.

Reform should facilitate a change in established approaches of the current practice; the trends of artificial verification of information containing the elements of crime should be replaced by the initiation of investigations within the scope of the Procedural Code only.

2.2. Grounds for Operative Activity

Operative-investigative activities can be implemented on several grounds. Among them:

a) To task a prosecutor or with the prosecutor's consent an investigator with operative-investigative measure to be conducted in case pending before him/her;

b) An instruction of the prosecutor, or of the investigator with the consent of the prosecutor, on the conduct of an operative-investigative measure when there is a duly received report or notification that a crime or any other unlawful action is being prepared, or is in progress or has been committed, and which requires the conduct of an investigation, but there are no elements of a crime or of any other unlawful action that would be sufficient to commence an investigation, and in such case, the period of the operative-investigative measure shall not exceed 7 days;

c) Resolution on the search of a person who hides from investigation, court or evades sentence;

d) The disappearance of a person, the discovery of an unidentified corpse or property;

e) Request and query of the body carrying out operative-investigative activities;

f) Request and query from an international or a foreign law enforcement agency under a Legal Aid Agreement (the Agreement).

The aggregate of operative activities is composed of measures that are quite strict and often disproportionate and incompatible with the aim pursued. Yet, as listed above, it provides only a formal basis for their implementation, which considering the international standard, is not a sufficient ground for carrying out covert police activity of this

scale and amount. On the contrary, international standards require the need for fact-based information to justify covert policing, credibility of which must be valued at the level higher than that of mere suspicion. Covert police action can only be justified if there is sufficient reason to believe that a serious crime has been committed or is being planned.[42] The Georgian legislation does not include this type of specification, on the contrary, the formal legislative basis is sufficient to implement an operative measure.

Among the grounds for conducting operative measures, the most important is the case where the operative measure is carried out by a prosecutor or on the basis of a prosecutor's instructions on a criminal case pending before them. The analysis of the norm shows that the investigation, in this case, has already begun. Accordingly, the response to information on the possible crime should be governed by the Procedural Code. However, the legislation leaves it open to investigators or prosecutors to "verify" the accuracy of specific information in a case through non-procedural mechanisms. In this regard, practitioners particularly emphasize such covert operative mechanisms as, for example, the insertion of an undercover agent or an operative worker in a criminal group. The Procedural Code does not recognize the possibility of using such mechanisms, but in practice, they can provide important information in a highly accurate and timely manner.[43]

No less problematic is the second ground for carrying out operative activities. According to it, an instruction of a prosecutor, or an investigator with the consent of the prosecutor, on the conduct of an operative-investigative measure when there is a duly received report or notification that a crime or any other unlawful action is being prepared, or is in progress or has been committed, and which requires the conduct of an investigation, but there are no elements of a crime or of any other unlawful action that would be sufficient to commence an investigation.[44] From this record, it is clear that this rule applies to both already committed and completed offences, as well as information on the preparation or attempt of the offence (if under the legislation preparation and attempt of the offence concerned is punishable).

It is noteworthy that the Law on Operative-Investigative Measures did not initially foresee the implementation of operative activities on the basis of the above. Legislation in this area has been amended several times, including in parallel with the application of the new Criminal Procedural Code. It, in turn, precisely defines the rule of procedural response to a crime when information is received.

42 Council of Europe, Committee of Ministers, Recommendation CM/Rec(2017)6 of 5 July 2017 on "special investigation techniques" in relation to serious crimes including acts of terrorism

43 The information is based on the results of interviews with law enforcement officers

44 Law of Georgia on Operative-Investigative Activities, Article 8, Paragraph 1, Subparagraph "b"

The Procedural Code does not require any special standard for launching an investigation, nor does it establish the degree of reliability of the information. In contrast, the Law of Georgia on Operative-Investigative Activities emphasizes the quality of the information available to conduct specific investigative actions.

Thus, the legislation determines the obligation of conducting an investigation regarding crime-related information within the scope of the Procedural Code. On the other hand, it allows the law enforcement officials to conduct operative-investigative measures on the basis of such information and this way to obtain information which is important for the investigation allowing them to avoid the initiation of an investigation. Such vague provisions in legislation increase the risk of the arbitrariness of the relevant authorities. Law enforcers have the opportunity, in each individual case, to independently evaluate the information received without the relevant legislative criteria and decide whether to respond within the scope of investigative or operative-investigative activities.[45]

It is unclear as to what is the purpose of inclusion in the legislation of independent instruments designated to react to crime outside the scope and in parallel with the Procedural Code. This is particularly vague considering that the Procedural Code does not leave the issue of responding to such information open. It specifies the grounds for initiating, carrying out and terminating the investigation.

In practice, it is unequivocally acknowledged that the quality of the investigation is largely dependent on the operative activity of the investigating body. This is conditioned by insufficient investigative tools in the Procedural Code coupled with a strict standard for investigative action by the Code. From practical assessment, the "flexibility" of the operative activities compared with other procedural measures, is associated with a lower standard of performance. This somewhat "goodness" is a combination of open and covert methods. The use of covert operative methods facilitates both timely and effective acquisition of information as there is no communication between the public and the investigative body at this time. Within the framework of covert operative activities, the investigating body receives information from the public in such a way that the public remains completely unaware of it. Collection of specific information by an investigator requires much more time and resources. At the same time, there is a high risk of public shutdown towards the investigator, which is not the case for confidants and operative workers.[46] Operative measures do not require specific procedures, are not subject to judicial authorization, are not particularly limited in time, which obviously makes the case easier for the relevant authorities and gives more free space at the expense of human rights protection.

45 Human Rights Education and Monitoring Centre (EMC), "Investigative System Analysis", p. 34, 2017

46 The information is based on the results of interviews with law enforcement officers

Such ambiguities in legislation resulted in the so-called pre-investigation stage, which is well-established in practice. Within the scope of this stage, the relevant authorities, instead of investigating based on the received information, launch operative measures to verify the information. This approach is unequivocally similar to the Soviet "information authentication test" that preceded the investigation and on the basis of which a final decision to launch or drop the investigation was made.

The problematic nature of this issue is also recognized in a practical setting. During the interviews, the law enforcement officials noted that the provision of law on conducting operative activities when information is considered insufficient for investigation requires special caution and individual assessment. According to the interviewers, such caution is necessary to restrain the provision from putting in practice launching of a case through operative measures regardless of circumstances.

In case the information clearly contains the elements of crime, it is necessary to launch an investigation. Accordingly, an operative measure cannot be regarded as a necessary component of an investigation. On the contrary, it should only be an auxiliary mechanism for giving directions.[47] In a situation like this, when legislation leaves space for free action, it is difficult to alter the methods that are firmly established in practice. Within the framework of this legislative order, nor will the cases of operative reaction to the information received about the crime be safeguarded by the establishment of crime registration rules. It is a significant challenge for the country. In order to, from the earliest stage, ensure a procedural legal response to information containing the elements of crime, in addition to the practical approaches it is important to undertake fundamental legislative changes.

Inclusion of the mechanisms of the criminal procedural nature within the scope of the Code is of particular importance to guarantee the protection of rights during its implementation. The Code protects the object of procedural measures by at least specifying procedural principles, timing and method of implementation of a particular measure, parties involved in the process, establishing monitoring mechanisms for the implementation of the measure, ensuring the right to appeal the outcome of the proceedings, etc. This system of the Procedural Code more or less creates a legitimate expectation of protection for the subjects of the proceedings. Such an opportunity does not unequivocally exist outside the Code and *vice versa*, criminal measures determined beyond the Procedural Code cannot rely on the same principle of mutual control of the same measures by the parties. This setting turns specific legislative regulation (in this case the Law on Operative-Investigative Activities) into the tool for procedural repression and increases

47 The information is based on the results of interviews with law enforcement officers

the risks of unjustifiable restriction of rights. For this reason, it is particularly important to fully identify procedural mechanisms in the legislation and to incorporate them within the scope of the procedural safeguards.

2.3. Principles of Operative Activity and Practice of Application

Initially, the principles of operative activity were generally defined in the law. The law applicable prior to 2005 stated that operative activities were based on human rights and freedoms, the principles concerning protection and respect for the rights of legal persons, legality, conspiracy, and open and covert methods. The same norm restricted the implementation of such operative measures that threatened human life, dignity, property and the rights of a legal person. The prohibition also covered measures of deception, blackmail, coercion. However, the nature of the operative measure itself and the manner in which it was carried out did not ensure compliance with the principles set out in the law.

As a result of the 2014 legislative amendment, the Criminal Procedural Code introduced covert investigative actions. It is noteworthy that the scope of this amendment changed the principles of conducting operative measures, and it mainly came in line with the principles established by the legislator for conducting covert investigative actions.

By the 2014 amendment, the implementation of an operative-investigative measure, as well as a covert investigative measure, was based on criteria of the proportionality of urgent public needs, measures and achievement of the objectives in a democratic society. Amid this amendment, the legislator expressed an aspiration to base operative activities upon the criteria and place it within the framework similar to that of covert investigative actions. In doing so, the legislator attempted to equalize the risk that covert investigative and operative activities included in terms of the intensity of interference with the right and to impose uniform safeguard mechanisms.

The test of necessity and legitimate goal which is essential in a democratic society and was imposed upon operative activity in the context of the above amendment necessitated a reduction in operative performance in practice. Yet, the intensity of operative activities conducted by law enforcement agencies has remained largely unchanged. On the contrary, operative activities are one of the main tools of prevention and eradication of crime in these bodies.

Such an abstract regulation of the above principles in law, without setting legislative guarantees accompanying legislative guarantees, clearly failed to fulfil its function and became fictitious. On the one hand, the law stipulated that an operative-investigative measure can only be carried out if it is expressly provided for by law[48] (as provided for by the Criminal Procedural Code in relation to covert investigative actions). However, the law lacks not only specific but also any general rule indicating the categories of crime prevention / eradication against which it is possible to use operative measures. Nor does it provide for any guidance as to the time limitation for conducting operative measures (save for the exceptions) and list of persons to whom this type of action may be carried out. This, as a rule, is a fundamental component of basic international standards for covert police activities. Without such guarantees, it is highly probable that the covert police activity will go beyond the framework of the necessity and become an instrument of mass control.[49]

The compatibility of the principles of operative activity with the practice of its application is particularly problematic and fictitious with respect to administrative offenses. After comprehending the existing provisions in a systematic manner, it becomes clear that the law permits the use of operative measures with a low degree of threat (misconduct) on the one hand and restricts the operative activity to a principal level by invoking necessity of democratic society, on the other hand.

An important component of the reform of operative activities should be to rectify legislative gaps, eliminate collisions in the operative and criminal procedural law and to change the practice of implementing operative measures.

The principles of conducting operative activities should come to effect in practice. With this in mind, practical approaches of law enforcement agencies should change, and operative measures must be based strictly on the principles of necessity of its application in a democratic society. It should no longer be a measure used by agencies to prevent, detect or eradicate actions of any gravity.

48 Law of Georgia on Operative-Investigative Activities, Article 2

49 Szabo and Vissy v. Hungary, § 67, Iordachi v. Moldova, § 44

3. Agencies implementing operative activities and their institutional framework

Agencies authorized to carry out operative activities are defined by the Law of Georgia on Operative-Investigative Activities. According to the existing legislation, the authority to conduct operative-investigation activities is exercised by nearly all investigation agencies.

Identifying the agencies authorized to conduct operative activities is one of the most frequently changing issues under this law. This, in turn, is explained by the frequent structural transformation of bodies, the redistribution of powers and the formation of the new institutional structures in the system of executive government.

At this stage, according to the law, operative-investigation activities may be performed by:

- the operational agencies and investigation units of the Ministry of Internal Affairs of Georgia;
- the authorized units of the State Security Service of Georgia;
- the operational agencies of the Special State Protection Service of Georgia;
- the operational agencies and investigation units of the Ministry of Finance of Georgia;
- operational agencies of Special Penitentiary Department under the Ministry of Justice of Georgia;
- the operative, investigative and intelligence units of the Ministry of Defense of Georgia;
- the operational agencies of the Georgian Intelligence Service
- the investigators of the Prosecutor's Office;
- the investigators and the employees of the relevant units of the Ministry of Justice of Georgia;

With the recent amendments to the law, employees of the relevant department of the State Inspector Service were authorized to carry out operative activities.[50] It is also noteworthy that the amendments were made only on technical grounds, without proper justification for granting the said authority to the State Inspector Service. In the explanatory note, it was once again emphasized that the understanding of operative activities in the legislative field is mainly related to its recognition as an auxiliary mechanism for investigation.[51]

As it was noted, nearly all of the agencies authorized to conduct operative activities, in parallel, represent investigation bodies.[52] The only exceptions, in that regard, are Special State Protection Service and Intelligence Service, as these two agencies do not have the investigative authority, according to the Criminal Procedure Code of Georgia.

It is noteworthy that, in the framework of the research, the organization addressed all structural units authorized for operative activities in order to request public information. Based on these FOI requests, the organization was seeking information regarding the departmental normative acts related to the operative activities, statistical data on the persons employed at the operative divisions of the agencies, acts defining qualification requirements for the operative personnel, the budget allocations for the operation of the operative units, statistical data of the number of individuals who, consensually, on the basis of a contract, cooperate with operative bodies and the amount of funds allocated for their activities, according to the budget.

It must be emphasized that all the relevant authorities have refused to provide the requested information, noting that any data related to operative activities is classified as state secret. The only agency that provided information on the budget and specific statistical data was the State Security Service. However, even in this case, the SSSG provided information in such a general manner that it is not possible to analyse the actual data based on the received answer.

In turn, information related to operative activities is undoubtedly a state secret, according to the legislation.[53] Information about the software used for operative purposes, information regarding operative plans and movement, etc., may be considered a state secret. Consequently, it is not fair for the agencies to generalize this limitation, in accordance with the law, and to indiscriminately incorporate all the information that is related

50 "Law of Georgia on Operative-Investigative Activities" article 12

51 See: Explanatory note on the draft law "On Operative-Investigative Activities" on Amendment to the Law of Georgia

52 Criminal Procedure Code, article 34

53 "Law of Georgia on State Secrets"

to the operative work under this limitation. The content, planning and methods may legitimately be subject to protection under the Law on State Secrets but not the generalized statistics and the budget allocated to the activity. In this regard, a uniform approach has been established by all agencies – to automatically make all information related to operative activities a state secret.

The structure and detailed functions of the bodies authorized for operative activities are determined by the special law and the bylaws. The law generally stipulates the basic powers that the bodies carrying out operative-investigation measures may exercise in frames of the special regulation.

Within the scope of their authority, defined by law, agencies conducting operative-investigation activities may: overtly and/or covertly carry out the operative-investigative measures, establish, on a gratuitous or remuneration basis, collaborative relations with persons who have agreed, on a confidential basis, to assist the agencies conducting operative-investigation activities; set up and use information systems that ensure the accomplishment of operative-investigation tasks; use the buildings or any other state property for operative purposes, on the basis of an agreement.[54]

In addition to establishing the rights of the agencies conducting operative-investigation activities, the law also sets out basic obligations of the said authorities. However, it should be noted that in this regard, the regulations are particularly general and they basically focus on the authorities' obligation to protect human rights and freedoms, the rules of secrecy, to comply with the existing guidelines by the prosecutor or investigator in relation to the operative activities; however, these directives are not grounds for immediate fulfillment of the obligation in their direct work of the agencies.

As it was mentioned above, most of the agencies that have investigative powers also exercise the authority to conduct operative activities. Only a few agencies make an exception to this legislative logic. Different agencies having the authority to conduct operative activities simultaneously, in turn, has to be critically assessed, especially considering that the nature of operative activities and their implementation methods are, in essence, problematic, because the more agencies are authorized to conduct operative activities, the bigger is the risk that the operative activities will interfere with the enjoyment of human rights. The increase in the mandate of various bodies, with regard to operative powers, implies full control of the state over the different spheres of social life within the activities of that particular body.

54 "Law of Georgia on Operative-Investigative Activities" article 4

Conducting operative activity is particularly critical under the mandates of the State Security Service and the Intelligence Service. The scope of these agencies' activities is significantly broadened by the authority to conduct operative-investigation work. During the time of legislative changes, there was a legitimate criticism towards authorizing the State Security Service to encompass investigative powers, as this addition of investigative powers to the scope of the State Security Service significantly increased the risks of excessive power and control exercised by the agency. And, imposing an operative function on the agency, in addition to their investigative power, further increases the said risks. Especially considering that the State Security Service is the agency responsible for managing the risk control of the internal and external (foreign) threats, coordinating the counter-intelligence activities of special services, and in light of this commitment, the agency is authorized to operate policing, preventive,[55] as well as operative-investigation and counter-intelligence work.[56]

The authority of the agency to conduct operative work is regulated separately in the framework of counterintelligence activities. Although, in this case, the focus of the activity is on controlling narrowly defined external threats, however, the scope of operative work is particularly broad in this context, regardless of its specific purpose. The same can be said on the Intelligence Service, which is authorized by a special law to carry out counterintelligence activities [57] and, accordingly, for this purposes, enjoys the powers prescribed by the Law on Counter-Intelligence Activities.

In the scope of counter-intelligence work, the law formally separates operative, operative-technical, and electronic surveillance activities. The main listing under the current legislation repeats the activities prescribed in the Law on Operative-Investigative Activities, but leaves room for internal regulation, noting that the types of operative activities are regulated by the legal acts of Special Services.[58] Internal departmental regulations, in turn, are classified acts, therefore it is difficult to assess the type of specific operative measure and its compliance with the legislation. In addition, such regulation is contrary to the Law on Operative-Investigative Activities, according to which, a new specific measure may be amended or supplemented only by a special law.

Such an accumulation of authority within one agency significantly increases the risks of arbitrariness and, at the same time, weakens human rights protection guarantees. Under the

55 Joint report of Transparency Internatioal – Georgia and Human Rights Education and Monitoring Center (EMC) on "Security Service reform in Georgia, results and challenges", 2018, pg: 31 Available: https://emc.org.ge/ka/products/usafrtkhoebis-samsakhuris-reforma-sakartveloshi-shedegebi-da-gamotsvevebi

56 See: Law of Georgia on State Seciruty Service and Law of Georgia on Counter-Intelligence Service

57 See: Law of Georgia on Intelligence Service, article 3

58 Law of Georgia on Counter-Intelligence Activities, article 9

current regulation, even those agencies that do not have an investigation function are also authorized to conduct operative activities and therefore, they do not need to use an operative measure, as an auxiliary investigation mechanism. Given the nature of their activities, it is difficult to determine the need for operative authority within a particular agency. An example of this might be the Special State Protection Service, whose primary function is to provide physical protection of persons and facilities, directly defined by law.[59] This type of service clearly requires specific information about the existing or expected threat, which can be collected through preventive means. Operative-investigation activities shall provide a body of this type with a large-scale, disproportionate mechanism for its purposes, as specified by law,

> The question of the appropriateness of operative powers within specific agencies should be thoroughly reviewed as part of the reform. These powers should not be exercised at least by those bodies whose activities are not directly related to the investigation and / or ensuring public order and security. The same applies to those agencies, which, in their capacity, have alternative mechanisms for detecting internal and external threats under a special law.

3.1. Internal structure of the agencies implementing operative activities

First chapters of the study showed that the existing legislation does not provide a clear distinction between investigative and operative activities. This is largely due to the inadequate allocation of powers between the operative and investigative bodies, the accumulation and blending of competences among them. It should also be noted that duplication of competences is caused not only by the wrong institutional set-up of specific bodies but also by the inadequate separation of powers between the investigator and the operative worker.

The powers of the investigator and the operative officer are wrongly divided firstly, under the Law on Operative-Investigative Activities, and then under the Act defining the structure, activities and powers of a particular agency, which should be properly and reasonably distributing competences in the system. However, given that the basic law itself is problematic in this respect, special laws and bylaws, in their turn, fail to protect the balance between the entities and their competencies.

The structural allocation of investigation and operative powers in the relevant agencies is as follows:

59 See: Law of Georgia on Special State Protection Service, article 5

Ministry of Internal Affairs
• **Investigation and operative activities are carried out simultaneously by the relevant structural units. The Tbilisi Police Department is an exception**
Investigation Service of the Ministry of Finance
• **Investigation is conducted by the Investigation Department** • **Operative-investigation activities are carried out by the Operative-technical provision Department**
Ministry of Defence
• **Investigation is conducted by the Main Division of Investigation** • **Operative-investigation activities are carried out by the Operational Assurance and Monitoring Division**
Ministry of Justice
• **Operative and investigation work is conducted by the Investigation Department** • **Operative work is conducted by the Special Penitentiary Service**
State Security Service
• **The relevant structural units of the Service carry out both investigation and operative activities simultaneously**
Office of the State Inspector
• **Operative and investigation work is conducted by the Investigation Department**
Prosecutor's Office
• **Operative and investigation powers are not separated within the structure of the agency**

Discussing this issue is especially important in scope of the Ministry of Internal Affairs. As this is the largest law enforcement agency in the country, which, at the same time, is responsible for crime prevention and investigation.

As the table shows, investigation and operative activities within the Ministry system are not clearly separated. The main units authorized to have investigative powers are the Central Criminal Police Department, Patrol Police, General Inspection. There is an operative unit under the Ministry, as a separate subdivision, whose main function is to carry out operative-investigation activities. However, it should be noted that each unit responsible for investigation also has operative powers.[60] Consequently, investigative,

60 Resolution N337 of the Government of Georgia of 13 December 2013 on Approving the Regulations of the Ministry of Internal Affairs of Georgia

operative and preventive activities within the Ministry system are not distinguished and are carried out simultaneously by the relevant units.

However, it should be noted that the Ministry has already begun work on separating investigative and operative authorities. The change in this direction was primarily reflected in the structure of the Tbilisi Police Department, where, in accordance with the order of the Minister, investigation and operative direction was separated. Within the scope of this amendment, the Investigation Division is not directly authorized to conduct operative activities and the Detective (Operative) Division, instead, is directly responsible for these activities.[61] This change is undoubtedly an important step, but it is imperative that the Ministry does not slow down this path of reform and that structural change is made throughout the Ministry. The separation of investigation and operative directions should, in turn, be the first stage of fundamental change, which will be the basis for a major reform of operative activities in the law enforcement system.

The problem of confusion is particularly evident in the example of the distribution of powers within the territorial bodies of the Ministry.[62] In virtually all territorial authorities, the powers are evenly distributed among the structural units. Preventive, operative, and investigative powers are exercised simultaneously by both the detectives and the district inspectors.

Below is a table of activities conducted both by the Division of Detectives and Inspectors.

61 Order of the Minister of Internal Affairs of Georgia N9 of February 1, 2019 on Approving the Regulations of the Police Department of the Ministry of Internal Affairs of Tbilisi

62 The territorial bodies of the Ministry are the main divisions of the Autonomous Republic of Abkhazia and Adjara; Tbilisi Main Division; Mtskheta-Mtianeti Regional Main Division; Shida Kartli Regional Main Division; Kvemo Kartli Regional Main Division; Kakheti Regional Main Division; Samtskhe-Javakheti Regional Main Division; Imereti, Racha-Lechkhumi and Kvemo Svaneti Regional Main Division; Guria Regional Main Division; Samegrelo-Zemo Svaneti Regional Main Division

Authority	Detectives Division	District Inspectors' Division
Gathering / processing operative information	✔	✔
Conducting operative-investigative and investigative activities	✔	✔
Implementing preventive measures	✔	✔
Use of remand measures	✔	✔
Holding operative information about those persons who are about to commit, are committing, or have committed a crime	✔	✔
Search of the accused / convicted, law offenders, missing persons	✔	✔
Participation in activities aimed at protecting public order	✔	✔
Detection of the facts of violation of the registration procedure by citizens and foreign citizens.	✔	✔

The need to differentiate between operative and investigative functions is also a recognized problem at the practical level. The need for a clear separation between these two activities of the law enforcement agencies was identified in the interviews conducted in the framework of this research. Several issues call for a need for reforms in this area, including the increase of professional qualifications, performance and degree of accountability. According to law enforcement officials, a clear separation of powers between the investigator and the operative would be a solid basis for investing more in retraining staff in each direction and, ultimately, for creating narrow, specialized units in investigative bodies.[63]

Operative and investigation powers should be clearly separated for the relevant authorities and structures. This process should not be stopped in the Ministry of Internal Affairs and this approach should be implemented equally in all territorial bodies of the Ministry.

63 The information is based on the results of interviews with law enforcement officers

4. Types and contents of operative activities

4.1. Collection of information and Surveillance

One of the types of operative activities is the collection of information and surveillance. According to the law, collection of information is defined as official collection of information, from forensic, operative-investigative or other sources, that is essential for operative means, by an operative or an investigator; Surveillance is is covertly performed by an operative, an investigator or an operative-investigative body directly or by operational and technical means;[64]

In general, the tactics and method of conducting an operative-investigation activity, which are mainly defined by departmental normative acts, are classified information and therefore, the methodological course of the measure cannot be assessed. Hence, it is difficult to determine what specific methods are prescribed by the law when collecting information. As suggested by the Law on Information Collection, this process is a stage, consisting of several components, aimed at fulfilling one purpose. The main purpose of operative activities is to detect, avoid and prevent a crime. According to the legislation, information about the crime should be collected using investigative measures. In these circumstances, it is logical to ask that if conducting investigation is the response to the criminal activity, what the purpose, is then, of gathering information through the means of operative-investigation measures.

In that regard, a much more problematic issue is conducting visual control, which is an operative surveillance without the use of appropriate technical means. For a long time, before the legislative change, electronic monitoring was also considered as an operative measure alongside surveillance. The main difference between these two measures was the method of their implementation. The surveillance as a rule was usually conducted without using electronic equipment.

Since the legislative change of 2014, electronic surveillance has become an independent form of covert investigation through technical means. The change was due to the fact that despite that the judicial control was exercised over this activity, as prescribed by the law, conducting the electronic surveillance under the operative activities could not mitigate the high risks of interference with a person's private life. Although electronic surveillance is a procedural activity as of today, similar measures, such as visual surveillance, have remained within the scope of the operative-investigation activities that may be carried out without judicial authorization.

64 Law of Georgia on Operative-Investigative Activities, article 1, para 2(b,c)

Although the law considers these two types of activities as independent measures, there is no significant difference between them in terms of the results obtained. It is noteworthy that the law recognized from the outset only a few measures that needed judicial authorization. Visual surveillance was not among the measures subject to judicial control. In this regard, no changes to the law were made as a result of the 2014 reform. Consequently, to this day, visual surveillance is still carried out without a prior judicial order. While, in essence, this measure is no different from electronic surveillance. In this case as well as in the case of electronic surveillance, the object of observation and information gathering is the same, the difference can only be in the method of conducting these activities. It should also be taken into account that the definition of the activity explicitly indicates the possibility of its implementation directly by means of human resources (surveillance by a physical person) or operative-technical measures, which, in turn, does not exclude electronic surveillance, as such.

The above reasoning clearly indicates that including electronic surveillance, through technical means, under covert investigative actions did not fully reduce the same risk the implementation of this measure would carry, if it were to be included under operative activities. To the extent that the law still allows for carrying out surveillance by different methods. Moreover, under current regulation, visual surveillance is a more flexible and easily enforceable mechanism for the relevant authorities, as the law allows it to be implemented without a judicial order, as a minimum guarantee.

> Specific operative measures should be thoroughly reviewed in the legislation. Measures that are characterized by a high risk and intensity of interference with rights should be reasonably limited in time, subject to prior judicial authorization and monitoring during the course of their implementation. Legislation should specify in detail a limited range of offenses where such measures can be used.

4.2. Obtaining electronic communications identifying data and determining geolocation in real time

Under the current regulation, it is difficult to determine what kind of action is gathering electronic communications identification data, whether it is a legal-procedural or an operative measure. Ambiguity comes from the fact that the activity is regulated both by the Procedure Code and the Law on Operative-Investigation Activities.

It is noteworthy that acts regulating electronic communications identification data appeared earlier in the Procedure Code than in the operative-investigation legislation. It

can be inferred that the said activity is one of the forms of operative work, which was included in the special legislation after the 2014 amendments.

Object of the said activity is defined by the Law of Georgia on Electronic Communications. According to this law, electronic communications identification data may be user identification data; data necessary for tracing and identifying a communication source; data necessary for identifying a communication addressee; data necessary for identifying communication date, time and duration; data necessary for identifying the type of a communication; data necessary for identifying user communication equipment or potential equipment; data necessary for identifying the location of a mobile communication equipment.[65]

Special rules on obtaining information concerning electronic communication is defined by the Procedure Code. In accordance with the Procedure Code, permission to obtain electronic communications identification data is subject to judicial oversight.

The nature and manner of obtaining electronic communication identification data within the scope of operative activities is not specified, per se. On the contrary, the Law also refers to the Criminal Procedure Code and expressly states that the body conducting operative-investigation activities has the right to obtain electronic communications identifying data in accordance with Article 136 of the Criminal Procedure.[66] It is unclear, in this context, why two different acts regulate the same measure.

We have a similar case for real-time geolocation determination. This activity is one of the newest of the investigative activities that will take effect in 2020.[67]

Real-time geolocation determination is a measure subject to a special legal order of investigation, to which the regime of covert investigative measure applies. Consequently, its implementation is strictly limited both to the legal basis and to the specific types and categories of crime. At the same time, these measures may be taken by investigative authorities in case of the wanted person, and maybe be used in the course of the operative-search activity to establish their whereabouts. However, its proper use in practice for the purposes of operative-search activities is problematic. Because, in cases concerning wanted persons, the investigation is usually already completed and the court has already made a decision. Accordingly, there is no separate stage to submit the motion to the court.

65 Law of Georgia on Electronic Communications. Article 2(z69)

66 Law of Georgia on Operative-Investigation Activity, article 7, para 3(a)

67 Criminal Procedure Code, article 1431 para. 1(g)

Existing regulation of this measure is also problematic in practice. In the relevant agencies, there is an approach that these two actions must be both operative and procedural in substance, though they must have different basis and methods of implementation.

According to the existing approach exercised by the investigation authorities, following the regulation in place, using the said activity for operative goals creates difficulties. Since its implementation concerns stages and procedures established by the Procedure Code. However, besides investigation, these activities are clearly operative activities. It is not necessary that the search is conducted in the frames of investigation procedure. On the contrary, as a rule, search is the following stage, after the completion of the investigation. The court does not discuss motion for operative activities, in this stage, according to the current regulation. Consequently, court cannot give authorization to conduct these activities, on the stage of operative work, without investigation.[68]

In practice, the need to regulate this issue under the operative activities is also emphasized. From the practical point of view, both of the activities are important mechanisms for timely operative reaction. Investigation authorities believe that it is important to amend the legislation is a way that the said activity can be conducted under the operative work, in accordance with the decision taken by the head of the organ. The need to introduce this regulation derives from the fact that as of now, there is no possibility to immediately react to the so-called SOS signals that they receive.[69]

In this regard, it is important to analyze the legislation systemically, as a whole. It is true that Procedure Code defines a special rule for conducting the said activity, however determining geolocation in real time is regulated not only by the Procedure Code. For example, the law of Georgia on Electronic Communications allows to automatically determine the exact location of the initiator of a call to the emergency number, 112. Therefore, the said record of the law does not prescribe the need to seek prior judicial permission to determine the location of the call initiator.

Undoubtedly, the legislation concerning issues related to determining geolocation and its practical implementation are not in line. Therefore, it is important to revise the legislation and clearly define it. Additionally, it is important that the rule to conduct operative-search activities is clearly regulated by the legislation. With regard to operative-search activities, such procedure needs to be established, which allows the relevant

68 Information is based on the results of the interviews conducted with the employees of law enforcement organs, in the frames of this research

69 Information is based on the results of the interviews conducted with the employees of law enforcement organs, in the frames of this research

authorities to establish the exact location of a wanted person, not only during the criminal law proceedings, but also after the final decision is taken by the court.

It is clear that the regulation should clearly define case proceedings of a missing person. Reaction to a SOS signal, coming from a concrete subject, in need of help, and a process to determine geolocation of a subject, for operative purposes, following the initiative of an operative body, should be clearly distinguished. In the first case, it is obvious that there should be a quick and an effective responsive measure when it comes to 112 signal, coming from a person in need. However, this mechanism for determining geolocation in real time, should not be the same for every instance.

Duplication concerning a concrete activity in the Criminal Procedure Code and the Law of Georgia on Operative-Investigation Activities should be cleared in the legislation. Parallel, contradictory regulations should be voided. Only the Procedure Code should prescribe the regulation of the investigation rules.

4.3 Censoring correspondence, as an operative activity

Censorship of correspondence of detainees, accused and convicted persons is still a form of operative measure.

It is noteworthy that in almost every post-Soviet country operative legislation recognizes postal control, though not in the form of correspondence censorship. Although the adoption of the aforementioned law was preceded by the enactment of the Constitution in Georgia, which established a ban on censorship at the constitutional level, the term still remains in the legislation. It is unfortunate that this change has not been corrected even under the fundamental penitentiary reform and the recent constitutional amendment.

More important than the terminological incompatibility is the type of activity, in general, and its significance. In turn, this is a special measure that is strictly limited to the range of persons to whom it applies, as the law defines the circle of use of the operative measure. Considering the circle of subjects, it is important to analyze this measure systematically in relation to other special legal acts.

In general, the law provides for the correspondence of the accused / convicted to be checked. However, the legislation clearly states that inspection should be limited to visual inspection only without inspecting its contents. Access to the content of the correspondence can only be provided on the ground that the dissemination of specific information

may endanger public order, security, the rights and freedoms of others. In such case, the relevant official of the penitentiary shall be entitled to access and, where necessary, to restrict the circulation of correspondence, which shall be notified immediately to the sender of the correspondence. The legislation lays down a special rule for the control of correspondence sent to a particular addressee.[70]

From the analysis of the above facts, we can say that the legislation recognizes two different mechanisms of controlling the correspondence of a detainee / accused / convicted person. One is to check correspondence under the Code of Imprisonment, which generally involves an external examination of the correspondence of a detainee / accused or convicted person, without specific content wise control, except in specific cases. The second case is the censorship of correspondence of these persons within the scope of operative activities. Censorship, in turn, implies, in any case, a substantive study of correspondence, and clearly, it is not limited to its external evaluation.

The Law on Operative-Investigaiton Activities does not, as mentioned, specify the circumstances, the basic criteria according to which content wise control of correspondence would be possible. This type of operative measure does not need to meet any standard of proof, so there is a high risk that correspondence censorship of the detainee / accused / convicted will be intense and uncontrolled.

In turn, the possibility of monitoring the correspondence of a convicted or otherwise imprisoned person is also provided by the practice of the European Court of Human Rights, according to which the control of a convicted person's correspondence should not be assessed as contrary to of the Convention, per se, [71] if the monitoring involves external examination, opening up and open monitoring.[72] The Court considers it important, under national law, for the monitoring of correspondence to take into account the need for a judicial decision.[73] The European Court of Human Rights considers this type of correspondence control as a violation, even if the law does not contain the detailed regulations, or regulatory act allows the individuals wide discretion in censoring the correspondence, when they can violate a free exchange of correspondence independently, without a prior court order.[74] If the legislation leaves the scope of discretion to the decision-maker, the court requires that the scope of discretion be strictly defined.[75]

70 Imprisonment code, article 16

71 CASE OF SILVER AND OTHERS v. THE UNITED KINGDOM, Application no. 5947/72

72 CASE OF DEMIRTEPE v. FRANCE, Application no. 34821/97

73 CASE OF Birznieks v. Latvia, Application no. 65025/01

74 CASE OF PETRA v. ROMANIA, Application no. 115/1997/899/1111

75 Domenichini v. Italy. Application no.15943/90

A separate issue is that the Procedure Code, in the context of covert investigative action, already contains the possibility of controlling postal and telegraphic correspondence, besides diplomatic mail. Which, in turn, is confined to the scope of the code in relation to the covert investigative actions and can only be conducted in case of extreme public need. In addition, the Code of Imprisonment provides for external correspondence checking and, where necessary, the possibility of inspecting the content. Alongside these mechanisms, the justification for correspondence censorship as an operative measure has no basis.

It is unclear what the basis was, at the time, to include the mentioned measure within the operative-investigation activities in parallel with the Procedure Code. In this case as well as in the other cases discussed above, there is a significant legislative gap that first raises the question of exactly what action this measure represents and under what legal regime (operative-investigation, penitentiary or criminal procedure law) it should be implemented.

4.4. Test Purchase and controlled delivery

One of the most frequently used measures in operative activities is controlled delivery and test purchase.

According to the law, controlled delivery is defined as controlled movement from a foreign state into Georgia or through Georgia of real evidence or of an object which is prohibited or restricted by law.[76] Test purchase is defined as a purchase or the creation of the situation of a purchase (without an intention of resale or consumption) of objects or substances by an operative, an investigator or an operative-investigative body based on information obtained from operative-investigative activities. [77]

On the international level, controlled delivery is defined as a special, covert type of investigation, a measure used to detect drug offenses, drugs and other illicit substances, objects.[78]

It is noteworthy that the legislation does not provide any other definition for the implementation of these measures. The only thing that is clear from the definition in the law is the stage of using controlled delivery and test purchase. Under this regulation, controlled

76 Law of Georgia on Operative -Investigation Activities, Subparagraph "e" of Article 1, Paragraph 2

77 Law of Georgia on Operative -Investigation Activities, Subparagraph "d" of Article 1, Paragraph 2

78 Deployment of Special Investigation Means, Council of Europe office in Belgrade, 2013

delivery may only be used for offenses already committed (to solve a crime, to detect a crime), and, in contrast, a test purchase may also be made for preventive purposes. This measure is particularly problematic for drug related offences. As procedural ambiguity does not insure against the arbitrariness of the parties involved, and if the defence party identifies arbitrary action, there is virtually no appropriate leverage for proving it, which in turn precludes establishment of the arbitrariness in the action.

One of the key features of the Georgian regulation of controlled delivery is the supply chain control. To the extent that the controlled delivery only applies to an object or substance the sale of which is prohibited or restricted by law. Accordingly, the object of controlled delivery may be an object, a substance, the sale and turnover of which is restricted or prohibited by law. The purpose of this type of operative measure is to determine the circulation / movement route of restricted items and to identify the persons involved (circulating restricted substances / objects and / or senders), who have committed or are committing a crime.

An important shortcoming of controlled delivery regulation is the fact that the legislation does not directly specify the circle of persons who can make a controlled delivery. The law generally states that an operative measure is an action taken by a duly authorized person or body, and, on the other hand, when defining almost each and every measure, it specifies the person authorized to execute it.[79] For example, the law explicitly states that a test purchase may be carried out by an operative officer or investigator, on the other hand, the law specifies an authorized entity when defining the collection of information, surveillance, and the creation of a conspiracy organization.

Such an approach in the law with respect to particular measures demonstrates the legislator's willingness to limit, in each case, the circle of persons authorized for conducting operative activity by specifying the entity implementing the operative measure. Controlled delivery does not have this limitation, which may, in practice, broaden the definition of controlled delivery and involve different parties in its implementation.

Unlike the Georgian legislation, detailed procedural regulation of test purchase and controlled delivery is included the legislation of those countries where controlled delivery exists as an operative measure. However, it should be noted that controlled delivery in these countries is not a simple operative measure and the legislation sets a very high standard for its use. For example, under Moldovan Law on Operative-Investigation Activities, controlled delivery can only be carried out with the consent of the Prosecutor General or his authorized representative. The law also specifies in detail what basic in-

79 Law of Georgia on Operative-Investigation activities, Article 1

formation should be provided to the Attorney General or their authorized representative. The information should include the justification for the need for a controlled delivery, the possible timing of the operative measure. In case of refusal to make a controlled delivery, the author of the petition must have the right to appeal.[80]

On the international level, test purchase and controlled deliveries have been primarily used for identification of illicit drug trafficking, but over time their scope has increased. In order to regulate test purchase and controlled deliveries, there are several basic criteria at the international level that national legislation must meet. According to these principles:

- internal legislation should regulate in detail the procedural aspects of test purchase and controlled delivery;
- legislation should clearly indicate the entity conducting test purchase and controlled delivery as well as the entity issuing the permit;
- legislation should include an accurate listing of the objects that may be the subject to the test purchase, controlled delivery;
- test purchase and controlled delivery should be understood as a special measure and any action taken within that measure must meet the test of necessity and proportionality.[81]

80 See: law on Operational activities Republic of Lithuania, article 15

81 Deployment of Special Investigation Means, Council of Europe office in Belgrade, 2013

5. Confidential Participation and Entrapment Risks in Operative Measures

5.1. Entrapment risks in specific operative measures

Controlled delivery and test purchase is an operative measure in Georgian law that involves a particularly high risk of entrapment, as these measures are by their nature directed not at establishing a specific criminal fact but at detecting a criminal fact, when there are no guaranties that inducement to criminal acts will not take place.

Test purchase and controlled delivery in a way induce individuals to commit a crime, even if the person had not genuinely intended to take particular action, at a particular time. In the context of these measures, it is difficult to prove with certainty that a person, even without a test purchase or a controlled delivery, would have inevitably committed a crime. These measures constitute an important precondition for the fulfilment of a possible criminal intent. The only thing that can be proven with more or less accuracy by these two measures is a person's criminal intent, which in turn cannot be defined as a crime without a specific action taken. Accordingly, controlled delivery and test purchase are contributing factors, the basis, for the fulfilment of the abstract purpose. It is also problematic that these activities are usually carried out with the participation of confidants, and there is practically no possibility to verify their identity.

In turn, a person's prior disposition to commit a crime and the degree of his or her initiation of the crime are important features for the European Court of Human Rights to assess a possible provocation of the crime. These are the main criteria that the European Court sets out to the national courts when considering the question of provocation of the crime. In this respect, the Court pays considerable attention to examining whether the law is "quality" in this respect. How detailed and fair the regulation is for conducting special investigative actions and what is the legislative standard for overseeing such a measure.[82]

The risks of inducement are also related to the admissibility of further information obtained through this measure. The European Court considers the evidence obtained on the basis of a possible entrapment to be unacceptable. Court practice usually does not preclude the use of covert measures of a similar nature for the purpose of investigating serious crimes, although it does require, at the level of law, a clear, detailed, balanced and procedural safeguard provided for these types of measures.

82 Case of Khudobini V. Russia №59696/00, 26/01/2007, ECtHR

Existing international standards unequivocally preclude the justification for the admission of the evidence, which was collected through the incitement of the crime. The case-law of the European Court excludes the imposition of responsibility for actions which were based on the action of a police officer or other person under his auspices – incitement of the commission of an offense, without which the offense would not have been committed.[83] According to the ECtHR, the legitimate aim of the state police is not to encourage, but to prevent or prosecute the criminal offense.[84] The Court assesses the legitimacy of these kinds of covert actions by two main tests – material-legal and procedural. In the first case, it is important for the court to determine how compelling and fact-based, the State justification was to deploy covert measures. The second case requires a judicial assessment of the possible inducement of the crime. At the same time, the Court concludes that the only effective mechanisms in such cases, at the national level, may be the creation of strict procedural rules for planning of a covert activity, and corresponding judicial authorization and its supervision / control.[85] The Court pays particular attention to the importance of effective oversight mechanisms. The comparative study of Council of Europe twenty-two member states shows that the member states are using covert measures, including undercover agents involved in a criminal case, however, in the majority of countries, the responsibility to authorize the work of an undercover operative is divided among several entities, where one of the main organs is a court.[86]

In our legislation, among other issues of principal importance, also problematic is the scope of applying these measures. The law does not refer to specific crimes, so State has a particularly harsh mechanism for responding to any category of crime, not only in exceptional cases. In this respect, the practice of EU member states is quite different. For example, under Slovak law, such measures may be used by the police to detect corruption offenses. In this model, the scope and grounds for deploying such measures are set out in detail in the legislation.[87]

Apart from the scope of activities, in which individuals are covertly participating and imitating real situations, also an important factor is determining the timing of the activity. It has to be said that the experience of different countries varies in this regard. In some cases, the determination of the timing is related to the specific type of the crime. In

83 Teixeira de Castro v. Portugal, 9 June 1998, § 36, and Nosko and Nefedov v. Russia, § 50, 30 October 2014, Tchokhonelidze v. Georgia, 2018, § 44.

84 Teixeira de Castro v. Portugal, § 39

85 Tchokhonelidze v. Georgia, 2018, §§ 44, 45; referring to Ramanauskas v. Lithuania [GC], § 67; Malininas v. Lithuania § 37, 2008; and Vanyan v. Russia §11 and 49, 15 December 2005; Khudobin v. Russia, § 135; Furcht v. Germany, § 53; Bannikova v. Russia, § 49, 50.

86 Veselov v. Russia, §§ 50-52

87 Slovakia, Code of Criminal Procedure, section 117.2

Romania, for example, the initial authorization period for detecting and combating organized crime against national security (trafficking, money laundering) is two months, while the term of the same measure is limited to one month for identifying corruption offenses. In general, from the experience of EU Member States, the terms of authorization is explicitly defined in the law, but in ad hoc method of authorization is also recognized, which is a characteristic of a German system.[88]

According to the general standard of the Criminal Procedure Code, evidence obtained in violation of the law is deemed inadmissible. The substantive infringement of the law is a notion, evaluation of which is largely dependent on the nature of the infringement and derives from the court decision, based on summary of positions on obtaining evidence, submitted by the parties to the court. Accordingly, in examining the lawfulness of forensic evidence, the court relies on the information submitted by the parties. It is noteworthy that the prosecution has no obligation to provide the court with all the evidence of a crime. The Procedure Code allows the parties to sort the evidence at their discretion and to present only concrete evidence to the court. [89] Accordingly, it may be possible to present to the court not the entire history of the operative-investigation activity, but only some passages from that history. At the same time, the prosecution itself is restricted from accessing important information on operative-investigation activities and, even if it so wishes, may fail to provide the court with the full information necessary to investigate the matter of incitement. The Criminal Procedure Code does not contain the rules that would allow for requesting additional materials from the prosecution or law enforcement agencies in order to get a full picture.[90]

It should be noted the practice of continental and case-law states, with regard to investigation activities that might induce criminal offence, somewhat differs. Establishing incitement, as a fact, in case-law states does not in itself exclude liability and is not a form of defense.[91] However, argument may be made in favor of the defendant if, in the course of an inciting activity, the conduct of the person (carrying out a controlled delivery or a Test purchase) is found to be inappropriate, and exceeding their authority. This situation may result in termination of the case. However, for the most part such instances may be the basis for excluding specific evidence from the case. In exceptional cases, if the court has found a certain provocation in the case, but not to the extent that would have served as a ground for termination, the court may take that fact into account when imposing a sentence and may mitigate the sentence.

88 Legal and Investigative tools, part:3, Gounev P.; Bezlov T.; Kojouharov A.; Ilcheva M.; Faion M.; Beltgens M.- Center for the study of democracy

89 Criminal Procedure Code, article 83

90 Georgian Law firms association, "Prohibition of a crime provocation" 2017

91 See: Hause of Lords in R V Sang (1980)

As for the common law countries, as a rule, Procedure Code explicitly bans using provocative means to obtain evidence. In case the incitement to criminal act is established, prosecution may be terminated, depending on the stage of the proceedings: if the case is heard by the court, the court terminates the proceedings, if the case has not reached the court yet – then it is a prosecutor who terminates the proceedings. In this case, as in the case-law, the discovery of a crime-inducing element in the case affects imposition of a final sentence.[92]

The European Court of Human Rights focuses on a number of factors in the case of identifying traces of incitement. It is crucial for the Court to answer a number of questions:

- what effect the covert measure had on the perpetrator's actions, how strong the prosecution's argument is that the person would still commit this crime, beyond this measure;
- how active or passive the operative was when commission of the crime took place, whether the commission of the crime was dependent on their actions;
- whether the intent to commit the crime is consistent with the facts of the case, beyond the incitement;
- the extent of the conduct of the accused that would support the assumption that he would have committed the crime without incitement;
- police directly caused the crime commission, or it only allowed individuals to commit the crime;
- how much difficulty was involved in dealing with crime by open methods, whether the use of covert, incitement measures was necessary;
- how high is the standard of supervision for this type of investigative action.[93]

European legislation on crime incitement was fundamentally changed in 1994. Until now, in most countries the component of prior conviction was a kind of test to determine if a person was a victim of a crime incitement or if he or she would have committed a crime without that component. In accordance with the case-law of the European Court

92 Deployment of Special Investigation Means, Council of Europe office in Belgrade, 2013

93 Schenk V Switzerland (1988) 13 E.H.R.R. 242; Ludi V. Switzerland (1992) 15 E.H.R.R.173, Teixeira De Castro V Portugal (1998) 28 E.H.R.R. 101.

of Justice, two approaches have been developed in national law: in case where incitement was identified, prosecution must either be terminated or specific evidence must be excluded.

The same approach applies to the Test purchase, as these two measures largely resemble each other in both the legal nature and the method of their implementation. European Court of Human Rights' ruling in the case of Vesselov and others v. Russia on Test purchase, makes an important precedent in relation to the establishment of specific standards. In considering this case, the Court assessed a large part of the legislation of the Council of Europe member states and recognized that the regulation of the Russia's Test purchase practice was one of the bad examples in this regard. Georgia was not among the precedents studied,[94] though we must bear in mind that, in this respect, the laws of both countries are almost no different.

The Court has set out the following basic principles in relation to test purchase, in the light of experience in different countries and of Council of Europe resolutions:

- the use of confidants by special investigative methods, especially for serious crimes, may be legitimate, though this process requires adequate safeguards, as only the public interest cannot justify obtaining evidence based on police provocation / incitement;

- the use of police-like covert mechanisms may only be justified within the framework of precautionary regulation when there is a possibility to grant the police the right to take action, to enforce it and to provide clear rules of supervision;

- the relevant authorities must have strong and solid evidence that they had an urgent need to carry out a Test purchase; at minimum, they have the responsibility to prove that the person would have committed the crime without a control buy;

- it is of fundamental importance for the court that a covert police action similar to a test purchase in carried out on a basis of judicial or other appropriate authorization and adequate supervision.[95]

A joint analysis of the existing legislative order, basic standards, and experience with regard to these types of operative measures reveals that there is a high risk in Georgian law that the law enforcement agencies will actually provoke crime, when trying to detect

94 Veselov and Othrs V Russia, 02.10.2012 N 23200/10, 24009/07 and 556/10

95 Deployment of Special Investigation Means, Council of Europe office in Belgrade, 2013

a criminal action. Especially given the fact that all the powerful mechanisms of incitement, test purchase and controlled delivery are not even procedural mechanisms, and are not subject to not only strong judicial control but also effective prosecutorial oversight within the scope of operative activities.

Dealing with such activities in the course of an operative-investigation measure absolutely precludes inspecting the probable incitement in the case and, on the basis of it, taking a favorable decision for the accused – termination of prosecution or omition of provocative evidence.

> Operative measures that include the risks of incitement should fall within the scope of the Procedure Code (test purchase and controlled delivery). At the same time, the Code should establish a mechanism for providing insurance against these acts. Legislation should make it possible to raise and discuss the issue of crime incitement at the trial stage, when examining evidence obtained on the basis of this measures. The discovery of signs of entrapment in the actions should be the basis for termination, mitigation, or acquittal.

5.2. Confidential participation in operative activities

Confidential participation in operative activities (so-called confidant/ informant engagement), the way, manner or method by which a particular person acts as a confidant to obtain important information for operative purposes is the least regulated and therefore at risk measure that the activities will disproportionately and unjustifiably interfere with human rights of others. Consequently, the involvement of the confidant is one of the issues that most question the legitimacy of operative activities and which need special safeguards for oversight.

From a practical standpoint, the justification for confidant's participation in operative activities remains linked to the degree of trust between the investigating authorities and the public. In general, the involvement of confidants in a case is decided on the basis of the individual circumstances of the case, taking into account the specific features of a particular society. A confidant is usually a trusted person in a particular community group, who receives a specific task from the investigating authority, a call for an action, and an assignment regarding receiving/obtaining information. They may carry out any operative activity, through predetermined tactics and methods.

A confidant is usually a specially selected person to participate in operative activities. In practice, the cooperation of a person with an investigative body in the form of a confidant engagement may be initiated on several different grounds, in accordance with the established practice. One example could be the involvement of persons with previous criminal convictions in the operative activities, as confidants.[96] Cooperating with investigative bodies naturally raises a logical question – what motive might a person have for engaging in covert investigation cooperation? One of the most likely answers to this question is prescribed in the law itself, which defines the guarantees of legal and social protection of citizens involved in operative-investigation activities. According to the law, the confidant, along with other social guarantees, has the right to receive remuneration for their activities.[97] Despite this record, the law does not specify the detailed rules for receiving remuneration and its amount. This issue is part of internal organizational regulation, which in turn is considered a secret act and therefore it is impossible to fully analyze the issue in this situation. Moreover, as the interviews have shown, investigation bodies are aware of cases where a confidant performs contractual activities without remuneration. In such a case, their motive may be to establish a close contact with the police, to obtain their support.

From this tendency, exception is the practice of Ministry of finance of investigation service. Within the investigation service, rights and obligations of the informants are regulated by the law. The law precise on the one hand informant's collaboration with the investigation service, in line with his/her social guarantees. On the other hand, law consists informants' obligation to deliver to the service true and thorough information. These provisions themselves are important but not sufficient guarantees for the hedge of risks coming from the informants' work.

In this respect, there are different practices in different EU states. The legislation of several countries explicitly provides for directives regarding the remuneration, including the laws of Portugal, Latvia and Romania. Fixed remunerations rules apply for example in the UK and France. Countries vary in their upper limits for remuneration, ranging from one thousand to twenty thousand euros in the laws of Bulgaria, Denmark and France. The UK recognized the so-called, the crime category matrix, which determines the exact amount of reimbursement in a particular case based on the gravity of the crime and the information received.[98]

96 The information is based on the results of interviews with law enforcement officers

97 Law of Georgia on operative-investigation activities. Article 17

98 Legal and Investigative tools, part:3, Gounev P.; Bezlov T.; Kojouharov A.; Ilcheva M.; Faion M.; Beltgens M.- Center for the study of democracy

Offering unreasonable remuneration to the informant, in turn, poses a risk of poor quality and unreliability of information. Exactly these risk factors call for the development of the alternative mechanisms of compensation, determining a particular benefit for the confidant involved in operative activities, such as, offering a plea agreement, waiver of a criminal liability, termination of the investigation and other measures.

Involvement of an informant / confidant in the case is not an exclusive method of Georgian policing. This mechanism is utilized in many different countries, however the problems associated with the work of informants are clearly identified in these practices. In the US, for example, confidential involvement may be offered to a person who cooperates with the investigative body in order to avoid a high sentence, implying that being an informant in the case precludes them being held liable for criminal activity. In many cases, the informant is also insured against future liability.[99]

The institute is also problematic because the information provided by the informants is often not reliable, as confidants are particularly interested to gather incriminating evidence to counterweigh their liability insurance and therefore confidant is just as much interested in the outcome of the case, as the police. Accordingly, there is a high risk in this activity that the confidant may fabricate specific evidence or case-related information in order to obtain the promised benefits.

Ultimately, the American experience with regard to the informants shows that the main difficulties are the unreliability of their activities, weak supervision, waiver of the criminal responsibility (which is a benefit for the informants in exchange for their cooperation), and the secretive nature of their work, which results in making the entire American criminal justice system less sensitive and accountable. According to the existing criticism, the use of informants in policing is a dangerous social policy as it disrupts social ties and public unity, and exactly this reflection was the basis of a large-scale social campaign "Stop Snitchin" in the US.[100] In order to avoid the impending dangers of confidant involvement in policing, various countries have begun to weaken this institution by introducing the principle of public cooperation with the police. This strategy has worked successfully in Dutch, British and Belgian practice. Where the police have created a hotline that has, over time, become an effective alternative mechanism for obtaining information for the police and has promoted the replacement of utilizing informants with the method of disclosing information, on the basis of confidentiality.[101]

99 A. Natapoff, Secret Justice: Criminal Informants and America's Underground Legal System. Prison Legal News, June 2010, p. 1

100 Alexandra Natapoff, „Secret Justice: Criminal Informants and America's Underground Legal System" published in Prison Legal News June, 2010, available at: https://www.prisonlegalnews.org/news/2010/jun/15/secret-justice-criminal-informants-and-americas-underground-legal-system/

101 Tradeoffs in Undercover Investigations: A comparative Perspective, Jacqueline E. Ross

In addition to the importance of confidant involvement in operative activities, the control of these measures, in practice, is a recognized problem. As far as, there is almost no effective control mechanism for its operation. That is to say, the techniques and tactics used by the confidants, depends solely on their presumption of good faith.

The state must take effective steps to improve police and community cooperation, and to build public confidence in the police system. This approach will also enhance the effectiveness of the investigation process, reducing the need to use informants.

6. Control and oversight of operative activities

One of the major problems with operative work are the issues of control and supervision over it, although different methods of control and supervision of operative activities are defined by law.

The law recognizes three different types of operational control. Specifically, the law distinguishes departmental, prosecutorial, and judicial control over operative activities.[102]

In the post-Soviet countries, Lithuania and Moldova have the best experience of overseeing operative activities. The laws of these countries recognize not only the departmental, prosecutorial and judicial control, but also guarantee governmental and parliamentary oversight over operative measures.[103]

As noted above, the general international standard on covert policing is particularly stringent in terms of activity planning as well as its immediate implementation and oversight. For example, the recommendations of the Committee of Ministers of the Council of Europe oblige Member States to establish effective legislative safeguards to ensure that judicial/other competent authorities are equipped with pre, ongoing or ex post facto oversight[104]

6.1. Departmental control over operative activities

Legislation with regard to departmental control is particularly vague, as it only contains a general record that the heads of agencies conducting an operative-investigation activity are personally responsible for the legality of organizing and conducting the operative activity.

Imposing responsibility on the head of the agency authorized to conduct operative activities legally does make sense. Especially considering that under this law, the authorities carrying out operative activities have exclusive and unlimited power to issue departmental normative acts in relation to the said activities.[105]

102 Law of Georgia on operative-investigation activities, chapter VI

103 Law on Operational Activities, Republic of Lithuania & Law of the Republic of Moldova on Operative Investigation activity

104 Council of Europe, Committee of Ministers, CM/Rec(2017)6 of 5 July 2017, Appendix.

105 Law of Georgia on operative-investigation activities, article 4, para. 2

The law, however, does not specify the concrete scope of regulation, the range of issues that may be included in and regulated by departmental normative acts. Accordingly, the law does not preclude to have departmental acts regulate the methods, scope, techniques and tactics of an operative event, which may in turn raise the question of the legality of an operative event.

In this respect, the second major problem is the legal nature of the act itself. However, in special cases, the state agencies may have legitimate authority to issue secrete acts, especially in the field of national security, however, given that the act is not publicly available, and it is difficult to even raise the issue of constitutionality of the acts, it is important that the law thoroughly defines the departmental control methods over operative activities.

In practice, one of the most effective mechanisms of control over operative activities is the method of departmental control. Since the head of an authority is directly involved in the planning and implementation of an operative activity from the outset, they monitor the process, have access to oversee the quality of adherence to the departmental acts during the process, which may not be available to the prosecutor.[106] In itself, such a practical implementation of departmental control has its merits. However, the main criticism of the effectiveness of departmental control is based on the fact that without an additional, external mechanisms, it is difficult to have trust in the efficiency of the control, when the activity planning, activity strategy elaboration and its immediate execution are functions of one single organ and often, this is one particular person. Especially given that the nature of the departmental acts, on which the whole process of operative activity is mainly built and which are both developed and executed by the head of the operative unit, is in itself problematic. As there is virtually no control over the acts, under their strict confidentiality rules.

6.2. Prosecutorial oversight of operative-investigation activities

Also problematic is the mechanism of prosecutorial control over operative activity. The law seems to set up a multi-component oversight mechanism by various agencies, though none of the mechanisms set out in the law are sufficiently clear and effective for any branch, including the prosecution, to be able to effectively exercise control over the legality of the operative activities. On the contrary, it can be said that the prosecutorial oversight mechanism is one of the weakest and most ineffective mechanisms established by the law. The law does not specify what prosecutorial control over operative activity should be, in what ways and by what means should the control be exercised.

106 The information is based on the results of interviews with law enforcement officers

In contrast, the law explicitly specifies what part of the operative activity is not subject to prosecutorial oversight. However, the law does not specify on what parts of the operative activity or in what ways, the prosecutorial supervision should be carried out. More specifically, according to the existing record, the prosecutor executes supervision and monitoring over the accurate and uniform implementation of the Law on Operative-Investigation Activities. And information on persons who provide or have provided confidential assistance, or cooperate with, or have ooperated with operative-investigation agencies is not the subject to prosecutorial oversight. Prosecution oversight also does not cover the methods, tactics, and organization of obtaining operative information.[107]

The precise and thorough rules of prosecutorial oversight over operative activities are not exemplified by the laws of other countries, either. Such a general provision from the post-Soviet legal regime is prescribed in the Lithuanian legislation, which requires high-level prosecutors to coordinate the implementation of operative activities by the relevant authorities and thus control the legality of the operative measure.

There is no further reference to the prosecutorial control other than this general entry in the law. However, in this case, the basis for the need of prosecutorial control is the specificity of the implementation of operative activities, which, in this country, according to the legislation, is not limited to the prosecutor tasking other organs with conducting operative activity, and but also the fact that the relevant authorities are directly dependent on the prior authorization of the prosecutor (permission to conduct operative work) when conducting operative activities.[108] Accordingly, the mandatory permission component already creates both formal and material grounds for accountability on the one hand, and on the other hand, for the oversight of operative activities by the prosecutor.

Under Georgian law, the scope of prosecutorial oversight imposed on operative activity is quite narrow. The prosecutor is not entitled to possess information and supervise the activities of those who provide confidential assistance to the operative authorities. The lack of prosecutorial oversight on information regarding condifants is particularly problematic in the sense that this information may be crucial in evaluating evidence in a particular criminal case and in making the final decision on the case.

In the context of closed information regarding confidants, when these circumstances are known only to the investigator, a procedural reality is created, where the defense would not have the opportunity to present substantiated counter arguments against the prosecution, which may not be known even to the prosecutor, and clearly the court might

107 Law of Georgia on Operative-Investigation Activities, article 21

108 Law on Operational Activities, Republic of Lithuania, Article 21

miss this information. At the same time, the accused cannot even rely on prosecution's "goodwill" to provide him with all the information that may call into question the credibility of the underlying evidence in the case.[109]

The absence of prosecutorial oversight further reduces the expectation of accountability, and the credibility of the evidence presented against the person relies solely on the investigator's "presumed good faith" This creates the danger that in certain cases the outcome of the trial may be based on the negligence, error, or misuse of powers of the investigator and that a person may be held liable because of failing to protect himself against accusations which the prosecution itself had limited access to. [110]

Complete secrecy over information regarding the confidant, which is the basis of all evidence subsequently obtained, implies the possibility of errors in the evidence evaluation process. There is a high likelihood that, no matter how (un)important the information is regarding the confidant, the lack of access to the said information, both for the judge and the party (even in an exceptional case and limited form) will have a significant impact on the final outcome. When a judge's internal conviction on a crime is established so that neither the judge has access to the main source of evidence nor the defense has a chance to build a strategy on the credibility of the source, it is impossible to speak of criminal proceedings oriented at avoiding mistakes.[111]

6.3. Judicial control mechanisms over operative activities

In addition to departmental and prosecutorial control, the legislation provides for the possibility of judicial control over operative activity. Exactly how, by what method and to what extent judicial control is applied, is not specified by law. The only indication the law provides in this regard is that judicial control over operative activity should be exercised in accordance with the procedure established by the Criminal Procedure Code.

It is noteworthy that the 2014 amendments, the main purpose of which was to bring the operative measures (subject to judicial supervision) under covert investigative actions, also dealt with the mechanism of judicial control over operative activity. Prior to the changes made in the legislation, judicial control over operative activities was directly related to the methods and legal basis for implementing the operative measure. This implies that there was a direct record in the law, thereby restricting judicial control to

109 ibid. para. 20;

110 ibid. para. 21;

111 Constitutional Court of Georgia Decision N1 / 1/548 of 22 January 2015, II – 50;

operative activities that may interefe with human rights, which in turn depended on the special authorization of the court.[112]

With this regulation, the judicial control over operative activity was somewhat restricted as the law, at the time, only recognized two types of operative measures subject to judicial authorization, and the court exerted ex ante control on these measures. Following the amendment, judicial control over the operative activity was expanded at first glance, as the law did not specify those measures the judicial control was originally limited to. However, in reality, after this change, the reference to the judicial control over operative activity has become merely fictitious.

As of today, the record in the law on judicial control over operative activity lacks both the substance and the basis. There are no purely operative measures in the law that require special permission from the court. And the interim measure activities, which are prescribed both in the Criminal Procedure Code and operative legislations, (for example, obtaining electronic communication identification data, real-time geolocation determination) are not operational but procedural acts and judicial control in this regard is implemented under the procedural legislation.

In this situation, it is unclear why the legislation covering operative activities should include reference on judicial control over the actions implemented under the Procedure Code, when the matter is regulated in detail by procedural law. Even this exsiting record in the law clearly indicates that the operative and investigative activities are not clearly distinguished not only on the pratical level but also on the theoretical, legislative level.

The court practice also clearly indicates to the formality of the record in the law on judicial control. In the framework of the study, detailed statistical information was requested from various courts throughout Georgia. With the aforementioned request, the organization sought information from five different courts about reviewing, granting, or denying petitions for a specific operative measure. The analysis of the court's responses revealed several important factual circumstances: there is no real judicial control over any kind of operative measure; there is no perception of attributing a particular activity to operative or investigative measure, even in the judicial standpoint. Responses from several courts referred directly not to operative-investigation activities but to covert investigative actions.[113] As noted in the previous chapter, despite the changes made to the law, there are number of operative measures in the law that involve a high risk of disproportionate interference with the

112 See Edition prior to the August 1, 2014 amendment to the Law of Georgia on Operative-Investigation Activites

113 See: Human Rights Education and Monitoring Center (EMC) correspondence Ng01/34/2019 of February 21, 2019

person's rights and, therefore, appropriate court authorization must be required to legitimize their implementation.

When reviewing certain types of operative-investigation actions, the basic standards for the review highlighted the importance of a strong, independent supervision mechanisms and particularly, judicial supervision over the covert policing activities,[114] which practically is not defined by the Georgian legislation, especially when certain types of operative activities contain, inter alia, high risks of entrapment (e.g. controlled delivery and test purchase). The judicial oversight mechanism in the law is so formal that it does not even insure the risk of provocation in a particular case.

The existing regulation and practice of operative activities make it clear that the nature of operative activity itself creates a problem of its supervision and control. Since neither on the theoretical nor on the practical level, it is clearly defined what kind of activity is an operative activity, what kind of mechanism of criminal law measure it is, whether it is preventive, purely policing or investigative. Naturally, without fully considering the nature of this activity and the role of specific entities / bodies involved, it is difficult to determine to what extent/ which body may have control and oversight over operative activities. Consequently, in order to have a good system of supervision and control over operative activity, the nature of the operative activity itself must first be clearly identified.

To summarize, it can be argued that operative activity is a problematic mechanism, not only considering its nature and legal characteristics, but also in terms of the oversight (or, lack of it) of operative measures. Operative activity in the hands of law enforcement officers is excessive on the one hand, and, on the other hand, it is an uncontrolled power, which completely goes beyond the realm of the state democratic mechanisms aimed at crime prevention and crime response. The end result is an effort to protect public safety through covert surveillance, crime incitement and strengthening the confidant institute.

Legislation should establish solid safeguards for oversight of operative activities. Practical control over operative activities should not be confined only to the implementing agency. Judicial oversight practices should be strengthened for specific operative measures that are at high risk of interference with rights. Legislation should establish mechanisms for court's prior authorization and monitoring after the enforcement.

114 Deployment of special investigation means, council of Europe office in Belgrade, 2013

Summary of the study

The study of the legislative and practical aspects of the operative activities conducted by the law enforcement agencies, revealed the main gaps that exist in terms of the covert activities of the relevant agencies in the country.

Since the restoration of Georgia's independence, despite significant legal reforms in the country, operative activities by the law enforcement agencies have been practiced in an almost unchanged manner, which over time has become an integral mechanism for investigative bodies and a key instrument of investigation. Nowadays, operative activities in the hands of law enforcement agencies are a complex mechanism, that is used both to prevent crime and to detect the offense.

In the framework of operative activities, artificial mechanisms of investigation are firmly established in practice, which completely ignore the basic standards set forth in the Criminal Procedure Code for investigation and are carried out without effective, objective supervision. Against the background of the strict confidential nature of operative activities and the secret methods of their implementation, it is difficult to exercise effective external control. The mechanisms of oversight provided by the law are largely formal.

It is noteworthy that, despite specific changes, the types of operative measures and the method of their implementation have not changed significantly to date. Many covert activities are carried out without the judicial permission and often without direct time limitations. Some of the operative measures and methods of obtaining information have a high risk of provoking crime.

It is clear that in the modern state, especially in light of the increasing technological progress, in certain cases, the relevant agencies should have the authority to resort to the use covert mechanisms. However, the use of covert measures should not be carried out in such a way that the idea of avoiding or preventing the crime, in practice, turns into a mass control of society. Therefore, a careful, clear and thorough revision of this field is necessary. The state should base the activities of law enforcement on the vision of human rights and ensure, in any process, a robust protection of rights.

In the current situation, it is necessary for the state to start a discussion on a fundamental reform of operative activities in the law enforcement system. Which should be a follow-up to the planned reform of the investigation system. It is advisable to carry out operative reform step by step. At the initial stage, it will be important to develop specific legislative changes aimed at distinguishing operative, policing and investigation powers, and, at the final stage of reform, the state should be able to replace operative activities with modern, democratic mechanisms of work of law enforcement agencies.