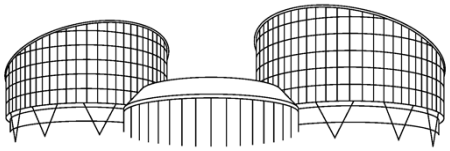

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF DENYSYUK AND OTHERS v. UKRAINE

(Applications nos. 22790/19 and 3 others –
see appended list)

JUDGMENT

Art 8 • Private life • Correspondence • Covert audio and video monitoring of the first applicant and interception of the second and third applicants' telephone communications in the context of police operations carried out during criminal proceedings against them • Applicants' denied access to judicial decisions authorising impugned measures • Court lacking access to those decisions and thus unable to conclude they were authorised as a result of proper and detailed judicial scrutiny • Lack of sufficient safeguards to ensure implementation of covert investigative measures • Applicants' communications with their lawyers not sufficiently protected by specific and detailed rules and procedures defining their identification and handling in the event of accidental interception • No independent oversight authority with sufficient competence to protect the applicants from abuse or mistakes by the law-enforcement officers • Lack of an effective domestic procedure for the determination of the core of their Art 8 complaints in good time • Interference not in "accordance with the law"
Art 8 • Private life • Correspondence • Structural deficiencies in the domestic legal framework protecting the confidentiality of lawyers' telephone communications with clients subject to telephone tapping • Art 34 • Victim • Fourth applicant, a lawyer, standing regardless of whether any of his actual telephone communications with his clients were intercepted
Art 38 • Non-compliance with State obligation to furnish all necessary facilities

Prepared by the Registry. Does not bind the Court.

STRASBOURG

13 February 2025

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Denysyuk and Others v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mattias Guyomar*, President*,
María Elósegui,
Stéphanie Mourou-Vikström,
Gilberto Felici,
Andreas Zünd,
Diana Sârcu,
Mykola Gnatovskyy*, judges*,
and Victor Soloveytchik, *Section Registrar,*

Having regard to:

the applications (nos. 22790/19, 23896/20, 25803/20, and 31352/20) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by four Ukrainian nationals, whose personal details are set out in the appended table ("the applicants"), on the various dates indicated in the appended table;

the decision to give notice to the Ukrainian Government represented, most recently, by their Agent, Ms M. Sokorenko ("the Government") of the complaints under Article 8 (all applications) and Article 13 of the Convention (applications nos. 23896/20, 25803/20 and 31352/20) and to declare inadmissible the remainder of applications nos. 22790/19 and 23896/20;

the parties' observations;

Having deliberated in private on 21 January 2025,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The applications concern the alleged incompatibility of covert investigative measures (*негласні слідчі (розшукові) дії*) with the applicants' rights guaranteed by Article 8 of the Convention, having regard, in particular, to the alleged lack of adequate safeguards in the applicable law and the practical means of implementing it in their respective cases. They also concern the availability of domestic remedies, within the meaning of Article 13 of the Convention, for the applicants' complaints raised under Article 8 (applications nos. 23896/20, 25803/20 and 31352/20).

THE FACTS

I. APPLICATION NO. 22790/19 (MR DENYSYUK)

2. The first applicant, Mr Stanislav Fedorovych Denysyuk, was born in 1958 and lives in Kharkiv.

3. On 24 May 2017 A.M., a prosecutor from the Prosecutor General's Office, issued the applicant with a written notification of suspicion (*повідомлення про підозру*), accusing him of participating in a large-scale corruption scheme and abusing his authority as the former head of a regional tax authority.

4. On the same date the applicant was arrested and subsequently remanded in custody until 22 May 2018.

5. On 14 March 2018 O.Y., another prosecutor from the Prosecutor General's Office, informed the applicant that the pre-trial investigation in his case and that of twenty-five other defendants had been completed and that he could familiarise himself with the prosecution's case file.

6. On 8 October 2018 the applicant received a letter from O.Y. dated 28 September 2018, which stated as follows:

> "In accordance with the requirements of Article 253 of the Code of Criminal Procedure, you are notified that in the course of the pre-trial investigation of the criminal case ... in which you are a defendant, your constitutional rights were temporarily restricted by means of a covert surveillance measure provided for in Article 270 of the Code of Criminal Procedure.
>
> No information that could be used as evidence was obtained during the execution of that measure."

7. On 4 and 10 December 2018 the applicant, represented by a lawyer, requested O.Y. to clarify what covert measure had been applied to him, what information had been collected, when the measure had been discontinued and whether it had involved the interception of his communications with his legal counsel.

8. By letters dated 6 and 11 December 2018 O.Y. notified the applicant that he had been subject to local audio and video monitoring, and that the material obtained in the course of that monitoring had been destroyed as it had had no evidential value. He further stated that Article 253 of the Code of Criminal Procedure required law-enforcement authorities to notify individuals that they had been subject to covert surveillance within twelve months of the discontinuation of the measure in question. According to the applicant, he never received the originals of these letters and copies were only handed to him in spring 2019, after he had complained in court about the prosecuting authority's failure to deal with his request for information.

9. On 14 March 2019 the applicant, represented by a lawyer, further requested the Kyiv Court of Appeal to provide him with information concerning the scope, duration and other details of the judicial authorisation for the covert measure concerning him.

10. On 18 March 2019 the President of the Kyiv Court of Appeal informed the applicant that the court was unable to provide the information requested since its record-keeping system did not register personal identifying details of individuals for whom authorisation for a covert

surveillance measure had been sought, as the very act of seeking such authorisation was classified information.

11. On 8 August 2019 the State Bureau of Investigation launched a criminal investigation into the applicant's complaint that the covert measure applied to him had been unlawful. The applicant argued, in particular, that he had reason to believe that the audio and video monitoring had taken place while he had been in custody. During that period, he had mostly been visited by lawyers and doctors, with whom communications were privileged and could not be monitored.

12. On 29 May 2020 the State Bureau of Investigation discontinued the criminal proceedings. Referring to the testimony of O.Y., who had submitted that the applicant's monitoring had been carried out in accordance with the law, the investigator concluded that it did not appear that a criminal offence had been committed.

13. According to the latest information from the parties, the criminal case against the applicant was ongoing before the Dniprovskyi District Court of Kyiv.

II. APPLICATION NO. 23896/20 (MR BEYLIN)

14. The second applicant, Mr Mykhaylo Mykhaylovych Beylin, was born in 1977 and lives in Kyiv.

15. On 6 January 2017 the National Anti-Corruption Bureau of Ukraine ("NABU") instituted criminal proceedings against several officials for their purported involvement in a large-scale corruption scheme concerning the procurement of goods for the State railway company.

16. On 2 October 2019 M.S., a NABU detective, issued the applicant with a notification of suspicion, accusing him of aiding and abetting the scheme by abusing his official authority as an adviser to the head of the President's administration.

17. On 20 November 2019 the pre-trial investigation in the case was completed and the prosecution's case file was disclosed to the defence. According to the applicant, the file included, in particular, transcripts of telephone conversations made from the tapped telephone lines of his co-defendants, accompanied by copies of seventeen phone tapping requests filed by detectives with judges and the relevant judicial authorisations. The applicant submitted that all these requests and authorisations had contained brief and formulaic language without any assessment of the individual circumstances of each case. No documents relating to the covert measures in relation to him personally had been included in the file.

18. On 21 December 2019 M.S. informed the applicant that he had been subject to unspecified covert surveillance measures in the course of the pre-trial investigation. He further informed him that the material obtained in

the context of those measures had not been used as evidence in the case against him. The relevant notice read as follows:

> "Pursuant to Articles ... 253 of the Code of Criminal Procedure ... you are being notified that in the course of the pre-trial investigation ... covert investigative (operative) measures were applied, as a result of which your ... constitutional rights were temporarily restricted.
>
> Material obtained in the course of [those] covert investigative (operative) measures has not been used as evidence."

19. On 26 December 2019 the applicant, represented by lawyers, filed a number of requests with various authorities seeking the disclosure of information concerning the type, scope, duration and other details of the aforementioned covert surveillance measures, including whether or not they had involved the interception of his communications with his lawyers. He stated that the prosecution's case file disclosed to him contained no relevant material.

20. On various dates in December 2019 and January 2020 the NABU officials, the Special Anti-Corruption Prosecutor's Office ("SAPO") authorities, and the President of the Kyiv Court of Appeal rejected the applicant's requests, informing him that all the material collected in the course of the disputed measures had been destroyed as having no evidential value and referring to the classified nature of the documents and information requested.

21. On 24 January 2020 the Ombudsman (Ukrainian Parliamentary Commissioner for Human Rights) refused to investigate the matter on the applicant's behalf on the basis that all the relevant procedures were governed by the provisions of the Code of Criminal Procedure.

22. On 10 July 2020, in the course of the preparatory hearing held by the Higher Anti-Corruption Court in preparation for the applicant's trial, the applicant complained that the NABU detectives and the SAPO prosecutor had acted unlawfully by refusing to provide him with documents relating to the covert surveillance measures applied to him and by prematurely destroying the material obtained in the course of those measures. He also alleged that the measures in question could have included the interception of his communications with his lawyers and requested that the interception of these communications be declared unlawful. The applicant's complaints were added by the court to his criminal file to be examined at the evidence stage.

23. As of April 2023, the trial was ongoing.

24. In their observations on the admissibility and merits of the case, the Government informed the Court that, according to the information they had received from NABU, the covert surveillance measure applied to the applicant had been phone tapping. This measure had been authorised by an investigating judge in accordance with the requirements of the Code of Criminal Procedure.

25. The Government further informed the Court that they were unable to comply with its request to provide copies of the relevant judicial authorisations or any other relevant material from the applicant's domestic case file. In particular, all relevant information that could have remained in the possession of the Kyiv Court of Appeal and SAPO had already been destroyed in accordance with the requirements of the applicable law and regulations. Also, the material obtained in the course of the covert surveillance in the applicant's case, which had not been used as evidence, had been destroyed. Other relevant documents, such as detectives' phone tapping requests to the investigating judges and the relevant judicial decisions, contained information that had not been declassified. Therefore, under section 32 of the State Secrets Act copies of these documents could not be provided.

III. APPLICATION NO. 25803/20 (MR BEREZKIN)

26. The third applicant, Mr Maksym Stanislavovych Berezkin, was born in 1980 and lives in Kropyvnytskyy.

27. Between 2003 and 2015 the applicant, a businessman, was the beneficial owner of companies affiliated with the private business group K., in which he also held various high-ranking positions.

28. On 16 May 2016 SAPO initiated criminal proceedings concerning a large-scale scheme involving the diversion of State funds and money laundering, involving a number of public employees and executives of K.

29. On 23 October 2019 Y.T., a NABU detective, issued the applicant with a notification of suspicion, accusing him of aiding and abetting the scheme by participating in a conspiracy and abusing his posts.

30. On the same date the applicant's flat was searched and his mobile phone was seized.

31. On 16 December 2019 the applicant was informed that the pre-trial investigation in the case had been completed and that he could familiarise himself with the prosecution's case file.

32. On the same date the applicant was notified that his telephone communications had been intercepted in the course of the investigation, pursuant to authorisations issued by the investigating judges of the Kyiv Court of Appeal (on 24 January 2017 and 21 September 2018) and the Lviv Court of Appeal (on 9 August 2017). Each authorisation had covered a two-month period. The material obtained in the course of the interception had not been included in the prosecution's case file as it had had no evidential value, and it had therefore been destroyed.

33. On 24 December 2019 the applicant, represented by lawyers, filed a number of requests with various authorities seeking the disclosure of the documents and further information concerning the interception, including assurances that his communications with his lawyers had been protected. He

stated that the prosecution's case file disclosed to him contained no relevant material.

34. On various dates in December 2019 and January 2020 the NABU officials, the SAPO authorities, and the Presidents of the Kyiv and Lviv Courts of Appeal rejected the applicant's requests, informing him that all the material collected in the course of the disputed interception had been destroyed as having no evidential value and referring to the classified nature of the documents and information requested.

35. According to the applicant, in the course of his examination of the prosecution's case file, he came across thirteen declassified interception authorisations concerning his co-defendants, which resulted in the collection of the material used as evidence. A number of these authorisations were made by handwriting the personal details of the subjects of interception on pre-filled printed forms. According to a graphology expert's assessment ordered by the applicant's lawyer, the handwriting on those forms belonged to Y.T., the detective in charge of the case.

36. On 20 January 2022, after the case had been remitted to the Higher Anti-Corruption Court for examination, the applicant complained to that court that the NABU detectives and SAPO prosecutor had acted unlawfully by refusing to provide him with the documents relating to the interception of his telecommunications and by prematurely destroying the material obtained in the context of that measure. He also alleged that the measure in question might have included the interception of his conversations with his lawyers and requested that the interception of these communications be declared unlawful.

37. On 9 May 2023 the Higher Anti-Corruption Court rejected the applicant's complaints in the course of a preparatory hearing. The court stated, in particular, as follows:

> "Since it was impossible [for the applicant] to inspect the documents on the basis of which the aforementioned covert surveillance measure had been carried out, [this matter] could have been significant if the relevant material had been used ... as evidence. However, for the purposes of the preparatory [court hearing], the grounds for authorising investigative measures whose results will not be used as evidence are irrelevant and do not fall within the scope of the issues which the court must decide before the start of the trial."

38. The court further held that the immediate destruction of material irrelevant to the criminal proceedings had been lawful and had served as a safeguard against misuse of the applicant's private information. Since he himself was the source of the communications in question, the material obtained in the course of their interception could not have contained any information unknown to him. Should he wish to use it for his defence, he remained free to use other means, such as calling his interlocutors as witnesses. The destruction of all the intercepted material served, in particular,

as a safeguard for the privacy of his communications with his lawyers. The court further noted as follows:

> "... according to the information from the detective ... the material obtained in the context of the covert investigative measure will not be used by the prosecution as evidence. Therefore, the question of how it was obtained, including any possible breach of the guarantees of advocate's activity and legal professional privilege, does not lend itself to be assessed either during the preparatory hearing or the subsequent trial. If, in the course of the trial, the court establishes that the information used by the prosecution as evidence was directly or indirectly obtained as a result of interference with the communications between the defendants and their counsel, the court will evaluate that evidence in accordance with the admissibility criteria."

39. According to latest information from the parties, the trial is ongoing.

40. In their observations on the admissibility and merits of the case, the Government informed the Court that, for the same reasons as in the second applicant's case (see paragraph 25 above), they were unable to comply with its request to provide judicial authorisations for the interception of the applicant's telecommunications or any other relevant documents.

IV. APPLICATION NO. 31352/20 (MR KULCHYTSKYY)

41. The fourth applicant, Mr Nazar Stepanovych Kulchytskyy, was born in 1981. He is a lawyer practising in Kyiv.

42. On various dates the second and third applicants and S.T. (the third applicant's co-defendant) engaged the fourth applicant as their defence counsel in the criminal cases against them.

43. On 16 December 2019 the fourth applicant learned that the third applicant and S.T. had been subjects to telephone tapping within the framework of the criminal proceedings against them and that the relevant material obtained had been destroyed.

44. On 21 December 2019 the fourth applicant learned that the second applicant had been subject to an unspecified covert investigative measure within the framework of the criminal proceedings against him.

45. According to the fourth applicant, in the course of the pre-trial investigation of his clients' cases, he discussed and advised them on legal matters on numerous occasions over the telecommunications network. As those clients were subject to phone tapping, his communications with them could have been intercepted by the investigating authorities and their content could have been known to them, in breach of lawyer-client privilege. In winter and spring 2020 the fourth applicant lodged numerous information requests with the law-enforcement and judicial authorities seeking to find out whether any of his conversations with the aforementioned clients could have been intercepted and whether their content could have become known to the investigation (see, in particular, paragraphs 19 and 33 above). The authorities refused to disclose any relevant information.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW

A. Code of Criminal Procedure (2012)

46. The relevant provisions of the Code of Criminal Procedure (№ 4651-VI of 13 April 2012), as in force at the material time, read as follows:

Article 246. Grounds for conducting covert investigative (operative) measures

"1. Covert investigative (operative) measures are a type of investigative (operative) measure, the fact and methods of which shall not be disclosed, except as provided for in this Code.

2. Covert investigative (operative) measures are conducted in cases where it is impossible to obtain information about a criminal offence and the person who committed it. The covert investigative (operative) measures outlined in Articles ... 263 ... [and] 270 ... of this Code shall only be conducted in criminal proceedings concerning serious or particularly serious offences.

3. .... The investigator shall notify the prosecutor of ... the results obtained. ... .

... ."

Article 248. Examination of requests for authorisation to conduct a covert investigative (operative) measure

"...

3. The investigating judge shall issue a ruling authorising a covert investigative (operative) measure if the prosecutor or investigator proves that there are sufficient grounds to believe that:

(1) a criminal offence of the relevant degree of seriousness has been committed;

(2) evidence may be obtained during the covert investigative (operative) measure that, alone or in combination with other evidence, may be essential for clarifying the circumstances of a criminal offence or identifying the perpetrators of a criminal offence.

... ."

Article 249. Period of validity of the investigating judge's decision to authorise a covert investigative (operative) measure

"1. The period of validity of the investigating judge's decision to authorise a covert investigative (operative) measure may not exceed two months.

2. If the investigator or prosecutor believes that the covert investigative (operative) measure should be continued, the investigator, with the prosecutor's consent, or the prosecutor shall have the right to apply to the investigating judge for authorisation in accordance with the requirements of Article 248 of this Code.

3. In addition to the information specified in Article 248 of this Code, the investigator or prosecutor shall provide additional information justifying the continuation of the covert investigative (operative) measure.

4. The total period during which a covert investigative (operative) measure authorised by an investigating judge may be conducted in one set of criminal proceedings may not exceed the maximum pre-trial investigation period provided for in Article 219 of this Code ....

5. The prosecutor shall discontinue the further covert investigative (operative) measure if no longer necessary."

Article 252. Recording the implementation and results of covert investigative (operative) measures

" ...

3. A report (*протокол*) on a covert investigative measure, with annexes, shall be submitted to the prosecutor no later than twenty-four hours after [the measure's] termination.

..."

Article 253. Notification of persons subject to covert investigative (operative) measures

"1. Persons whose constitutional rights have been temporarily restricted during covert investigative (operative) measures, as well as the suspect and his or her defence counsel, shall be notified in writing of the restriction by the prosecutor or, on his or her behalf, by the investigator.

2. The specific time of the notification shall be determined taking into account the presence or absence of threats to the achievement of the objectives of the pre-trial investigation, public safety, or the life or health of persons involved in covert investigative (operative) measures. Notification of the fact and results of covert investigative (operative) measures shall be made within twelve months from the date of their discontinuation, but no later than the filing of an indictment with the court."

Article 255. Measures to protect information not used in criminal proceedings

"1. Information, items, and documents obtained as a result of covert investigative (operative) measures that the prosecutor does not consider necessary for further pre-trial investigation shall be immediately destroyed on the basis of his or her decision ...

2. It is prohibited to use the material referred to in the first paragraph of this Article for purposes not related to criminal proceedings, or to familiarise participants in criminal proceedings or other persons with them.

...

4. The destruction of information, items and documents shall be carried out under the supervision of the prosecutor.

..."

Article 258. General provisions on interference with private communications

"1. No one may be subjected to interference with private communications without the authorisation of the investigating judge.

2. The prosecutor [or] investigator with the prosecutor's consent shall apply to the investigating judge for permission to interfere with private communications in accordance with the procedure specified in Articles 246, 248, 249 of this Code, if any investigative (operative) measures include such interference.

...

5. Interference with private communications between a defence counsel, [or] a clergyman and a suspect, accused, convicted or acquitted person is prohibited."

Article 263. Interception of information from [electronic] telecommunications networks

"1. Interception of information from [electronic] telecommunications networks ... is a type of interference with private communications carried out without the knowledge of persons using telecommunications to transmit information, on the basis of a decision of an investigating judge, if during its implementation it is possible to establish circumstances relevant to criminal proceedings.

2. In this case, the investigating judge's authorisation to intercept private communications shall also specify the identifying features that will enable the precise identification of the subscriber to be placed under surveillance, as well as the [electronic] telecommunications network and the terminal equipment on which the interception of private communications may be carried out ..."

Article 270. Local audio and video monitoring

"1. Local audio and video monitoring may be carried out during the pre-trial investigation of a serious or particularly serious offence and consists in the covert recording of information through audio and video means inside publicly accessible places without the knowledge of the owner, possessor or persons present at the place, if there is information that the conversations and behaviour of persons in that place, as well as other events taking place there, may contain information relevant to criminal proceedings.

2. Local audio and video monitoring, in accordance with the first paragraph of this Article, shall be carried out on the basis of a decision of an investigating judge in accordance with the procedure provided for in Articles 246, 248, 249 of this Code."

Article 303. Decisions, actions or omissions of the investigator or prosecutor that may be challenged during the pre-trial investigation and the right to complain

"...

2. Complaints against other decisions, actions or omissions of the investigator or prosecutor shall not be examined during the pre-trial investigation, but may be subject to examination during the preparatory court hearing in accordance with the provisions of Articles 314 to 316 of this Code."

Article 309. Decisions of the investigating judge that may be challenged during the pre-trial investigation

"...

3. Complaints concerning other rulings of the investigating judge are not amenable to appeal and objections to them may be filed during the preparatory court hearing."

Article 315. Resolution of issues relating to the preparation for trial

"...

2. In order to prepare for the trial, the court shall:
(1) fix the date and place of the trial;
(2) determine whether the trial shall be held in public hearing or in camera;
(3) determine the list of persons participating in the hearings;
(4) examine requests from participants in the proceedings with regard to: calling certain persons to appear in court for examination; requesting the production of certain items or documents; [and] conducting the hearings in camera."
(5) take such other steps as may be necessary to prepare for the trial."

B. The State Secrets Act

47. The relevant provisions of the State Secrets Act (Law of Ukraine "On State Secrets" no. № 3855-XII of 21 January 1994), as in force at the material time, read as follows:

Section 1. Definition of terms

"In this Act, the terms shall be used in the following sense:

State secret (hereinafter also referred to as 'classified (secret) information') - a type of classified information that includes information in the field of defence, economy, science and technology, foreign relations, State security [or] law enforcement, the disclosure of which may harm the national security of Ukraine and which is classified as a State secret in accordance with the procedure specified in this Act and is subject to State protection; ..."

Section 32. Restrictions on the disclosure of State secrets to a foreign State or to an international organisation

"Classified information, prior to its declassification ... and material objects containing such information, which has not been declassified, may be disclosed to a foreign State or an international organisation only on the basis of international agreements ratified by the Verkhovna Rada of Ukraine or by a written, reasoned order of the President of Ukraine, regard being had to the need to ensure the national security of Ukraine on the basis of proposals of the National Security and Defence Council of Ukraine."

C. Bar and Advocacy Act

48. The relevant provisions of the Bar and Advocacy Act (Law of Ukraine "On the Bar and Advocates' Activity" no. 5076-VI of 5 July 2012) as in force at the material time, read as follows:

Section 22. Legal privilege

"1. Legal privilege shall cover any information that has become known to the advocate, ... about the client, as well as the issues on which the client ... sought the advocate's advice, ... the content of the advocate's advice, consultations or explanations, documents drawn up by the advocate, information stored on electronic media, and other documents and information received by the advocate in the course of his or her legal practice."

Section 23. Safeguards for advocates' activity

"1. The professional rights, honour and dignity of an advocate shall be guaranteed and protected by the Constitution of Ukraine, this Act and other laws, in particular:

(1) any interference with and obstruction of the performance of an advocate's activity shall be prohibited;

...

(9) interference with an advocate's private communications with a client shall be prohibited ..."

D. Other relevant laws and regulations

49. References to the relevant provisions (Article 1176) of the Civil Code and the Compensation Act (Law of Ukraine "On the procedure for compensation for damage caused to citizens by the unlawful acts of bodies of inquiry, pre-trial investigation authorities, prosecutor's offices and courts" no. 266/94-BP of 1 December 1994) can be found, *inter alia*, in the Court's judgment in *Nechay v. Ukraine* (no. 15360/10, §§ 36-37, 1 July 2021).

50. The Instruction on Covert Measures (Instruction on the implementation of covert investigative (operative) measures and the use of their results in criminal proceedings) was adopted jointly by the Prosecutor General's Office, the Ministry of the Interior, the Security Service of Ukraine, the State Border Guard Service, the Ministry of Finance and the Ministry of Justice on 16 November 2012 (Order no. 114/1042/1199/936/1687/5). The Instruction includes procedures for the collection, recording, storage, classification, declassification and destruction of data by means of covert investigative (operative) measures.

51. Under sections 5.9. and 5.10 of the Instruction, upon completion of covert measures, the prosecutor in charge of the case decides whether to declassify the relevant material "taking into account the circumstances of the criminal proceedings and the need to use [that] material ... as evidence ...". This decision is formalised by a resolution, which must be approved by the chief prosecutor of the relevant office.

52. Under sections 6.1. and 6.4.1, if the prosecutor in charge of the case decides that certain material is not necessary for the pre-trial investigation, it must be immediately destroyed on the basis of his or her written resolution, which must contain a full list of the material to be destroyed.

53. Under sections 6.6. and 6.8., the destruction is carried out by a designated commission in the presence of the prosecutor who ordered it, and the commission must draw up an "act" containing details of the destruction.

54. The Instruction does not contain any provisions detailing procedures for identifying and handling accidentally intercepted privileged communications, such as exchanges between lawyers and their clients.

II. RELEVANT INTERNATIONAL, EUROPEAN AND COMPARATIVE LAW MATERIAL

55. The relevant international, European and comparative law material can be found in the Court's judgment in the case of *Pietrzak and Bychawska-Siniarska and Others v. Poland* (nos. 72038/17 and 25237/18, §§ 87-91 and 93-123, 28 May 2024).

THE LAW

I. JOINDER OF THE APPLICATIONS

56. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

II. ALLEGED VIOLATIONS OF ARTICLE 8 OF THE CONVENTION IN RESPECT OF THE FIRST, SECOND AND THIRD APPLICANTS

57. The first, second and third applicants complained that the covert investigative measures of which they had been notified on 8 October 2018, 21 December 2019 and 16 December 2019 respectively had breached their rights guaranteed by Article 8 of the Convention, having regard, in particular, to the alleged lack of adequate safeguards in the applicable law and the practical means of implementing it in their respective cases. They relied on Article 8 of the Convention, which reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. Admissibility

1. The Government

58. The Government argued that the three aforementioned applicants had not exhausted the domestic remedies available to them, or, in the alternative, that their applications were manifestly ill-founded because they had not made use of the effective avenues of redress provided by the domestic legal system.

59. In this regard, the Government acknowledged that the applicable law did not provide for a possibility of appealing against judicial rulings authorising covert measures. They argued, however, that there were other suitable remedies. In particular, once the applicants' respective cases had been referred for trial, they had had the right, under Article 309 § 3 of the Code of Criminal Procedure, to file objections concerning the lawfulness of the decisions taken by the investigating judges. Under Article 303 § 2 of that Code they could also lodge complaints concerning the actions, omissions or decisions of the law-enforcement officials (see paragraph 46 above). The courts would have been obliged to take those objections and complaints into account when examining the applicants' respective cases. If the applicants had succeeded in obtaining a decision in their favour, they would have been able to claim damages on the basis of either Article 1176 of the Civil Code or the Compensation Act (see paragraph 49 above).

60. The Government further pointed out that in the cases of *Meimanis v. Latvia* (no. 70597/11, § 78, 21 July 2015) and *Kibermanis v. Latvia* ((dec.) no. 42065/06, § 49, 3 November 2015) the Court had already found that a two-tier redress mechanism enabling individuals to complain about covert police operations in the course of criminal or other proceedings and, if successful, to resort to a civil-law remedy for compensation, was effective in principle. They also submitted that findings as to the potential effectiveness of a similar two-tier mechanism had been made by the Court in Ukrainian cases, in particular *Orlovskiy v. Ukraine* (no. 12222/09, §§ 14 and 58, 2 April 2015) and *Tikhonov v. Ukraine* (no. 17969/09, §§ 22 and 39, 10 December 2015). In both cases the domestic courts, in the course of the applicants' trials, had made separate rulings (*окрема ухвала*) acknowledging irregularities in the applicants' arrest and detention. Since the applicants had not followed up by filing compensation complaints, the Court had found that they had not exhausted domestic remedies for their complaints under Article 5 § 1 of the Convention.

61. The Government acknowledged that the two latter cases had been examined at domestic level under the 1960 Code of Criminal Procedure. However, they argued that unspecified provisions of the current 2012 Code, which was applicable in the present case, provided a comparable solution.

62. To illustrate the effectiveness of the existing remedies, the Government referred to a Supreme Court ruling (case no. 61-6654ск21) issued on 8 December 2021. In that ruling, the court dismissed an appeal on

points of law filed by the Ternopil police against a judgment awarding non-pecuniary damages to the head of a private company who had been subject to covert interception of information from telecommunication channels in connection with a criminal investigation into an alleged breach of intellectual property rights by his company. The proceedings in that case had been discontinued for lack of evidence that an offence had been committed. In its ruling, the Supreme Court stated as follows:

> "...the very fact of discontinuation of the criminal proceedings on rehabilitative grounds ... constitutes sufficient proof of the unlawfulness of the actions of the investigative authority, the unlawfulness of which does not need to be additionally established in [separate] court proceedings."

63. The Government acknowledged that that ruling was a rather isolated example, in that it specifically concerned a request for compensation related to covert investigative measures. They contended, however, that the ruling had to be viewed in the context of a larger number of court decisions where individuals had succeeded in obtaining compensation for being prosecuted, detained, searched or otherwise affected by criminal proceedings which had then been discontinued, ended in acquittals, or where the law-enforcement authorities' conduct had been otherwise recognised as unlawful in the course of the criminal trial.

64. The Government submitted that the first applicant had not availed himself of any of the aforementioned remedies. They further noted that the second and third applicants had not made use of the remedies provided for in Article 309 of the Code of Criminal Procedure. Those applicants had, however, availed themselves of the remedies provided for in Article 303 of the Code of Criminal Procedure, and their respective complaints had not yet been examined. The Government therefore concluded that the complaints lodged by all three applicants were either inadmissible for non-exhaustion of domestic remedies, premature or, in the alternative, manifestly ill-founded, given that an effective mechanism for raising their complaints was available in domestic law.

2. The applicants

(a) The first applicant

65. The first applicant argued that he had not been bound to exhaust the remedies suggested by the Government, because they were *a priori* ineffective. First of all, the court hearing his criminal case at first instance had not had jurisdiction to act as an appellate court in respect of the disputed ruling. Nor had it been competent to deal with the substance of his complaint that the covert surveillance measure was not justified under Article 8 of the Convention, or to award any compensation. Secondly, any ability he might have had under the Code of Criminal Procedure to file objections or complaints at the preparatory hearing had been severely curtailed by his

inability to obtain a copy of the authorisation to apply a covert measure in his case or any other documents relating to the contested measure. Thirdly, as his case had been referred to the Dniprovskyi District Court in April 2019, and as of July 2023 no trial had started yet, any objections or complaints lodged at the preparatory hearing would have remained unresolved for such a long period that the remedy would have lost any effectiveness it might have had. Lastly, he argued that the Government's suggestion that he could have made use of Article 1176 of the Civil Code or the Compensation Act to obtain compensation was irrelevant to his case, as there had been no meaningful possibility for him to establish that the surveillance authorisation in his case had breached his rights.

(b) The second and third applicants

66. The second and third applicants submitted that they had attempted to make use of the remedy available under Article 303 § 2 (see paragraph 46 above). In practice, their attempts had proved to be ineffective. In particular, the second applicant's complaints, which had been joined to the case in July 2020, had remained unresolved for over three years (see paragraph 23 above). The third applicant's complaints, in turn, had been dismissed without the substance of his Article 8 complaint being examined (see paragraphs 37-38 above). As regards the remedy provided for in Article 309, which would have purportedly enabled them to file objections to the rulings of the investigating judges, they could not have made use of it as they had had no access to the copies of the rulings in question.

67. Both applicants further argued that the *Meimanis* and *Kibermanis* cases cited by the Government (see paragraph 60 above) were substantially different from their case, since the Latvian legal system had allowed for the assessment of the substance of the applicants' Article 8 complaints in the course of the criminal proceedings, as evidenced by the facts of these cases. In contrast, under the Ukrainian legal system, the current 2012 Code of Criminal Procedure no longer permitted the courts to issue "separate rulings", a provision which had existed under the 1960 Code. The Court's findings as to the potential effectiveness of this remedy in the cases of *Orlovskiy* and *Tikhonov* cited by the Government (ibid.), and later in *Lysyuk v. Ukraine* (no. 72531/13, judgment of 14 October 2021, §§ 42-46) were therefore not relevant to their case.

68. Lastly, the applicants argued that the Supreme Court's judgment referred to by the Government (see paragraph 62 above) was based on entirely different facts (in that case, the criminal proceedings were discontinued on rehabilitative grounds, and the civil courts considered that fact alone sufficient for establishing compensation without assessing the "lawfulness" or "necessity" of the covert measure *per se*). It was therefore not pertinent to their cases (in which the proceedings were ongoing) either. As recognised by the Government, that case remained, in any event, an

isolated example. Other available rulings on compensation for damage caused by unlawful actions of investigative authorities were even less pertinent to their case, as they concerned very different facts.

3. The Court's assessment

69. The Court considers that the Government's objections are so closely linked to the substance of the applicants' complaints that they must be joined to the merits.

70. The Court further notes that the above complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. They are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicants

(i) The first applicant

71. The first applicant complained that he had been unable to obtain any meaningful information concerning the scope and duration of the audio and video monitoring to which he had been subjected. He considered that he had been under surveillance in the detention facility during his lawyers' and doctors' visits. He had also been unable to obtain assurances that his confidential exchanges with them had not been intercepted. A declaration by the prosecutor that all the material collected in connection with his surveillance had been destroyed had not been reassuring, as it had been of a very general nature and had lacked any supporting documentation.

72. The first applicant further argued that his personal situation was the result of a systemic flaw in the domestic legal system, which granted unfettered discretion to the law-enforcement authorities in conducting covert surveillance operations. Judicial control at the authorisation stage was pro forma. Judges largely copied formulaic statements from investigators' requests without assessing their necessity or requesting any supporting material other than proof that their requests concerned criminal proceedings duly registered as ongoing in the State Register of Pre-Trial Investigations. There was no independent oversight of the execution of surveillance authorisations, and there were no remedies available to surveillance subjects for complaining about the measures taken with respect to them. The first applicant's criminal complaint had been dismissed with reference to very vague assurances given by the prosecutor handling his case, which had been taken at face value and without any real effort by the investigators to establish relevant details or verify the facts.

(ii) The second and third applicants

73. The second and third applicants argued that, as a result of deficiencies in domestic law and administrative practice, they had been the victims of arbitrary and unjustified phone tapping, which they claimed had encroached upon the confidentiality of their exchanges with their lawyers. They further complained that it had not been possible for them to raise meaningfully their relevant complaints at domestic level owing to the inability to access relevant information and documents, and the unavailability of appropriate avenues of redress.

74. They submitted, firstly, that the tapping of their telephones had apparently been authorised without adequate analysis of the necessity of that measure. Their requests for copies of the relevant judicial rulings had been rejected on the grounds that they had remained classified. They had therefore been unable to familiarise themselves with their content and to verify whether the "necessity" analysis had been properly carried out.

75. Secondly, the second and third applicants argued that the declarations by the NABU detectives that all material collected in the course of the covert investigative measures in their cases had been destroyed had been insufficient to protect their Article 8 rights. They complained that the actual destruction of the material had not been confirmed by the disclosure of any relevant documents, such as prosecutor's decisions or "acts" of destruction. They also complained that they could not obtain access to the relevant reports and transcripts and could therefore not verify whether or not the intercepted material had contained, in particular, transcripts of their privileged communications with their lawyers.

76. In the applicants' view, access to the intercepted material was justified because, although the applicable law generally protected the confidentiality of lawyer-client communications, it did not lay down any specific procedural rules on how these communications should be identified, screened and handled in the event of accidental interception, in order to prevent the law-enforcement authorities from becoming familiar with information that should remain confidential.

77. The applicants next alleged that the problem of securing the proper handling of intercepted material by law-enforcement officers was closely linked to structural deficiencies in the oversight mechanism. In particular, there was no legal requirement for law-enforcement officers to report the results of interceptions to the courts, the data protection authority (Ukrainian Parliament Commissioner for Human Rights (Ombudsman)) or any other independent authority. The only authority to which they had to report were the prosecutors dealing with the case, who were not independent due to their vested interest in collecting evidence to secure convictions of surveillance subjects. In addition, these prosecutors had no power to provide appropriate relief in the event of a finding that the officers carrying out the interception had breached their subjects' rights. In particular, they could not issue formal

decisions acknowledging such breaches, which would be open to public scrutiny.

78. Additionally, the applicants argued that the regulatory framework defining the modalities and traceability of access to private mobile telecommunications by law-enforcement officers was similar to that examined by the Court in the case of *Roman Zakharov v. Russia* ([GC], no. 47143/06, §§ 268-71, ECHR 2015). The lack of detailed and specific rules on the implementation of covert measures, which would have established independent oversight, had created the possibility for law-enforcement officers to obtain unauthorised access to any material outside the scope of judicial authorisations or in breach of lawyer-client confidentiality. The destruction of this material could not, on its own, serve as a sufficient safeguard, since the relevant information could be used indirectly, for example, by helping the authorities to discover other evidence or enabling them to use the unlawfully intercepted data for ulterior purposes.

79. Lastly, the applicants complained of flaws in the procedure for notifying surveillance subjects concerning the measures carried out in relation to them, as provided for in the Code of Criminal Procedure. In particular, in the applicants' view, there had been no grounds for keeping the relevant judicial authorisations classified after the investigations in their respective cases had been completed and the measures discontinued, especially since all the rulings in respect of their co-defendants, whose intercepted material had been added to the respective criminal files, had been declassified. The applicants submitted that the fact that the relevant material had remained classified in their specific cases derived from a structural deficiency in the legal framework. They argued that, since they had been unable to access the relevant information and documents, they had stood a poor chance of effectively making use of any potential remedy, even if one had been available in the domestic legal order.

(b) The Government

80. The Government accepted that the audio and video monitoring in the first applicant's case and the tapping of the second and third applicant's telephones had amounted to interference with their rights protected by Article 8 of the Convention.

81. They next argued that that interference had complied with the Convention, asserting that it had been lawful, had pursued legitimate aims and had been necessary.

82. They submitted that the legal provisions on which the interference had been based, as contained in the Code of Criminal Procedure, were accessible and foreseeable. In their view, these provisions also contained sufficient procedural safeguards to ensure compliance with the rule of law.

83. In particular, both audio and video monitoring and telephone tapping (Articles 270 and 263) could only be ordered by competent investigating

judges, who were required by the applicable law to verify the necessity of the interference at the authorisation stage. Given the strict criteria for the selection of these judges, the provisions in question guaranteed that all covert measure requests were subject to particularly rigorous scrutiny. In accordance with Article 246, in order to obtain authorisation, the requesting law-enforcement authority had to satisfy the judges that there was a reasonable suspicion that the individuals in question had committed serious or particularly serious criminal offences according to the classification of the Criminal Code and that it was not possible to collect the necessary evidence by other, less intrusive means. For telephone tapping, Article 263 of the Code additionally required the specification of the unique characteristics of the service subscriber, the telecommunication network and the equipment to be tapped in order to avoid excessive interception. Article 249 of the Code capped the period of validity of an authorisation at two months, after which the investigator had to obtain a new authorisation justifying the need to extend the operation.

84. The applicable law had also provided appropriate safeguards to ensure the applicants' rights in the course of the implementation of the disputed measures. In particular, protection of their exchanges with lawyers had been guaranteed by section 23 of the Bar and Advocacy Act and Article 258 of the Code of Criminal Procedure, which prohibited interference with private communications between lawyers and clients. A further safeguard was set out in Article 255, which mandated the immediate destruction of any intercepted material irrelevant to the investigation and prohibited its disclosure to any third parties or the use for any other purpose. To ensure appropriate handling of the intercepted material, prosecutors were entrusted by law to ensure supervision of the relevant measures. In particular, within twenty-four hours of completion of the measures, reports (*протоколи*) had to be provided to the prosecutors assigned to the case, who had to decide whether the material should be retained for the files or destroyed under their personal supervision (Articles 252 and 255). The prosecutors also had right to discontinue a covert investigative measure at any time (Article 249). The Government refused to comment on the second and third applicants' allegations concerning the technical possibility for law-enforcement officers to intercept any telecommunications without seeking authorisation. They argued, in that connection, that documents detailing interception techniques could reveal the operative methods of the police authorities and were therefore justifiably classified.

85. The Government then argued that all the applicable legal safeguards had been properly applied in the applicants' cases. They stated that the relevant covert measures had been duly authorised by the investigating judges. The Government also expressed regret that they were unable to provide copies of the relevant rulings, since they had not been declassified. They further emphasised that all the material collected in the course of the

surveillance operations carried out in the applicants' cases had been destroyed in accordance with the applicable law and that their private information had therefore been duly protected.

86. The Government also reiterated that the applicants had been free to challenge the legality and necessity of the disputed covert measures. They referred to the mechanisms described by them in their non-exhaustion objection (see paragraph 59 above) and emphasised that the obligation imposed by law on the law-enforcement authorities to notify individuals that they had been subject to covert measures had been duly complied with in the applicants' cases. They stressed that the notification requirement constituted an important procedural safeguard enabling those concerned to vindicate their Article 8 rights by bringing proceedings at domestic level.

87. Lastly, the Government argued that the surveillance measures in the applicants' cases had not only been carried out in accordance with the law, but had also pursued several of the legitimate aims set out in Article 8 § 2 of the Convention and had been "necessary in a democratic society". They noted, in that connection, that the applicants had been suspected of involvement in very serious offences and that the covert measures carried out in their cases had been subject to strict procedural guarantees laid down in the relevant legal provisions.

2. The Court's assessment

(a) General principles

88. The relevant general principles on the compatibility of secret surveillance operations with the requirements of Article 8 of the Convention have been set out, in particular, in *Big Brother Watch and Others v. the United Kingdom* ([GC], nos. 58170/13 and 2 others, 25 May 2021) as follows:

> "332. Any interference with an individual's Article 8 rights can only be justified under Article 8 § 2 if it is in accordance with the law, pursues one or more of the legitimate aims to which that paragraph refers and is necessary in a democratic society in order to achieve any such aim (see *Roman Zakharov*, cited above, § 227; see also *Kennedy v. the United Kingdom*, no. 26839/05, § 130, 18 May 2010) ...
>
> 333. The meaning of 'foreseeability' in the context of secret surveillance is not the same as in many other fields. In the special context of secret measures of surveillance, such as the interception of communications, 'foreseeability' cannot mean that individuals should be able to foresee when the authorities are likely to resort to such measures so that they can adapt their conduct accordingly. However, especially where a power vested in the executive is exercised in secret, the risks of arbitrariness are evident. It is therefore essential to have clear, detailed rules on secret surveillance measures, especially as the technology available for use is continually becoming more sophisticated. .... Moreover, the law must indicate the scope of any discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity to give the individual adequate protection against arbitrary interference (see *Roman Zakharov*, cited above, § 230; see also, among other authorities, *Malone*, cited above,

§ 68[1]; *Leander*, cited above, § 51[2]; *Huvig*, cited above, § 29[3]; *Kruslin*, cited above, § 30[4]; and *Weber and Saravia*, cited above, § 94[5]).

...

335. ...[I]n its case-law on the interception of communications in criminal investigations, the Court has developed the following minimum requirements that should be set out in law in order to avoid abuses of power: (i) the nature of offences which may give rise to an interception order; (ii) a definition of the categories of people liable to have their communications intercepted; (iii) a limit on the duration of interception; (iv) the procedure to be followed for examining, using and storing the data obtained; (v) the precautions to be taken when communicating the data to other parties; and (vi) the circumstances in which intercepted data may or must be erased or destroyed (see *Huvig*, cited above, § 34; *Kruslin*, cited above, § 35; *Valenzuela Contreras*, cited above, § 46[6]; *Weber and Saravia*, cited above, § 95; and *Association for European Integration and Human Rights and Ekimdzhiev*, cited above, § 76[7]). ...

336. Review and supervision of secret surveillance measures may come into play at three stages: when the surveillance is first ordered, while it is being carried out, or after it has been terminated. As regards the first two stages, the very nature and logic of secret surveillance dictate that not only the surveillance itself but also the accompanying review should be effected without the individual's knowledge. Consequently, since the individual will necessarily be prevented from seeking an effective remedy of his or her own accord or from taking a direct part in any review proceedings, it is essential that the procedures established should themselves provide adequate and equivalent guarantees safeguarding his or her rights. In a field where abuse in individual cases is potentially so easy and could have such harmful consequences for democratic society as a whole, the Court has held that it is in principle desirable to entrust supervisory control to a judge, judicial control offering the best guarantees of independence, impartiality and a proper procedure (see *Roman Zakharov*, cited above, § 233; see also *Klass and Others v. Germany*, 6 September 1978, §§ 55 and 56, Series A no. 28).

337. As regards the third stage, after the surveillance has been terminated, the question of subsequent notification of surveillance measures is a relevant factor in assessing the effectiveness of remedies before the courts and hence to the existence of effective safeguards against the abuse of surveillance powers. There is in principle little scope for recourse to the courts by the individual concerned unless the latter is advised of the measures taken without his or her knowledge and thus able to challenge their legality retrospectively (see *Roman Zakharov*, cited above, § 234; see also *Klass and Others*, cited above, § 57, and *Weber and Saravia*, cited above, § 135) or, in the alternative, unless any person who suspects that he or she has been subject to surveillance can apply to courts, whose jurisdiction does not depend on notification to the surveillance subject of the measures taken (see *Roman Zakharov*, cited above, § 234; see also *Kennedy*, cited above, § 167) ..."

---

[1] *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A
[2] *Leander v. Sweden*, judgment of 26 March 1987, Series A no. 116
[3] *Huvig v. France*, judgment of 24 April 1990, Series A no. 176-B
[4] *Kruslin v. France*, judgment of 24 April 1990, Series A no. 176-A
[5] *Weber and Saravia v. Germany* (dec.), no. 54934/00, ECHR 2006-XI
[6] *Valenzuela Contreras v. Spain*, judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V
[7] *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria,* no. 62540/00, judgment of 28 June 2007

(b) Application to the present case

(i) Whether there has been an interference

89. The Court considers that the covert audio and video monitoring of the first applicant and the interception of the second and third applicants' telephone communications amounted to an interference with their rights protected by Article 8 of the Convention (see, among other authorities, *Zubkov and Others v. Russia*, nos. 29431/05 and 2 others, §§ 120-21, 7 November 2017; and *Berlizev v. Ukraine*, no. 43571/12, §§ 37-38, 8 July 2021). The existence of an interference with the rights of these applicants is not disputed by the parties.

(ii) Whether the interference was justified

(α) General approach

90. In order for the Court to establish whether the interference at issue was justified under Article 8 § 2 of the Convention, it must first ascertain whether it was "in accordance with the law," which, in the context of covert surveillance, must include particularly detailed and rigorous safeguards aimed at securing the "necessity" of interference exercised by the executive in secret (see, among other authorities, *Roman Zakharov*, cited above, §§ 227-30). In the event of a finding that the interference was "not in accordance with the law" within the meaning of the Convention, the Court may find a violation without analysing any further whether the interference was also "necessary in a democratic society" for one of the aims enumerated in Article 8 § 2 (see, in particular, *Bykov v. Russia* [GC], no. 4378/02, §§ 82-83, 10 March 2009; *Enea v. Italy* [GC], no. 74912/01, §144, ECHR 2009; and *Potoczká and Adamčo v. Slovakia*, no. 7286/16, §§ 76-80, 12 January 2023).

91. In deciding whether the disputed interference with the applicants' rights in the present case – which concerns three specific and undisputed police operations carried out in the course of criminal proceedings against the applicants – was "in accordance with the law", the Court considers that its task is not to assess, *in abstracto*, the overall quality of the applicable law, but to confine itself, as far as possible, to analysing how the applicants were actually affected by the application of the law in the case at hand. Although such an assessment may still require a degree of abstraction, it cannot be of the same level as in cases concerning general complaints about laws permitting secret surveillance (see, as a recent authority, *Vasil Vasilev v. Bulgaria*, no. 7610/15, § 83, 16 November 2021, and the cases cited therein).

92. The Court will therefore assess, in the light of the general principles developed in its case-law (see paragraph 88 above), whether the surveillance operations in the applicants' specific cases were authorised and implemented in accordance with the law, which included relevant and sufficient safeguards

to protect their Article 8 rights in the course of these operations and to enable them to raise any complaints they may have had after those operations had been discontinued.

(β) Authorisation procedure in the applicants' cases

93. In so far as the applicants complained that their Article 8 rights had been breached on account of defects in the authorisation procedure, the Court should take into account a number of factors in assessing whether that procedure was capable of ensuring that secret surveillance was not ordered haphazardly, irregularly or without due and proper consideration. These factors include, in particular, the authority competent to authorise surveillance, its scope of review and the content of the interception authorisation (see, among other authorities, *Roman Zakharov*, cited above, § 257).

94. Turning to the facts of the present case, the Court notes that, as is apparent from the available material, the disputed covert measures had some basis in domestic law, more specifically Articles 263 and 270 of the Code of Criminal Procedure.

95. The Court further notes the Government's arguments indicating that the Code sets out a number of procedural safeguards against arbitrary or indiscriminate application of surveillance measures. In particular, authorisation has to be given by a judicial authority (see Articles 246 and 263, cited in paragraph 46 above), and to obtain it, the law-enforcement officers have to submit reasoned requests. The judges, in turn, are empowered to require the production of supporting material and are required to state specific reasons for their decisions (see Article 248, likewise cited in paragraph 46 above). The Court also notes the Government's further argument that Articles 246, 248, 258 and 263 of the Code require, in substance, that judges, when authorising measures implicating the interception of private communications, perform a balancing exercise between the public interest in combating serious crime and the individual rights protected by Article 8.

96. Although the applicants, whose requests for access to the judicial rulings authorising covert measures in their cases were denied, expressed doubts that these rulings had actually existed, the Court, having regard to the facts of the case and the Government's explanations, will proceed on the assumption that the disputed measures were authorised by judges as required by the applicable law (compare and contrast *Šantare and Labazņikovs v. Latvia,* no. 34148/07, §§ 18, 23 and 59-62, 31 March 2016).

97. The Court emphasises, however, that when dealing with requests by surveillance subjects to disclose the decisions authorising covert measures in respect of them, the authorities are required to strike a proper balance between the interests of these persons in vindicating their Article 8 rights and the public interest in detecting and prosecuting serious offences (see, among other authorities, *Zubkov and Others*, cited above, § 129, and *Avanesyan*

v. Russia, no. 41152/06, § 29, 18 September 2014). The Court also emphasises that, by default, surveillance subjects should be granted access to the documents in question, unless there are compelling grounds for denying it (see, among other authorities, *Zubkov and Others*, cited above, § 129; *Radzhab Magomedov v. Russia*, no. 20933/08, §§ 82-84, 20 December 2016; and *Rodionov v. Russia*, no. 9106/09, § 184, 11 December 2018).

98. As is apparent from the available material, in the present case the national authorities denied the applicants access to the rulings relating to them on the sole ground that they were "classified". There is no indication that the decisions to keep these rulings classified after the relevant investigations had been completed and the intercepted material destroyed resulted from a balancing exercise between the competing interests at stake. Furthermore, owing to the Government's refusal to provide copies of the relevant rulings in the second and third applicant's cases, despite the Court's specific requests, the Court is unable to establish their content.

99. Having regard to Rule 44C § 1 of the Rules of Court, according to which the Court may draw such inferences as it deems appropriate where a party fails to adduce evidence or provide information requested by it (see, in particular, *Savriddin Dzhurayev v. Russia*, no. 71386/10, § 130, ECHR 2013 (extracts)), the Court lacks basis for concluding that the secret surveillance measures in the applicants' respect were authorised as a result of proper and detailed judicial scrutiny, which reflected, in particular, a balanced approach to the competing interests at stake, as required by the Convention and by the applicable domestic law (compare *Zubkov and Others*, § 133; *Rodionov*, § 185; and *Potoczká and Adamčo*, §§ 72-79, all cited above).

100. There has therefore been a breach of Article 8 of the Convention on this account.

(γ) Implementation of the covert surveillance measures and alleged interception of privileged material in the applicants' cases

101. In so far as the applicants' complaints concern the implementation of the surveillance measures against them, and, in particular, the treatment of confidential client-lawyer communications, the Court reiterates, firstly, that, while Article 8 protects the confidentiality of all correspondence between individuals, it will afford "strengthened protection" to exchanges between lawyers and their clients (see, among other authorities, *Michaud v. France*, no. 12323/11, § 118, ECHR 2012; *R.E. v. the United Kingdom*, no. 62498/11, § 131, 27 October 2015; and *Dudchenko v. Russia*, no. 37717/05, § 104, 7 November 2017).

102. The Court has emphasised that Article 8 of the Convention accords a privileged status to any correspondence and exchanges between a lawyer and his or her client, whatever their purpose (see, in particular, *Sérvulo & Associados - Sociedade de Advogados, RL and Others v. Portugal*, no. 27013/10, § 77, 3 September 2015, and *Bersheda and Rybolovlev*

v. Monaco, nos. 36559/19 and 36570/19, § 74, 6 June 2024). Even where conversations between lawyers and their clients do not consist, strictly speaking, in legal advice, they are still entitled to such strengthened protection (see, in particular, *Michaud*, cited above, § 117; *Laurent v. France*, no. 28798/13, § 47, 24 May 2018; and *Vasil Vasilev*, cited above, § 90).

103. As a consequence, any legal provisions relating to secret surveillance measures potentially infringing on the professional secrecy of lawyers should comply with particularly rigorous requirements in terms of clarity and precision in order to be considered "lawful" (see, among other authorities, *R.E. v. the United Kingdom*, § 131-32: and *Pietrzak and Bychawska-Siniarska and Others*, § 222, both cited above).

104. The Court has developed the following minimum safeguards that should be set out in law in order to avoid abuses of power in cases where legally privileged material has been acquired through measures of secret surveillance. Firstly, the law must clearly define the scope of the legal professional privilege and state how, under what conditions and by whom the distinction is to be drawn between privileged and non-privileged material (see, in particular, *Dudchenko*, cited above, §§ 105-06). Given the sensitivity of the matter, it is unacceptable that this task should be assigned to a member of the executive, without supervision by an independent authority (see, among other authorities, *Kopp v. Switzerland*, 25 March 1998, §§ 73 and 74, *Reports of Judgments and Decisions* 1998-II, and *Dudchenko*, cited above, § 106).

105. Secondly, the legal provisions concerning the examination, use and storage of the material obtained, the precautions to be taken when communicating the material to other parties, and the circumstances in which recordings may or must be erased or the material destroyed must provide sufficient safeguards for the protection of legally privileged material (see *Pietrzak and Bychawska-Siniarska and Others*, cited above, § 218). In particular, national law should set out with sufficient clarity and define: (i) the procedures for reporting to an independent supervisory authority for the review of cases where material subject to legal professional privilege has been acquired as a result of secret surveillance; (ii) the procedures for the secure destruction of such material; (iii) the conditions under which it may be retained and used in criminal proceedings and law-enforcement investigations; and (iv) the procedures for its safe storage, dissemination and subsequent destruction as soon as it is no longer required for any of the authorised purposes (see *R.E. v. the United Kingdom*, §§ 138-39, and *Dudchenko,* § 107, both cited above).

106. Turning to the facts of the present case, the Court notes that in the Ukrainian legal system, the Bar and Advocacy Act provides for the protection of legal professional privilege, which is understood as covering any information exchanged between an advocate and his or her client within the framework of their professional relationship (see paragraph 48 above). This

general provision is supplemented by Article 258 § 5 of the Code of Criminal Procedure, which prohibits interference with private communications between a lawyer and his or her client in the context of covert investigative (operative) measures (see paragraph 46 above).

107. The Court is also mindful that, according to the domestic authorities, no material gathered in the course of the disputed covert investigative measures in relation to the applicants was used by the prosecution as evidence against them. Furthermore, none of that material is stored in the authorities' files anymore, as it has been destroyed in accordance with Article 255 of the Code of Criminal Procedure.

108. The Court finds that the rule set out in the aforementioned provision, which mandates the immediate destruction of the material collected in the course of a covert measure once it is qualified as irrelevant for the purpose of that collection – that is, prosecution of the offence – is not as such contrary to the Convention (see, in particular, *Roman Zakharov*, § 255 *in fine*, and *Vasil Vasilev*, § 72 *in fine*, both cited above). Insofar as the second and third applicants argued that they should have been given the opportunity to access and inspect that material in its entirety before it had been destroyed, the Court is mindful that such a demand would have imposed on the authorities, among all, an obligation to store the applicants' personal information longer than necessary for the initial collection purpose, thus creating tension with the data minimisation principle set out in the international data protection instruments (see, in particular, *Surikov v. Ukraine*, no. 42788/06, § 74, 26 January 2017).

109. At the same time, the Court finds that the applicants may have had a legitimate interest in being provided with a copy of the prosecutor's decision ordering the destruction of the intercepted material, as well as the "act" of destruction (see paragraphs 51-53 above), which, like the court rulings authorising the covert investigative measures against them, remained classified without any particular explanation from the authorities.

110. The Court further finds that the applicants have raised legitimate concerns regarding the existence of publicly available clear rules and guidelines for screening and destruction of intercepted material, including rules concerning supervision of the relevant processes by an independent body (see, in particular, *Pietrzak and Bychawska-Siniarska and Others*, cited above, § 213, and the cases cited therein).

111. The Court notes that certain relevant rules and procedures are set out in the Instruction on Covert Measures of 16 November 2012 (see paragraphs 51-53 above). However, the Instruction contains no specific guidelines detailing the content of the legal provisions concerning the protection of lawyer-client communications. Neither from the case file nor from the Government's observations is it apparent that there exist any other publicly available instruments in domestic law which set out specific safeguards to be applied and procedures to be followed in cases where the authorities accidentally intercept a suspect's privileged conversation with his

or her counsel in the course of telephone tapping, audio monitoring or some other similar operation (see *Iordachi and Others v. Moldova*, no. 25198/02, § 50, 10 February 2009; see also *R.E. v. the United Kingdom*, § 131, and *Dudchenko*, § 109, both cited above). That leaves open the question of how precisely any such intercepted material is to be identified as concerning privileged communication, processed and destroyed, to fulfil the requirements of Article 258 § 5 of the Code of Criminal Procedure (compare *Vasil Vasilev*, cited above, § 91).

112. Furthermore, it appears from the available material that the judicial authorities, who authorised the covert investigative measures, have no competence to supervise the implementation of their rulings, and that their powers are limited to the initial authorisation stage. They are not informed of the results of the surveillance operations ordered and have no power to review whether the requirements of the decisions granting authorisation have been complied with (compare *Roman Zakharov*, cited above, § 274). The Instruction vests all decision-making powers relating to the processing of intercepted material, including the identification and screening of privileged communications, in law-enforcement officers supervised by the prosecutors assigned to the criminal case. The Court has not been presented with any material indicating that there are any other authorities sufficiently independent from those involved in the case for the purposes of prosecuting the purported offence, with decision-making powers concerning the handling of intercepted information and capable of verifying, in the course of the implementation of the measure, that law-enforcement officers are not abusing their powers exercised in secret (see, among other authorities, *Roman Zakharov*, §§ 279-82, cited above; and *Ekimdzhiev and Others v. Bulgaria*, no. 70078/12, §§ 336-47, 11 January 2022. See also *Pietrzak and Bychawska-Siniarska and Others*, cited above, §§ 228-29 and 232-34, respectively, for a compilation of cases presenting examples of systems of supervision entrusted to independent authorities which were found by the Court to comply with the requirements of Article 8, and for examples of systems of supervision entrusted to prosecutorial authorities which were found by the Court not to comply with the requirements of Article 8).

113. In the light of the considerations set out above concerning the lack, in the applicable domestic legal order, of detailed rules and guidelines setting out the procedure for identifying and handling accidentally intercepted privileged communications between lawyers and clients, and absence of an independent supervisory authority overseeing the interception of private communications, the Court finds that relevant domestic law did not afford the applicants sufficient safeguards to ensure that the implementation of the covert investigative measures in their cases complied with Article 8 of the Convention.

114. There has, accordingly, been a breach of Article 8 in this regard.

115. In these circumstances, the Court finds that the second and third applicants' complaints to the effect that the applicable regulations allegedly empower the executive to access mobile telephone communications without any judicial authorisation (compare *Roman Zakharov*, cited above, §§ 268-70) do not need to be addressed separately in the context of the present case, which concerns specific instances of interference.

(δ) Notification and availability of post-factum remedies

116. In so far as the applicants complained that the applicable legal framework did not provide them with an effective possibility of verifying, *post factum*, the lawfulness and necessity of the covert measures in their cases, the Court reiterates that, in order to be compatible with Article 8, national law must provide surveillance subjects with such a possibility (see, in particular, *Roman Zakharov*, cited above, § 300). In order for any potential domestic remedy to comply with the "effectiveness" requirement, it must be clear (see, in particular, *Hambardzumyan v. Armenia*, no. 43478/11, § 48, 5 December 2019) and capable of addressing the core of the Article 8 complaint. That is, the remedy must provide a possibility to determine whether the disputed interference was not only "lawful", but whether it also answered "a pressing social need" and was "proportionate" to any legitimate aim pursued (see, among other authorities, *Akhlyustin v. Russia*, no. 21200/05, § 26, 7 November 2017; *Hambardzumyan,* cited above*,* § 43; and *Sigurður Einarsson and Others v. Iceland*, no. 39757/15, § 123, 4 June 2019).

117. In some cases, in particular where applicants have attempted to challenge the lawfulness of the covert measures in the course of the criminal trial, in conjunction with contesting the admissibility of the resulting evidence, the Court has accepted that that course of action counted towards the exhaustion of effective domestic remedies (see, in particular, *Dragojević v. Croatia,* no. 68955/11, §§ 35, 42, 47 and 72, 15 January 2015; see also *Radzhab Magomedov*, §§ 20 and 77-79, and *Lysyuk* §§ 41-46, both cited above).

118. In other cases, however, the Court has noted that although the criminal courts could consider questions of the fairness of admitting evidence in the criminal proceedings, they were not necessarily able to deal with the substance of a complaint that the interference with Article 8 rights was not "in accordance with the law" or "necessary in a democratic society" within the meaning of that provision (see *Zubkov and Others*, § 88; *Hambardzumyan,* § 43; and *Sigurður Einarsson and Others*, § 123; all cited above).

119. The Court has also emphasised that unless national law guarantees to anyone who suspects that they have been under surveillance the possibility of raising that suspicion before an independent supervisory body with the authority to access the closed documents (see, in particular, *Kennedy*

v. the United Kingdom, no. 26839/05, § 167, 18 May 2010), the question of the effectiveness of any remedy is inextricably linked to the question of notification of the relevant information to the surveillance subjects (see, among other authorities, *Roman Zakharov*, cited above, § 234). In this context, the Court has stated that a legal framework which, owing to the lack of appropriate notification arrangements, renders any remedies available under national law theoretical and illusory, eschews an important safeguard against the improper use of special means of surveillance (see, in particular, *Association for European Integration and Human Rights and Ekimdzhiev*, §§ 90-91, and *Roman Zakharov*, §§ 293-300, both cited above). The Court has also found that, in addition to being notified of the surveillance itself, individuals should, in principle, be able to access documents providing sufficient information concerning the factual and legal reasons for ordering the surveillance in order to be able to exercise their right to bring legal proceedings in an effective manner (see *Roman Zakharov*, § 302; and *Zubkov and Others*, §§ 91, 129 and 132, both cited above).

120. Turning to the facts of the present case, the Court observes that Article 253 of the Code of Criminal Procedure establishes a default rule mandating the law-enforcement authorities to notify surveillance subjects of the fact that they have been under surveillance within twelve months of the discontinuation of the relevant measures, but no later than when the criminal file is sent for trial (see paragraph 46 above). The Court considers that by setting out the aforementioned notification requirement in Article 253, the Ukrainian legislature has introduced an important procedural safeguard for the protection of individual rights under Article 8 of the Convention and has made a tangible step forward compared with the state of national law as examined by the Court in its 2006 judgment in the case of *Volokhy v. Ukraine* (no. 23543/02, § 59, 2 November 2006).

121. In the present case, however, the Court finds that the applicants' ability to vindicate their Article 8 rights was significantly handicapped in view of the unexplained refusals of the authorities to provide access to the judicial rulings authorising covert measures (compare *Zubkov and Others*, cited above, § 91) and documents concerning the destruction of the intercepted material (see paragraphs 98 and 109 above).

122. The Court next takes note of the Government's position concerning alleged existence of a two-step remedial mechanism comprising the following steps: (i) the possibility for the applicants to file complaints and/or objections under Article 303 § 2 and/or Article 309 § 3 of the Code of Criminal Procedure at the preparatory hearing; and (ii) the possibility for them to bring civil proceedings for compensation under either Article 1176 of the Civil Code or the Compensation Act (see paragraph 49 above). Additionally, the Court observes that, as is apparent from the Supreme Court's ruling (case no. 61-6654ск21) cited by the Government (see paragraph 62 above), if the charges against the applicants had been dropped

without their case being sent for trial, they would have been able to attempt to go directly to "step two". The Court needs not, in the context of the present case, assess the potential effectiveness of this latter "step-two-only" redress option, since, according to the last information received from the parties, the proceedings against all three applicants concerned had been ongoing.

123. Insofar as the full "two-step" mechanism is concerned, the Court notes that – as indicated by the Government – it has already recognised, in principle, the potential effectiveness of multi-step redress mechanisms, in particular, in other Ukrainian cases (see *Orlovskiy*, §§ 55-61; *Tikhonov*, § 39; and *Lysyuk*, §§ 40-46, all cited above). However, it notes that these three cases were decided domestically under the old Code of Criminal Procedure (1960), which is no longer in force. More specifically, in *Orlovskiy* and *Tikhonov*, the domestic courts acknowledged breaches of the applicants' rights to liberty by using their discretionary power to issue so-called "separate rulings" under Article 23-2 of the 1960 Code (see *Orlovskiy*, §§ 13-14, and *Tikhonov*, § 22; see also *Lysyuk*, § 29, for the reference to Article 23-2; all cases cited above). This power has not been incorporated into the current Code and the Government have not indicated which provisions of that Code, if any, gave the judicial authorities comparable discretional competences. The Court cannot, therefore, conclude that its findings in the above judgments, insofar as they relate to the "separate rulings" remedy are applicable to the present case. At the same time, however, the Court observes that in *Lysyuk* it also accepted that an acknowledgment of a breach of the applicant's Article 8 rights could be made in the course of his trial by some other means, for instance, in a decision on the merits of his case (ibid., § 42). In the light of the *Lysyuk's* findings, complaints by criminal defendants concerning breaches of their Article 8 rights in the course of the trial against them may still result in the acknowledgment of the breaches of their rights, notwithstanding the abolition of the "separate rulings" mechanism.

124. It is important to point out, however, that the applicant's Article 8 complaint in *Lysyuk* was limited to an allegation that the disputed interference had been unlawful in domestic terms (ibid., §§ 25 and 38). There was no question in that case that the decision on that matter fell within the competence of the criminal courts, as they had to decide on the admissibility of evidence collected as a result of the disputed interference (ibid., § 46). The findings in *Lysyuk* cannot therefore be directly and automatically pertinent to cases where, as in the present case, the core of the Article 8 complaint may require the domestic courts to carry out a broader analysis unrelated to the admissibility of evidence or to the determination of the guilt or innocence of the defendant (compare *Sigurður Einarsson and Others*, § 123, cited above, and the cases cited therein).

125. With these considerations in mind, the Court will focus on analysing the scope of the remedies set out in Article 303 § 2 and Article 309 § 3 of the current Code of Criminal Procedure, which were suggested by the

Government as appropriate procedures to be followed for the completion of "step one" in the applicants' criminal cases.

126. In that respect, the Court notes, firstly, that neither of these procedures can be triggered independently as surveillance subjects need to wait until the preparatory hearings in their criminal proceedings are scheduled before lodging the relevant complaints. This requirement can potentially lead to unpredictable delays (compare *Kotiy v. Ukraine*, no. 28718/09, §§ 69-70, 5 March 2015, and *Zosymov v. Ukraine*, no. 4322/06, § 61, 7 July 2016). The Court finds that in the present case, any potential effectiveness of the aforementioned remedies has already been compromised by the length of the relevant proceedings (compare also *Ratushna v. Ukraine*, no. 17318/06, §§ 57-59, 2 December 2010).

127. Secondly, and most importantly, the scope of the issues to be decided by a criminal court in the course of the preparatory hearing, as defined in Article 315 of the Code of Criminal Procedure (see paragraph 46 above), does not include any specific competences given to judges in order to verify the lawfulness or necessity of the conduct of law-enforcement officers in connection with covert investigative (operative) measures, let alone any competences to review the reasons given by investigating judges when authorising such measures. The Government did not provide any examples of domestic decisions indicating that such competences, not expressly mentioned in the law, could derive from settled judicial practice (compare *Hambardzumyan,* cited above, § 48).

128. The Court further notes that the second and third applicants' attempts to resort to the procedure set out in Article 303 § 2 have proved to be ineffective in practice. In particular, the second applicant's complaints were joined to the file without having been examined at the preparatory hearing. In the third applicant's case similar complaints were rejected, as they were found to be irrelevant to the subject matter of a preparatory hearing. In addition to that, as is apparent from the relevant reasoning of the Higher Anti-Corruption Court, it did not consider itself competent to take up, at any stage of the proceedings, any complaints related to those measures other than those implicating potential inadmissibility of resulting evidence (see paragraphs 37-38 above).

129. Given the absence of specific provisions in domestic law setting out the competences of the criminal courts to address the core of the applicants' Article 8 complaints, either at the preparatory hearing or during trial, to the impossibility of deriving such competences from settled judicial practice, and the experience of the second and third applicants, whose efforts to lodge complaints at the preparatory hearings have proved to be ineffective in practice, the Court concludes that the procedure provided for in Article 303 § 2 of the Code of Criminal Procedure does not meet the requirements of an "effective remedy" for addressing the substance of the applicants' complaints under Article 8 of the Convention.

130. As regards the procedure provided for in Article 309 § 3, which was not used by any of the applicants, the Court, in addition to having the same concerns as with regard to the procedure provided for in Article 303 § 2, cannot see how the applicants could have used it, given that they were denied access to the very decisions against which they could, theoretically, file objections under that Article (compare *Šantare and Labazņikovs*, § 55; *Radzhab Magomedov,* §§ 81-84; *and Zubkov and Others*, §§ 91 and 132, all cited above).

131. The Government have thus not demonstrated, by citing specific legal provisions or examples of settled case-law, that the applicants in the present case could have obtained, in good time, judicial determination of the core of their Article 8 complaints by resorting to the remedies proposed by them as "step one" in a "two-step" remedial mechanism. In these circumstances, the Court, while recognising the potential pertinence of the compensatory remedies cited by the Government as "step two" in that mechanism, finds, for the reasons stated above, that these remedies were not made available to the applicants in the present case in good time.

132. In view of the above considerations, the Court finds that the applicable domestic law did not contain sufficient procedural safeguards with a view to providing the applicants with an effective possibility of verifying, *post factum*, the lawfulness and necessity of the covert investigative measures and of obtaining redress for any alleged breaches of their Article 8 rights in the course of the authorisation and implementation of those measures.

133. The Court thus considers that the Government's objection as to non-exhaustion of domestic remedies must be dismissed.

134. It further finds that there has been a breach of Article 8 of the Convention in view of its findings made in paragraph 132 above.

(ε) General conclusion

135. In the light of the above, the Court finds that the interference with the first, second and third applicants' rights protected by Article 8 of the Convention was not "in accordance with the law" for the following reasons: (i) lacking access to the judicial decisions authorising the disputed measures, the Court cannot conclude that they were ordered "lawfully," including regarding the requirement to conduct a prior "necessity" assessment of those measures; (ii) in the course of the implementation of the disputed measures, the applicants' communications with their lawyers were not sufficiently protected by specific and detailed rules and procedures defining how such communications should be identified and handled in the event of having been intercepted accidentally and because there was no independent oversight authority with sufficient competence to protect the applicants from abuse or mistakes by the law-enforcement officers; and (iii) the applicants could not obtain sufficient information and documents for challenging, in a meaningful way, the legality and necessity of the disputed measures after their completion

and did not have at their disposal an effective domestic procedure for the determination of the core of their Article 8 complaints in good time.

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION IN RESPECT OF THE FOURTH APPLICANT

136. The fourth applicant, a lawyer, complained that his Article 8 rights had been compromised, as the domestic law applicable to covert interception of telephone communications lacked adequate safeguards protecting his privileged communications with clients.

A. Admissibility

1. The parties

(a) The Government

137. The Government argued that there had been no interference with the fourth applicant's Article 8 rights in the present case and invited the Court to dismiss the present complaint as manifestly ill-founded.

138. They submitted that the domestic legal framework for the protection of lawyer-client telephone communications had been of appropriate quality. They also noted that the fourth applicant himself had not been subject to any covert investigative measures. Nor had he provided any evidence that he had had any telephone conversations with the second applicant, the third applicant or S.T. during the period when their telephone lines had been tapped. In any event, the aforementioned tapping operations had been carried out prior to the dates on which those individuals had been served with notifications of suspicion. The fourth applicant could not therefore have been their "defence counsel" at the time when the disputed measures had been applied. In any event, it would be inconceivable to prohibit all interception operations on the sole premise that the surveillance subject might have hired a lawyer and might potentially discuss defence strategy or other confidential matters with him or her by telephone.

(b) The fourth applicant

139. The fourth applicant challenged that view. He argued, in particular, that as a practising lawyer he had been a victim of deficiencies in applicable legal framework regardless of whether or not his particular conversations with the second or third applicants or S.T. had been intercepted. He raised arguments similar to those of the second and third applicants in this regard and invited the Court to consider the present complaint on the merits and to find a breach of Article 8 of the Convention. He also argued that the interception of private telecommunications interfered with the rights of all parties concerned, irrespective of whom was the target of the surveillance. He

submitted that it would have been excessively formalistic and contrary to section 22 of the Bar and Advocacy Act, as well as to the Court's case-law, to consider privileged only those communications between lawyers and clients that would occur after the signing of a legal representation contract or after the client had obtained formal status as a suspect in a particular set of criminal proceedings.

2. The Court's assessment

140. The Court notes that unlike the first, second and third applicants, who referred to the specific instances of interference with their rights, the fourth applicant targets, in the first place, the alleged structural deficiencies in the domestic legal framework protecting the confidentiality of the lawyers' telephone communications with clients subject to telephone tapping. Regard being had to the Court's relevant case law, it finds that the fourth applicant has standing to make out the above complaint, regardless of whether any of his actual telephone communications with the clients mentioned in his application had been intercepted (compare *Roman Zakharov*, cited above, §§ 170-79).

141. The Court further considers that the present complaint raises issues of fact and law which lend themselves to being examined on the merits. It finds that it is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention (compare also *Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, no. 62540/00, §§ 5-6, 59 and 63, 28 June 2007; *Ekimdzhiev and Others*, §§ 2, 10 and 260; and *Pietrzak and Bychawska-Siniarska and Others,* §§ 125 and 130, both cited above). This complaint must therefore be declared admissible.

B. Merits

1. The parties

(a) The fourth applicant

142. The fourth applicant argued that structural deficiencies in the applicable legal framework gave the investigating authorities unfettered power to intercept his confidential communications with clients. He also pointed out that while criminal defendants had at least some formal means of raising their Article 8 complaints within the framework of the criminal proceedings against them, there were no meaningful recourse mechanisms for lawyers or other third parties whose communications with surveillance subjects had been accidentally affected by interception operations.

(b) The Government

143. The Government did not provide separate observations on the merits of the present complaint.

2. The Court's assessment

(a) Whether there has been an interference

144. The Court reiterates at the outset that it has already found in various cases that mere existence of the legislation allowing secret interception of telecommunications may amount to an interference with the exercise of individual rights to respect for private life and correspondence under Article 8 of the Convention (see, among others, *Roman Zakharov*, § 179; *Ekimdzhiev and Others*, §§ 262; and *Pietrzak and Bychawska-Siniarska and Others*, § 146; all cited above).

145. It next notes that the interception of communications in the course of covert phone tapping operations implicates the Article 8 rights of all parties to those communications, regardless of whose line was placed under surveillance (see, specifically as regards lawyers' conversations intercepted as a result of the monitoring of their clients' telephone lines, *Pruteanu v. Romania*, no. 30181/05, § 41, 3 February 2015; *Versini-Campinchi and Crasnianski v. France*, no. 49176/11, § 49, 16 June 2016; and *Vasil Vasilev*, cited above, § 84).

146. The Court further reiterates that since any communications between lawyers and their clients are entitled to strengthened protection under the Convention, it is not decisive for the purposes of Article 8 whether, at the time of the particular conversation, the lawyer had concluded a formal legal representation contract with the client (see *Dudchenko*, § 103 *in fine*; *Vasil Vasilev*, § 90; and *Ekimdzhiev and Others*, § 333, all cited above). Since the core of the fourth applicant's complaint relates to structural deficiencies in the applicable legal framework and not to a specific instance of interception, the Court finds that he is not required to provide evidence that his specific conversation with any client was intercepted (see, as a recent authority, *Pietrzak and Bychawska-Siniarska and Others*, § 195, cited above).

147. In the light of the above considerations, the Court finds that there has been an interference with the fourth applicant's right to respect for his private life and correspondence under Article 8 of the Convention.

(b) Whether the interference was justified

148. The Court reiterates the general principles concerning the compatibility with Article 8 of national legal frameworks concerning secret surveillance (see paragraph 88 above) and the more specific principles concerning the protection of lawyer-client communications in the context of interception (see paragraphs 101-105 above).

149. It observes that, in paragraphs 106-113 above, in dealing with the complaints lodged by the first, second and third applicants of alleged interference with their communications with their lawyers, it has already established that Ukrainian law does not provide sufficient safeguards against abuse of power or mistakes by the executive authorities in cases where, in the course of the implementation of a covert measure, legally privileged material is accidentally intercepted. The Court observes that its findings in relation to the complaints lodged by the above applicants as regards interference with their privileged communications with their lawyers are equally pertinent to the complaint lodged by the fourth applicant of alleged interference with his privileged communications with his clients.

150. The Court also observes that, according to its settled case-law, an individual whose communications have been accidentally intercepted in the course of a surveillance operation targeting another person should have the possibility of vindicating his or her relevant Article 8 rights by resorting to an appropriate domestic remedy (see, in particular, *Lambert v. France*, 24 August 1998, §§ 34-41, *Reports* 1998-V; *Roman Zakharov*, cited above, § 295 *in fine*; and *Plechlo v. Slovakia*, no. 18593/19, §§ 47-51, 26 October 2023). It is not apparent from the material in the present case or from the Government's observations that the fourth applicant, as a person potentially randomly affected by the interception of his telecommunications, had any mechanism at his disposal for verifying the veracity of his allegations and the lawfulness and necessity of the authorities' actions.

151. It follows that there has been a breach of Article 8 of the Convention in respect of the fourth applicant.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION CONCERNING THE SECOND, THIRD AND FOURTH APPLICANTS

152. The second, third and fourth applicants also complained that they had had no effective remedies for their complaints under Article 8. They relied on Article 13 of the Convention, which reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

153. Having regard to its findings under Article 8 of the Convention in paragraphs 132 and 150 above, the Court considers that, although the applicants' complaints under Article 13 of the Convention are closely linked to their complaints under Article 8 and therefore have to be declared admissible, it is not necessary to examine them separately (see *Roman Zakharov,* cited above, § 307).

V. OBSERVANCE OF ARTICLE 38 OF THE CONVENTION BY THE RESPONDENT GOVERNMENT IN THE APPLICATIONS BROUGHT BY THE SECOND, THIRD, AND FOURTH APPLICANTS

154. In their observations on the admissibility and merits, filed on 17 July 2023 in response to those of the Government, the second, third and fourth applicants argued that the Government's refusal to provide copies of documents from the second and third applicants' domestic case files, in particular the judicial rulings authorising the monitoring of the second and third applicants' telephone lines requested by the Court (see paragraphs 25 and 40 above) as well as their refusal to provide texts of the technical regulations concerning modalities and traceability of access to mobile telecommunications by law-enforcement authorities amounted to a failure to comply with Article 38 of the Convention. The relevant provision reads as follows:

> "The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities."

155. In their further observations submitted on 12 October 2023, the Government noted that the laws and regulations in force, in particular, section 32 of the State Secrets Act, prevented them from communicating the requested documents, since they had been lawfully classified at domestic level (see paragraph 47 above). The Government further expressed regrets that they could not provide them and argued that their inability to comply with the Court's relevant requests was due to legal and operational constraints and not to an unwillingness to cooperate or a reluctance to disclose information.

156. The Court will examine the matter in the light of the general principles concerning compliance with Article 38 of the Convention as summarised, in particular, in *Janowiec and Others v. Russia* ([GC], nos. 55508/07 and 29520/09, §§ 202-06 and 208-09, ECHR 2013). In that judgment, the Court reiterated, in particular, that Article 38 of the Convention required the respondent State to submit the requested material in its entirety, if the Court so requested, and to account for any missing elements. The question of whether certain documents or evidence should or should not be submitted to the Court is not a matter that can be decided by the respondent Government, who are obliged, as a party to the proceedings, to comply with the Court's requests for evidence (see, among others, *Davydov and Others v. Ukraine*, nos. 17674/02 and 39081/02, § 171, 1 July 2010; and *Tomov and Others v. Russia*, nos. 18255/10 and 5 others, § 89, 9 April 2019).

157. That being said, the Court is sensitive to the fact that in various circumstances the parties to the proceedings before it may have reasoned concerns regarding disclosure of a particular document or information on

security, confidentiality or other serious grounds. In this relation, however, the Court reiterates that Rules of Court provide a number of avenues for those concerns to be voiced before it with a view to resolving them in a most appropriate manner. Well-founded concerns may be addressed, in particular, by redacting a document or editing out the sensitive passages (see, among other examples, *Nolan and K. v. Russia*, no. 2512/04, § 56, 12 February 2009 and, more recently, *Georgia v. Russia (II)* [GC], no. 38263/08, §§ 343-44, 21 January 2021); restricting public access to the material in question under Rule 33 of the Rules of Court; or, *in extremis*, by holding a hearing behind closed doors (see, in particular, *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, § 357, 24 July 2014). Since 25 September 2023 it has also become open to the parties to seek application of the procedure for the treatment of highly sensitive documents set out in Rule 44 F of the Rules of Court.

158. In the instant case, the Government did not produce the material requested by the Court or furnish any explanation for their omission to do so, beyond a reference to a provision of the domestic law which precluded, by default, the disclosure of classified documents to international organisations (compare *Janowiec and Others*, cited above, §§ 210-11; *Georgia v. Russia (I)* [GC], no. 13255/07, §§ 106-08, ECHR 2014 (extracts); and, more recently, *Carter v. Russia*, no. 20914/07, § 93, 21 September 2021). In this relation, the Court reiterates that the Convention is an international treaty which, in accordance with the principle of *pacta sunt servanda* codified in Article 26 of the Vienna Convention on the Law of Treaties, is binding on the Contracting Parties and must be performed by them in good faith. Pursuant to Article 27 of the Vienna Convention, the provisions of internal law may not be invoked as justification for a failure by the Contracting State to abide by its treaty obligations. In the context of the obligation flowing from the text of Article 38 of the Convention, this requirement means that the respondent Government may not rely on domestic legal provisions or other impediments, such as an absence of a special decision by a different agency of the State, to justify an omission to furnish the material requested by the Court (see *Husayn (Abu Zubaydah)*, cited above, § 358, and the authorities cited therein). In fact, the obligation under Article 38 implies putting in place any such procedures as would be necessary for unhindered communication and exchange of documents with the Court (see *ibid*., § 366). Moreover, the domestic legal provision invoked by the Government in the present case does not contain an absolute prohibition but rather sets out the procedure for and limits to the disclosure. The respondent Government have not, however, made any practical proposals to the Court that would have enabled them to satisfy their obligation to cooperate while addressing any legitimate concerns they might have had in relation to the possibly sensitive nature of the relevant documents classified under domestic law (compare *Georgia v. Russia (II)*, cited above, § 345).

159. Having regard to the considerations set out in paragraph 158 above and to the importance of cooperation by the Governments in Convention proceedings, the Court considers that in the present case the respondent Government have failed to comply with their obligations under Article 38 of the Convention on account of their refusal to submit the documents requested by the Court.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

160. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

161. The first applicant claimed EUR 350,000 (EUR) in respect of non-pecuniary damage.

162. The second and third applicants claimed EUR 5,000 each in respect of non-pecuniary damage.

163. The fourth applicant made no claim.

164. The Government alleged that the amounts claimed were unsubstantiated and invited the Court to reject the claims.

165. Having regard to the circumstances of the case, the Court considers that the finding of violations of the applicants' Convention rights constitutes sufficient just satisfaction for any non-pecuniary damage that may have been sustained by them. It therefore makes no award under this head.

B. Costs and expenses

1. The first and fourth applicants

166. The first and fourth applicants made no claims under this head. The Court therefore makes no award.

2. The second and third applicants

167. The second and third applicants jointly claimed EUR 15,660 in legal fees incurred before the Court, to be paid directly into the bank account of the law firm Nazar Kulchytskyy and Partners. They submitted time-sheets showing that Mr Bem and Mr Kulchytskyy (who is also the fourth applicant) had spent 16.2 hours and 3.3 hours respectively on their cases at an hourly rate of EUR 250 and that another lawyer, Ms Tymoshenko, had spent 71.9 hours at an hourly rate of EUR 150.

168. The Government argued that these amounts were exorbitant and that there was no justification for the applicants to seek advice from multiple lawyers.

169. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the second and third applicants jointly the sum of EUR 6,000 covering costs under all heads, plus any tax that may be chargeable to them on the above amount, which should be paid, as requested, into the account of Nazar Kulchytskyy and Partners.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Decides* to join to the merits of the complaint under Article 8 of the Convention the Government's objections concerning the exhaustion of domestic remedies by the first, second and third applicants and dismisses them having examined the merits of that complaint;

3. *Declares* admissible the complaints under Article 8 lodged by all the applicants;

4. *Holds* that there has been a violation of Article 8 of the Convention in respect of all of the applicants;

5. *Holds* that there is no need to examine separately the complaint under Article 13 of the Convention raised by the second, third and fourth applicants;

6. *Holds* that the respondent State has failed to comply with its obligations under Article 38 of the Convention;

7. *Holds* that the finding of violations constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

8. *Holds*,

   (a) that the respondent State is to pay the second and third applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 6,000 (six thousand euros) plus any tax that may be chargeable to them, in respect of legal fees, to be converted into the currency of the

respondent State at the rate applicable at the date of settlement and to be paid into the bank account of the law firm Nazar Kulchytskyy and Partners, as requested by these applicants;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

9. *Dismisses* the remainder of the applicants' claims for just satisfaction.

Done in English, and notified in writing on 13 February 2025, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytchik Registrar	Mattias Guyomar President

APPENDIX

List of cases:

No.	Application no. Case name Lodged on	Applicant Year of Birth Place of Residence Nationality	Represented by
1.	22790/19 Denysyuk v. Ukraine 06/04/2019	**Stanislav Fedorovych DENYSYUK** 1958 Kharkiv Ukrainian	Tetyana Volodymyrivna APARINA
2.	23896/20 Beylin v. Ukraine 22/05/2020	**Mykhaylo Mykhaylovych BEYLIN** 1977 Kyiv Ukrainian	Markiyan Volodymyrovych BEM
3.	25803/20 Berezkin v. Ukraine 26/06/2020	**Maksym Stanislavovych BEREZKIN** 1980 Kropyvnytskyy Ukrainian	Nazar Stepanovych KULCHYTSKYY
4.	31352/20 Kulchytskyy v. Ukraine 22/07/2020	**Nazar Stepanovych KULCHYTSKYY** 1981 Kyiv Ukrainian	Markiyan Volodymyrovych BEM