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ROLE OF THE COURT IN EXAMINING CRIME PROVOCATION (ENTRAPMENT) COMPLAINTS

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ABSTRACT

This article provides an extensive analysis of one of the guarantees under the right to fair trial – prohibition of crime provocation (entrapment), and the role of the court in the process of examining complaints related to the crime provocation (entrapment complaints).

The article provides a brief overview of the European Court of Human Rights (hereinafter: ECtHR) case law related to the crime provocation, a summary of basic principles of the Court and the approaches for revealing the essence of the prohibition of entrapment.

The European Court examined the entrapment complaints based on substantive test and procedural test.

Under the substantive test, the ECtHR assesses whether the government representatives acted "in an essentially passive manner", whether without their involvement the subject would commit the crime concerned, and, accordingly, ascertain if the entrapment actually took place.

Under the procedural test, the ECtHR assesses the procedure of national courts for examining the entrapment complaint. The Court requires the procedure in question to be adversarial, thorough, comprehensive and conclusive on the issue of crime provocation. The burden of proof to rebut the entrapment complaint is on the prosecution. Herewith, the ability of the prosecution to successfully carry this burden of proof does not excuse national courts from their obligation to effectively examine the entrapment plea.

The present article also analyses the legislative framework of Georgian Courts for examining the entrapment complaints. In addition, the article provides assessment of the interdependence of the laws governing the conduct of operative-investigative activities and the effective examination of the entrapment complaints by the courts. In this regard, the first Georgian case examined by ECtHR – *Chokhonelidze v Georgia* – is also discussed below.

In the end, the article offers a conclusion that Georgian legislation and legal practice (especially considering the decision of the Constitutional Court of Georgia dated September 29, 2015) allow Georgian courts to be proactive and assess the issues necessary for the examination of the entrapment complaint upon their own initiative. Such an initiative on the part of the courts should not be deemed a violation of the principle of adversarial process under the Criminal Procedure Code of Georgia since in this case, the initiative serves the purpose of providing the defendant with an opportunity to enjoy the fair trial right.

Herewith, the article assesses significant gaps and shortcomings in Georgian legislation – absence of the notion of crime provocation or entrapment, non-existence of proper judicial or prosecutorial supervision over the operative-investigative activities that are "vulnerable" to entrapment, as well as the legislative restriction to access the information obtained in result of such operative-investigative activities, which quite frequently makes it impossible for domestic courts to effectively examine the entrapment complaint.

1. INTRODUCTION

The prohibition of crime provocation (entrapment) is one of the integral components of the right to trial right. The ECtHR examined a number of cases that discuss and explain the idea and the scope of this prohibition.

The standard of the prohibition of crime provocation identified in Georgian legal practice is in no compliance with the prohibition of entrapment standards established by European Convention for the Protection of Human Rights and Fundamental Freedoms (Hereinafter: ECHR). The main reason for this incompliance is the flawed legislation, outdated tactics, and methodology deployed by the law-enforcement agencies conducting operative-investigative activities, and the general practice of Georgian law-enforcement agencies and judicial authorities, developed in this flawed environment. The existence of serious issues with regard to the prohibition of entrapment in Georgia was once again emphasized by the ECtHR in the first Georgian case examined by the Court – *Chokhonelidze v Georgia*.[1]

1 Application #31536/07, 28.06.2018.

The prohibition of entrapment is a very complex matter, inclusive of the issues such as the laws governing the conduct of crime-intelligence activities, tactics, the methodology of and supervision over such activities, substantive and procedural criminal legislation, the role of the court in examining the entrapment complaints, etc. However, we will not be able to cover all of these issues in one article.

Thus, the article aims at analyzing one important aspect of the prohibition of entrapment – the role of the courts in examining the entrapment complaints.

2. CRIME PROVOCATION AND PROHIBITION OF ENTRAPMENT IN THE ECTHR CASE LAW – BASIC PRINCIPLES

The ECtHR provided detailed definition of the entrapment in the case *Ramanauskas v Lithuania*, according to which entrapment is a situation where the officers involved – whether members of the security forces or persons acting on their instructions – "*do not confine themselves to investigating criminal activity in an essentially passive manner, but exert such an influence on the subject as to incite the commission of an offence that would otherwise not have been committed*".[2] Herewith, the Court noted that such conduct shall be deemed as entrapment only when it is carried out in order to make it possible to establish the offense that is to provide evidence and institute a prosecution.[3]

Despite the fact that the ECtHR has repeatedly recognized the use of undercover agents on a number of occasions as the legitimate investigative technique for the fight against grave crimes, at the same time the Court considers that it should be subject to clear, adequate and proper procedural guarantees and safeguards as public interest cannot justify the use of evidence obtained as a result of incitement.[4]

In the light of the above mentioned standards, the ECtHR's examination of complaints of entrapment has developed on the basis of two tests: the substantive and the procedural test of incitement.[5]

2 *Ramanauskas vs Lithuania (Grand Chamber)*, Application #74420/01, 05.02.2008, §55.

3 Ibid.

4 *Teixeira De Castro vs Portugal,* Application #44/1997/828/1034, 09.06.1998, §36.

5 See, Tinatin Tskhvediani, Entrapment Issue in the Case Law of ECHR (Association of Law Firms of Georgia, Prohibition of Entrapment, Tbilisi, 2017).

2.1. The Substantive Test

Under the substantive test, the ECtHR assesses whether the government representatives acted "in an essentially passive manner", whether without their involvement the subject would commit the crime concerned, and, accordingly, ascertain if the entrapment actually took place.[6]

At the initial stage, the ECtHR studies the reasons underlying the covert operation. In particular, the State is obliged to prove that it possessed specific, objective evidence that the criminal act was already commenced by the time the police got involved in it.[7]

Where the authorities claim that they acted upon information received from a private individual, the ECtHR draws a distinction between an individual complaint and information coming from a police collaborator or informant.[8]

The participation of a collaborator or an informant in an operation under the supervision of the law-enforcement agencies is often vulnerable to the risk of representing the collaborator or the information as an agent provocateur, leading to a possible violation of Article 6 (1) of the ECHR. Therefore, it is of crucial importance to ascertain in each and every case that the criminal act was already commenced when the source started cooperating with the police.[9] When examining an entrapment complaint it is equally important to determine if a private person, who informed the law-enforcement agencies about possible illegal conduct, had any covert interest in the matter.[10]

The ECtHR determined that a line between the legitimate infiltration of undercover agents and the provocation of a crime will always be crossed unless the national legislation includes foreseeable rules and procedures for authorization and conduct of covert operations under proper supervision. The Court stated that judicial oversight is the most adequate form of supervision over the covert operations;[11] although, the Court does not exclude the possibility of carrying out supervision by other public authority.

In cases, where the lack of case files or the conflicting interpretations of factual circumstances by the opposing parties obstructs the court from determining the fact of entrapment, procedural aspects of the case gain the crucial importance.[12] Herewith, the ECtHR deems the examination of procedural aspects even if the substantive test failed to determine that inciting actions on the part

6 See, *Morari vs the Republic of Moldova*, Application #65311/09, 08/03/2016, §37.

7 *Furcht vs Germany,* Application # 54648/09, 23/01/2015, §51.

8 See, Tinatin Tskhvediani, Entrapment Issue in the Case Law of ECHR (Association of Law Firms of Georgia, Prohibition of Entrapment, Tbilisi, 2017), P. 12; *Gorgievski vs Former Yugoslav Republic of Macedonia, Application #*18002/02. §§52-53.

9 *Vanyan vs Russia,* Application #53203/99, 15/03/2006, §47.

10 *Miliniene vs Lithuania,* Application #74355/01, 24/09/2008, §39.

11 *Khudobin v Russia,* Application#59696/00, 26/01/2007, §135.

12 *Tchokhonelidze v Georgia,* Application #31536/07, 28/06/208, §46.

of the State authorities[13] or if the substantive test results are sufficient for proving violation of Article 6 of ECHR.[14]

2.2. The Procedural Test

The ECtHR has not determined a specific procedure for examination of the entrapment complaints.[15] The important criteria are the adversariality, comprehensiveness and conclusiveness with regard to the incitement to commit a crime.[16] Since test purchases and other similar investigative methods are generally associated with the risk of police entrapment, the ECtHR requires existence of firm procedural safeguards in this regard.[17]

When a person filed an entrapment complaint which, in turn, is not clearly unsubstantiated, the burden of proof rests with the prosecution.[18] Moreover, examination of the matter by domestic courts should include an examination of underlying reasons of the covert operation, also the understanding of the degree of law-enforcement involvement and the analysis of any incitement or influence exercised on the person concerned.[19]

The obligation of national courts to ensure respect of the principle of fairness requires, *inter alia*, the cross-examination of undercover agents and other witnesses by the defense, or at least a detailed explanation of the reasons as to why it was impossible to hear the testimonies of those individuals.[20]

Under the procedural test, conclusions of national courts are of utmost importance for determining whether Article 6 of the ECHR has been violated or not.[21] If the entrapment is proved, the national courts must draw inferences in accordance with the ECHR.[22]

13 See, Tinatin Tskhvediani, Entrapment Issue in the Case Law of ECHR (Association of Law Firms of Georgia, Prohibition of Entrapment, Tbilisi, 2017), P. 16-17; *Ramanauskas,* §61.

14 Ibid. Compare to *Scholer v Germany,* in which based on the substantive test the ECHR determined that there was no violation of Article 6 of the Convention (Application #14212/10, 18.12.2014, §§84-91).

15 For example, in cases against the United Kingdom, the ECHR has not granted a particular primacy to any of the regulations of English legislation (see, *Edwards and Lewis v the United Kingdom,* Applications #39647/98 and #40461/98, 22.07.2003, §46). Despite the fact that according to English laws the incitement to commit a crime is not a direct precondition for removing charges against the subject, the judges are still obliged to terminate case proceedings or exclude all evidence obtained as a result of the incitement from the case Tinatin Tskhvediani, Entrapment Issue in the Case Law of ECHR (Association of Law Firms of Georgia, Prohibition of Entrapment, Tbilisi, 2017), P. 17; See, also *Rajcoomar v the United Kingdom*, Application #59457/00, 14.12.2004).

16 *Bannikova v Russia,* Application #18757/06, 04.11.2010, §§57-58.

17 *Lagutin and Others v Russia,* Applications #6228/09, #19123/09, #19678/07, #52340/08, and #7451/09, §115.

18 *Guide on Article 6 of the European Convention on Human Rights, Right to a Fair Trial (Criminal Limb)* (Council of Europe/European Court of Human Rights, 2014), available at www.echr.coe.int, P. 29.

19 *Ramanauskas,* §§70-71.

20 *Bulfinsky v Romania,* Application #28823/04, 01/06/2010, §45.

21 *Sepil v Turkey,* Application #17711/07, §§37-40.

22 *Ramanauskas,* §70; *Sepil,* §37.

Acknowledgment of the violation of the right or mitigation of a sentence[23] is insufficient – all evidence obtained as a result of entrapment (crime provocation) must be excluded or a procedure with similar consequences must apply.[24] It is noteworthy, that even if the prosecution fails to discharge the requisite burden of proof, that omission does not excuse domestic courts from the need to address effectively the plea of entrapment.[25]

3. GEORGIAN LEGISLATION – OPPORTUNITIES OF GEORGIAN COURTS IN THE PROCESS OF EXAMINING THE ENTRAPMENT COMPLAINTS

3.1. Supervision over Operative-Investigative Activities

The Georgian legislation differentiates between operative-investigative activities and covert investigative activities.

The regulations and provisions on operative-investigative activities are governed by the 1999 Law of Georgia on Operative-Investigative Activities, whereas the covert investigative activities are governed by the specific provisions of the Criminal Procedure Code of Georgia (CPC).[26]

With regard to the prohibition of crime provocation, the specific types of covert investigative activities envisaged by the CPC are less problematic, due to their nature, compared to the operative-investigative activities. Among various types of operative-investigative activities, there are the ones that are more susceptible to the risks of entrapment; these are, for example: test purchase, controlled delivery, infiltration of undercover officials or operative officers in a criminal group and some other activities. As mentioned above, the ECtHR standard requires for such operations to be controlled, and the most adequate form of the control is judicial oversight. Contrary to the aforesaid, Georgian legislation does not envisage judicial control over operative-investigative activities.

Pursuant to the Law of Georgia on Operative-Investigative Activities, Prosecutor General of Georgia and his subordinate prosecutors are in charge of supervising the correct and uniform application of the law in the course of conducting operative-investigative activities as well as the lawfulness of the decisions made in the process of conducting operative-investigative activities. Pros-

23 See, *Furcht,* §§65-71.

24 *Ramanauskas,* §60; *Khudobin,* §§133-135; *Banikova,* §54.

25 *Chokhonelidze,* §52.

26 CPCG, Chapter 16', Covert Investigative Actions.

ecutorial supervision, as established by the law, has a significant legislative flaw which is discussed below in a detailed manner.

3.2. Opportunities to Effectively Examine the Entrapment Complaint at the Merits Hearing

As mentioned above, according to the ECtHR case law, even if the prosecution fails to discharge the requisite burden of proof that omission does not excuse domestic courts from the need to address effectively the plea of entrapment. The effectiveness of the court in addressing the entrapment plea is assessed based on the evaluation of the submitted reasoning and arguments. Domestic courts must examine through adversarial procedural action the grounds for conducting a covert operation, and the scope of influence or incitement exerted on the person concerned. As noted by the ECtHR, court proceedings should be adversarial, thorough, comprehensive and conclusive on the issue of incitement.

However, a question may be raised: is a conflict between the aforementioned conclusion from the ECtHR case law and the principle of adversarial process deployed under CPC? Is it justified and possible for the domestic court to take an initiative while the prosecution is passive and demand and examine in the participation of the parties the evidence that is important for examining the entrapment plea?

In its decision of September 29, 2015, the Constitutional Court of Georgia explained the idea of the equality of arms and adversarial process secured under Article 85(3) of the Constitution of Georgia.[27] In particular, the Constitutional Court had to decide on the following issue: if the cassation and appeals courts were authorized to go beyond the scope of cassation or appeals complaints and render a decision on a matter which had not been raised by the defense in its complaint. This issue concerned two basic constitutional principles – the retrospective application of the law revoking criminal liability and double jeopardy clause. The Constitutional Court needed to decide if the adversarial process guaranteed under the CPC and the Constitution of Georgia would be violated if the court upon its own initiative would go beyond the scope of the cassation or appeals complaints, and ensure that the two constitutional principles were applied in relation to the convicted person.

First of all, the Constitutional Court marked the difference between the adversarial model of criminal proceedings as the historically developed and formed model and the adversarial principle as one of the elements of the right to fair trial.[28]

The adversarial model of criminal proceedings is characterized by a specific system of conducting procedural actions and specific separation of the roles of parties to the proceedings. In contrast

27 The decision of the Constitutional Court of Georgia, #3/1/608-609.

28 See, the decision of the Constitutional Court of Georgia, §14.

to the inquisitorial system, where a judge is granted the authority to examine the case-related circumstances upon his/her own initiative, the fundamental principle of the adversarial system is that the establishment of objective truth in the case is trusted to the parties' initiative, while the judge remains neutral.[29]

As for the adversarial principle, it is the integral component of the right to fair trial, representing a part of both inquisitorial and adversarial models of criminal proceedings.[30] It was clear for the Constitutional Court that Article 85 (3) of the Constitution of Georgia refers to the closely interrelated elements of adversarial process and equality of arms and not the adversarial model of criminal proceedings.[31]

Considering the requirements of Article 85 (3) of the Constitution of Georgia, it is groundless to claim that by enforcing the principles of the retrospective application of the laws revoking liability or the double jeopardy clause upon its own initiative, when the request has not been raised by the appellant *per se*, the court violates or restricts the adversarial principle. The adversarial principle, along with other procedural guarantees, is the mean and instrument to ensure a right to fair trial and the "right and fair decision" in a criminal case. Legislative obligation, which restricts the judge from applying fundamental and imperative constitutional principles merely because the parties have not initiated a request to do so, excludes the possibility of enforcing the right to fair trial and rendering a fair decision in the case concerned. Thus, to argue that the rule which excludes the achievement of the aim, can be justified by enforcing the means of achieving this goal, in this case – the adversarial principle – is groundless and unsubstantiated.[32]

Therefore, according to the judgement of Constitutional Court, if the issue at hand is related to the risk of violating a constitutional principle,[33] courts are obliged to enforce the constitutional principle, and in doing so there will be no violation of the equality of arms and the adversarial principle.

This legal logic developed by the Constitutional Court is in full compliance with the principle of effective examination of the entrapment complaint by the court as established by the ECtHR. The prohibition of crime provocation (entrapment) is one of the guarantees under the right to fair trial along with other components. Hence, in situations where the state prosecution is unwilling or unable to fulfil its obligation to carry the burden of proof with regard to the entrapment plea, courts – upon their own initiative – will be obliged to fully and effectively address the entrapment complaint in the participation of the parties to the proceedings concerned. In any other case, the constitutional principle – the defendant's right to a fair trial – will be violated.

29 Ibid, §15.

30 Ibid, §16.

31 Ibid, §19.

32 Ibid, §20.

33 Notwithstanding the fact that in this decision the Constitutional Court discussed only two constitutional principles – double jeopardy and retrospective application of the law revoking criminal liability, the rationale behind the reasoning provided by the court is a clear indication that such an approach may be applied to any constitutional right.

The ECtHR underlined an importance of effective examination of the entrapment plea by the court in the case *Chokhonelidze v Georgia*. In the context of entrapment, this is the first case from Georgia examined by the ECtHR, in which the Court held that the right to a fair trial had been violated based on the procedural test of the incitement to commit a crime.

3.3. Chokhonelidze v Georgia

The applicant, Eldar Chokhonelidze, was the Deputy Governor of Marneuli District. According to the official version of events, the applicant told Ms. K. that she needed to make a pay-off (bribe) of a certain amount in exchange for issuing a permit necessary for the construction of a petrol station. Ms. K. contacted the law-enforcement authorities and reported the fact of demanding a pay-off on the part of the applicant for issuing the construction permit. She expressed her readiness to cooperate with law enforcement agencies on this matter. The authority immediately opened a criminal case into Ms. K.'s allegations and planned the conduct covert investigative actions, including secret video-audio surveillance. At one of the meetings, Ms. K. handed over 10,000 USD in cash to the applicant. The banknotes had been pre-marked with a special substance by the law-enforcement. As soon as the applicant touched the cash, he was arrested.

Later, at the court hearing, the applicant claimed that he had not taken a bribe (pay-off) and explained that 10,000 USD was intended for the construction company which was supposed to build the petrol station.

At the court hearings, Ms. K. initially changed her statement of facts given to the investigation and supported the testimony of the applicant, additionally admitting that she generally cooperated with the law-enforcement agencies and had worked on 4 other cases with the Constitutional Security Department (CSD). Later, Ms. K. once again changed her testimony and supported her previous statements given to the investigation, i.e. claiming that the applicant requested a bribe from her.

Herewith, the domestic court was unable to locate and summon one important prosecution witness, who was also a person secretly cooperating with the law-enforcement authorities and who had a land plot purchase agreement concluded with Ms. K. (the same land plot, where the petrol station should have been constructed). The mentioned agreement was annulled shortly afterwards as it was a part of the cover story elaborated by law enforcement agencies.

The applicant claimed that he was a victim of law-enforcement entrapment (i.e. crime provocation).

The ECtHR examined the applicant's claim using two tests designed by the Court – the substantive test and the procedural test of incitement.

Under the substantive test, the ECtHR was unable to determine if the entrapment took place as the case files and the conflicting interpretation of the factual circumstances of the case by the defense and prosecution did not allow the Court to conclude if the crime at issue had been com-

mitted as a result of the crime provocation. Herewith, the ECtHR took in consideration the fact that the applicant himself initiated the discussion about financial issues stating that he actually received 10,000 USD, although he said it was never intended to be taken as a bribe.[34]

In these conditions, the procedural test had the decisive power.

The ECtHR assessed if the applicant actually had an effective opportunity to submit his entrapment plea. The ECtHR determined that the state prosecution failed to discharge the requisite burden of proof as the party did not make any argument throughout the proceedings in an attempt to refute the applicant's allegations of entrapment.[35]

Herewith, the Court observed that the DCS sending Ms. K., the infiltrated agent, to the applicant on an undercover mission was never ordered or supervised either by a court, which is considered by the Court's case-law as the most appropriate form of supervision in such matters, or any other independent public authority competent in criminal matters.[36] The ECtHR also emphasized that under the national legislation it was not required that infiltration by an undercover agent – unlike certain other investigative techniques – be ordered and supervised by a court. In other words, the domestic law did not provide for the adequate regulation of the conduct of such a covert operation.[37] Lastly, the ECtHR assessed the effectiveness of the domestic court's procedure for examining the entrapment plea. The Court observed as follows:

> *"Even if the Prosecutor's Office had failed to discharge the requisite burden of proof, that omission could not have excused the domestic courts from the need to address effectively the applicant's plea of entrapment. The effectiveness of the judicial review should be assessed by having due regard to the reasons contained in the domestic courts' decisions. The courts were expected to establish, after having conducted adversarial proceedings, the reasons why the undercover operation had been mounted against the applicant, the extent of the DCS's involvement in the offence and the nature of any incitement or pressure to which the applicant had been subjected (see, for instance, Ramanauskas, cited above, § 71). However, the Court observes that the domestic courts, confronted with the applicant's well-substantiated allegations, did not provide any single reason in their decisions as to why those allegations ought to be dismissed… In such circumstances, it cannot be said that the judicial review of the allegations of entrapment was either conducted with sufficient respect for the principle of adversarial proceedings or that it established adequate reasons for dismissing the applicant's defense"*.[38]

Accordingly, the ECHR established that there has been a violation of Article 6 of ECHR – the right to fair trial.

34 *Chokhonelidze,* §49.

35 Ibid, §51.

36 Ibid.

37 Ibid.

38 Ibid, §52.

In the *Chokhonelidze Case*, the ECtHR also concluded that the law of Georgian governing special investigative activities included a fundamental flaw. Even if the above-mentioned assessment by the ECtHR was referred to the law valid as of 2005, it is still applicable to the legislation currently in force as much as no amendments or additions have been made to the law since then to reflect the issues related to the prohibition of entrapment. This issue is directly linked to the problem of effective examination of the entrapment plea by the courts and, therefore, will be discussed below.

3.4. Laws Governing the Special Investigative Activities and Its Interdependence with the Effective Examination of the Entrapment Plea

As mentioned above, in the case *Chokhonelidze v Georgia*, the ECtHR observed that Georgian legislation (Law of Georgia on Special Investigative Activities) did not provide for adequate regulation of the cover operation. In particular, Article 7(3-7) of the Law did not require judicial supervision over the activities of undercover agents.[39]

To this day, no amendments have been made to the Law of Georgia on the Operative-Investigative Actions, specifically in the model of planning and conducting covert actions. Today, just as well as in past, domestic courts have no control over the sensitive activities with regard to the entrapment, such as the infiltration of an undercover agent in a criminal group, test purchase, controlled delivery, etc.

In 2005, and same is true for today, the only authority supervising the correct and uniform application of the law in the course of operative-investigative activities, as well as over the lawfulness of the decision made in the course of operative-investigative activities were the Chief Prosecutor of Georgia and his subordinate prosecutors.[40] Yet, such supervision is general and does not include the substantive issues related to the effective examination of the entrapment plea. In particular, information about the persons who provide confidential assistance to, and cooperate or used to cooperate with the law-enforcement agencies, also methods, tactics, and organization of the process of obtaining operative-investigative information are not subject to prosecutorial supervision.[41] The Law of Georgia on the Prosecution Service of Georgia also includes a similar provision.[42] In the case *Chokhonelidze v Georgia*, the ECtHR apparently considered such prosecutorial supervision insufficient, as it concluded that the legislation of Georgia did not regulate adequately the conduct of the cover operation.

Herewith, the absence of adequate control over the special investigative activities is not the only problem – restrictions to access significant information is also an issue. In general, if under the

39 *Chokhonelidze,* §51.

40 Law of Georgia on Operative-Investigative Activities, Article 21 (1).

41 Ibid, Article 21 (2).

42 Organic Law of Georgia on the Prosecution Service of Georgia, Article 25 (4).

law the prosecutor does not have access to the methods, tactics, and organization of the obtaining operative-investigative information, such information cannot be submitted to the court at the hearing about the entrapment complaint.

Is it possible for the court to examine the entrapment plea effectively and in line with the European standards in the absence of the aforementioned information?

As mentioned earlier, an effective examination of the entrapment plea implies the examination of the underlying reasons for the action, ascertaining the details of any influence or oppression exercised on the person concerned. These issues clearly concern and include information about the methods, tactics, and organization of obtaining the operative information. For example, how was the so-called "cover story" developed for the purpose of obtaining the trust of the person of interest and how the first steps were planned to get closer to that person? In general, these initial activities show if the law-enforcement authorities got involved after the crime had already commenced or was the crime committed as a result of illegal pressure or influence exerted on the person concerned.

Thus, the current situation, in which neither judiciary nor effective prosecutorial supervision is carried out on the special investigative activities, the methodology, organization and tactics thereof, all of which are important for the examination of the entrapment plea. Herewith, as the prosecutors do not have access to this information, it cannot be submitted to the court at the hearing on examining the entrapment plea. Such analysis allows for the conclusion that even if the court starts examination of the entrapment plea upon its own initiative, in most cases the fact of incitement still cannot be effectively examined.

3.5. Absence of Entrapment and Crime Provocation Notions in the Legislation of Georgia

The Georgian legislation – the Law of Georgia on Operative-Investigative Activities, the CPCG or any other act – does not recognize the notion of entrapment or incitement to commit a crime. Only Article 145 of the Criminal Code of Georgia[43] has the disposition to cover the cases of entrapment, although the mentioned article is insufficient. The Association of Law Firms of Georgia (ALFG) also discussed this issue in its recent study.

In particular, the ALFG study states as follows:

> *"Absence of the special notion of entrapment in the CPCG and/or in the law governing the conduct of operative-investigative activities will restrict the court. Herewith, having one article in only the Criminal Code of Georgia with the entrapment disposition might be an obstacle for*

43 Article 145 of the Criminal Code of Georgia – "provocation of crime, i.e. persuading others into committing a crime for the purpose of his/her criminal prosecution."

the court in the course of examining the entrapment plea. There will always be some party to argue that a specific person – person who incited the subject to commit a crime – is not yet convicted for the crime under Article 145 of the Criminal Code – for inciting a crime, and that for the purposes of criminal proceedings it is impossible for the court to consider and determine the entrapment fact by such a person until the conviction."[44]

In the light of the foregoing, the ALFG concluded that there should be a

"Clear distinction between the operative-investigative and criminal procedure issues of the prohibition of entrapment, and the substantive-legal issues of the agent provocateur's criminal liability. European standards require to from the presiding judge to effectively address the entrapment plea, including, to find all evidence obtained through this illegal method inadmissible or any other result of the same effect in case if the fact of entrapment is established. Georgian courts should not wait for the finalization of criminal prosecution against the agent provocateur and respective conviction for inciting to commit a crime. While examining the entrapment plea, the court should access to effective instruments of criminal procedure in order to ensure the guarantee of the prohibition of entrapment, to find the evidence obtained through entrapment inadmissible and/or achieve any other result with the same effect."[45]

4. CONCLUSION

Thus, the role of domestic courts in the examination of the entrapment plea holds a special place in the ECtHR case law. Apart of the position of the prosecution, in particular, whether or not the prosecution was able to discharge the requisite burden of proof with regard to the entrapment complaint, the court should be proactive and effectively address the complaint upon its own initiative. The scope of effective examination of the complaint must include the reasons why the operative-investigative activity was mounted, the extent of the law enforcement authorities' involvement in the offense and the nature of any incitement or pressure to which the person concerned was subjected.

The Georgian legislation and subsequent practice (especially considering the decision of the Constitutional Court of Georgia dated September 29, 2015) allow Georgian courts to be proactive and assess the issues necessary for the examination of the entrapment complaint upon its own initiative. Such an initiative on the part of domestic courts should not be deemed a violation of the

44 See, Entrapment Issue in the Case Law of ECHR (Association of Law Firms of Georgia, Prohibition of Entrapment, Tbilisi, 2017), P. 48.
45 Ibid, PP. 48-49.

adversarial principle under the CPC of Georgia since in this case, the initiative serves the purpose of providing the defendant with an opportunity to enjoy the right to fair trial.

In addition, significant shortcomings and gaps of Georgian legislation – absence of the notion of incitement to commit a crime or entrapment, non-existence of proper judicial or prosecutorial supervision over the operative-investigative activities that are "vulnerable" to entrapment, as well as the legislative restriction to access the information obtained as a result of such operative-investigative activities, quite frequently makes it impossible for domestic courts to effectively examine the incitement complaint.