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Kateryna Chyzhmar,
Doctor of Law, Associate Professor, Chief Researcher at the Department of Scientific-Legal Expertise and Legislative Work, Scientific Institute of Public Law, 2a, H. Kirpa street, Kyiv, Ukraine, postal code 03035, k.chyzhmar@gmail.com
ORCID: *orcid.org/0000-0001-8638-7872*

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GUARANTEES OF NOTARIAL ACTIVITIES: CONCEPT AND CONTENT

Abstract. ***Purpose.*** The purpose of the article is to define the concept and content of guarantees of notarial activities. ***Results***. The adoption of legal provisions solely cannot fully ensure the exercise of the rights of participants in legal relations. In practice, frequently there are situations when subjective rights which establish specific legal guarantees cannot be exercised. As a rule, such cases require relevant authorised state and public bodies or their officials to intervene to remove possible obstacles to the actual ensuring of the rights provided for in the provision. In addition, there are a number of legal guarantees, the essence thereof is in the activities of the relevant authorities. These include, for example, the activities of judicial authorities to restore violated rights. Therefore, the activities of the relevant state authorities, as provided for by law, together with the guarantee-provisions, act as a legal guarantee of the rights of the parties to legal relations. The impartiality of a notary is one of the most important features of his or her legal status as an actor of notarial process and is a guarantee not only for the parties concerned, but also for the notary himself or herself. ***Conclusions***. Indirect judicial control is exercised when the court considers other civil cases related to challenging notarial transactions and other notarial documents in court, in other cases where the disputed legal relations of the parties are related to the performance of notarial acts. In such cases, the court's assessment of the legality of notarial acts is interim. The court checks whether the notary complied with the requirements of the law when performing a notarial act in order to determine the nature of the legal relationship between the parties to the litigation. In this case, the main purpose of the litigation is to resolve a dispute between the parties. In this case, the court's assessment of notarial acts is usually provided in the reasoning part of the court decision. Therefore, judicial control over the performance of notarial acts as one of the guarantees of notarial activities can be defined as a court's assessment of a notary's compliance with the requirements of the law when performing a notarial act.

Key words: notary office, notary public, duty, notarial acts.

1. Introduction

The guarantees of notarial activities are aimed at separating the notary from other participants in civil legal relations who have applied to him/her, defining him/her as a holder of public power and an independent arbitrator. To guarantee (synonymous with "to provide") means to create an enabling environment for the implementation of something (Skakun, 2001, p. 212). Legal theory actively uses this term.

Legal provisions themselves are legal guarantees, since certain "means and methods" become legal guarantees only through their legal form, through their enshrining legal provisions. The very term "legal guarantees" indicates their legal basis, and the enhancement of guarantees is primarily based on the use of the opportunities provided by the existing legal provisions (Anton, 2005, p. 187).

Undoubtedly, the adoption of legal provisions by itself cannot fully ensure the exercise of the rights of parties to legal relations. In practice, situations often arise in which subjective rights that establish specific legal guarantees cannot be exercised. Usually, such cases require the relevant authorised state and public bodies or their officials to intervene to remove possible obstacles to the actual ensuring of the rights provided for in the provision.

In addition, there are a number of legal guarantees, the essence thereof is in the activities of the relevant authorities. These include, for example, the activities of judicial authorities to restore violated rights. Therefore, the activities of the relevant state authorities, as provided for by law, together with the provisions-guarantee, act as a legal guarantee of the rights of the parties to legal relations.

The purpose of the article is to define the concept and content of guarantees of notarial activities.

2. The concept of guarantees of notarial activities

The general theoretical understanding is that guarantees are ways and means of achieving something. In legal science, general and special guarantees are distinguished. Moreover, general guarantees include such phenomena that do not have their own legal form, but significantly affect the implementation of a particular legal provision. That is, the classical classification, as follows from the analysis of scientific sources, is the division into social, economic, political, ideological and other guarantees (Skakun, 2001, p. 180). Approaches to the understanding of guarantees vary from a complete denial of such an element in law to a detailed study, determination of the structure, classification, and justification as a necessary feature of any legal provision. According to H. Ellinek, the essential feature of the concept of law is therefore not coercion, but a guarantee, one of the types thereof is coercion (Ellinek, 1908, p. 117).

The Law of Ukraine "On Notaries" contains provisions on guarantees of notarial activities. Therefore, it is necessary to first define the essence of notarial activities itself, and then the mechanism for its provision. According to the Constitution of Ukraine (Article 3, part 2), human rights and freedoms and their guarantees mark the content and direction of the state's activities (Constitution of Ukraine, 1996). The state thereby undertakes to create a mechanism for the protection of human rights and to encourage these activities. In addition, the state establishes a special system of bodies whose tasks and functions include law enforcement.

Notarial activities, as we have repeatedly noted, should be viewed as a type of qualified legal assistance. In other words, its focus is law enforcement, mediating state protection. And its guarantees should ensure reliable protection of citizens' rights.

Thus, the guarantees of notarial activities are a legally significant mechanism for ensuring the activities of notary bodies, which is strictly implemented on the basis of the constitutional consolidation of the right of a citizen to qualified legal assistance at both the legislative and law enforcement levels.

The guarantees of notarial activities are aimed at ensuring the observance of the rights of interested parties, as well as the appropriate status of a notary within notarial procedural legal relations as an actor – a holder of public power and at the same time as an independent arbitrator, legal adviser to the parties. Therefore, guarantees of notarial activities are equally important for all participants of notarial legal relations, as they are intended to ensure compliance with and exclude the possibility of violation of their rights (Barankova, 2010, p. 297).

It should be noted that Law of Ukraine No. 614VI "On Amendments to the Law of Ukraine "On Notaries" has a somewhat one-sided approach to regulating this aspect. Article 8-1, entitled "Guarantees of notarial activities", sets out rules that prevent violations of notaries' rights and protect their activities from unlawful interference and influence. The issue of protecting notaries' rights is outside the scope of the notarial process and should be addressed by notarial legislation only in terms of implementing the principle of independence and impartiality of a notary as an actor of notarial proceedings. Therefore, it should be agreed that the concept of guarantees of notarial activities is much broader than the content of Article 8-1 of the Law (Barankova, 2010, p. 298).

Therefore, since the current legislation of Ukraine on notaries does not clearly define the guarantees of notarial activities, they can be formulated based on the content of certain provisions of the Basic Law. Thus, in our opinion, the following guarantees of notarial activities should be highlighted: 1) impartiality; 2) independence; 3) guidance only by the Constitution and laws, legal regulations of state authorities and local self-government bodies adopted within their competence, as well as international regulations; 4) notarial secrecy; 5) judicial protection of notarial activities. Unfortunately, not all of the above provisions have been directly enshrined in the current legislation on notary office. In particular, the Law "On Notaries" does not contain a separate provision that would enshrine the principle of independence and impartiality of a notary. However, the provisions of these principles of notarial activities can be traced from a number of other provisions of the Law. Let us consider their content comprehensively.

The principle of impartiality of a notary is not clearly defined by the current legislation of Ukraine. Unlike the "Law on Notaries," the current Code of Civil Procedure of Ukraine defines the impartiality of judges as the absence of personal, direct or indirect interest in the outcome of a case or other circumstances that cast doubt on impartiality. Therefore, one of the procedural guarantees for the implementation of the tasks of civil proceedings and the adoption of lawful and reasonable decisions in civil cases is the institution of recusal of a judge, which aims to remove judges whose impartiality is in

doubt from participation in a case. Therefore, the institution of challenge aims to create confidence among the parties and other participants in the process, as well as among citizens present in the courtroom, that the case is considered and resolved impartially and absolutely objectively, which in turn contributes to the increase of the authority of the decisions made by the court and their educational value (Kharchuk, 2010).

When performing his or her duties, a notary shall not allow granting preferences or creating an enabling environment for granting preferences to any persons or groups of persons on the basis of gender, race, nationality, language, origin, property and official position, place of residence and attitude to religion, beliefs, or membership in public associations, professional affiliation and other grounds, as well as to any legal entities, unless otherwise provided by the current legislation of Ukraine (Order of the Ministry of Justice of Ukraine On approval of the Rules of Professional Ethics of Notaries of Ukraine, 2013).

In other words, the provision only establishes a prohibition on the performance of a notarial act. In such circumstances, the notary shall refuse to perform a notarial act. Describing this provision, many representatives of the notary community argue that such a prohibition is aimed at eliminating personal interest in the act. However, it is not difficult to imagine a situation when a notary may act as an interested party in relation to a party to an action. This may be personal friendships, business relations of a close relative of the notary, etc. All these are circumstances that call into question notaries' impartiality.

Furthermore, the legislation does not provide for the institution of notary recusal, in particular, if one of the parties has any information about the notary that indicates his or her interest, they can apply to another notary. But it is good if there are several notaries within one notary district, but what if there is only one notary in the district? Moreover, this circumstance may be discovered later, and it will not be a ground for announcing the action taken illegal.

Therefore, when performing a notarial act, a notary shall not give preference to any of the interested parties. The requirements of impartiality determine the duties of a notary to explain to the interested parties – participants in the notarial act – their rights and duties, the essence and sequence of the notarial act in a comprehensive, complete and exhaustive manner so that legal ignorance cannot be used to their detriment (Law of Ukraine On Notaries, 1993).

Therefore, the impartiality of a notary is one of the most important features of his or her legal status as an actor of notarial process and is a guarantee not only for the parties concerned, but also for the notary himself or herself. In this way, the possibility of exerting influence on a notary with the aim of making an illegal notarial act is excluded, which is evident from the content of Article 8-1 of the Law under consideration.

With regard to the application of the principle of *notary independence*, questions often arise: independence from whom? From him/herself? Here we should proceed from ensuring the functions of the notary. Above, we have already described the notary as an arbitrator of legal relations. For our country, the existence of such a notary – an independent arbitrator – is still a relatively distant prospect. However, the principle of notary independence was proclaimed precisely to create such conditions. A notary shall be free from opportunistic considerations, the political situation and the opinion of the head of the judiciary and other officials.

The legal guarantees of notary independence include, in particular, the indefinite validity of the certificate of the right to practice notary, and the judicial procedure for appealing against notary actions. However, in our opinion, they cannot be recognised as appropriate and sufficient. In this regard, firstly, it would be appropriate to provide for a mandatory judicial procedure for suspension and termination of notarial activities. Secondly, the mechanism of control of notarial activities needs to be significantly improved so that issues of violation of the law in the performance of notarial acts would also be resolved exclusively by the court (Barankova, 2010, p. 217).

For private notaries, the judicial procedure for removal from office also serves as such guarantee. Public notaries are less independent from the judiciary, as they are directly subordinated to it. This is an employment relationship. A notary working in a notary public's office may be dismissed in accordance with labour law.

It should be noted that under the current labour legislation, labour discipline is based on the conscious and conscientious performance of labour duties by employees and is a prerequisite for productive work. It is ensured by: 1) creation of the necessary organisational and economic environment for normal productive work; 2) conscious attitude to work; 3) methods of persuasion; 4) education; 5) rewards for conscientious work (Labour Code of Ukraine, 1971).

Violators of labour discipline are subject to disciplinary and social influence. Employees

shall work honestly and consciously, timely and accurately comply with the orders of the owner or his/her authorised body, increase labour productivity, improve product quality, obey labour and technological discipline, meet the requirements of regulations on labour protection, safety and industrial sanitation, and to treat the owner's property with care and attention (Labour Code of Ukraine, 1971).

The main duties of employees are: 1) to work honestly and in good faith; 2) to comply with labour discipline and internal regulations: to arrive at work on time, to observe the established working hours, to use all working time exclusively for productive work, to timely and accurately comply with the orders of the owner or his authorised body, etc; 3) to increase labour productivity, timely and diligently perform tasks and orders, meet production standards and standardised production targets, etc.

The Labour Code of Ukraine stipulates that an employment contract may be terminated by the owner or his/her authorised body, in particular in case of systematic failure of the employee to fulfil his/her duties under the employment contract or the Internal Labour Regulations without valid reasons, if the employee has previously been subject to disciplinary or public penalties (Bolotina, Chanysheva, 2001, p. 122). Therefore, the orders of justice officials are mandatory for notaries working in state notary offices. Dismissal for failure to comply with them is quite possible. Furthermore, it will be quite difficult to prove otherwise in court, since formally the truth will be on the side of the justice authority. In addition, informal ties between the judiciary and justice officials should be considered, which are often the cornerstone of final decisions.

The financial basis for notaries' independence should be economic support guaranteed for their activities. The source of funding for the activities of a private notary is the money from performing notarial acts and providing legal and technical services, as well as other financial receipts that do not contradict the current legislation of Ukraine. All funds become the property of the notary, the state only obliges him to pay the relevant taxes and other mandatory payments. In this case, the notary's income serves as a guarantee of financial independence and a guarantee of compensation for damage caused by the notary's actions (Dun, 2009, p. 20).

Therefore, the issue of practical implementation of the independence of the notary office makes it important to address the issue of its financial support, in particular, payment for notaries' services, validity of related services of the notarial process, taxation of notaries' income, etc.

The need for state regulatory framework for payment for notarial services stems from the very nature of notarial activities. Given that, as we have repeatedly noted, private notarial activities are inherent in private law principles, in addition to public law principles, the issues of the most optimal choice of models, methods of financial support for notarial activities and payment for notarial services are on the agenda. In our opinion, the concept of reforming the financial support for notaries' activities, in particular payment for notarial services, should be based on the search for the most optimal model to ensure both public and private interests.

The issue of the share of the fee for notarial services is relevant, as it is related to the status of notary's income and the problem of its taxation. At the theoretical level, this issue remains controversial. The most widespread proposal is to grant the funds collected for notarial acts the status of means of ensuring notarial activities and property security of citizens and legal entities, which is due to the property liability of a private notary in case of damage caused by illegal actions (Sosymenko, Kolomoiets, Hulievska, 2010, p. 159).

When deciding on the status of funds charged by a notary for performing notarial acts, it is necessary to allow for not only self-financing of notarial activities, but also to determine the issue of property liability for professional activities. If these funds are not granted the status of means of ensuring notarial activities, property interests of individuals and legal entities that have applied to a notary, it is necessary to exclude from the legislation the full financial liability of a notary, preserving it only to the extent of compulsory insurance of the risk of professional liability of a notary.

The notary's independence is also guaranteed by the provision that notarial activities are not entrepreneurial activities and do not pursue the goal of making a profit. However, many spears have been broken around this rule. That is why we will reveal whether a notary is an entrepreneur by his or her status and whether he or she can carry out entrepreneurial activities, and whether notarial activities are entrepreneurial.

Article 1 of the Law of Ukraine "On Notaries" defines the purpose of notaries' duties as providing legal certainty to the rights and facts certified by notaries, and not to make a profit, and the actions that a notary is entitled to perform are provided for by law, not by initiative as in business. In notarial activities, the initiative for a notary to perform a particular

act always belongs to the person who applies for it, not to the notary.

Pursuant to Article 50 of the Civil Code of Ukraine, a natural person has the right to engage in entrepreneurial activity that is not prohibited by law, but the same article stipulates that the Constitution and law may impose restrictions on such right of a natural person to engage in entrepreneurial activity (Civil Code of Ukraine, 2003). One of these restrictions is the prohibition on entrepreneurial activities by a natural person such as a notary. This is stated in Article 3 of the Law of Ukraine "On Notaries", which, among other requirements for persons who may be notaries, includes the following prohibition: "...a notary may not engage in entrepreneurial or advocacy activities..." (Law of Ukraine On Notaries, 1993).

3. Content of guarantees of notarial activities

One of the main guarantees of notarial activities is the guidance of the Constitution and current legislation. But a logical question arises: does the practical implementation of this principle mean that a notary shall take on the functions of evaluating legal regulations? Some legal scholars argue that when applying orders and instructions of ministries and departments, acts of local state authorities and acts of local self-government bodies, the notary shall check whether they have been issued within the competence granted to these bodies and whether they comply with the law (Barankova, 2010, p. 119). Moreover, given the certain chaotic nature of modern legislation, it is currently quite difficult for a notary, like any other lawyer, to assess the legal significance of a bylaw.

The situation is exacerbated by the fact that non-legal grounds for specific cases are also a risk factor. The local judiciary, being dependent on the executive branch or subject to certain corporate interests, and sometimes due to corruption, does not always ignore legal regulations of regional authorities, even if they grossly contradict the current laws of Ukraine. Apparently, it is necessary to correlate the rules governing the relevant legal regulations with the grounds for notary liability. Legislation should be based on the premise that if a body adopts a legal regulation, the burden of responsibility for its "poor quality" should be shared between the body and the executor (Fursa, 1999, p. 111).

It should be noted that the legal literature review reveals that the principle of supremacy of the Constitution and law is frequently identified with the principle of legality. That is why, when describing the guarantees of notarial activities, it is emphasised that a notarial act shall not be performed if it contradicts the law (Law of Ukraine On Notaries, 1993).

The principle of governance by law relates to the procedural activities of a notary and is primarily a continuation of his/her independence. It is no coincidence that the Law "On Notaries" refers to independence and subordination to the law in the same article (Article 16). The governance by law principle stipulates that a notary shall not allow for administrative or other pressure, and interference in notarial activities is prohibited.

The principle of legality is a universal principle that is broader than the principle of rule of law. According to D. Bakhrakh, the most important aspect of legality is revealed in considering it as a regime of interrelations between citizens and organisations and the authorised actors, which contributes to the rights and legitimate interests of the individual, his/her comprehensive development, formation and development of civil society, and successful operation of the state mechanism (Bakhrakh, 1991, p. 67).

The basis of the principle is laid in the constitutional duty of everyone to observe the Constitution and laws (Constitution of Ukraine, 1996). The implementation of the above guarantees of notarial activities is ensured by restrictions On Notaries's activities, which indicates restrictions primarily on the general legal status of the notary. According to Article 3 of the Law "On Notaries", a notary cannot engage in entrepreneurial or advocacy activities, be a founder of advocacy associations, or be in the civil service or local self-government, in the staff of other legal entities, as well as perform other paid work, except for teaching, research and creative activities (Order of the Ministry of Justice of Ukraine On approval of the Rules of Professional Ethics of Notaries of Ukraine, 2013).

Restrictions are absolute for a notary, in other words, they are valid throughout his or her activities, and the law does not provide for any exceptions (except for scientific, teaching and creative activities). All these restrictions apply to both notaries working in a notary public's office and notaries engaged in private practice (Semakov and Kondrakova, 2001, p. 88).

An important component of the guarantees of the notary offices in Ukraine is notarial secrecy. According to V. Parasiuk, notarial secrecy, along with attorney-client, banking and medical secrecy, is a type of professional secrecy (Parasiuk, 2010, p. 183). As is known, professional secrets are materials, documents, and other information used by a person in

the course of performing his or her professional duties, which may not be disclosed in any form.

The original version of the Law of Ukraine "On Notaries" was limited to stating that a notary is obliged to keep confidential the information obtained in connection with the performance of notarial acts. Further reform of the notary in Ukraine was marked by amendments to the said Law, which expanded the concept of "notarial secrecy". According to Article 8 of the Law of Ukraine "On Notaries", notarial secrecy is a set of information obtained during the performance of notarial acts or when an interested person applies to a notary, including information about a person, his/her property, his/her property rights and obligations, etc. (Law of Ukraine On Notaries, 1993). Therefore, the subject matter of notarial secrecy is any information obtained by a notary in the course of notarial activities.

Another element of the content of the principle of notarial secrecy may be the need to take measures to preserve confidential information by persons to whom such information has been entrusted. This part of the principle of notarial secrecy is implemented in the impossibility of disclosing information that forms the subject matter of notarial secrecy to other persons without the consent of the client. We believe that the duty to "keep notarial secrecy" (Law of Ukraine On Notaries, Art. 8, parts 2, 3, 1993) implies that such secrets cannot be disclosed without the consent of the client, which obviously shall be formally expressed, and we advocate the view of V. Marchenko (2002, p. 35).

Therefore, as we can see, on the one hand, the legislation grants the right to request information and documents in criminal cases, on the other hand, simply in cases that are under the jurisdiction of competent state bodies, and, in addition, if there is a need to obtain intelligence information in the interests of the state and society (Bondareva, 2009, p. 199).

With regards to the principle of keeping notarial secrecy, we propose to highlight such an element of its content as the awareness of persons obliged to keep notarial secrecy, which is the result of their professional activities or involvement in certain specific professional actions (in the case of representatives, witnesses, translators, etc.) From the perspective of the parties obliged to keep secrecy when performing notarial proceedings, providing legal advice or performing technical actions, Article 8 of the Law "On Notaries" refers to all persons listed in Article 1 of this Law, such as notaries and officials of local self-government bodies, consular offices and diplomatic missions of Ukraine, persons authorised to perform acts equated to notarised acts in accordance with Article 40 of the Law, as well as notary trainees, and other persons who obtained knowledge is the result of their involvement in performing notarial acts (Law of Ukraine On Notaries, 1993). According to M. Bondareva, the rule on confidentiality of information obtained by a person remains in force even in the event of dismissal of an official, officer, retirement, or resignation (in the case of representatives, managers, executors of wills, guardians, etc.). On the other hand, there is obviously complete freedom of expression of the person on whose behalf or in whose interests the action has been taken. This person is free to disseminate secret information regarding notarial proceedings in any way (Bondareva, 2009, p. 199).

Another important component of the principle of secrecy of a notarial act, as well as its guarantee, is that the consequences of unlawful disclosure of information constituting a notarial secret are negative and are associated with bringing the perpetrator to legal liability.

Article 8 of the Law "On Notaries" uses the phrase "breach of notarial secrecy" (part 4) to define the content of the act of a person guilty of violating the principle of notarial secrecy. This strict approach, in the opinion of M. Bondareva, already cited above, does not indicate the logical perfection of this construction, at least because there is a need to interpret the composition of such an offence (Bondareva, 2009, p. 200). In this context, we fully share the approach that the requirement of secrecy of notarial acts means that notarial acts should be performed only in the presence of the person (or persons) concerned, and if necessary, in the presence of those who assist them (representatives of translators, citizens who sign documents for the sick or illiterate, etc.). No unauthorised persons should observe the notarial procedure. The notary is obliged to comply with this requirement regardless of whether he/she performs a notarial act in the office or outside the office. Accordingly, the participants of the notarial process have the right to insist on the creation of conditions that will exclude the disclosure of information that they intend to keep secret (Marchenko, 2002, p. 36).

4. Conclusions

It should be noted that the state vests notaries with certain powers to perform notarial acts and has the right to control the compliance of notary activities with the rules established by it. The current Law "On Notaries" provides for two main types of such control: administrative (Articles 18, 33) and judicial (Article 50) (Law of Ukraine On Notaries, 1993). In our opinion, it is the *judicial control over the legality of notarial acts* that is another guarantee of notarial activities.

Judicial control over the performance of notarial acts is usually divided into direct and indirect control. Direct control is exercised when courts consider cases on appeal against notarial acts or refusal to perform them, notarial acts. This category of cases is considered by the courts in civil proceedings in the form of an action, and the defendant in such cases is the notary who has performed the relevant notarial act (refused to perform it) (Barankova, 2010, p. 13). The outcome of a court hearing of such a case is the court's verification of the notary's compliance with the law when performing a notarial act and the court's conclusion on the legality or illegality of the notarial act (refusal to perform it, notarial deed). Accordingly, the main purpose and the final result of court proceedings in such cases is to protect the rights and legally protected interests of the parties concerned in legal relations with the notary. In this case, the court's assessment of notarial acts is provided in the operative part of the court decision (Zaitseva, Galeeva, Jarkov, 2000, p. 140).

Indirect judicial control, according to I. Shundik, is exercised when the court considers other civil cases related to challenging notarial transactions and other notarial documents in court, in other cases where the disputed legal relations of the parties are related to the performance of notarial acts (Shundik, 2009, p. 97). In such cases, the court's assessment of the legality of notarial acts is interim. The court checks whether the notary complied with the requirements of the law when performing a notarial act in order to determine the nature of the legal relationship between the parties to the litigation. In this case, the main purpose of the litigation is to resolve a dispute between the parties. In this case, the court's assessment of notarial acts is usually provided in the reasoning part of the court decision (Zaitseva, Galeeva, Jarkov, 2000, pp. 141-142).

Therefore, judicial control over the performance of notarial acts as one of the guarantees of notarial activities can be defined as a court's assessment of a notary's compliance with the requirements of the law when performing a notarial act.

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Катерина Чижмарь,
доктор юридичних наук, доцент, головний науковий співробітник відділу науково-правових експертиз та законопроєктних робіт, Науково-дослідний інститут публічного права, вулиця Г. Кірпи, 2а, Київ, Україна, індекс 03035, k.chyzhmar@gmail.com
ORCID: *orcid.org/0000-0001-8638-7872*

ГАРАНТІЇ НОТАРІАЛЬНОЇ ДІЯЛЬНОСТІ: ПОНЯТТЯ ТА ЗМІСТ

Анотація. ***Мета.*** Метою статті є визначення поняття та змісту гарантій нотаріальної діяльності. ***Результати.*** Прийняття правових норм саме по собі ще не може повністю забезпечити реалізацію прав суб'єктів правовідносин. На практиці досить часто виникають ситуації, за яких суб'єктивні права, що встановлюють конкретні юридичні гарантії, не можуть бути реалізовані. У таких випадках, як правило, необхідне втручання відповідних уповноважених державних, громадських органів чи їхніх посадових осіб, яке спрямоване на усунення можливих перешкод щодо реального забезпечення передбачених нормою прав. Окрім того, є низка юридичних гарантій, сутність яких полягає саме в діяльності відповідних органів. До них належить, наприклад, діяльність судових органів щодо відновлення порушених прав. Таким чином, діяльність відповідних державних органів, що передбачена законодавством, спільно з нормами-гарантіями є юридичною гарантією реалізації прав суб'єктів правовідносин. Неупередженість нотаріуса є однією з найважливіших ознак його правового статусу як суб'єкта нотаріального процесу та являє собою гарантію не тільки для зацікавлених осіб, але й для самого нотаріуса. ***Висновки.*** Непрямий судовий контроль здійснюється під час розгляду судом інших цивільних справ, пов'язаних з оспорюванням у судовому порядку нотаріальних правочинів, інших нотаріальних документів, в інших випадках, коли спірні правовідносини сторін пов'язані з вчиненням нотаріальних дій. У таких справах оцінка судом законності нотаріальних дій має проміжний характер. Суд перевіряє дотримання нотаріусом вимог закону під час вчинення тієї чи іншої нотаріальної дії, щоб визначити характер правовідносин, які виникли між сторонами судового спору. При цьому основною метою судового процесу є вирішення суперечки між сторонами. У такому разі оцінка судом нотаріальних дій надається, як правило, у мотивувальній частині судового рішення. Таким чином, судовий контроль за вчиненням нотаріальних дій як одну з гарантій нотаріальної діяльності можна визначити як владну оцінку судом дотримання нотаріусом вимог закону під час вчинення нотаріальної дії.

Ключові слова: нотаріат, нотаріус, обов'язок, нотаріальні дії.

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Marina Vedeniapina,
PhD in Law, Associate Professor at the Department of Economic Security and Financial Investigations, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, vedenyapinamarina@ukr.net
ORCID: *orcid.org/0000-0002-3148-4744*

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THE INDUSTRIAL PARK CONCEPT IN UKRAINIAN LEGISLATION COMPARED TO THE UNITED NATIONS STANDARDS

Abstract. ***Purpose***. The purpose of the article is to study the modern regulatory framework for industrial parks in our country and to propose potential solutions to the numerous problems arising in connection with the reform of this institution. ***Results.*** The article studies the concept of industrial parks in the legislation of Ukraine, compares it to the UN standards and reveals the need for further research and improvement of national and international legislation in this field. Given the changes in legislation and the dominant global views on industrial parks, it should be noted that current Ukrainian legislation continues to ignore progressive global trends in the development of eco-industrial parks, focusing on an outdated approach typical of totalitarian planned economies, for which the creation of an investment-friendly climate is a significant deviation from the existing administrative command system. In this case, industrial parks will not be able to continue to perform the functions of attracting investment, i.e. the functions for which they are actually created. ***Conclusions.*** It is concluded that it is necessary to focus on the advantages that are considered essential in the modern world: 1) improvement of infrastructure (industrial parks should be subject to fairly stringent requirements in terms of logistics and energy components, and improved provision of all buildings with state-of-the-art communications; industrial parks should have their own hubs, logistics terminals, convenient transport interchanges, etc.); 2) improved environmental performance (in order to transform industrial parks into modern eco-industrial parks that will receive favourable feedback from UN experts, it is necessary to provide a modern power grid based on renewable sources, uninterrupted supply of quality water and its timely treatment, etc.; currently, many European investors prefer environmentally friendly production, so Ukraine should take care of this); 3) if tax incentives are granted (they should be given to those who invest in the creation of innovative advanced technologies and companies that create such technologies; global experience shows that it is through innovation that a country can earn significant funds in the future; given the challenges of rebuilding Ukraine's industry and housing stock after the war, investors and developers who propose to use innovative technologies in rebuilding Ukraine's infrastructure may also receive benefits).

Key words: industrial parks, investment attraction, industrial park territory, regulatory framework for industrial park activities, UN Industrial Development Organisation, EIP Framework.

1. Introduction

Modern Ukraine requires significant capital injections both during the war and after the victory, during the period of reconstruction and further development of the national economy. Both the public and private sectors of our economy need investments.

In the Index of Economic Freedom, Ukraine ranks 130th and is among the countries whose economies are characterised as "mostly unfree" (Index of Economic Freedom, 2022). It is therefore understandable that the authorities are trying to make the domestic economy more efficient and attractive to foreign and domestic investors, including by creating special zones with reduced taxes and opportunities for further industrial development. However, the means by which Ukrainian lawmakers are trying to attract investors' attention sometimes seem questionable and may even worsen the state of our country's current economy. Therefore, the regulatory framework for industrial parks requires a comprehensive analysis and it should begin with a thorough study of the relevant concepts.

At present, industrial parks as a possible means of rebuilding the state economy are primarily of interest to journalists and economic analysts, such as V. Marchuk, O. Bilan, V. Bilotkach, Y. Horodnichenko, O. Zholud, T. Kupe, T. Milovanov, V. Movchan, A. Nikolsko-Rzhevskyi, D. Nizalov, O. Nizalova, I. Solohub, O. Talavera, N. Shapoval, etc. The scientists who focused on the issues of industrial parks in their studies are L. Benovska, O. Boiko, O. Marchyshynets, S. Marchyshynets, N. Rud, Yu. Chyrychenko. However, due to significant changes in Ukrainian legislation and the lack of modern research, the issue of the feasibility of industrial parks and regulatory framework for them clearly requires scholars' significant attention.

The purpose of the article is to study the modern regulatory framework for industrial parks in our country and to propose potential solutions to the numerous problems arising in connection with the reform of this institution.

2. Theoretical issues of industrial parks' development

According to the Law of Ukraine "On Industrial Parks," Article 1, clause 3, an industrial (manufacturing) park (hereinafter referred to as the industrial park) is a land plot designated by the initiator of the industrial park in accordance with urban planning documentation and equipped with the proper infrastructure, where participants of IP can engage in economic activities in the field of processing industry, recycling of industrial and/or municipal waste (except for waste disposal), as well as scientific and technical activities, activities in the field of information and electronic communications under the conditions specified by this Law and the agreement on economic activities within the industrial park (Law of Ukraine On Industrial Parks, 2012).

Therefore, the legislator has actually equated industrial and manufacturing parks, considering these concepts synonymous. We believe that this is not true, as the reduction of industrial parks exclusively to manufacturing facilities (or industrial hubs) confuses the focus of attention of both legislators and scientists, leaving out such important innovations as the development of the most popular production sectors (computer technology, space technology, technologies with an enhanced environmental component, etc.). Nevertheless, these technologies should be constantly under focus by the legislator, as they are associated with the largest amount of investment and, consequently, the largest possible future income.

According to the definition, an industrial park is, first of all, a territory, i.e. a certain land plot that shall meet certain criteria:

1. It should be designated by the initiator of the industrial park in accordance with urban planning documentation. That is, it is a land plot that obviously cannot contain objects protected by other laws, such as legislation on the protection of historical monuments or land and environmental legislation.

The land plot should be properly designated by local authorities for the purpose of creating an industrial park;

2. It should be equipped with proper infrastructure.

The last point raises some questions. The Law does not specify what kind of infrastructure can be considered "proper". Only two terms are used: " proper infrastructure" and "engineering and transport infrastructure".

According to Article 8 of the Law, the following specific requirements are imposed on a land plot:

1) it shall belong to industrial land;

2) it shall be suitable for industrial use, meet the conditions and restrictions established by the relevant urban planning documentation;

3) the area of the land plot or the aggregate area of adjacent land plots shall be at least 10 hectares and not more than one thousand hectares.

It is allowed to locate between the land plots of the industrial park the land plots on which only engineering and transport infrastructure facilities are located or are supposed to be located in accordance with the urban planning documentation.

Again, we do not see any requirements for the infrastructure that shall be provided for the land plot. Nevertheless, as the practice of foreign countries shows, it is infrastructure that determines the success or failure of industrial parks.

3. Regulatory framework for industrial parks

The Law of Ukraine "On Industrial Parks" also regulates the activities that can be carried out on the territory of such a park. For example, economic activities in the processing industry, recycling of industrial and/or household waste (except for waste disposal), as well as scientific and technical activities, activities in the field of information and electronic communications can be carried out on this territory (Law of Ukraine On Industrial Parks, 2012).

In addition to the prohibition on waste disposal, according to the Law of Ukraine "On Industrial Parks," Article 1, clause 3, activities related to the production of excisable goods (except for the production of passenger cars, car bodies, trailers and semi-trailers, motorcycles, vehicles designed to carry 10 people or more, vehicles for the carriage of goods) shall not be carried out on the territory of industrial parks,

as well as economic activities subject to licensing in accordance with paragraphs 18, 18-1, 20-22, 32 of part one of Article 7 of the Law of Ukraine "On Licensing of Economic Activities", namely:

1) issue and conduct of lotteries;

2) activities in the gambling market, which are licensed in accordance with the Law of Ukraine "On state regulation of activities on organising and conducting gambling";

3) mediation in employment abroad;

4) commercial fishing for aquatic bioresources outside the borders of Ukraine;

5) cultivation of plants included in Table I of the List of narcotic drugs, psychotropic substances and precursors approved by the Cabinet of Ministers of Ukraine, as well as development, production, manufacture, storage, transportation, acquisition, sale (release), importation into the territory of Ukraine, exportation from the territory of Ukraine, use, destruction of narcotic drugs, psychotropic substances and precursors included in the List;

6) household waste disposal (Law of Ukraine On Industrial Parks, 2012; The Law of Ukraine On Licensing Types of Economic Activities, 2015).

Such prohibitions seem understandable, as they can be divided into three broad categories:

1. Prohibitions related to activities subject to additional taxes. According to the legislator, legal entities and natural persons operating in the territories of industrial parks already have appropriate tax benefits, so the budget cannot afford extra costs.

However, the possibility of granting additional benefits to persons investing in industrial parks is currently being debated;

2. Prohibitions related to a high risk of violation of the current criminal legislation of Ukraine;

3. Prohibitions related to the possibility of environmental pollution.

Moreover, the Law of Ukraine "On Industrial Parks" provides for the so-called cross-border industrial park, which is an industrial park that is created and operates on the basis of an international agreement of Ukraine concluded between governments or their authorised initiators. The procedure for the creation and operation of such industrial parks is regulated by international treaties of Ukraine (Law of Ukraine On Industrial Parks, 2012). In this case, the legislator emphasised the cross-border nature of the industrial park, emphasising this principle. However, it remains unclear how such an international treaty would be concluded, what competence and within what limits would be exercised by, for example, "initiators of the establishment authorised by the governments of the states", and who would have the right to grant them the relevant competence. In fact, we may even be talking about private individuals who will have competence comparable to that of local authorities or may even perform certain governmental functions. This, of course, is not acceptable.

Therefore, the Law of Ukraine "On Industrial Parks" contains an outdated definition of an industrial park that existed before. With regard to the types of activities specified in the law, we can state that the legislator, similar to previous years, sees the industrial park as another replacement for free economic zones, which have repeatedly shown their inefficiency, whereupon they changed their name and continued to exist for corrupt purposes as offshore zones, since their main feature was tax benefits.

In today's world, industrial (manufacturing) parks in almost all developed countries and in most developing countries are giving way to so-called eco-industrial parks, which are supported by the relevant UN agencies (specifically, the UN Industrial Development Organisation, hereinafter referred to as UNIDO). The main purpose of such parks is not only to generate profits, but primarily to develop innovative technologies and preserve the environment at the same time (International Guidelines for Industrial Parks. UNIDO, 2019).

In 2018-2020, UNIDO assessed 50 parks in eight developing countries and countries with economies in transition against the 51 preconditions and performance indicators set out in the International Framework for Eco-Industrial Parks (EIP Framework). Eight countries were covered: Colombia, Egypt, Indonesia, Nigeria, Peru, South Africa, Ukraine and Vietnam. The aim was primarily to test the feasibility of transforming industrial parks into environmentally friendly eco-industrial parks and to provide appropriate funding for this (Van Beers, Tyrkko, Flammini, Barahona, Susan, 2020).

Four industrial parks were inspected in Ukraine: IP AgroMash (Zaporizhzhia), IP BVAK, IP Chemical and Metallurgical Plant, IP Patriot. Unfortunately, the report noted that Ukraine and South Africa have the highest gap between current efficiency and planned efficiency. Ukraine is (together with Peru) the country with the smallest size of industrial parks, and this is not a coincidence, as a lot of land in our country is allocated for agricultural rather than industrial production. The overall performance of parks in Ukraine is recognised as relatively equal, i.e. there are no so-called beacon industrial parks in our country that have the highest performance and can be used as a reference for others to learn from their experience in managing industrial parks. According to the report, if a country does not

have a beacon park with a very high EIP performance indicators, it is likely that there are limited opportunities, knowledge and/or experience at the country level for developing eco-industrial parks (Van Beers, Tyrkko, Flammini, Barahona, Susan, 2020).

In fact, UNIDO considered investing in Ukrainian industrial parks, but this opportunity was rejected, as it was recognised that Ukraine does not have the appropriate capacity to transform industrial parks into eco-industrial parks. The highest rating was given to public-private industrial parks in Vietnam and private industrial parks in Indonesia and Colombia. Therefore, it is reasonable to assume that since the UN has not found opportunities to invest in "industrial parks of the future", private investors interested in advanced industrial parks will not see the Ukrainian proposals as attractive either.

Furthermore, it is a plausible assumption that unscrupulous investors will come to our country in search of cheap resources, investing in the so-called "third world" countries, where labour slavery is actually encouraged, workers' wages are extremely low, and profits are exported abroad. However, they may be attracted by Ukraine's exceptionally favourable geopolitical location and there will not be many of them, as our country has a fairly well-developed labour law, and European environmental organisations will put a lot of pressure on the Ukrainian government over air and water pollution.

Thus, given the changes in legislation and the dominant global views on industrial parks, it should be noted that current Ukrainian legislation continues to ignore progressive global trends in the development of eco-industrial parks, focusing on an outdated approach typical of totalitarian planned economies, for which the creation of an investment-friendly climate is a significant deviation from the existing administrative command system. In this case, industrial parks will not be able to continue to perform the functions of attracting investment, i.e. the functions for which they are actually created.

It is important to realise that for investors from developed countries, whom we are trying to attract, the scheme used in Ukraine is also outdated and therefore not of much interest to them. The tax benefits that are supposed to attract investors are, firstly, quite small, and secondly, they are effectively levelled by the stipulation in the law that the profits generated by these benefits shall be spent exclusively on the development of the enterprise or the industrial park.

In general, we believe that the practice of granting new tax benefits to industrial park participants is largely inappropriate. At present, global practice convincingly shows that taxes are not a good reason to make additional investments. An analysis of the conditions under which industrial parks operate in foreign countries today demonstrates that tax incentives are rarely used and are not perceived by businesses as a significant advantage. The availability of ready-made infrastructure, potential partners who do not need to be sought out, the opportunity to take out a targeted loan or receive a grant from the state on favourable terms, and the absence of import duties on equipment are much more valued.

In addition, foreign investors, unfortunately, have already seen that Ukrainian legislation is changing very quickly. We believe that they will not rush to invest even if the tax burden is significantly reduced.

4. Conclusions

Consequently, we consider it appropriate to change the approach to the regulatory framework for the creation and operation of industrial parks by substantially revising the definition of "industrial park" in the current legislation and ceasing to focus on tax benefits that effectively turn industrial parks into another variant of an offshore zone. Instead, we believe that it is necessary to focus on the advantages that are considered essential in the modern world:

1. Improvement of infrastructure. Industrial parks should be subject to fairly stringent requirements in terms of logistics and energy components, and improved provision of all buildings with state-of-the-art communications. Industrial parks should have their own hubs, logistics terminals, convenient transport interchanges, etc.

2. Improved environmental performance. In order to transform industrial parks into modern eco-industrial parks that will receive favourable feedback from UN experts, it is necessary to provide a modern power grid based on renewable sources (wind turbines, solar panels, etc.), uninterrupted supply of quality water and its timely treatment, etc. Currently, many European investors prefer environmentally friendly production, so Ukraine should take care of this.

3. If tax incentives are granted, they should be given to those who invest in the creation of innovative advanced technologies and companies that create such technologies. Global experience shows that it is through innovation that a country can earn significant funds in the future. Given the challenges of rebuilding Ukraine's industry and housing stock after the war, investors and developers who propose to use innovative technologies in rebuilding Ukraine's infrastructure may also receive benefits.

Further research should focus on the issue of creating an attractive economic situation in Ukraine without the use of inefficient tax incentives and on creating enabling environment at the legislative level for attracting advanced technologies and investments in efficient new technologies to our country.

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Марина Веденяпіна,
кандидат юридичних наук, доцент кафедри економічної безпеки та фінансових розслідувань, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, vedenyapinamarina@ukr.net
ORCID: *orcid.org/0000-0002-3148-4744*

ПОНЯТТЯ ІНДУСТРІАЛЬНОГО ПАРКУ В ЗАКОНОДАВСТВІ УКРАЇНИ ПОРІВНЯНО ЗІ СТАНДАРТАМИ ООН

Анотація. ***Мета.*** Метою статті є вивчення сучасного правового регулювання індустріальних парків у нашій державі та пропонування можливих варіантів вирішення численних проблем, що виникають у зв'язку з реформуванням цієї інституції. ***Результати.*** Статтю присвячено поняттю індустріальних парків у законодавстві України та порівнянню його зі стандартами ООН, також наголошено на необхідності подальших досліджень і вдосконалення національного й міжнародного законодавства в цій сфері. З огляду на зміни в законодавстві та панівні погляди на індустріальні парки у світі варто зауважити, що сучасне українське законодавство продовжує ігнорувати прогресивні світові тенденції розвитку екопромислових парків, зосереджуючись на застарілому підході, властивому насамперед тоталітарним країнам із плановою економікою, для яких створення інвестиційно привабливого клімату є значним відхиленням від наявної адміністративно-командної системи. У такому разі індустріальні парки й надалі не зможуть виконувати функції приваблювання інвестицій, тобто ті функції, для яких, власне, і створюються. ***Висновки.*** Зроблено висновок про необхідність зосередитися на перевагах індустріальних парків, які в сучасному світі вважають суттєвими: 1) покращенні інфраструктури (до індустріальних парків мають висуватися досить жорсткі вимоги щодо наявності логістичного та енергетичного складників, покращення забезпечення всіх будівель надсучасними засобами зв'язку; індустріальні парки повинні мати власні хаби, логістичні термінали, зручні транспортні розв'язки тощо); 2) покращених екологічних показниках (задля перетворення індустріальних парків на сучасні екопромислові парки, які отримуватимуть схвальні відгуки від експертів ООН, необхідно забезпечити сучасну енергомережу на відновлюваних джерелах, безперебійну подачу якісної води та її своєчасне очищення тощо; наразі багато європейських інвесторів віддають перевагу екологічно безпечному виробництву, тож Україна має турбуватися про це); 3) можливості надання податкових пільг (однак у такому випадку їх мають отримати ті особи, які інвестують у створення інноваційних передових технологій, та компанії, що займаються створенням таких технологій; світовий досвід показує, що саме завдяки інноваціям країна в майбутньому може заробляти значні кошти; з огляду на проблеми, що виникнуть із відновленням промисловості й житлового фонду в Україні після війни, пільги також можуть отримати інвестори та забудовники, що пропонуватимуть використання інноваційних технологій під час відновлення української інфраструктури).

Ключові слова: індустріальні парки, залучення інвестицій, територія індустріального парку, правове регулювання діяльності індустріального парку, Організація промислового розвитку ООН, Міжнародна структура EIP.

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Vitaliy Kadala,
Candidate of Legal Sciences, Associate Professor, Head of Legal Clinic "Legal Protection", Associate Professor at the Department of Economic and Legal Disciplines and Economic Security of the Faculty № 4, Donetsk State University of Internal Affairs, Velika Perspektivna str., 1, Kropyvnytskyi, Ukraine, postal code 25000, info@dnuvs.ukr.education
ORCID: *orcid.org/0000-0002-6868-9487*

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APPLICATION OF MEDIATION FOR THE SETTLEMENT OF AN ECONOMIC DISPUTE

Abstract. ***Purpose***. The article is devoted to the study of issues related to economic litigation, the use of alternative protection, mediation, analysis of the effectiveness of the protection of the rights of economic entities, etc. ***Research methods.*** To achieve the goal, the following research methods were used: hermeneutic semantic, system-structural, comparative legal, and others. The hermeneutic semantic method was used to study the content of the "mediation" concept in Ukrainian law. The system-structural method was employed to determine areas for improving the Law of Ukraine "On mediation". The comparative legal method was used to present a proposal to introduce of mediator's civil liability insurance, to submit a proposal to amend the Law of Ukraine "On mediation" following the experience of the Law of Ukraine "On notary". ***Results.*** The scientific novelty consists in the study of relations regarding the legal regulation of mediation relations in Ukraine, as well as in the determination of ways to improve the Law of Ukraine "On Mediation" and the development of provisions for such improvement. Proposals for the Law of Ukraine "On Mediation" have been proposed. ***Conclusions***. It was established that with the appearance of a new form of out-of-court dispute resolution in the legal field of Ukraine, additional issues of a law enforcement nature arose, which are related to certain defects of the new legal act. They can take place in case of violation of the mediation agreement concluded by the parties, application of responsibility to the mediator, determined by the status of individuals of the mediation procedure, etc. The uncertainty of the outlined issues can have a number of negative consequences for the parties to the mediation procedure. Based on the research results, it is proposed to make changes to the Law of Ukraine "On Mediation"; and when applying for the mediation procedure, business entities should take into account the existing imperfection of the relevant legislation and analyze additional means of protecting their own rights and interests.

Key words: economic litigation, alternative protection, mediation, protection of the rights of business entities, justice.

1. Introduction

The activity of business entities involves constant connections between themselves and with other participants in relations in the sphere of business. These connections are not always conflict-free due to various circumstances. Among such circumstances, it is possible to single out the bad faith of counterparties, the action of force majeure, the activities of state authorities, etc. Such circumstances, in turn, cause delivery of low-quality goods, works, services, delay in their delivery, untimely payment, improper use of property objects, including intellectual property, etc. In order to resolve such conflicts, the current legislation provides for several ways, the main of which is the protection of the rights of business entities in court. However, this type of protection is not always acceptable to the parties due to certain factors. Among the alternative types of protection is a pre-trial settlement between the parties. The development of alternative types of protection of the rights of business entities is taking place thanks to the recently adopted Law of Ukraine "On Mediation". Despite the fact that the law has just appeared in the legal field of our country, the request for extrajudicial protection procedures has always existed. This is confirmed by the norms regarding pretentious settlement of disputes in the Economic Code of Ukraine and the Economic Procedural Code of Ukraine.

Literature review. There is also a great scientific and practical interest in alternative ways of resolving disputes between business entities. We can name some authors who studied these issues: B. Derevyanko (2022), L. Nikolenko

(2022), I. Kovalenko (2021), M. Nikolaishyn (2023), S. Gud (2021), V. Kovalenko (2022), R. Antoniv (2022), V. Sytyuk (2020) etc. However, constant changes in theory, practice, and legislation require new research, including in terms of studying and considering the positive aspects in the legislation of EU countries.

Taking into account the study of individual issues of alternative dispute resolution, the effectiveness of each type of out-of-court dispute resolution should be clarified, the existing problems in the mediation procedure proposed by the new legislation; imperfection of the legislation that existed before the adoption of the specified act in terms of ensuring dispute settlement, etc. Separately, there are issues that arise when the parties violate the mediation agreement concluded, the responsibility of the mediator, the status of individuals in the mediation procedure, etc. The uncertainty of the outlined issues can have a number of negative consequences for the parties participating in the mediation procedure, and this confirms the relevance of the study.

Research methods. To achieve the goal, the following research methods were used: hermeneutic semantic, system-structural, comparative legal, and others. The hermeneutic semantic method was used to study the content of the "mediation" concept in Ukrainian law. The system-structural method was employed to determine areas for improving the Law of Ukraine “On mediation”. The comparative legal method was used to present a proposal to introduce of mediator's civil liability insurance, to submit a proposal to amend the Law of Ukraine “On mediation” following the experience of the Law of Ukraine “On notary”.

The ***purpose*** of the present article is to study the issues related to the use of mediation to settle a business dispute and to analyze the effectiveness of protecting the rights of business entities using this procedure.

2. Determining the notion of mediation in Ukraine

Analyzing the regulatory legal framework that ensures the settlement of the issue concerned, one should determine the main legislative act in this area – the Law of Ukraine "On Mediation" (On Mediation, 2021).

According to Art. 3 of the specified Law, its effect extends to a fairly wide range of social relations, including civil, family, labor, economic, administrative cases, as well as cases of administrative offenses and criminal proceedings with the aim of reconciling the victim with the suspect (accused) (On Mediation, 2021).

If you refer to part 1 of Art. 18 of the Law of Ukraine "On the Judiciary and the Status of Judges", courts specialize in consideration of civil, criminal, economic, administrative cases, as well as cases of administrative offenses, which fully corresponds to the circle of social relations defined above (On the Judiciary and the Status of Judges, 2016).

In turn, the Economic Procedural Code of Ukraine, namely, Clause 2 Part 2 of Art. 182 stipulates that in the preparatory session the court finds out whether the parties wish to conclude a settlement agreement, conduct an out-of-court settlement of the dispute through mediation, refer the case to an arbitration court, international commercial arbitration or apply to the court for settlement of the dispute with the participation of a judge (Economic Procedural Code of Ukraine, 1991).

From the analysis of the specified norm, it can be concluded that the economic procedural legislation currently defines five alternative options for dispute resolution for participants in commercial disputes. Turning to the norms of substantive law, namely, Art. 222 of the Economic Code of Ukraine, one more pre-trial dispute settlement procedure is considered – the pre-litigation procedure (Economic Code of Ukraine, 2003).

It follows from a comprehensive analysis of the specified norms of economic procedural and material law that the application of the first five options requires the will of two parties, and the application of the sixth requires the will of one of the parties.

3. Peculiarities of the legal regulation of relations during mediation

The effectiveness of each of the types of dispute resolution, their positive and negative aspects have repeatedly become the subject of scientific and practical interest. In the context of this study, we are interested in the effectiveness of the mediation procedure. Thus, researchers determine that among the main positive aspects of mediation are the saving of time, money, and effort, settlement of the dispute without conflicts and the opportunity to maintain good relations and confidentiality, relief of the domestic judicial system, confidentiality and preservation of business reputation I. Kovalenko (2021), V. Kovalenko (2022), R. Antoniv (2022).

At the same time, we can agree with R. Antoniv, who points out that mediation should not be perceived as an alternative to litigation, since it by definition does not involve state coercion, and therefore is useless in the absence of the will of both parties to resolve the conflict through negotiations, and in its essence, mediation is similar to the dispute settlement procedure with the participation of a judge, which did not have a significant impact on the effectiveness of dispute resolution

R. Antoniv (2022). Therefore, when talking about the possibility of using mediation by business entities to resolve the dispute, one should take into account the totality of circumstances, including the quality of the new legislative act regulating the specified procedure.

Analyzing some of the provisions of the Law of Ukraine "On Mediation", certain questions arise regarding the legal constructions applied in them. According to Art. 9 of the Law, a natural person can be a mediator who has undergone basic mediator training in Ukraine or abroad. In turn, in Art. 10 of the Law stipulates that the basic training of mediators is carried out according to a program with a volume (duration) of at least 90 hours of training, including at least 45 hours of practical training. The training of mediators is carried out by subjects of educational activity ("On Mediation", 2021).

According to Art. 1 of the Law of Ukraine "On Education", the subject of educational activity is a physical or legal entity (educational institution, enterprise, institution, organization, public association) that conducts educational activity, and Art. 74 of the same Law stipulates that the register of subjects of educational activity is a component of the single state electronic database on education issues (On Education, 2017).

Consequently, the question arises – how a mediator who has undergone basic mediator training abroad will meet the requirements of the specified articles of the relevant Law and legislation in the field of education. Therefore, the legislation in this part needs some adjustment, namely, harmonization of the provisions of the specified legislative acts.

The following contradictory provisions of the Law of Ukraine "On Mediation" are the provisions of Part 3-4 of Art. 9 of the Law, according to which mediation parties, state authorities and local self-governments, enterprises, institutions, organizations regardless of the forms of ownership and subordination, public associations may set additional requirements for the mediators they engage or whose services they use, in particular regarding availability of special training, age, education, practical experience, etc. Associations of mediators and entities providing mediation may set additional requirements for mediators they include in their registers, in particular regarding the presence of special training, age, education, practical experience, etc. (On mediation, 2021).

These provisions are in direct contradiction with the provisions of Part 1 of Art. 2-1 of the Code of Labor Laws, according to which any discrimination in the field of labor is prohibited, in particular, violation of the principle of equality of rights and opportunities, direct or indirect limitation of the rights of employees depending on age. At the same time, actions established by this Code and other laws, as well as restrictions on the rights of employees that depend on the requirements inherent in a certain type of work (regarding age, education, state of health, gender) or due to the need for strengthened social and legal protection of certain categories of persons.

So, if the mediator has passed the basic training, he has the appropriate certificate confirming the completion of this training, that is, he meets the requirements of Art. 10 of the Law of Ukraine "On Mediation", there is no reason to put forward additional requirements in the form of special training, age, education, practical experience, firstly, due to the requirements of other legislative acts, and secondly, that such criteria for special training, age, education, practical experience should be specified directly in the Law, and not be left to the discretion of state authorities, local self-governments, enterprises, institutions and organizations, because this is a wide field for abuse.

As for the above-mentioned associations of mediators and entities that provide mediation, certain questions also arise regarding their status defined by the Law. Having analyzed the definitions given in Art. 1 of the Law, it can be concluded that the first and second have similar functions – they provide mediation services. Similar functions are assigned to them and part 1 of article 14 of the Law of Ukraine "On Mediation" – the association of mediators and entities that provide mediation maintain registers of mediators in compliance with the requirements of the law regarding the collection, storage, use and distribution of confidential information about a person (On Mediation, 2021).

Further, in Chapter III of the Law "Conducting Mediation" in Part 1 of Art. 16 states that a mediator or an entity providing mediation carries out preparatory measures with the parties to an existing or possible conflict (dispute), together or separately, to clarify the possibility of conducting mediation in order to prevent the occurrence or settlement of a conflict (dispute), in particular, meetings, collection and exchange of information, documents necessary for the parties to the conflict (dispute) to make a decision and the mediator's decision to participate in mediation, as well as other measures agreed between the parties to the conflict (dispute) and the mediator or the entity providing mediation . That is, the mediator and the entity providing the mediation are equal in carrying out preparatory measures for the mediation. Along with the fact that it follows from Art. 17 of the Law of Ukraine "On Mediation" the mediation procedure itself is conducted by the mediator(s) (On Mediation, 2021).

Therefore, the question arises about the status of the entity that ensures mediation – on

the one hand, the functions assigned to it are duplicated with the same functions of the association of mediators, on the other – with the functions of the mediator. The legislator determined that the entity that provides mediation is a legal entity of any organizational and legal form that provides mediation services and maintains a register of mediators, but in our opinion, this definition and its status require more detailed specification in the Law. Since ambiguous interpretations in normative legal acts create chaos in law enforcement and judicial practice, they do not contribute to the proper regulation of social relations in this area.

Another challenging issue is the question of applying responsibility to the mediator. Part 3 of Art. 6 of the Law stipulates that the disclosure of confidential information is subject to liability provided for by law. Part 4 of Article 13 determines that the procedure for holding a mediator who is a member of such an association to account for non-compliance with the norms of professional ethics is determined in the statute or regulation of the association of mediators. Art. 15 stipulates that in case of breach of obligations under the mediation agreement, the mediator bears civil liability in accordance with the law. In cases provided by law, the mediator bears administrative or criminal responsibility. In case of non-compliance with the norms of professional ethics, the mediator bears the responsibility defined by the charter or regulations of the association of mediators, of which he is a member (On Mediation, 2021).

In this regard, the following should be noted. In the course of his work, the mediator gets access to confidential information, and therefore there is a need for its reliable preservation from disclosure. In addition, in the case of poorly performed work of the mediator, the parties lose time and money to resolve the existing dispute and subsequently turn to other methods of dispute resolution. Of course, the mediator cannot guarantee any result, but in such a case (low-quality service provision), one can talk about applying a certain responsibility to him. All the above-mentioned provisions of the Law do not provide working mechanisms for applying such responsibility to violators. Speaking about the mediator's liability, it is advisable to turn to experience in other areas and introduce mediator's liability insurance. For example, Art. 28 of the Law of Ukraine "On Notaries" stipulates that in order to ensure compensation for damage caused as a result of a notarial act and/or other act entrusted to a notary in accordance with the law, a private notary is obliged to conclude a civil law insurance contract before starting private notarial activity responsibility The minimum insurance amount is one thousand minimum wages (On Notary, 1993).

In our opinion, it would be appropriate to add part 1 of Art. 15 of the Law of Ukraine "On Mediation" as follows: "In order to ensure compensation for damage caused as a result of the act committed by the mediator in accordance with the law, the mediator is obliged to conclude a civil liability insurance contract before starting mediation. The minimum insurance amount is one thousand minimum wages."

Therefore, when building their own defense strategy, business entities should take into account the possible legal consequences when choosing such a strategy, because they will have their own set of pros and cons when applying to court, and their own when using alternative means. Business entities, when applying for the mediation procedure, should take into account the existing imperfection of the legislation that regulates it and analyze additional means of protecting their own rights and interests.

4. Conclusions

Current legislation establishes certain rules for resolving disputes between business entities. They can be judicial and extrajudicial in nature. At the same time, when resolving disputes, business entities should take into account certain features of each of the dispute resolution methods provided for by current legislation. Each of them has its positive and negative points. Taking into account the obtained research results, the following conclusions can be drawn.

First, the current legislation provides for several ways to resolve economic conflicts, the main of which is the protection of the rights of business entities in court. However, this type of protection is not always acceptable to the parties due to certain factors. Among the alternative types of protection is a pre-trial settlement between the parties. The development of alternative types of protection of the rights of business entities takes place thanks to the Law of Ukraine "On Mediation". Secondly, the specified legal act has certain shortcomings. These shortcomings may manifest themselves in case of violation by the parties of the concluded mediation agreement, application of responsibility to the mediator, determined by the status of individuals of the mediation procedure, etc. The uncertainty of the outlined issues can have a number of negative consequences for the parties participating in the mediation procedure. In this regard, there is a need to adjust the legislation regulating the mediation procedure. Thirdly, business entities, when applying for the mediation procedure, should take into account the existing imperfection of the legislation that regulates it and analyze additional means of protecting their own rights and interests, which, in turn, determines the conduct of further scientific developments in this direction.

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Віталій Кадала,
кандидат юридичних наук, доцент, голова Юридичної клініки «Правовий захист», доцент кафедри господарсько-правових дисциплін та економічної безпеки факультету № 4, Донецький державний університет внутрішніх справ, вулиця Велика Перспективна, 1, Кропивницький, Україна, індекс 25000, info@dnuvs.ukr.education
ORCID: *orcid.org/0000-0002-6868-9487*

ЗАСТОСУВАННЯ МЕДІАЦІЇ ДЛЯ ВРЕГУЛЮВАННЯ ГОСПОДАРСЬКОГО СПОРУ

Анотація. ***Мета***. Статтю присвячено дослідженню питань, пов'язаних із господарським судочинством, застосуванням альтернативного захисту, медіацією, аналізом ефективності захисту прав суб'єктів господарювання тощо. ***Методи дослідження.*** Для досягнення мети використано такі методи дослідження, як герменевтично-семантичний, системно-структурний, порівняльно-правовий та інші. Завдяки герменевтично-семантичному методу досліджено зміст поняття «медіація» в українському праві. Системно-структурний метод використано для визначення напрямів удосконалення Закону України «Про медіацію». За допомогою порівняльно-правового методу подано пропозиції щодо запровадження страхування цивільно-правової відповідальності медіатора, внесення змін до Закону України «Про медіацію» на основі досвіду Закону України «Про нотаріат». ***Результати.*** Наукова новизна дослідження полягає в аналізі відносин щодо правового регулювання медіації в Україні, а також у визначенні шляхів удосконалення Закону України «Про медіацію» та розробленні положень стосовно цього вдосконалення. Запропоновано внести зміни до Закону України «Про медіацію». ***Висновки.*** Встановлено, що з появою в правовому полі України нової форми позасудового вирішення спорів виникли додаткові питання правозастосовного характеру, які пов'язані з певними вадами нового нормативно-правового акта. Вони можуть мати місце в разі порушення сторонами медіаційної угоди, застосування до медіатора відповідальності, визначення статусу окремих осіб процедури медіації тощо. Невизначеність окреслених питань може мати низку негативних наслідків для сторін, які беруть участь у процедурі медіації. За результатами дослідження пропонується внести зміни до Закону України «Про медіацію», а в разі звернення до процедури медіації суб'єктам господарювання необхідно врахувати наявну недосконалість законодавства, що її регулює, та проаналізувати додаткові засоби захисту власних прав та інтересів.

Ключові слова: господарське судочинство, альтернативний захист, медіація, захист прав суб'єктів господарювання, правосуддя.

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Oleksandr Husarov,
PhD in Law, Head of Pechenizka ATC, Postdoctoral Student, Kharkiv National University of Internal Affairs, 27 Lev Landau avenue, Kharkiv, Ukraine, postal code 61080, oleksandrhusarov@ukr.net
ORCID: *orcid.org/0000-0001-7493-1789*

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GUARANTEES FOR PROTECTION OF LABOUR RIGHTS OF HIRED WORKERS IN THE CONTEXT OF ATYPICAL FORMS OF EMPLOYMENT

Abstract. ***Purpose.*** The purpose of the article is to determine the scope and reveal the content of guarantees for protection of labour rights of hired workers in the context of atypical forms of employment. ***Results.*** The article, relying on the analysis of scientific perspectives and provisions of current legislation, reveals the scope and content of guarantees for protection of labour rights of hired workers in the context of atypical forms of employment. It is emphasised that guarantees for protection of labour rights of hired workers in the context of atypical forms of employment are a set of legally defined conditions, instruments and means used by the State, employer and employees themselves to ensure the actual exercise of their rights, freedoms and interests in the relevant field. The author determines that legal guarantees are enshrined in a large number of legal regulations of various legal force: from the Constitution of Ukraine and international treaties and agreements to local legal regulations adopted by each individual employer. These guarantees are aimed at creating an appropriate and effective regulatory framework for the protection of the legitimate rights, freedoms and interests of hired workers in the context of atypical forms of employment. In addition, the existence of these guarantees, a priori, is a guarantee that the employee's rights will not be violated and, in case of violation, will be restored. It is revealed that the main state social guarantees are: 1) the minimum wage rate; 2) the minimum old-age pension rate; 3) the tax-free minimum income of citizens; 4) the amount of state social assistance and other social benefits. The basic state social guarantees, which are the main source of subsistence, cannot be lower than the subsistence minimum established by law. ***Conclusions.*** It is concluded that to date, the legislator has developed a fairly broad system of guarantees for the protection of rights of hired workers in the context of atypical forms of employment. However, a common drawback is the fact that, despite their legal consolidation, currently no effective mechanisms for their practical implementation exist.

Key words: guarantees, protection, labour rights, hired workers, atypical forms of employment, legislation.

1. Introduction

In the context of atypical forms of employment, the legislator and employers should create an enabling environment of an organisational, legal, economic nature, etc. for protecting the labour rights of the category of employees under study. The system of such conditions is commonly referred to as guarantees. In general, the creation of guarantees is the main goal of the State, and it is the State that guarantees human rights and freedoms. The law secures the rights and freedoms of every individual and, by regulating human relations, prevents their violation. Moreover, it defines the role of the law as a guarantor only through the prism of the use or application of punitive forces (Lokk, 1960, p. 50). Therefore, the creation of a system of guarantees for the protection of labour rights of hired workers in the context of atypical forms of employment is of great theoretical and practical importance.

The problem of protection of labour rights of hired workers in the context of atypical forms of employment has been considered in the scientific works by: T.M. Zavorotchenko, I.V. Zub, Yu.Yu. Ivchuk, V.V. Pavchuk, V.H. Rotan, V.M. Sloma, O.Ye. Sonin, I.M. Shopina, I.I. Yatskevych, and many others. However, despite a considerable number of scientific achievements, the above-mentioned scholars have not focused on the analysis of guarantees for protection of labour rights of hired workers in the context of atypical forms of employment.

That is why the purpose of the article is to determine the scope and reveal the content of guarantees for protection of labour rights of hired workers in the context of atypical forms of employment.

2. Legal guarantees for protection of labour rights of hired workers

At the outset of the research, it should be noted that guarantees for protection of labour rights of hired workers in the context of atypical forms of employment are a set of legally defined conditions, instruments and means used by the State, employer and employees themselves to ensure the actual exercise of their rights, freedoms and interests in the relevant field. These guarantees can best be divided into: a) Legal (juridical) guarantees are a set of legal conditions and means by which social relations in the field under study are regulated and ordered; b) Economic guarantees are activities aimed at ensuring the economic and financial rights and interests of employees; c) Social guarantees are aimed at implementing social measures in relation to the specified category of employees; d) Procedural guarantees are activities to protect the rights of employees in court or out of court; d) Political guarantees imply the activities of the State to ensure the rights and freedoms of citizens in general and in the field of labour, in particular; e) Organisational guarantees.

First, legal guarantees should be under focus, which, in turn, are a basis for the formation and implementation of other guarantees. For example, according to V.S. Nersesiants, legal (juridical) guarantees are a system of interrelated forms and means (regulatory, institutional, procedural) that ensure proper recognition, protection and enforcement of certain rights and their obligations. Legal guarantees are a constructive expression of the principle of self-defence of rights. They embody the idea of the coordinated action of law and the State, when some forms, directions and functions of State regulatory framework and performance serve as a protective mechanism for others and vice versa. It is only in this general context of mutual support and coherence of various parts and aspects of the entire state legal complex that certain special forms and constructions of legal guarantees of individual rights and freedoms can actually fulfil their protective role. In short, legal guarantees themselves require legal guarantees, and these can ultimately only be provided by the legal State and legal laws (Nersesiants, 1999, p.142).

According to T.M. Zavorotchenko, legal guarantees have their own characteristics, such as: standardisation, which provides for the definition of guarantees only in the texts of legal regulations; systemic nature, which means that all legal guarantees are closely interconnected, interdependent and interrelated, that is, form a certain system; comprehensiveness of legal guarantees, which follows from the previous feature and means that in real life legal guarantees act jointly (systematically), support and mutually reinforce each other; permanence of guarantees, due to which guarantees of rights do not cease to be valid and do not arise sporadically, but are permanent; legal reliability, which reflects, on the one hand, the link between the guarantee and the social situation, and, on the other hand, the stability of its social content (the question of the reasons for the unreliability of certain legal guarantees deserves special consideration; it may, in particular, be due to the unsuccessful design of the regulatory framework, the lack of specific sanctions); the reality, that is, legal guarantees should ensure that a person actually enjoys the rights granted by Ukrainian legislation (Zavorotchenko, 2002).

Legal guarantees are enshrined in a large number of legal regulations of various legal force: from the Constitution of Ukraine and international treaties and agreements to local legal regulations adopted by each individual employer. These guarantees are aimed at creating an appropriate and effective regulatory framework for the protection of the legitimate rights, freedoms and interests of hired workers in the context of atypical forms of employment. In addition, the existence of these guarantees, a priori, is a guarantee that the employee's rights will not be violated and, in case of violation, will be restored.

The next group of guarantees is economic. Purposefully, we distinguish these guarantees after the legal ones, as any employee's work is to receive benefits in monetary terms. O. Taranenko argues that, in general, economic guarantees are: 1) an efficient economy; 2) an appropriate level of public welfare; 3) fair competition; 4) actual freedom of collective and individual participants in economic relations; 5) awareness of the need for economic entities to comply with their fiscal obligations to the State; 6) growth in labour productivity and output; 7) equal economic opportunities of participants in social relations, etc. Therefore, economic guarantees are aimed at ensuring that the legislator and the employer create a material and financial basis for a person, including an employee who works from home, remotely or on a flexible schedule, to fully ensure a decent standard of living for themselves and their family. These guarantees include timely and full payment of salaries, social security for employees, and the growth of employee welfare.

Further, in the context of the issues being studied, social guarantees should be under

focus. In essence, social guarantees of rights are the conditions that the State shall create for the implementation of human and civil rights and freedoms. In terms of content, it is a system of measures aimed at realising the relevant rights (organisation of healthcare, recreation, social security). In terms of form, it is the organisational and legal forms of realisation of social rights and freedoms of man and a citizen provided for by the Constitution and laws of Ukraine (Makhnovskyi, 2003, p. 138). According to Vitruk, social guarantees are the social means and conditions for ensuring the freedom and personal inviolability of man and a citizen, as enshrined in the constitutional provisions. In addition, these guarantees are characterised as raising the level of education and culture of all members of society, which are necessary conditions for ensuring all rights, including the right to personal integrity (Vytruk, 1985, p. 39). Basic state social guarantees are established by law to ensure the constitutional right of citizens to an adequate standard of living. The main state social guarantees include: 1) the minimum wage rate; 2) the minimum old-age pension rate; 3) the tax-free minimum income of citizens; 4) the amount of state social assistance and other social benefits. The basic state social guarantees, which are the main source of subsistence, cannot be lower than the subsistence minimum established by law (Stashkiv, 2005, p. 91).

V. Horyn argues that social guarantees can rightly be defined as a key lever for achieving social security. By allocating its own financial resources to provide for them, allowing for economic opportunities and public expectations, the State guarantees each citizen a certain level of satisfaction of his or her tangible and intangible needs, i.e., a certain level of social security. Public policy on financing of social guarantees should meet the following criteria: 1) concentration of state resources on meeting priority social interests; 2) sufficiency of state funding to ensure neutralisation or prevention of threats to the social interests of both individuals and entire society; 3) creation of an effective mechanism for achieving social security, which implies development of the system of financial support for social guarantees. This creates the preconditions for a targeted policy on protecting the social interests of both individuals and entire society (Horyn, 2013). Social guarantees are manifested in the system of social protection of labour rights of hired workers in the context of atypical forms of employment.

3. Procedural guarantees for the protection of labour rights of hired workers

The next are procedural guarantees. Procedural guarantees are guarantees aimed at ensuring the protection of the rights of hired workers in the context of atypical forms of employment through the courts. These guarantees are enshrined in the Constitution of Ukraine and the provisions of the Labour Code of Ukraine, which, according to Article 232, provides that labour disputes are heard directly by local general courts upon application of:

1) employees of enterprises, institutions and organisations where labour dispute commissions are not elected;

2) employees on reinstatement regardless of the grounds for termination of the employment agreement, change of the date and wording of the reason for dismissal, payment for the period of forced absence from work or performance of lower-paid work, except for disputes of employees referred to in part 3 of Article 221 and Article 222 of this Code;

3) the head of an enterprise, institution, organisation (branch, representative office, department and other separate subdivision), his/her deputies, chief accountant of an enterprise, institution, organisation, his/her deputies, as well as officials of tax and customs authorities who have been awarded special titles, and officials of central executive authorities implementing public policy on state financial control and price control; and managers elected, approved or appointed by state authorities, local self-government bodies, as well as public organisations and other associations of citizens, on issues of dismissal, change of date and wording of the reason for dismissal, transfer to another job, payment for the period of forced absence and imposition of disciplinary sanctions, except for employee disputes referred to in part 3 of Article 221 and Article 222 of this Code;

4) an employer for compensation by employees for material damage caused to an enterprise, institution or organisation;

5) employees on the issue of applying labour legislation, which, in accordance with the current legislation, was previously resolved by the employer and the elected body of the primary trade union organisation (trade union representative) of the enterprise, institution, organisation (subdivision) within the scope of their rights;

6) employees for formalisation of labour relations in case they perform work without entering into an employment contract and establishing the period of such work (Labour Code of Ukraine, 1971).

It should be noted that the interests of employers and employees do not always coincide, and it is quite logical that these interests may clash at any stage of the employment relationship. Therefore, in times of a difficult economic situation in Ukraine, the problem of resolving labour disputes arising between the owner of an enter-

prise, institution, organisation or an authorised body or a physical person, on the one hand, and a particular employee or labour collective, on the other hand, is very relevant [10, p.76]. Nowadays, according to I. Diorditsa, the current legal provisions that create an effective system for exercising labour rights and interests of workers and employees are enshrined in a number of legislative regulations. In employment relations, an employee and an employer have certain rights and obligations that may be breached by either party. In view of this, certain controversies arise in the application of labour law, including disputes over the reinstatement of employees following their dismissal by their employers. Given the large number of legal regulations on labour relations, it is necessary to note the existence of certain problems in law application and the ambiguity of judicial practice in resolving relevant labour disputes (Diorditsa, Shevchuk, 2021).

The penultimate group of guarantees is political. In this context, A.Yu. Oliinyk argues that political guarantees are political conditions and means enshrined in constitutional provisions and principles that ensure the exercise of a person's freedom to engage in entrepreneurial activity. These include constitutional provisions that enshrine the duties of the state and its bodies and other actors of the political system of society to create conditions and use means for the exercise of this constitutional freedom (Oliinyk, 2020). For example, according to the scholar, Article 3 of the Constitution of Ukraine enshrines the need to establish and ensure human rights and freedoms as the main duty of the State. According to Article 92 of the Basic Law, the Parliament of Ukraine shall determine exclusively by law the freedoms (including the freedom to engage in entrepreneurial activity) and guarantees for their implementation. The Constitution of Ukraine recognises a number of functions of the Parliament of Ukraine (Article 85), including ensuring the freedom of a person to engage in entrepreneurial activity. The people have the right to form the parliament and the head of the State. The President of Ukraine is defined as the head of the Ukrainian State (Article 102), who is the guarantor of constitutional freedoms of man and citizen. The President of Ukraine and the Verkhovna Rada of Ukraine (Parliament) form the Government (CMU), powers thereof include the functions of ensuring constitutional freedoms of individuals (Article 116). The government ensures constitutional freedoms through the system of central and local state authorities (Oliinyk, 2020).

The last group of guarantees for protection of the rights of hired workers in the context of atypical forms of employment is organisational. According to V.M. Beschastnyi, organisational guarantees are systematic organisational activities of the State and all its bodies, officials, and public organisations aimed at creating an enabling environment for citizens to really enjoy their rights and freedoms. Such guarantees include the existence of a clear system of interconnection between a person and the State. It is manifested in a well-established mechanism for checking citizens' complaints and responding to them promptly, etc. (Beschastnyi, Filonov, Subbotin, Pashkov, 2007).

4. Conclusions

To sum up, it should be noted that to date, the legislator has developed a fairly broad system of guarantees for the protection of rights of hired workers in the context of atypical forms of employment. However, a common drawback is the fact that, despite their legal consolidation, currently no effective mechanisms for their practical implementation exist.

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Олександр Гусаров,
кандидат юридичних наук, голова Печенізької ОТГ, докторант, Харківський національний університет внутрішніх справ, проспект Льва Ландау, 27, Харків, Україна, індекс 61000, oleksandrhusarov@ukr.net
ORCID: *orcid.org/0000-0001-7493-1789*

ГАРАНТІЇ ЗАХИСТУ ТРУДОВИХ ПРАВ НАЙМАНИХ ПРАЦІВНИКІВ У РАЗІ ВИКОРИСТАННЯ НЕТИПОВИХ ФОРМ ЗАЙНЯТОСТІ

Анотація. ***Мета.*** Мета статті полягає у встановленні кола та розкритті змісту гарантій захисту трудових прав найманих працівників у разі використання нетипових форм зайнятості. ***Результати.*** У статті з огляду на аналіз наукових поглядів учених і норм чинного законодавства розкрито коло та зміст гарантій захисту трудових прав найманих працівників у разі використання нетипових форм зайнятості. Наголошено на тому, що гарантії захисту трудових прав найманих працівників у разі використання нетипових форм зайнятості являють собою сукупність законодавчо визначених умов, інструментів і засобів, які використовують держава, роботодавець та самі працівники з метою забезпечення фактичної реалізації своїх прав, свобод та інтересів у відповідній сфері. Визначено, що юридичні гарантії закріплені великою кількістю нормативно-правових актів різної юридичної сили: від Конституції України, міжнародних договорів та угод до локальних нормативно-правових актів, що приймаються кожним окремим роботодавцем. Зазначені гарантії спрямовані на те, щоб створити належне й ефективне нормативно-правове підґрунтя для захисту законних прав, свобод та інтересів найманих працівників у разі використання нетипових форм зайнятості. Окрім того, наявність таких гарантій апріорі є запорукою того, що права працівника не будуть порушені, а в разі порушення будуть відновлені. З'ясовано, що до переліку основних державних соціальних гарантій належать: 1) мінімальний розмір заробітної плати; 2) мінімальний розмір пенсії за віком; 3) неоподатковуваний мінімум доходів громадян; 4) розміри державної соціальної допомоги та інших соціальних виплат. Основні державні соціальні гарантії, які є основним джерелом існування, не можуть бути нижчими від прожиткового мінімуму, встановленого законом. ***Висновки.*** Зроблено висновок, що на сьогодні законодавцем розроблено досить широку систему гарантій захисту прав найманих працівників у разі використання нетипових форм зайнятості. Водночас як спільний недолік варто назвати той факт, що, незважаючи на юридичну закріпленість гарантій, на цей час фактично відсутні дієві механізми їх практичної реалізації.

Ключові слова: гарантії, захист, трудові права, наймані працівники, нетипові форми зайнятості, законодавство.

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Valentyn Melnyk,
PhD in Law, Associate Professor, Senior Lecturer at the Department of Legal Support of Economic Activity and Financial Security, Kharkiv National University of Internal Affairs, 27, Lev Landau avenue, Kharkiv, Ukraine, postal code 61080, melnykvalentyn@ukr.net
ORCID: *orcid.org/0000-0001-9348-8444*

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PARTICULARITIES OF RESOLVING LABOUR DISPUTES RELATED TO COMPENSATION FOR DAMAGES

Abstract. ***Purpose.*** The purpose of the article is to reveal the particularities of resolving labour disputes related to compensation for damages. ***Results.*** Compensation for damage caused by an employee to an employer often leads to disagreements between the parties to the relevant legal relations. This leads to labour disputes, which are resolved in court. A labour dispute in the context of the issues presented is a disagreement between an employee and an employer over: a) the existence and/or degree of the employee's fault; b) the amount of damage caused by the employee; c) the procedure for compensation for damage; d) failure to comply with the requirements of applicable law by the parties to the relevant labour relations. The article analyses comprehensively the judicial practice related to the resolution of labour disputes, including those of a property nature. Relying on the review of scientific perspectives of scholars, provisions of legislation in force and law application practice, the author highlights the particularities of resolving labour disputes related to compensation for damages. It is emphasised that a statement of claim, complaint, petition or any other document shall be submitted to the court through the post office, as a valuable letter with an inventory of the attachment or a registered letter (it is necessary to keep a document (payment receipt) issued by the post office confirming the sending of documents; it should be remembered that the day of the relevant action is the day the document is submitted to the post office, which is determined by the postmark, and not the day the letter is received by the court) or personally through the court office during working hours to the court employee who receives and registers incoming correspondence (general office). ***Conclusions.*** The author concludes that the resolution of disputes related to compensation for damage caused by an employee to an employer has a number of specific features, among which the following should be highlighted: the existence of a special set of grounds for resolving such cases in court (in particular, the amount of damage shall exceed the employee's average monthly salary); the specific subject matter of a labour dispute; the need for the parties to the dispute to provide and collect evidence on their own; in addition, the courts shall take a special approach to the assessment of such evidence; the actual absence of effective mechanisms for pre-trial resolution of such labour disputes.

Key words: labour disputes, dispute resolution, civil courts, compensation for damages, labour law.

1. Introduction

Compensation for damage caused by an employee to an employer often leads to disagreements between the parties to the relevant legal relations. This leads to labour disputes, which are resolved in court. A labour dispute in the context of the issues presented is a disagreement between an employee and an employer over: a) the existence and/or degree of the employee's fault; b) the amount of damage caused by the employee; c) the procedure for compensation for damage; d) failure to comply with the requirements of applicable law by the parties to the relevant labour relations. Commonly, labour disputes are resolved by labour dispute commissions and courts. For the purposes of this research, we will analyse the judicial procedure for resolving such disputes, which is directly provided for in Article 136 of the Labour Code of Ukraine. Given the particularities of this issue, the procedure for resolving labour disputes related to compensation for damages has its own specific features.

Some problematic issues related to compensation for damage were considered in the scientific works by: L.V. Avramenko, S.D. Husarev, M.P. Donchyk, V.Ye. Zherebkin, I.F. Koval, S.Yu. Liubimova, O.V. Petryshyn, I.A. Rymar, O.D. Tikhomirov, M.V. Tsvik, H.P. Yarmaki,

and many others. However, despite the considerable number of scientific achievements, the legal literature reveals insufficient research on the particularities of resolving labour disputes related to compensation for damages.

That is why the purpose of the article is to reveal the particularities of resolving labour disputes related to compensation for damages.

2. The right to initiate proceedings in a civil case

It should be noted that the right to apply to court for judicial protection is a procedural institution that regulates the right to initiate proceedings in a civil case. The right to a fair trial is a legal institution of substantive and procedural law (Melnikov, 1969, p. 106). The general rules on employee liability are set out in Chapter IX of the Labour Code and the Regulations on the liability of workers and employees for damage caused to an enterprise, institution or organisation, approved by Decree No. 4204-IX of the Presidium of the Supreme Soviet of the USSR of 13 July 1976. These substantive law provisions define both the grounds and conditions for imposing liability on employees and the amount of such liability. When considering cases on employee liability for damage caused to the employer, other legal acts that define or clarify the procedure for applying certain provisions of Chapter IX of the Labour Code are also applied, in particular: the Law "On determining the amount of damages caused to an enterprise, institution or organisation by destruction (damage), shortage or loss of precious metals, precious stones and currency valuables" No. 217/95-VR of 6 June 1995, the Procedure for calculating the average salary approved by Resolution of the Cabinet of Ministers of Ukraine No. 100 of 8 February 1995; the List of positions and works to be filled or performed by employees with whom an enterprise, institution or organisation may conclude written agreements on full financial responsibility for failure to ensure the safety of valuables transferred to them for storage, processing, sale (release), transportation or use in the production process, approved by Resolution of the USSR State Labour Committee and the Secretariat of the All-Union Central Council of Trade Unions No. 447/24 of 28 December 1977; Model agreement on full individual financial responsibility, approved by Resolution of the USSR State Labour Committee and the Secretariat of the All-Union Central Council of Trade Unions No. 447/24 of 28 December 1977; List of works for which collective (brigade) financial responsibility may be introduced, approved by Order of the Ministry of Labour No. 43 of 12 May 1996; Model agreement on collective (brigade) financial responsibility, approved by Order of the Ministry of Labour No. 43 of 12 May 1996; Procedure for determining the amount of losses from theft, shortage, destruction (damage) of material assets, approved by Resolution of the Cabinet of Ministers No. 116 of 22 January 1996 (Website of *Law and Business*, zib.com.ua).

The Labour Code stipulates that disputes over refusal to hire are also heard directly in district, city district, city or city district courts: 1) employees invited to work as part of a transfer from another enterprise, institution or organisation; 2) young specialists who have graduated from a higher education institution and are sent to work at the enterprise, institution or organisation in accordance with the established procedure; 3) pregnant women, women with children under the age of three or a disabled child, and single mothers if they have a child under the age of 14; 4) elected officials after the expiry of their term of office; 5) employees who have been granted the right of return employment; 6) other persons with whom the owner or his authorised body is obliged to conclude an employment contract in accordance with the applicable law (Code of Labour Laws of Ukraine, 1971).

With regards to the particularities of resolving labour disputes regarding compensation for damage caused by an employee in court, we note that the following are subject to court review: a) applications from the owner of an enterprise, institution, organisation or authorised body to an employee for compensation for damage in an amount exceeding the average monthly salary, as well as in an amount not exceeding this salary (exceeding, but the law establishes liability within the average monthly salary), if the compensation cannot be made by order of the owner or his/her authorised body by deduction from the salary (for example, if the employee terminates his/her employment with the company, due to the expiry of the period for issuing an order for deduction); b) applications of employees who disagree with the deductions made by the owner or his/her authorised body, or with the amount of deductions (Resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of compensation for damage caused to enterprises, institutions, organisations by their employees" dated December 29, 1992 No. 14 with amendments and additions made by resolutions of the Plenum of the Supreme Court of Ukraine, 1997).

In addition, when deciding whether to initiate proceedings in a case, the courts should proceed from the fact that, pursuant to Articles 15 and 16 of the Civil Procedure Code, courts consider cases on protection of violated, unrec-

ognised or disputed rights, freedoms or interests arising from civil, housing, land, family, labour relations, as well as other legal relations, in civil proceedings, except where consideration of such cases falls within the competence of other bodies or courts. In connection with the above, courts should proceed from the fact that the criteria for distinguishing cases of civil jurisdiction from others are, first, the presence of a dispute over civil law (cases on claims arising from any legal relations, except for cases when such cases are considered in accordance with the rules of other legal proceedings), and second, the parties to this dispute (one of the parties to the dispute is usually an individual) (Generalisation of the practice of court application of the legislation regulating the material liability of employees for damage caused to the employer (Excerpt), 2015).

3. Resolving a labour dispute in court

As a general rule, in accordance with Article 233 of the Labour Code, an employee may file an application for resolution of a labour dispute directly with the court within three months from the date when he or she learned or should have learned of the violation of his or her right, and in cases of dismissal - within one month from the date of delivery of a copy of the dismissal order or from the date of issuance of the employment record. In case of violation of labour legislation, an employee has the right to file a lawsuit to recover wages due to him or her without any time limit (Code of Labour Laws of Ukraine, 1971; Prorok, 2020). As for the issues of compensation for damage, including non-pecuniary damage, by the owner of the enterprise or his authorised body, the employee may apply to the court no later than three months after the date when he or she learned or should have learned of the violation of his or her right. It should be noted that in case of missed deadlines established by Article 233 of the Labour Code for valid reasons, the court may renew these deadlines (Article 234 of the Labour Code) (Code of Labour Laws of Ukraine, 1971; Prorok, 2020).

A statement of claim, complaint, petition or any other document shall be submitted to the court: 1) through the post office, as a valuable letter with an inventory of the attachment or a registered letter. It is necessary to keep a document (payment receipt) issued by the post office confirming the sending of documents. It should be remembered that the day of the relevant action is the day the document is submitted to the post office, which is determined by the postmark, and not the day the letter is received by the court; 2) personally through the court office during working hours to the court employee who receives and registers incoming correspondence (general office). Copies of the documents submitted to the court shall be stamped with the date of receipt and registration number (The official WEB-portal of the Federation of Trade Unions of the Vinnytsia Region, 2020).

It should be noted that in accordance with Article 120 of the Civil Procedure Code, the statement of claim shall be accompanied by: 1) evidence supporting the claim; 2) a power of attorney or other document confirming the authority of the representative, if the claim is filed by a representative (The official WEB-portal of the Federation of Trade Unions of the Vinnytsia Region, 2020). According to S.F. Safulka, evidence is any factual data established on the basis of explanations of the parties, third parties, their representatives interrogated as witnesses, witness testimony, written evidence, and material evidence, such as, audio and video recordings, expert opinions, and on the basis of which the court determines the presence or absence of circumstances justifying the claims and objections of the parties, and other circumstances relevant to the resolution of the case. Moreover, only those circumstances that are relevant to the decision in the case and in respect of which the parties and other persons involved in the case have a dispute are subject to proof. Circumstances admitted by the parties and other persons involved in the case, as well as recognised by the court as common knowledge, are not subject to proving (Sviatotskyi, Zakharchenko, Safulko, 2008). Therefore, proving is the process of establishing the objective truth in a case, which includes the collection, examination, evaluation and use of evidence. Evidence in a case of an administrative offence is carried out by the body (official) that carry out proceedings. On the one hand, proving serves to establish the facts and circumstances that took place, their essence and assessment of their significance for establishing the truth in the case, on the other hand, it is their recording in the manner prescribed by law and the forms of obtaining the results to give them the status of evidence. Data in the form of rumours, assumptions, even if they were obtained from a person summoned as a witness, expert, set out in a document, etc. cannot be considered as evidence (Yarmaki, 2015, p.116).

It should be noted that the judges in this category of cases had some difficulty in correctly determining the scope of relevant evidence. In order to correctly determine the scope of relevant evidence, courts should consider the explanations provided in paragraph 23 of Supreme Court Plenum Resolution No. 14, according to which in cases of damage compensation, the judge, regardless of the circumstances of the case, shall, in particular, decide whether the parties submit or request the submission of:

– accounting data and other documents on the existence and amount of direct actual damage, such as inventory materials, audit reports and accounting documents, acts and other documents on the shortage, damage, loss, destruction of property, conclusions of the commodity expertise bureau, certificates and other documents on the value of property, the amount of excessive cash payments, as well as the amounts spent on the acquisition, restoration of property, satisfaction of third-party claims, etc. If there is a need to conduct an accounting or other expert examination to determine the amount of damage and the circumstances of its infliction, it shall be appointed with due regard to the opinion of the persons involved in the case;

– evidence of the employee's culpable breach of duties under the employment contract and the existence of a causal link between his or her unlawful behaviour and the damage that occurred, the time of its discovery, the employee's explanations, acts and report notes of officials, materials of internal inspections, court verdict or decision of the investigating authority, order based on the results of the inspection of the case, conclusions of competent authorities or expert examination on the violations committed and the causes of damage, documents on the scope of the employee's work duties;

– other evidence relevant to determining the type of liability and the amount to be recovered, such as an agreement on full individual or collective (team) liability, a power of attorney or other one-time document for the employee to receive material assets under the report, data on damage caused by an employee in a state of intoxication, calculations of the distribution of damage between team members, certificates of the employee's tariff rate in case of team liability or his/her earnings for the two calendar months preceding the filing of claims for damages, in other cases, information about the employee's family, valuable property (house, car, etc.), subsidiary farm, other income; information about working conditions and storage of material assets, employee's memos on these issues (Website of *Law and Business*, 2020).

Resolution No. 14 of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of compensation for damage caused to enterprises, institutions, organisations by their employees" of 29 December 1992 states that courts should improve the preparation of cases for compensation for damage for trial and its efficiency. Meeting the requirements of Article 143 of the Civil Procedure Code, the judge, regardless of the circumstances of the case, shall, in particular, decide whether the parties submit or request the submission of:

– accounting data and other documents on the existence and amount of direct actual damage, such as inventory materials, audit reports and accounting documents, reports and other documents on shortage, damage, loss, destruction of property, and opinions of the commodity expertise bureau, certificates and other documents on the value of the property, the amount of excessive cash payments, as well as the amounts spent on the acquisition, restoration of property, satisfaction of third-party claims, etc. If there is a need to conduct an accounting or other expert examination to determine the amount of damage and the circumstances of its infliction, it should be appointed with due regard to the opinion of the persons involved in the case;

– evidence of the employee's culpable breach of duties under the employment contract and the existence of a causal link between his or her unlawful behaviour and the damage that occurred, the time of its discovery, the employee's explanations, acts and report notes of officials, materials of internal inspections, court verdict or decision of the investigating authority, order based on the results of the inspection of the case, conclusions of competent authorities or expert examination on the violations committed and the causes of damage, documents on the scope of the employee's work duties;

– other evidence relevant to determining the type of financial liability and the amount to be recovered, such as an agreement on full individual or collective (team) financial liability, a power of attorney or other one-time document authorising the employee to receive material assets against a report, data on the employee causing damage in a state of intoxication, calculations of the distribution of damage between team members, certificates of the employee's tariff rate in case of team liability or his/her earnings for the two calendar months preceding the claim for damages, in other cases, the composition of the employee's family, the employee's valuable property (house, car, etc.), minor farm, other income; data on working conditions and storage of material assets, employee's report notes on these issues (Resolution of the Plenum of the Supreme Court of Ukraine "On judicial practice in cases of compensation for damage caused to enterprises, institutions, organisations by their employees" dated December 29, 1992 No. 14 with amendments and additions made by resolutions of the Plenum of the Supreme Court of Ukraine, 1997).

4. Conclusions

Thus, the conducted study enables to state that the resolution of disputes related to compensation for damage caused by an employee to an employer has a number of characteristic

features, among which the following should be highlighted:

– the existence of a special set of grounds for resolving such cases in court (in particular, the amount of damage shall exceed the employee's average monthly salary);

– the specific subject matter of a labour dispute;

– the need for the parties to the dispute to provide and collect evidence on their own;

– in addition, the courts shall take a special approach to the assessment of such evidence; In particular, in order to correctly determine the scope and content of relevant evidence, courts should consider the explanations provided in paragraph 23 of SC Plenum Resolution No. 14;

– the actual absence of effective mechanisms for pre-trial resolution of such labour disputes.

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Валентин Мельник,
кандидат юридичних наук, доцент, доцент кафедри правого забезпечення підприємницької діяльності і фінансової безпеки, Харківський національний університет внутрішніх справ, проспект Льва Ландау, 27, Харків, Україна, індекс 61000, melnykvalentyn@ukr.net
ORCID: *orcid.org/0000-0001-9348-8444*

ОСОБЛИВОСТІ ВИРІШЕННЯ ТРУДОВИХ СПОРІВ, ПОВ'ЯЗАНИХ ІЗ ВІДШКОДУВАННЯМ ШКОДИ

Анотація. ***Мета.*** Мета статті полягає у з'ясуванні особливостей вирішення трудових спорів, пов'язаних із відшкодуванням шкоди. ***Результати.*** Відшкодування шкоди, завданої працівником роботодавцю, досить часто призводить до виникнення розбіжностей між сторонами відповідних правовідносин. Зазначене призводить до виникнення трудових спорів, які, відповідно, вирішуються в судовому порядку. Трудовий спір у контексті представленої проблематики являє собою розбіжності між працівником та роботодавцем щодо таких питань: а) наявності та/або ступеня вини

працівника; б) розміру шкоди, яка була завдана працівником; в) порядку відшкодування шкоди; г) невиконання вимог норм чинного законодавства сторонами відповідних трудових правовідносин. У статті здійснено комплексний аналіз судової практики, пов'язаної з вирішенням трудових спорів, зокрема й майнового характеру. З огляду на аналіз наукових поглядів учених, норм чинного законодавства та правозастосовної практики виокремлено особливості вирішення трудових спорів, пов'язаних із відшкодуванням шкоди. Наголошено на тому, що позовна заява, скарга, клопотання чи будь-які документи подаються до суду через поштове відділення, як цінний лист з описом вкладення або рекомендований лист (у цьому випадку необхідно зберігати документ (квитанцію про оплату), який видається на пошті, що підтверджує відправлення документів; також варто пам'ятати, що днем вчинення відповідної дії вважається день здачі документа на пошту, який визначається за поштовим штемпелем, а не день надходження листа до суду) або власноруч через канцелярію суду в робочий час працівнику суду, який веде прийом і реєстрацію вхідної кореспонденції (загальна канцелярія). ***Висновки.*** Зроблено висновок, що вирішення спорів, пов'язаних із відшкодуванням шкоди, завданої працівником роботодавцю, має низку характерних особливостей, а саме: наявність спеціального набору підстав для вирішення подібних справ саме в судовому порядку (зокрема, сума шкоди має перевищувати середньомісячну заробітну плату працівника); специфічний предмет трудового спору; необхідність надання та збирання доказів сторонами спору самостійно; обов'язок судів особливим чином підходити до оцінки вказаних доказів; фактична відсутність дієвих механізмів досудового вирішення такого виду трудових спорів.

Ключові слова: трудові спори, вирішення спорів, цивільні суди, відшкодування шкоди, трудове право.

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Andrii Varkhov
External Postgraduate Student, Scientific Institute of Public Law, 2a, H. Kirpa street, Kyiv, Ukraine, postal code 03055, varkhovandrii@ukr.net
ORCID: *orcid.org/0000-0002-5637-2924*

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LEGAL NATURE OF ADMINISTRATIVE LAW MEANS SHAPING THE STRUCTURE OF ADMINISTRATIVE LAW MECHANISM FOR INTERACTION OF THE SECURITY AND DEFENCE SECTOR ENTITIES TO ENSURE NATIONAL SECURITY

Abstract. ***Purpose.*** The purpose of the article is to reveal the categories and content of administrative law means shaping the structure of the administrative law mechanism for interaction of the security and defence sector entities with regard to ensuring national security since this issue has not been systematically and comprehensively disclosed within the administrative law branch of scientific knowledge yet. ***Results.*** It is determined that the administrative and legal means shaping the structure of the administrative and legal mechanism for interaction of security and defence sector entities with regard to ensuring national security can be considered in two aspects: as a set of administrative and legal provisions or as instruments for implementing administrative decisions in this field. In the first case, the administrative and legal mechanism for interaction between the security and defence sector actors to ensure national security is identified with the regulatory mechanism for this process, and in the second case, its content is reduced to the instrumental component. The latter approach is used in the general definition of the concept of administrative and legal mechanism, including the one under study, i.e., the emphasis is placed on its instrumental component, since it reflects its most significant features. However, the literature review also reveals other components of the mechanism, which are often identified as the category of administrative and legal means. ***Conclusions.*** It is concluded that administrative and legal means as a basic element of the mechanism under study are used in its conceptual and categorical definition to represent its essence and highlight the instruments for achieving the purpose of its functioning, since these are the legal phenomena which ensure that the established rules, procedures and standards of joint activities of such entities are put into practice.

Key words: administrative and legal means, administrative and legal mechanism, interaction, security, national security, mechanism, national interests, security and defence sector.

1. Introduction

In recent years, as never before in its modern history, Ukraine has faced a pressing task of ensuring national security effectively and efficiently (Aleksandrov, 2020, p. 78). Moreover, the theoretical and practical aspects related to national security require a systematic and comprehensive approach that includes both general theoretical research and the achievements of sectoral sciences, as well as the needs of practice in the interests of security of the individual, society and the state. They are gaining additional relevance due to the increase and change in the types of security in general, the emergence of new threats and challenges, and dynamic changes in the global geopolitical space (Bilyi, Mykhalchuk, 2021, pp. 93-94). In this regard, it is relevant to consider the issue of determining the essence and content of the administrative and legal mechanism for interaction between security and defence actors to ensure national security, since, according to strategic planning documents, interaction is a key element in achieving the efficiency of a particular system in the context of the study.

Our other scientific studies define that: "the administrative and legal mechanism for interaction between the security and defence sector entities to ensure national security is a set of administrative and legal means". This study is directly aimed at revealing the content of the above thesis.

The theoretical and practical issues of solving the problems presented for analysis are generally considered in the works by: V. Aleksandrov, O. Bandurka, V. Bilyi, O. Holovko, N. Zaiats, V. Komziuk, O. Kutsyi, V. Mykhalchuk, S Salmanova, D. Slynko. Relying on the opinions of these authors, we consider it necessary to reveal the categorical and substantive content of administrative and legal means shaping the structure of the administrative and legal mechanism for interaction of security and defence sector entities with regard to ensuring national security since this issue has not been systematically and comprehensively disclosed within the administrative and legal branch of scientific knowledge yet.

2. Structure of the administrative law mechanism

In general, means, as a legal category, are instruments for ensuring any activity and are of a general scientific, interdisciplinary nature (Oliinyk, 2015, p. 66).

In this context, the correlation of this category with the category of "instrument" is quite interesting. For example, the scholar A. Zamryga argues that in the generally accepted meaning, an instrument means a technique, some special action that enables to do something, to achieve something; a method; something that serves as a tool in any action, business (Zamriga, 2018, p. 307). A "technique" is a method of performing or carrying out something; a certain measure for carrying out something, achieving a certain goal; a means of expression. A "method" is a certain action, technique or system of techniques that makes it possible to do something, to accomplish something, to achieve something; something that serves as a tool, means, etc. in any business or action. A "measure" is a set of actions or means to achieve or implement something. Accordingly, schematically, an instrument is a means; a means is a technique; a technique is a method or measure; a method is a certain action; a measure is a set of actions (Bilodid, 1972).

Therefore, it can be argued that the administrative and legal shaping the structure of the administrative and legal mechanism for interaction between the security and defence sector actors to ensure national security are actually instruments for achieving its goal.

It should also be noted that, according to A. Malko, legal means are legal phenomena that are manifested in the instruments for establishing subjective rights, duties, benefits, prohibitions, encouragement, rewards and actions related to the technology of exercising rights and duties (Malko, 1999, p. 326).

3. Definition of the concept of administrative law mechanism

According to N. Zaiats, as an independent category, the concept of "legal means" began to be studied in the early 80s of the twentieth century at the sectoral level. The issue of legal means was first raised to the level of the general theory of law by S. Aleksieiev in 1987. It is with his name that the emergence of instrumental theory in the law study can be associated. It should be emphasised that "instrumentalism" in law cannot and should not be opposed to existing theoretical and legal concepts. It is considered only as one of the methodological approaches to the study of law. Legal means do not create phenomena of reality that are fundamentally different from the traditional ones, which are fixed in the generally accepted conceptual apparatus and are formulated mainly in terms of the needs of analytical jurisprudence. This is the whole spectrum of legal phenomena of different levels but they have a rather significant difference, namely, they are distinguished and considered not from the perspective of the needs of legal practice, but from the perspective of their functional purpose, while providing their necessary characteristics as instruments for solving economic and other social problems (Zaiats, 2016, p. 203).

O. Bandurka considers this concept in the context of concepts "legal influence" and "regulatory framework" and argues that the relevant means form a holistic, systemic legal mechanism that regulates the entirety of social relations which are the target of the regulatory mechanism. According to O. Bandurka's perspective on the system of legal means, it is a legal regulatory mechanism the main structural elements thereof which are legal provisions, legal relations and acts of exercising legal rights and duties (Hnatiuk, Krakovska, 2022). According to N. Zaiats, legal means are objective substantive legal phenomena that have a number of features that contribute to the realisation of the potential of law (Zaiats, 2016, p. 202). Expanding on her own opinion, the author clarifies that legal means are a multifaceted theoretical and legal phenomenon that can be considered from the legal (as a set of legal instruments and a formalised result of the activity of performers) and social (enshrining the values of law, reflecting certain interests and contributing to the achievement of the relevant result) aspects. Legal means are substantive phenomena of legal reality of different levels, they have a certain functional focus on solving social problems. They are different in nature institutional formations through which the potential of law is implemented. They constitute a certain system but are not tied to one sector of social relations; they are intended to ensure social freedom and activity of actors' behaviour (permissions) or, on the contrary, to impose on persons a passive obligation to refrain from committing actions that interfere with the interests of a person (prohibitions), to provide for a certain kind of behaviour, to guarantee the use of subjective rights by other actors (obligations); they should contain positive incentives for actors to exercise their subjective rights and fulfil their obligations and be aimed at achieving a certain result,

that is, ensuring the effectiveness of regulatory framework; they have a certain connection with the subjective rights of the person concerned (permissions) or other persons (obligations, prohibitions). To sum up, the scholar argues that legal means is a multidimensional phenomenon; this category is used in relation to law in general, in the process of analysing legal regulation, in relation to human rights, legal regimes, etc. That is why it is necessary to focus on analysing this category from the perspective of the instrumental theory of law (Zaiats, 2016, p. 205).

In 2004, O. Kutsyi noted that: "legal means as legal instruments are divided into constitutional, administrative, financial, etc. depending on the sectoral affiliation. Administrative and legal means are, first of all, the provisions contained in the managerial acts in a particular field of activity" (Kutsyi, 2004, p. 11).

For example, in the course of the study of the essence of administrative and legal means of customs administration, V. Komziuk determines that these are organisational means, such as: a) means of determining the types and structure of executive authorities acting in the field of customs administration; b) means of determining the legal status of these bodies; c) means of organising the civil service in the customs authorities. The second block, in the author's opinion, is formed by administrative and legal methods of managerial activities of customs authorities. The most important thing in this regard is the division of managerial methods into persuasion and coercion, allowing for the nature of the managerial impact of a particular measure (Komziuk, 2003, p. 8). With regard to ensuring the rights of individuals in tax relations, such means are a set of all measures used to ensure the exercise of the rights of actors and protect their interests. In particular, these are: a) preventive, which proactively create conditions that prevent unlawful actions; b) protection of rights, i.e. state guarantees that ensure the restoration of taxpayers' rights (Kutsyi, 2004, p. 12).

O. Salmanova advocates a similar perspective and argues that administrative and legal means aimed at ensuring road safety are, first of all, mandatory rules relating to road safety, the leading place of which in this system is due to the fact that all other means are aimed at ensuring their implementation, prevention and deterrence of their violations, and bringing those responsible to administrative liability. In addition, as a separate part of this system, it identifies incentives and other persuasive measures that promote the creative activity of participants in these legal relations and reflect the state's positive assessment of their lawful activities. Furthermore, despite the fact that in the course of the development of social relations, increase of culture and legal awareness of citizens, the crucial role of persuasion is growing, coercive measures used by the police to ensure road safety also have a major place in this system (Salmanova, 2020, p. 8).

Moreover, according to N. Hnatiuk and A. Krakovska, despite the lack of a single scientific perspective on the essence and content of this concept, V. Nehodchenko's point of view should be noted, and administrative and legal means should be understood as the set of administrative and legal provisions from the perspectives of their functional purpose for solving a certain range of tasks, regulating relevant social relations (Nehodchenko, 2015, pp. 149-151). This position is consistent with both the perspectives of representatives of the general theory of law and the vast majority of modern sectoral studies directly related to the issue of administrative and legal means (Hnatiuk, Krakovska, 2022).

To sum up, according to the above-mentioned perspectives of scholars, the administrative and legal means shaping the structure of the administrative and legal mechanism for interaction of security and defence sector entities with regard to ensuring national security can be considered in two aspects: as a set of administrative and legal provisions or as instruments for implementing administrative decisions in this field.

In the first case, the administrative and legal mechanism for interaction between the security and defence sector actors to ensure national security is identified with the regulatory mechanism for this process, and in the second case, its content is reduced to the instrumental component.

The latter approach is used in the general definition of the concept of administrative and legal mechanism, including the one under study, i.e., the emphasis is placed on its instrumental component, since it reflects its most significant features. However, the literature review also reveals: 1) its institutional element, which implies the existence of a set of actors of interaction, which, in turn, are endowed with the appropriate administrative and legal status; 2) a set of managerial decisions made and implemented by competent actors; 3) legal fact; 4) organisational elements (Rusetskyi, 2018, p. 154). Regarding this perspective, S. Naumenko argues that the distinction of such an element as a legal fact is not entirely correct since it contributes to the rise of legal relations but not to their regulatory mechanism (Naumenko, 2018, pp. 121-122).

4. Conclusions

Relying on the analysis of the scholars' perspectives, it can be concluded that administrative and legal means as a basic element of the mechanism under study are used in its conceptual and categorical definition to represent its essence and highlight the instruments for achieving the purpose of its functioning, since these are the legal phenomena which ensure that the established rules, procedures and standards of joint activities of such entities are put into practice.

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Андрій Вархов,
здобувач, Науково-дослідний інститут публічного права, вул. Г. Кірпи, 2а, Київ, Україна, індекс 03035, varkhovandrii@ukr.net
ORCID: *orcid.org/0000-0002-5637-2924*

ЮРИДИЧНА ПРИРОДА АДМІНІСТРАТИВНО-ПРАВОВИХ ЗАСОБІВ, ЯКІ ФОРМУЮТЬ СТРУКТУРУ АДМІНІСТРАТИВНО-ПРАВОВОГО МЕХАНІЗМУ ВЗАЄМОДІЇ СУБ'ЄКТІВ СЕКТОРУ БЕЗПЕКИ Й ОБОРОНИ ЩОДО ЗАБЕЗПЕЧЕННЯ НАЦІОНАЛЬНОЇ БЕЗПЕКИ

Анотація. ***Мета.*** Метою статті є розкриття категорійно-сутнісного змісту адміністративно-правових засобів, які формують структуру адміністративно-правового механізму взаємодії суб'єктів сектору безпеки й оборони щодо забезпечення національної безпеки, адже системного та комплек-

сного розкриття в межах адміністративно-правової галузі наукових знань ця проблематика досі не отримала. ***Результати.*** Визначено, що адміністративно-правові засоби, які формують структуру адміністративно-правового механізму взаємодії суб'єктів сектору безпеки й оборони щодо забезпечення національної безпеки, можна розглядати у двох аспектах: як сукупність адміністративно-правових норм або як інструменти виконання адміністративних рішень у цій сфері. Причому в першому випадку здійснюється ототожнення адміністративно-правового механізму взаємодії суб'єктів сектору безпеки й оборони щодо забезпечення національної безпеки з механізмом нормативного забезпечення цього процесу, а у другому випадку відбувається звуження його змісту інструментальним складником. Саме останній підхід застосовується у процесі загального визначення поняття адміністративно-правового механізму, зокрема досліджуваного, тобто акцентується на його інструментальному складнику, адже він віддзеркалює найбільш істотні його особливості. Однак у науковій літературі виділяються також інші його складники, нерідко ототожнені приналежністю до категорії адміністративно-правових засобів. ***Висновки.*** Зроблено висновок про те, що адміністративно-правові засоби як базовий елемент досліджуваного механізму використовуються в разі його понятєво-категорійної визначеності задля репрезентації його сутності, висвітлення інструментів досягнення мети його функціонування, адже це ті юридичні феномени, які забезпечують утілення на практиці встановлених правил, процедур і стандартів спільної діяльності таких суб'єктів.

Ключові слова: адміністративно-правові засоби, адміністративно-правовий механізм, взаємодія, забезпечення безпеки, забезпечення національної безпеки, механізм, національні інтереси, сектор безпеки й оборони.

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Yuliia Turia,
Candidate of Technical Sciences, Associate Professor, Associate Professor at the Department of Civil, Commercial and Environmental Law, Dnipro University of Technology, 19, Dmytro Yavornytskyi avenue, Dnipro, Ukraine, postal code 49005, tiuriayuliia@ukr.net
ORCID: *orcid.org/0000-0001-7732-3535*

Turia, Yuliia (2023). Epistemology of the concept of "legal doctrine in the field of artificial intelligence" in Ukraine. *Entrepreneurship, Economy and Law, 1*, 39–44, doi https://doi.org/10.32849/2663-5313/2023.1.07

EPISTEMOLOGY OF THE CONCEPT OF "LEGAL DOCTRINE IN THE FIELD OF ARTIFICIAL INTELLIGENCE" IN UKRAINE

Abstract. ***Purpose.*** The purpose of the article is to study the state of doctrinal consolidation of artificial intelligence and to highlight the prospects for further development with due regard to global trends. ***Results.*** The article addresses important issues of the legal nature and doctrinal consolidation of artificial intelligence in Ukraine. We present the ways of defining the concept of "artificial intelligence" in various aspects, including philosophical ones, and its active application for decades, especially in recent times, as IT breakthrough is only one side. Like any social relationship, the result of human activity in modern conditions requires legal consolidation to be fully implemented. The areas of application of artificial intelligence in Ukraine are diverse. It is impossible to imagine humanity refusing to use artificial intelligence, but in addition to its development, improvement, and implementation, it requires doctrinal consolidation. As of today, Ukraine does not officially recognise the concept of "artificial intelligence", the scope and limits of artificial intelligence, or the status of entities related to artificial intelligence at the legislative level. As for the actors, they may be the developers of the programme, the owners of the programme, or the users of such a programme. A separate question arises as to the liability of the machines themselves, which are carriers of artificial intelligence, and the final determination of the limits and specifics of legal liability. Since Ukraine has been actively conducting research in the field of artificial intelligence in recent years, using various software programmes, but legally we can refer to only a branch of intellectual property, including the product, that is, a computer programme, as a carrier of artificial intelligence. This gap in the legislation is currently being filled by analogy, following the example of the doctrinal consolidation of intellectual property. However, these issues can only be resolved in relation to developers, owners and users of software as carriers of artificial intelligence. Therefore, the article addresses important issues of eliminating the gap in legislation and doctrinal consolidation of artificial intelligence in Ukraine. ***Conclusions***. The strategy for the development of artificial intelligence in Ukraine is aimed at developing and using artificial intelligence provided that the rule of law, fundamental human rights and freedoms, and democratic values are respected, and the implementation of these values should be ensured by appropriate guarantees, including the possibility of unimpeded human intervention in the functioning of the artificial intelligence system. The protection of human rights and freedoms involves ensuring the right to work and providing citizens with the opportunity to acquire knowledge and skills to successfully adapt to the digital economy.

Key words: artificial intelligence, artificial intelligence system, actors of the legal process, intellectual property, copyright.

1. Introduction

The active introduction of artificial intelligence into human life necessitates the regulatory framework for this branch. The doctrinal basis for the use of artificial intelligence in Ukraine is absent and the application of legal provisions by analogy with intellectual property and copyright law cannot fully replace the regulatory framework for artificial intelligence. The branch of artificial intelligence goes beyond the usual regulatory framework, both in terms of the subject matter and actors. Therefore, today the issue of doctrinal consolidation of the concept of "artificial intelligence" and the scope of artificial intelligence is quite acute and requires significant attention and practical implementation.

Some issues related to the doctrinal consolidation of artificial intelligence were covered in the works by: V.H. Androshchuk, T.H. Katkova, Yu.V. Kryvytskyi, Ye.O. Kuptsova, Ye.O. Michurin, O.E. Radutnyi,

S.K. Ramazanov, A.I. Shevchenko, and others. However, as we have noted, the problem of legislative consolidation of artificial intelligence in Ukraine is quite acute and requires careful research for practical application.

The purpose of the article is to study the state of doctrinal consolidation of artificial intelligence and to highlight the prospects for further development with due regard to global trends.

2. General principles of artificial intelligence existence

We agree with the authors on the prospects for the development of science in the near future in the IT sector and specifically the use of artificial intelligence. For example, the authors underline that the definition of the initial fundamental parameters of order and their prospects in the global world, the concepts and principles of creating an artificial intelligence system, its structure and important aspects and principles of the development of future science and technology in the field of analysis and synthesis based on synergistic approaches, innovative, information, convergent technologies, considering the design of future viable, safe and sustainable development in the context of industry and society. The main scientific and technological factor in the 21st century will be the development of artificial intelligence, nanotechnology, bio-, media-, cognitive and socio-humanitarian technologies. More specifically, it is the modern development of innovative technologies. Therefore, it should be noted that the principles of intellectualisation, integration, convergence, co-evolution, and socio-humanitarian technology should be considered. It is important and necessary to allow for the modern principles of designing sustainable and secure artificial intelligence systems and to solve the problem of harmonisation between the two worlds: real and virtual, especially when they are hybridised. Our near future is a hybrid non-linear world. Today, we need important intelligent information and innovation technologies and systems, in particular, artificial intelligence systems and technologies (Ramazanov, Shevchenko, Kuptsova, 2020).

From a practical point of view, artificial intelligence can be defined as a software product that receives a specific request, collects and processes data, and then produces a ready-made solution. Such a solution is often perceived as the result of a programme's work that demonstrates intelligent behaviour and works in a manner similar to human thinking. Since artificial intelligence is a software product similar to a computer programme, the regulatory framework for artificial intelligence can be applied by analogy to the regulatory framework for a computer programme. Currently, in Ukraine, the regulatory framework for a computer programme is equated to a literary work (Klian, 2022).

In his study, Yu. Kryvytskyi considers the controversial issues of legal aspects of artificial intelligence and argues that the spread of artificial intelligence technologies in the modern world is gaining momentum. Soon enough, people will not be able to imagine life without artificial intelligence systems, which are likely to become the largest innovative project in the history of human civilisation. Currently, there is no unified approach to understanding the nature of artificial intelligence in the technical sector, which leads to some uncertainty in the legal, social, moral and ethical sectors. There is a discussion between different groups of experts in law on the legal aspects of the benefits, advantages, threats and risks of artificial intelligence development; possible recognition of the legal personality of artificial intelligence robots; the need to develop new mechanisms for legal liability and compensation for damage in the context of artificial intelligence. Obviously, it is difficult or almost impossible to stop the development of artificial intelligence (Kryvytskyi, 2020).

Indeed, we can agree with the author's discussion of the threats and benefits of artificial intelligence development. In our previous works, we have considered such risks and benefits. The benefits are obvious, and humanity will not be able to refuse the advantages of artificial intelligence. Risks, of course, can also arise, as well as threats. However, in human activities the risks of using familiar objects (without the use of artificial intelligence) also arise constantly and doctrinal consolidation of any human activity gives a sense of protection in the event of such risks, for example: compensation for damages in case of violation of rights. The same principle should be taken as a basis for the application of artificial intelligence. The idea of legal personality of robots with artificial intelligence seems to be interesting, quite logical and is actively considered in other countries.

In the era of the global redistribution of everything, the need to improve the entire legal doctrine and its individual aspects related to robotics and automation, the Internet of Everything, the Internet of microorganisms, artificial intelligence, Big Data, cloud computing, 3D and 4D printing, digital human, bioengineering, genetic engineering, nanotechnology, high-tech implants, RFID tattoos, new substances and materials, quantum technology, etc. becomes a priority for experts in law (Radutnyi, 2021).

According to Yu. Kryvytskyi, the creation, implementation and use of artificial intelligence should be prioritised, be socially ori-

ented and meet the interests of human security, preservation of personal space, freedom and self-awareness. Moreover, artificial intelligence systems should be developed and used only consistent with the rule of law, fundamental human and civil rights and freedoms, democratic values, and appropriate safeguards in the implementation of such technologies. In recent years, examples of the implementation of artificial intelligence systems in various fields and segments of social activity have been emerging at an intensive pace, with mostly positive results. The fundamental and undeniable advantage of artificial intelligence technologies is that decisions are made and implemented in real time based on the collection and processing of a huge amount of data; identification of all actors and objects involved in the processes; and the use of special mathematical algorithms and robots (Kryvytskyi, 2020).

On the contrary, O.E. Radutnyi notes that the participants of the legal space are not actually living people, but parties to legal relations - the intersection of social forces of different significance, the most important thereof are those symbolic formations that contain normative elements. One of these intersections may be new phenomena – artificial intelligence, which can easily overcome obstacles to its recognition as a party to legal relations, and a natural person whose consciousness, intelligence and personality are transferred to a digital medium. Modern legal science should differ from religion in the following ways: 1) A willingness to admit ignorance, which is based on the Latin precept *ignoramus* ("we do not know") and is based on the premise that we do not know everything and that there are no theories or ideas beyond reasonable criticism; 2) The desire to acquire new knowledge; 3) Constant expansion of opportunities; 4) The search for the elimination of contradictions" (Radutnyi, 2018).

Ukraine has not yet considered the concept of artificial intelligence as a party to law relations, although, as we can see, it is actively used in various fields. It is necessary to consider artificial intelligence from different perspectives, namely as a subject matter of social relations, an object of law, a right of ownership, and a "party" to legal relations.

The importance of determining whether to theoretically consider artificial intelligence as an object or an actor arises in connection with its participation in legal relations. Since the object and the actor are elements of civil legal relations, the theoretical definition of these elements of artificial intelligence depends on whether it (artificial intelligence) will be a party to real legal relations or whether other actors of legal relations will enter into transactions with it, be granted property rights, etc. The literature review reveals another issue, which will be discussed in more detail below, that is, the granting of certain rights to artificial intelligence. According to some researchers, such a "digital being" should be endowed with such rights because of the need for humane treatment. However, for the purposes of our discussion, it should be noted that the mere granting of certain rights does not mean "legal personality" in civil law. After all, by analogy, although animals are endowed with certain rights (to respect, not to be subjected to ill-treatment or cruelty, etc.), they are objects of civil law (Michurin, 2020).

With regard to the practical state of the doctrinal position in the field of artificial intelligence, T. Katkova refers to EU Resolution 2015/2103(INL), where the authors understand artificial intelligence as an *object*. The current legislation of Ukraine allows for the legal framework to be established for relations arising in connection with the use of artificial intelligence, in particular, in the case of determining the owner's liability for the actions of artificial intelligence, and in the case of such actions as a result of defects of the manufacturer and programmer, through the use of the concept of recourse. However, the legislation is not tailored to such situations, which can lead to difficulties in law application practice. In the future, in order to grant legal personality to artificial intelligence, lawmakers should answer the main question: Do developers and users of artificial intelligence want to disclaim liability for the actions of artificial intelligence or do developers and users want to control the functioning of artificial intelligence? (Katkova, 2020).

3. Processing of personal data by automated systems

The state of doctrinal consolidation, as noted above, is reduced to the analogy of the law, since there is no clear consolidation and regulatory framework for artificial intelligence. Thus, it is considered within the scope of personal data protection, copyright, and intellectual property. Let us consider the aspects we have mentioned.

Protection of personal data. One of the options for raising a person's awareness of the collection of data about them is the mechanism of differentiated consent to the processing of personal data. With this approach, the user can allow or prohibit the collection of certain types of data or can pay a certain amount for using the application, refusing to provide it with one's data. At first glance, this may seem to make their situation worse, as they have to pay for a product that was previously free, but in fact, such a relationship recognises the value of personal data and shapes their understanding of data rights. Therefore, the developers

of the Artificial Intelligence Regulatory Mapping should decide on the approach to personal data protection: whether to use the mechanism of informed consent or differentiated consent to personal data processing. In addition, the Artificial Intelligence Regulatory Mapping should define a separate area of personal data protection and medical AI, which should be developed with the involvement of medical professionals (Katkova, 2020).

For example, Article 1 of the Law of Ukraine "On Protection of Personal Data " states that: "The law regulates legal relations with respect to the protection and processing of personal data and is aimed at protecting the fundamental rights and freedoms of man and citizen, in particular the right to privacy, in connection with the processing of personal data. This Law applies to the processing of personal data carried out in whole or in part with the use of automated means, as well as to the processing of personal data contained in a file or intended to be included in a file, with the use of non-automated means" (Law of Ukraine On Protection of Personal Data, 2010).

Therefore, the Law provides for the processing of personal data by automated systems, while the Law does not define the extent of liability for the disclosure of personal data, since Article 4 of the Law contains an exhaustive list of parties to relations with respect to personal data.

These include personal data actor; personal data owner; personal data manager; third party; and the Ukrainian Parliament Commissioner for Human Rights (Law of Ukraine On Protection of Personal Data, 2010).

Comparison of the concepts of "intellectual property" and "artificial intelligence". According to the report of the UK Intellectual Property Office (IPO) *Artificial Intelligence: A worldwide overview of AI patents and patenting by the UK AI sector*, the number of published patent applications related to artificial intelligence has increased by 400% over the past decade. The number of patent applications on using artificial intelligence technology filed in the US doubled between 2002 and 2018. WIPO has launched a series of consultations on artificial intelligence and intellectual property. The question of whether artificial intelligence creations should be protected by copyright, design rights, patents or sui generis rights, or not protected at all, is being discussed. There are well-known "controversial" examples of AI inventions, such as the unusual but effective antenna developed in 2004 for NASA by "evolutionary" software, and at least one issued patent has been attributed to an inventive AI. US patent No. 6,847,851 issued in 2005 refers to a scheme whose inventor is John Koza, although it was later revealed that it was developed using genetic programming (Androshchuk, 2020).

Copyright and artificial intelligence. Similarly, copyright is the main legal regulator in Ukraine for software development. According to T. Katkova, "the use of artificial intelligence in the creation of new inventions increases the risk of concentration of economic power in the market by individual entities to obtain numerous patents. E. Fraser gives examples of how computer software can help or independently generate textual patent applications. For example, Cloem is an example of a commercial service in which a human operator uses a computer algorithm to create variants of existing patent applications. The algorithm creates a large number of permutations of the original application by rearranging phrases and replacing terms with alternative definitions, synonyms or antonyms" (Katkova, 2020).

Compensation for damage caused by artificial intelligence. The only way to ensure that decisions do not systematically disadvantage members of non-protected groups (immigrants, internally displaced persons) is to reduce the overall accuracy of all definitions provided to the algorithm. In addition, AI decision-making can have discriminatory results if the system learns from discriminatory, sometimes outdated, data. For example, in 2018, Amazon.com.Inc. was accused of creating discriminatory artificial intelligence. The company developed a recruitment programme that rejected women's CVs when reviewing application forms. This was due to the fact that artificial intelligence was "trained" by examining the resumes of hired employees for 10 years, among which men dominated, given the general trend of their greater number in the technology industry (Katkova, 2020).

Cautions to be considered when developing the Strategy for the Development of Artificial Intelligence in Ukraine. Ukraine's existing government programmes and legislative documents have not fully developed a paradigmatic vision of artificial intelligence development that would include the following components: a clear understanding of the purpose and scope of technological transformation in the world; determining Ukraine's place in the global distribution of innovation production and practical mechanisms for achieving this place. The Strategy for the Development of Artificial Intelligence in Ukraine should develop the existing regulatory documents, such as the Strategy for the Development of the Information Society in Ukraine, the Concept for the Development of the Artificial Intelligence Sector in Ukraine, but allow for the constant development of technologies and the growing responsibility (including moral) of people who introduce arti-

ficial intelligence technologies into public use (Shevchenko, 2022).

4. Conclusions

Therefore, the issues of the legal doctrine of artificial intelligence identified at the beginning of our work are obvious and require more attention. There is no regulatory framework for artificial intelligence in Ukraine, although the Strategy for the Development of Artificial Intelligence in Ukraine, which we have reviewed, is aimed at developing and using artificial intelligence provided that *the rule of law, fundamental human rights and freedoms, and democratic values* are respected, and the implementation thereof should be ensured by appropriate guarantees, including the possibility of unimpeded human intervention in the functioning of the artificial intelligence system. The *protection of human rights and freedoms involves ensuring* the right to work and providing citizens with the opportunity to acquire knowledge and skills to successfully adapt to the digital economy. Moreover, the doctrinal concept of "artificial intelligence" should be defined, the scope of liability in case of violation of law in connection with the use of artificial intelligence should be outlined, and the actors of regulatory framework should be identified.

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Юлія Тюря,
кандидат технічних наук, доцент, доцент кафедри цивільного, господарського та екологічного права, Національний технічний університет «Дніпровська політехніка», проспект Дмитра Яворницького, 19, Дніпро, Україна, індекс 49005, tiuriayuliia@ukr.net
ORCID: *orcid.org/0000-0001-7732-3535*

ЕПІСТЕМОЛОГІЯ КОНЦЕПТУ «ПРАВОВА ДОКТРИНА У СФЕРІ ШТУЧНОГО ІНТЕЛЕКТУ» В УКРАЇНІ

Анотація. ***Мета.*** Метою статті є дослідження стану доктринального закріплення штучного інтелекту та висвітлення перспектив його розвитку в майбутньому з урахуванням світових тенденцій. ***Результати.*** У статті розглянуто важливі питання правової природи та доктринального закріплення штучного інтелекту в Україні. Наведено шляхи визначення поняття «штучний інтелект» у різних аспектах, зокрема й філософському, та зазначено, що активне застосування штучного інтелекту вже десятки років, особливо останнім часом, як IT-прорив є лише одним із них. Як і будь-які

суспільні відносини в результаті діяльності людини в сучасних умовах, це явище потребує правового закріплення для реалізації в повному обсязі. Галузі застосування штучного інтелекту в Україні є різноманітними. Неможливо уявити відмову людства від використання штучного інтелекту, однак, крім його розвитку, удосконалення, реалізації, необхідне також доктринальне закріплення. На сьогодні в Україні офіційно не закріплене на законодавчому рівні поняття «штучний інтелект», сфери та межі його застосування, статус суб'єктів, які пов'язані зі штучним інтелектом. Цими суб'єктами можуть бути розробники програм, власники програм, користувачі відповідної програми. Окреме питання виникає щодо відповідальності самих машин, які є носіями штучного інтелекту, та остаточного визначення меж та особливостей юридичної відповідальності. Україна останніми роками активно проводить дослідження в галузі штучного інтелекту, громадяни є користувачами різних програм, однак законодавчо можемо визначити це явище лише як галузь інтелектуальної власності, до якої й відносять продукт – комп'ютерну програму як носій штучного інтелекту. Ця прогалина в законодавстві наразі заповнюється за аналогією до закону за прикладом доктринального закріплення інтелектуальної власності. Однак зазначені питання можна врегулювати лише щодо розробників, власників та користувачів програм як носіїв штучного інтелекту. Тому у статті розглянуті важливі питання усунення прогалини в законодавстві та доктринального закріплення штучного інтелекту в Україні. ***Висновки.*** Стратегія розвитку штучного інтелекту в Україні націлена, зокрема, на розроблення та використання штучного інтелекту лише за умови дотримання верховенства права, засадничих прав і свобод людини та демократичних цінностей, реалізація яких має забезпечуватися відповідними гарантіями, зокрема можливістю безперешкодного втручання людини у процес функціонування системи штучного інтелекту. Захист прав і свобод людини передбачає забезпечення права на працю та надання громадянам можливості отримувати знання й набувати навички для успішної адаптації до умов цифрової економіки.

Ключові слова: штучний інтелект, система штучного інтелекту, суб'єкти правового процесу, інтелектуальне право, авторське право.

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Dmytro Mirkovets,
Doctor of Law, Associate Professor, Professor at the Department of Criminology and Forensic Medicine, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, DmytroMirkovets@ukr.net
ORCID: *orcid.org/0000-0003-2539-2824*

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SYSTEM OF PRE-TRIAL INVESTIGATION BODIES: CONCEPT OF STRUCTURE AND IMPROVEMENT

Abstract. ***Purpose.*** The purpose of the article is to determine the most efficient system of pre-trial investigation bodies, their subordination and structure. ***Results.*** At the current stage of development of criminal justice, the issues of an effective and optimal national model of pre-trial investigation, search for options for organising and institutionalising the law enforcement system that would meet modern challenges, practice needs and international standards remain relevant. The author studies the issues of the optimal national model of pre-trial investigation, options for organisation and institutional structure of the law enforcement system. The necessity of "vertical" subordination of pre-trial investigation bodies is substantiated. The author suggests ways to reform the system of pre-trial investigation bodies. ***Conclusions.*** It is concluded that the transformation of the pre-trial investigation bodies of Ukraine into the State Pre-trial Investigation Service will fully ensure the idea of "vertical" subordination of investigative units. Moreover, the status of the person who directly performs the function of managing the pre-trial investigation, the head of the pre-trial investigation body, will be brought to the same level as the heads of territorial law enforcement bodies, which is again a prerequisite for effective management of the pre-trial investigation. This reorganisation of the system of pre-trial investigation bodies (with clear subordination and structure) is required today, due to the need to functionally separate them from the activities of territorial law enforcement bodies. Ultimately, this will significantly improve the quality and efficiency of the pre-trial investigation itself. The establishment of a single pre-trial investigation body will eliminate competition between the currently disparate investigative apparatuses, eliminate conflicts in determining the investigative body, and put an end to the issue of inadmissibility of evidence due to violations of the rules of subject matter jurisdiction. In addition, the experience of criminal justice reforms has shown that changes should be comprehensive, carried out in parallel and within a certain timeframe, allowing for all transitional and adaptive periods and goals to be achieved in prospect.

Key words: pre-trial proceedings, head of a pre-trial investigation body, criminal justice reform, vertical subordination, autonomy and independence of an investigator.

1. Introduction

At the current stage of development of criminal justice, the issues of an effective and optimal national model of pre-trial investigation, search for options for organising and institutionalising the law enforcement system that would meet modern challenges, practice needs and international standards remain relevant

Only in 2014-2023, four completely new pre-trial investigation bodies were created (investigative units of the SBI, the SACC and the BESU, and a unit of NABU detectives), and the largest investigative apparatus of the Internal Affairs bodies was reorganised (into investigative units of the National Police).

Prior to that, the system of pre-trial investigation bodies had been stable for a rather long period of time (1960-2014), consisting of investigative units: Internal Affairs, security agencies, prosecutor's office and tax police (since 1998).

However, the issue of improving this system has been particularly relevant during all periods and attempts to reform the criminal justice system (Antonov, 2014; Shevchyshen, 2011; Farynnyk, 2010).

The purpose of the article is to determine the most efficient system of pre-trial investigation bodies, their subordination and structure.

2. Particularities of establishing the system of pre-trial investigation bodies in Ukraine

First, the issue of depriving the prosecutor's office of the investigative function was raised. For example, in 2008, a petition was even filed with the CCU to find unconstitutional certain provisions of the Law of Ukraine "On the Prosecutor's Office" (in the version in

force at the time), in particular the provisions that determined the possibility of pre-trial investigation in criminal cases by investigators of the prosecutor's office and the availability of investigator positions in the PGO and the relevant prosecutor's offices.

With reference to Articles 121, 123 of the Constitution of Ukraine, it was noted that the above provisions of the Law establish the powers of the Prosecutor's Office of Ukraine, which are not consistent with the Basic Law. It was pointed out that the prosecutor's office, instead of coordinating, actually governs law enforcement bodies (including investigators). Under such conditions, "the prosecutor's office becomes a superpower, which is very dangerous for the development of a democratic state". The unconstitutionality of these provisions of the Law of Ukraine "On the Prosecutor's Office" was also proved by exceeding powers of the Prosecutor's Office of Ukraine granted to it by the Constitution of Ukraine "by the activities of investigative units and investigators subordinate to prosecutors and employees subordinate to the prosecutor". It was argued that "at present, the system of pre-trial investigation is formed and defined by the Criminal Procedure Code of Ukraine" and that the function of investigating criminal cases in the prosecutor's office should be eliminated. The constitutional submission also noted that "the implementation of the Transitional Provisions on the Prosecutor's Office has not been carried out, which should not be the case in a legal state ".

However, the Constitutional Court of Ukraine concluded "that the process of establishing a system of pre-trial investigation and reforming the bodies of criminal investigation is incomplete". In addition, it was argued that during the transitional period, there is every reason to apply provisions of clause 9 of section XV "Transitional Provisions" of the Constitution of Ukraine, according to which the prosecutor's office continues to perform the function of pre-trial investigation in accordance with the current laws - until the pre-trial investigation system is formed and the laws regulating its functioning are enacted, as the constitutional basis for legislation regulating the activities of investigators of the prosecutor's office provided for in Article 17 of the Law of Ukraine "On the Prosecutor's Office". Moreover, sharing the concern of the people's deputies of Ukraine, attention was drawn to the need for legislative implementation of the "Transitional Provisions" of the Constitution of Ukraine (Judgment of the Constitutional Court of Ukraine in the case based on the constitutional submission of 46 People's Deputies of Ukraine regarding the conformity of the Constitution of Ukraine (constitutionality) with the provisions of Article 1, the first part of Article 7, Articles 8, 9, 10, the fourth part of Article 14, Article 17, the first part of Article 20 , part three of Article 29 of the Law of Ukraine "On the Prosecutor's Office", 2008).

Furthermore, it is precisely to implement these recommendations that most drafts and, accordingly, the 2012 CPC of Ukraine deprive the prosecutor's office of the pre-trial investigation function (Draft of the Criminal Procedure Code of Ukraine, 2007; Draft of the Criminal Procedure Code of Ukraine, 2012).

It was the need to deprive the prosecutor's office of the pre-trial investigation function, considering the requirements of clause 9 of the Transitional Provisions of the Constitution of Ukraine, that led to the creation of the SBI. After all, it is obvious that this function cannot be effective if both investigation and supervision are carried out by the same body.

According to O.Yu. Tatarov, there were unsuccessful attempts to launch the new body in 1997 and 2005. However, this negative experience did not "bury" the idea of creating a separate independent pre-trial investigation body. In one of the submissions of the Government Commissioner for the ECHR to the Cabinet of Ministers of Ukraine (hereinafter referred to as the CMU), it was stated that when considering the issue of Ukraine's implementation of the ECHR judgments, it is necessary to focus on the problems of effective investigation, including the establishment of the SBI, given the large number of judgments on Ukraine that "stated ineffective investigation". The human rights organisation Amnesty International has repeatedly called on Ukraine to speed up the establishment of the SBI to carry out independent investigations, primarily into unlawful acts committed by law enforcement officials. In its opinion on the draft CPC, the Venice Commission drew attention to the need to ensure the prompt establishment and functioning of the SBI for pre-trial investigations (Tatarov, 2010).

Experience has shown that the newly established pre-trial investigation body (SBI), which began its law enforcement activities on 27 November 2018, is increasing its importance in the state and ensuring high-quality pre-trial investigations. Moreover, the change of the SBI's status (in 2020) to a state law enforcement body provided no alternative guarantees of independence to perform its powers.

To date, professional staff has been recruited for both the Central Office and the territorial departments, with employees deployed in each region to effectively respond to crime, enabling to detect and investigate criminal offences "autonomously" from other bodies. The effec-

tive work of the State Bureau of Investigation is reflected in its performance indicators. For example, in 2022, SBI investigators conducted pre-trial investigations in 48.8 thousand criminal proceedings, investigated 22.7 thousand, of which 4.524 thousand were sent to court with indictments.

Having "inadvertently" fulfilled the next demand of society (primarily business), that is, the elimination of the tax police (section XVIII-2 "Tax Police" was excluded from the Tax Code of Ukraine by the Law of Ukraine "On Amendments to the Tax Code of Ukraine on improving the investment climate in Ukraine", which came into force on 1 January 2017), lawmakers brought the matter to an end only 4 years later. Despite a number of draft laws submitted to the parliament that provided for the creation of a separate pre-trial investigation body to replace the tax police with different names (National Financial Security Bureau, Financial Police), the Bureau of Economic Security of Ukraine was established in January 2021.

Moreover, practice shows that not all "experiments" on the creation of new pre-trial investigation bodies or reform of existing ones have been successful. For example, the Law of Ukraine "On the High Council of Justice," adopted on 21 December 2016, supplemented Article 216 of the CPC of Ukraine with a new part ("Investigators of the SPS of Ukraine shall conduct pre-trial investigation of crimes committed on the territory or in the premises of the SPS of Ukraine"), in attempts to solve the most pressing problems of the penitentiary system related to the prompt response to criminal offences by both the administration of penitentiary institutions and convicts, by objective investigation of cases and punishment of perpetrators.

As noted above, this part of the reform of the penitentiary system is a priority, as the inclusion of investigative units of the SES into the system of pre-trial investigation bodies will primarily allow for discipline and order in prisons, significantly reduce the number of crimes and increase the level of responsibility for criminal offences committed in penal institutions and pre-trial detention centres (Yahunov, 2017).

We share the opinion of scholars, human rights activists and practitioners that the creation of the institution of investigators of the Ministry of Justice of Ukraine is unacceptable and contrary to the logic of the procedural law. The Ukrainian Parliament Commissioner for Human Rights showed special and much-needed integrity on this issue, calling on the Ministry of Justice of Ukraine to do what is obviously necessary to eliminate this unnatural initiative in the context of the "penitentiary reform": 1) as soon as possible to revoke the legislative changes concerning the granting of investigative powers to the SPS; 2) immediately stop the creation of investigative units of the SPS (Yahunov, 2017).

3. ECHR Judgements as a basis for reforming pre-trial investigation bodies in Ukraine

According to the ECHR, a law enforcement system established in accordance with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 shall ensure an independent and impartial investigation; the competent authorities shall act with exemplary diligence and promptness, and shall initiate an investigation that is able to, firstly, establish the circumstances in which the incident occurred, and any shortcomings in the functioning of the regulatory system; secondly, to identify the officials or public authorities involved (paragraph 187 of the judgment in the case of "Salakhov and Islyamova v. Ukraine" of 14 March 2013); as a general rule, it is considered necessary that persons responsible for and carrying out the investigation are independent of those involved in the relevant events (paragraph 42 of the judgment in the case of "Mykhalkova and others v. Ukraine" of 13 January 2011).

In April 2018, allowing for the above criteria of independence and impartiality of the investigation, the CCU declared unconstitutional the creation of the institution of investigators in the system of the Ministry of Justice of Ukraine, which subsequently led to the liquidation of the established pre-trial investigation bodies.

The issues of optimal options for organising the system of pre-trial investigation bodies and structuring the investigative apparatus of the State are inextricably linked to improving the concept of control and supervision, since today certain pre-trial investigation bodies (National Police and security agencies) are directly subordinated to the heads of territorial law enforcement bodies (heads of the General Directorate of the National Police, the Security Service of Ukraine), and their employees are actually "under the direction of" and dependent on the heads of these bodies. As a result, investigators and inquirers are distracted from investigating criminal offences by performing functions that are not typical for them (they are often involved in the protection of public safety, appointed as duty officers and responsible for the body, etc.)

The current system of subordination of pre-trial investigation bodies, which has been in place since Soviet times, cannot guarantee the independence and autonomy of investigators in the course of criminal investigations. Although the heads of the territorial bodies of the National Police and security agencies are

not entitled to interfere with the procedural activities in accordance with Ukrainian law and their functional responsibilities, they are entitled to appoint and dismiss investigators/inquiry officers, impose disciplinary sanctions on them, set the level of their remuneration, assign special ranks and determine the frequency of their leave, etc.

The subordination of investigators in the administrative aspect and the existing criteria for performance evaluation lead to the fact that heads of territorial law enforcement bodies, in order to improve statistical performance indicators, using their powers to organise the work of investigators, directly or indirectly try to influence the conduct of pre-trial investigations ("manage" the activities of investigators).

As a result, this provokes bias in the investigation, and mistakes made by operatives (sometimes direct falsifications) are not always detected. Cases of arbitrary apprehensions with clearly insufficient evidence have become widespread. Moreover, in accordance with departmental acts, the heads of territorial law enforcement bodies are responsible for ensuring the independence of the investigator in procedural activities and preventing interference in their activities by officials who are not authorised to do so by the legislation of Ukraine.

Therefore, the imperfection of the current structure of subordination of investigators not only violates the basic principle of pre-trial investigation bodies, procedural autonomy and independence, but also negatively affects the effectiveness of combating crime and cannot fully guarantee the protection of the rights and freedoms of citizens and the observance of the legality. This results in a low level of public trust in the investigative apparatus and critical assessments of its activities by international experts.

Nowadays, a qualitatively new approach to the organisation of the work of pre-trial investigation bodies is particularly relevant and necessary. The subordination structure should ensure real procedural independence of investigators. This will not only meet the purpose and spirit of the reforms but will also help to avoid a punitive bias in the investigation, mistakes and human rights violations.

There are different opinions in the scientific community regarding the organisational change of the "outdated" structure of subordination of investigators, in particular: 1) transfer of all investigative apparatus to the prosecutor's office or the National Police; 2) concentration of the actors of investigation in a single apparatus (committee, bureau) or through the establishment of the Personal Investigation Agency (PIA), the Ukrainian State Investigation Agency (UDAR), the National Bureau of Investigation (NBI); 3) establishment of an investigative apparatus in the judiciary or entrusting pre-trial investigation to the judiciary, etc. (Antonov, 2014; Shevchyshen, 2011; Farynnyk, 2010).

However, it should be objectively recognised that at the professional and personnel level, and even more so mentally, the implementation of these positions is practically unrealistic, as the state and society are not yet ready to introduce a different pre-trial investigation organisation than the one that is currently in place (Tatarov, 2010). A striking example of this is the hasty liquidation of the investigative apparatus of the Ministry of Justice of Ukraine.

It should be considered that the best system of pre-trial investigation bodies is the existing one, but it needs significant improvement and scientific development (Pohoretskyi, 2002).

It is also worth agreeing that given the considerable experience of investigative units in the National Police (until 2015, the Ministry of Internal Affairs), as well as the material, technical and organisational and legal basis for the SBI's activities created in recent years, the pre-trial investigation bodies of the relevant agencies should be the basis for reforming the investigative apparatus of the State, as they "bear the brunt" of the fight against crime. In addition, it is extremely risky to recklessly break the existing interaction between pre-trial investigation bodies and operational units, this will lead to uncontrolled processes, seriously weaken the fight against crime, and negate the positive experience gained in recent years of the existence of investigative units.

If an Investigative Committee is created under the Ministry of Internal Affairs or the National Police of Ukraine, the heads of investigative units will continue to be heads of structural units of the National Police and will not actually receive any additional powers (e.g., to appoint/dismiss investigators, etc.). The autonomy of the investigative apparatus within the structure of the MIA or the National Police will not be able to fully resolve the problem of procedural independence of the investigator. Operational and administrative intra-departmental interests will manifest themselves in one way or another and subjectively influence the investigation. The same applies to security agencies.

After all, an investigation is considered effective if the principle is observed: the persons conducting the investigation shall be independent hierarchically and institutionally from anyone (paragraph 260 of the judgment of the European Court of Human Rights in the case of "Karabet and Others v. Ukraine" of 17 January 2013).

That is why, in our opinion, it is necessary to completely remove the investigative units of the NP,

the SS of Ukraine and the BES from departmental subordination and separate them into a single investigative body created on the basis of the investigative units of the State Bureau of Investigation – the State Pre-trial Investigation Service (hereinafter referred to as the SPIS).

The status of this body should be defined as central executive bodies (hereinafter referred to as the CEB) in the form of a "service" (and not a "bureau", which from the perspective of constitutionality does not correspond to the legal status of the CEB). The Constitution of Ukraine does not provide for the existence of executive bodies with a special status in the state mechanism, which would perform relevant functions outside the system of executive bodies. Moreover, any law enforcement body should be created only by the CMU and be part of its CEB system, since the creation, reorganisation and liquidation of the CEB are within the scope of the CMU's powers, and the fight against crime is one of its functions.

Therefore, the SPIS should become a central executive body whose activities are directed and coordinated by the CMU. In addition, the CMU, upon the proposal of the SPIS Director, should determine the maximum number of the central office and territorial departments of the SPIS. The organisational structure of the SPIS should be approved by the Director of the SPIS in consent with the CMU.

The structure of the SPIS should include specialised units for investigating crimes in the field of state security (based on the SBU investigative apparatus), in the field of economic security (based on the BESU investigative apparatus, economic units of the National Police and the SBI), in the field of investigating "top corruption" (based on the NABU investigative apparatus, which should be terminated). Territorial units of the SPIS should be established in each oblast and the city of Kyiv (25 territorial departments of the SPIS in total) and district ones (136 district units of the SPIS).

On the one hand, it is necessary to preserve the interaction between investigative and operational units in the investigation of criminal offences that has been established over decades, and on the other hand, to overcome the departmental dependence of investigators on the heads of territorial law enforcement bodies that will in no way contradict the legislation of Ukraine (primarily the Law of Ukraine "On Central Executive Bodies"), which will fully apply to the activities of the relevant investigative apparatus.

4. Conclusions

Thus, the transformation of the pre-trial investigation bodies of Ukraine into the SPIS will fully ensure the idea of "vertical" subordination of investigative units. Moreover, the status of the person who directly performs the function of managing the pre-trial investigation, the head of the pre-trial investigation body, will be brought to the same level as the heads of territorial law enforcement bodies, which is again a prerequisite for effective management of the pre-trial investigation. This reorganisation of the system of pre-trial investigation bodies (with clear subordination and structure) is required today, due to the need to functionally separate them from the activities of territorial law enforcement bodies. Ultimately, this will significantly improve the quality and efficiency of the pre-trial investigation itself.

The establishment of a single pre-trial investigation body (SPIS) will eliminate competition (sometimes even "unhealthy" competition) between the currently disparate investigative apparatuses, eliminate conflicts in determining the investigative body, and put an end to the issue of inadmissibility of evidence due to violations of the rules of subject matter jurisdiction.

In addition, the experience of criminal justice reforms has shown that changes should be comprehensive, carried out in parallel and within a certain timeframe, allowing for all transitional and adaptive periods and goals to be achieved in prospect.

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Дмитро Мірковець,
доктор юридичних наук, доцент, професор кафедри криміналістики та судової медицини, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, DmytroMirkovets@ukr.net
ORCID: *orcid.org/0000-0003-2539-2824*

СИСТЕМА ОРГАНІВ ДОСУДОВОГО РОЗСЛІДУВАННЯ: КОНЦЕПЦІЯ ПОБУДОВИ ТА ВДОСКОНАЛЕННЯ

Анотація. ***Мета.*** Метою статті є визначення найбільш ефективної системи органів досудового розслідування, їх підпорядкування та структури. ***Результати.*** На сучасному етапі розвитку кримінальної юстиції залишаються актуальними питання дієвої та оптимальної національної моделі досудового розслідування, пошуку варіантів організації та інституційної побудови системи органів правопорядку, які відповідатимуть сучасним викликам, потребам практики й міжнародним стандартам. Досліджено питання оптимальної національної моделі досудового розслідування, варіантів організації та інституційної побудови системи органів правопорядку. Обґрунтовано необхідність «вертикального» підпорядкування органів досудового розслідування. Запропоновано шляхи реформування системи органів досудового розслідування. ***Висновки.*** Зроблено висновок, що завдяки трансформації органів досудового розслідування України в Державну службу досудових розслідувань повною мірою буде забезпечено ідею щодо «вертикального» підпорядкування слідчих підрозділів. При цьому статус особи, яка безпосередньо реалізує функцію керівництва досудовим слідством – керівника органу досудового розслідування, буде виведено на один рівень із керівниками територіальних правоохоронних органів, що знову-таки є необхідною умовою ефективного керівництва досудовим розслідуванням. Така реорганізація системи органів досудового розслідування (із чітким підпорядкуванням і структурою) на сьогодні вкрай потрібна, що зумовлено необхідністю функціонального відмежування їх від діяльності територіальних правоохоронних органів. У підсумку це дасть змогу суттєво підвищити якість та ефективність самого досудового розслідування. У разі створення єдиного органу досудового розслідування буде ліквідовано конкуренцію між розрізненими на сьогодні слідчими апаратами, усунуто конфліктні ситуації під час визначення органу розслідування та назавжди поставлено крапку в питанні визнання доказів недопустимими через порушення правил предметної підслідності. Своєю чергою досвід реформ у сфері кримінальної юстиції засвідчив, що зміни мають бути комплексними, проводитися паралельно та у визначені часові межі з урахуванням усіх перехідних та адаптивних періодів і цілей, які необхідно досягти в перспективі.

Ключові слова: досудове провадження, керівник органу досудового розслідування, реформування кримінальної юстиції, вертикальне підпорядкування, самостійність і незалежність слідчого.

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Stanislav Svyrydenko,
PhD in Law, Senior Lecturer at the Department of Criminal Procedure, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, svyrydenkostanislav@ukr.net
ORCID: *orcid.org/0009-0009-2542-8357*

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PARTICULARITIES OF APPLYING MEASURES TO ENSURE CRIMINAL PROCEEDINGS TO PERSONS ENJOYING IMMUNITY

Abstract. ***Purpose.*** The purpose of the article is to determine the particularities of applying measures to ensure criminal proceedings to persons enjoying immunity. ***Results.*** In the article, it is underlined that the current legal mechanism for applying measures to ensure criminal proceedings against persons enjoying immunity has a number of unresolved aspects which need to be regulated. In this area, it is an urgent issue to bring national legislation in line with the basic principles of criminal justice and the realities of today's society. The first steps of this course have already been taken, including the adoption of new laws on administration of justice, but they need to be harmonised with other legislation of Ukraine in terms of the issues raised. It is noted that the specifics of the grounds and procedure for applying measures to ensure criminal proceedings to persons enjoying immunity is that some of them (in particular, a summons, apprehension, imposition of a measure of restraint in the form of detention or house arrest) can be implemented only with the consent of the relevant competent authority. Moreover, it is necessary to allow for the purpose of measures to ensure criminal proceedings, which is to create the necessary conditions for an operative, prompt, complete and impartial investigation and trial on the merits. ***Conclusions.*** The specifics of the grounds and procedure for applying measures to ensure criminal proceedings to persons enjoying immunity is that some of them can be implemented only with the consent of the relevant competent authority. Moreover, it is necessary to allow for the purpose of measures to ensure criminal proceedings, which is to create the necessary conditions for an operative, prompt, complete and impartial investigation and trial on the merits. The application of measures to ensure criminal proceedings that restrict the rights and freedoms of a People's Deputy of Ukraine is allowed only if the Verkhovna Rada of Ukraine has given its consent to bring him/her to criminal liability.

Key words: criminal proceedings, provisional measures, persons enjoying immunity, particularities of application.

1. Introduction

The specifics of criminal proceedings and the importance of their tasks under Article 2 of the CPC of Ukraine necessitate the provision of appropriate measures to ensure their implementation. The list of such measures is enshrined in Article 131 of the CPC of Ukraine, which includes: summons by investigator, prosecutor, judicial summons and compelled appearance; imposition of a monetary penalty; temporary restriction on the exercise of a special right; removal from office; temporary suspension of a judge from administration of justice; temporary access to things and documents; temporary confiscation of property; seizure of property; detention of a person; measure of restraints (Criminal Procedure Code of Ukraine, 2012). When describing the essence and characteristic features of measures to ensure criminal proceedings, it is necessary to focus on their compulsory nature. In this regard, a number of questions arise regarding the application of provisional measures to persons enjoying immunity, since not all of these measures are related to criminal prosecution (which is the subject of immunity) and therefore are not subject to restrictions. Moreover, it is impossible to implement the provisions of law by analogy or logic, and the issue of applying measures to ensure criminal proceedings to persons enjoying immunity has not, unfortunately, been comprehensively studied. Therefore, there is an urgent need to define the particularities of criminal procedural coercion in the context of measures to ensure criminal proceedings and their application to persons enjoying immunity.

Some aspects of this issue were studied by L. D. Udalova and I. B. Babii (2010), but study was conducted, firstly, on the basis of the CPC of Ukraine of 1960 and the previous Law of Ukraine "On the Judicial System and Status of Judges" of 07 July 2010; secondly, the study was carried out only in the context of presidential, parliamentary and judicial immunity, but today these are not all persons enjoying immunity, in particular, the Ukrainian Parliament Commissioner for Human Rights and persons with diplomatic immunity were left out. The study by O.Yu. Tatarov is focused on the comparison of the mechanism of implementation of measures of criminal procedural coercion in other countries. The scientist notes that (with the exception of Mongolia, Hungary, and Ukraine) in cases of arrest of a Member of Parliament at the scene of a crime, the latter is automatically deprived of immunity without parliamentary sanction (in Finland, it is possible to arrest a parliamentarian and initiate criminal proceedings against him/her without parliamentary sanction if his/her act is classified as a crime punishable by imprisonment for a term of at least 6 months; in Sweden, 2 years; in Macedonia, Slovenia, Croatia, Yugoslavia, 5 years), and parliaments may only demand the dismissal of a Member of Parliament before the court passes a verdict, referring to his or her immunity (Tatarov, 2015, p. 206). In the context of the analysis of these legislative provisions, M.V. Cherkhavskyi and S.E. Ablamskyi note that the fullness of the pre-trial investigation, including the possibility of apprehension of a People's Deputy by law enforcement bodies, depends on obtaining the consent of the Verkhovna Rada to bring him to criminal liability; therefore, the current model of criminal procedural regulation of the aspect under study has a number of contradictions and shortcomings, which undoubtedly have a negative impact on the practical application of the CPC of Ukraine (Cherkhavskyi, Ablamskyi, 2018, pp. 248–250). V.I. Farynnyk argues that the liberty of a person should be restricted only when it is impossible to ensure the fulfilment of the tasks, namely for a prompt, complete and impartial pre-trial investigation of criminal offences, including those committed by persons enjoying immunity (Farynnyk, 2015, p. 86). Thus, this issue is of interest for scientific research.

The purpose of the article is to determine the particularities of applying measures to ensure criminal proceedings to persons enjoying immunity.

2. Categories of persons enjoying immunity in criminal proceedings

The specificity of the grounds and procedure for applying measures to ensure criminal proceedings to persons enjoying immunity is that some of them become possible only with the consent of the relevant competent authority. Therefore, there is a need to consider comprehensively the criminal procedure mechanism for applying measures to ensure criminal proceedings to persons enjoying immunity. The analysis of the current legislation reveals that the scope of the immunity of People's Deputy significantly complicates the process of applying a number of measure of restraints to them. This is clearly evidenced by the provisions of Article 27 of the Law of Ukraine "On the Status of People's Deputy of Ukraine" and Article 482 of the CPC of Ukraine (Law of Ukraine On the status of People's Deputy of Ukraine, 1992). In addition, in our opinion, this situation is explained, firstly, by the fact that the content of immunity is interpreted rather broadly in the above articles; secondly, by the prevailing understanding of measures to ensure criminal proceedings exclusively as a means of coercion. Taken together, these two circumstances turn parliamentary immunity into a privilege rather than an enhanced guarantee due to the specifics of professional activity. If one literally interprets the legislator's position on this issue, one may even come to the absurd conclusion that such a simple measure of ensuring criminal proceedings as a summons may be regarded as an attempt to restrict the rights and freedoms of a People's Deputy. But this is not the case, because the challenge does not restrict the rights and freedoms of a People's Deputy, so it should not be considered as such. As a witness, a People's Deputy is obliged to appear when summoned by an investigator, prosecutor, or court, and to duly fulfil other witness duties provided for by the CPC of Ukraine. At the same time, the People's Deputy's parliamentary immunity does not exempt him/her from fulfilling this obligation, since:

– first, maintaining the regime of law and order in the state and society, restoring persons' rights, freedoms and legitimate interests violated as a result of unlawful actions, as well as bringing perpetrators to justice is one of the state's top priorities. For the proper performance of this task, the competent actors of the law enforcement system of the State, among other things, should be able to interact (cooperate) with other participants in proceedings without hindrance, regardless of their procedural status. Obviously, work with witnesses is one of the manifestations of this interaction, and the specific legal status of a person should not be an obstacle to its implementation;

– second, the summons is not an urgent measure, so the witness has a certain time to implement it, which allows him/her to prop-

erly prepare for it, to plan his/her affairs in such a way as to fulfil this obligation without significant inconvenience to himself/herself. For example, in accordance with Article 135 of the CPC of Ukraine, a person shall receive a summons or be notified of it in another way no later than three days before the day on which he or she is obliged to appear. If the CPC establishes deadlines for procedural actions that do not allow for the summons to be made within the specified timeframe, the person shall receive the summons or be notified of it in another way as soon as possible, but in any case, with the necessary time to prepare and arrive at the summons (Criminal Procedure Code of Ukraine, 2012);

– third, the summons of a People's Deputy as a witness does not actually have a direct coercive nature. All these circumstances in practice allow a People's Deputy to evade appearing before law enforcement bodies without any significant consequences for themselves (Svyrydenko, 2016).

It should be noted that according to Article 139 of the CPC of Ukraine, if a suspect, accused, witness, victim, civil defendant, representative of a legal entity in respect thereof proceedings are being conducted, has been summoned in accordance with the procedure established by the CPC (in particular, there is a confirmation of receipt of the summons or familiarisation with its content in another way), fails to appear without valid reasons or fails to report the reasons for his/her non-appearance, a fine shall be imposed in the amount of: 0.25 to 0.5 of the subsistence minimum for able-bodied persons – in case of failure to appear at the call of the investigator, prosecutor (Criminal Procedure Code of Ukraine, 2012). The procedure for imposing a monetary penalty is set out in Articles 144-174 of the CPC of Ukraine, which stipulate that during the pre-trial investigation it shall be imposed by a ruling of the investigating judge at the request of the investigator or prosecutor, and during the court proceedings – by a court ruling at the request of the prosecutor or on his/her own initiative. The motion shall be considered no later than three days from the date of its receipt by the court. The officer who filed the motion and the person who may be subject to a pecuniary penalty shall be notified of the time and place of the motion's consideration, but their failure to appear shall not prevent the consideration of the matter. If during the consideration of the motion the investigating judge or court finds that the person has failed to fulfil the procedural obligation imposed on him/her without valid reasons, he/she shall impose a monetary penalty on him/her. A copy of the respective decision shall be sent to the person on whom the monetary penalty was imposed no later than the next business day after its issuance (Criminal Procedure Code of Ukraine, 2012). Therefore, the analysis of the above provisions of the CPC of Ukraine reveals that there are no restrictions on the possibility of imposing a monetary penalty on a People's Deputy, as well as on other persons enjoying immunity.

In practice, the issue of applying a compelled appearance to a People's Deputy is more complicated, as the CPC of Ukraine does not directly establish this. This again raises the question of the possibility of applying physical coercion to a People's Deputy if he or she refuses to voluntarily comply with the decision on a compelled appearance with respect to him or her. This is explained by the fact that the use of physical force against a People's Deputy may be regarded as an attempt to put pressure on him/her, especially if he/she is not deprived of immunity in accordance with the established procedure. In our opinion, in order to avoid practical misunderstandings regarding this issue, the CPC of Ukraine should include a provision according to which, until the Verkhovna Rada of Ukraine gives its consent to bring a People's Deputy to criminal liability, no measures of physical influence may be applied to him/her, including during the execution of the compelled appearance. If a People's Deputy refuses to voluntarily comply with the decision of the investigating judge or court on compelled appearance and proceed to the place of summons, the person executing such a decision shall record the relevant reasons for the refusal and return the decision to the court.

Therefore, we propose to supplement Article 140 of the CPC of Ukraine with an additional Part 5 as follows: *"5. The compelled appearance cannot be applied to a People's Deputy until the Verkhovna Rada of Ukraine gives its consent to bring him/her to criminal liability. If the People's Deputy refuses to voluntarily comply with the decision of the investigating judge or court on compelled appearance and proceed to the place of summons, the person executing such a decision shall record the relevant reasons for the refusal and return the decision to the court without its execution"*.

We consider that the focus should be on the fact that the investigating judge or court, when considering a motion to impose a monetary penalty or a compelled appearance on a People's Deputy, shall find out whether his or her absence is due to valid reasons. Moreover, relying on the provisions of the CPC, the investigating judge or court, in resolving these issues, should check not only the existence of valid reasons for non-appearance, but also find out whether the person had a real

opportunity to inform the pre-trial investigation body or the prosecutor of the objective impossibility of arrival. This, in particular, follows from Article 137 of the CPC of Ukraine, which provides that the summons shall contain a reminder of the obligation to notify in advance of the impossibility of appearing (Criminal Procedure Code of Ukraine, 2012). Therefore, we can conclude that if the investigating judge or court finds out that the People's Deputy failed to appear at the summons of the investigator or prosecutor, albeit for valid reasons, but fails to notify in advance, having a real opportunity to do so, he or she may be subject to a monetary penalty or a compelled appearance.

In addition to the above measures to ensure criminal proceedings, other measures to ensure criminal proceedings provided for by the CPC of Ukraine may be applied to a People's Deputy, but only after the VRU gives its consent to bring him/her to criminal liability. However, there is no special procedure for applying these measures to a People's Deputy at the legislative level, except for his or her apprehension, imposition of a measure of restraint in the form of detention or house arrest. The implementation of these measures requires the consent of the Parliament, regardless of whether the latter has agreed to bring the perpetrator to criminal liability.

It should be emphasised that the provisions of Article 482 of the CPC of Ukraine, unlike the requirements of Article 80 of the Constitution of Ukraine and Article 27 of the Law "On the Status of the People's Deputy of Ukraine", also require the consent of the Verkhovna Rada of Ukraine to impose a measure of restraint in the form of detention or house arrest on a People's Deputy. Obviously, this situation has arisen because in the previous CPC of Ukraine of 1960 the terms "arrest" and "detention" were used synonymously. However, the current CPC of Ukraine introduced a new measure of restraint associated with a significant restriction of the liberty of a suspect or accused – house arrest. At the same time, if we refer to Decision of the Constitutional Court of Ukraine No. 12-rp/2003 (case on guarantees of parliamentary immunity) of 26 June 2003, it explains that parliamentary immunity should be understood in such a way that a special procedure for bringing a deputy to criminal liability, his/her apprehension, arrest, as well as application of other measures related to restriction of his personal rights and freedoms is envisaged (Decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of 56 People's Deputies of Ukraine on the official interpretation of the provisions of the first and third parts of Article 80 of the Constitution of Ukraine, the first part of Article 26, the first, second and third parts of Article 27 of the Law of Ukraine "On the Status of the People's Deputy of Ukraine" and according to the constitutional submission of the Ministry of Internal Affairs of Ukraine on the official interpretation of the provisions of the third part of Article 80 of the Constitution of Ukraine regarding the detention of a people's deputy of Ukraine (case on guarantees of parliamentary immunity), 2003). However, neither this Decision nor the provisions of Article 80 of the Constitution of Ukraine contain a direct indication that house arrest is applied to People's Deputies with the consent of the Verkhovna Rada. In order to avoid such misunderstandings in practice regarding the above legislative discrepancy, it is advisable to amend part 3 of Article 80 of the Constitution of Ukraine and Article 27 of the Law of Ukraine "On the Status of the People's Deputy of Ukraine" to read as follows: *"The prosecution of a People's Deputy of Ukraine, his or her apprehension or arrest, or the imposition of a measure of restraint in the form of detention or house arrest may not be carried out without the consent of the Verkhovna Rada of Ukraine"*.

The procedure for the Parliament's consent to the apprehension, arrest or imposition of a measure of restraint in the form of detention or house arrest on a People's Deputy is the same as the procedure for consenting to the prosecution of a People's Deputy. However, this approach seems somewhat ambiguous. On the one hand, the need for the VRU's consent to detain a People's Deputy and to impose a measure of restraint in the form of detention or house arrest on him or her is even more logical and justified than consent to bring him or her to criminal prosecution. This is due to the fact that these measures, firstly, are of the most severe and extreme nature; secondly, they restrict one of the fundamental human rights and freedoms – the right to liberty and security of person; thirdly, they impede the proper performance of the People's Deputy's professional duties and, most importantly, his/her duties to the voters. On the other hand, the procedure for granting consent to these measures is too lengthy, which, of course, does not allow for their timely application, which, in turn, may negatively affect their effectiveness and efficiency. An additional argument for the need to promptly resolve the issue is the requirements of Article 186 of the CPC of Ukraine, which stipulates that a motion to apply or change a measure of restraint shall be considered by the investigating judge or court without delay, but no later than seventy-two hours after the suspect, accused has actually been apprehended, or from the moment of receipt of the petition by the court, if the sus-

pect, accused is at large, or from the moment the suspect, accused, his/her defence counsel files the relevant petition with the court (Criminal Procedure Code of Ukraine, 2012).

According to the legislation in force, when considering the Prosecutor General's motion to consent to the apprehension, arrest or detention of a People's Deputy, the Verkhovna Rada of Ukraine also checks the motivation and clarity of the justification of this motion, ascertains whether it contains specific facts and evidence confirming the need for a measure of restraint. This raises the question of the significance of the VRU's conclusions for the investigating judge and the court when considering a motion to impose a measure of restraint on a People's Deputy. In general, given the principles guiding justice in Ukraine, including impartiality, it can be noted that the VRU's conclusion on granting permission to apply a measure of restraint to a People's Deputy is not binding on the investigating judge or court that will subsequently consider a motion to apply a measure to ensure criminal proceedings or conduct a procedural action.

3. Problematic issues of applying measures to ensure criminal proceedings to persons enjoying immunity

The issue of apprehension of a People's Deputy without a ruling of an investigating judge or court is problematic. In general, we agree that the apprehension of a People's Deputy should be subject to a special procedure, as this measure, although temporary, is quite severe, which is frequently emphasised by researchers. According to L. D. Udalov, apprehension is a severe restriction of human liberty in criminal proceedings, which is essentially similar to criminal punishment in the form of deprivation of liberty since a person in custody is subject to restrictions on his or her rights and freedoms provided for by the Constitution of Ukraine. First and foremost, this is about restricting the inviolability of the person (Udalova, Babii, 2010, p. 142). Instead, it should not be forgotten that one of the main tasks of law enforcement bodies is to prevent, deter criminal activity, prevent and/or eliminate its negative consequences, and ensure that all perpetrators are prosecuted. Therefore, apprehension can rightly be considered one of the key tools at the disposal of law enforcement bodies. Therefore, in the event of a criminal offence, apprehension is an effective and efficient means of creating the necessary conditions for determining the involvement of a person in the commission of a crime and deciding on a measure of restraint for the detainee. That is why, as scientists quite appropriately note, timely apprehension of a person suspected of committing a crime makes it impossible for him or her to evade pre-trial investigation bodies, as well as to obstruct the establishment of the truth in the case, and to continue criminal activity (Rozhnova, 2005, p. 141; Udalova, Babii, 2010, pp. 141–142). In accordance with the provisions of part 1 of Article 177 of the CPC of Ukraine, apprehension of a person is aimed at preventing attempts to hide from the pre-trial investigation and/or court; destroy, conceal or distort any of the things or documents that are essential for establishing the circumstances of a criminal offence; exert unlawful influence on a victim, witness, other suspect, accused, expert, or specialist in the same criminal proceedings; to obstruct criminal proceedings in any other way; to commit another criminal offence or to continue the criminal offence of which the person is suspected or accused Moreover, V. I. Farynnyk emphasises that criminal procedure legislation does not contain a clear definition of the purposes of apprehension (Farynnyk, 2015, p. 86). Instead, we believe that in this case, the purpose and objective of detention of a person coincide, despite the actor of its application. According to the CPC of Ukraine, Article 178, part 2, the grounds for applying a measure of restraint are the existence of a reasonable suspicion that a person has committed a criminal offence, as well as the existence of risks that give sufficient grounds for the investigating judge or court to believe that the suspect, accused or convicted person may commit the actions provided for in part one of this article. The investigator and the prosecutor have no right to initiate the application of a measure of restraint without grounds provided for by the CPC. Moreover, the legislative approach to providing for reasonable suspicion as a ground for applying a measure of restraint does not seem logical enough. We believe that the recognition of a reasonable suspicion that a person has committed a criminal offence as a ground for applying a measure of restraint is not quite correct. In this case, it is a necessary condition, not a ground. Relying on the analysis of the current legislation of Ukraine, we conclude that the apprehension of a People's Deputy is possible only with the consent of the Verkhovna Rada of Ukraine. That is, if we characterise this aspect from the procedural perspective, the consent of the Verkhovna Rada of Ukraine is a necessary condition for the apprehension of a People's Deputy (Farynnyk, 2015, p. 130). However, we believe that, on the one hand, making it impossible to detain a People's Deputy at the scene of a crime or immediately after it has been committed does not meet either the objectives of criminal proceedings or the principles of equality of all before the law and the court and the inevitability of legal liability for unlawful acts. On the other hand, the general provisions on the application of measure of restraints do not provide for such consent, and only a special provision (CPC of Ukraine, Article 482, part 3) requires that such consent be

obtained from the Verkhovna Rada. In this regard, we conclude that the current legislative approach to the procedure for apprehension of a People's Deputy has a negative impact on the quality of pre-trial investigation, in particular on the preservation of evidence of a crime. Therefore, we believe that the CPC of Ukraine, Article 482, part 3, should be supplemented with the following provision:

"A People's Deputy detained on suspicion of committing an act subject to criminal liability shall be immediately released after his or her identity is established, except for the following:

1) if the Verkhovna Rada of Ukraine has given consent to his or her apprehension;

2) apprehension of a People's Deputy during or immediately after the commission of a grave or exceptionally grave crime, if such apprehension is necessary to prevent the commission of a crime, to prevent or avert the consequences of a crime or to ensure the preservation of evidence of such crime. The People's Deputy shall be released immediately if the purpose of such apprehension (prevention of a crime, prevention or averting of the consequences of a crime or ensuring the preservation of evidence of such crime) is achieved".

In our opinion, this approach cannot be considered an encroachment on the inviolability of a People's Deputy, since the mere fact of apprehension does not oblige the latter to be notified of suspicion in accordance with Article 276 of the CPC, as this requires the consent of the Verkhovna Rada. Such apprehension is primarily aimed at providing a better evidence base, and therefore will increase the level of validity and motivation of the motion to bring the latter to criminal prosecution.

4. Conclusions

The specifics of the grounds and procedure for applying measures to ensure criminal proceedings to persons enjoying immunity is that some of them (in particular, a summons, apprehension, imposition of a measure of restraint in the form of detention or house arrest) can be implemented only with the consent of the relevant competent authority. Moreover, it is necessary to allow for the purpose of measures to ensure criminal proceedings, which is to create the necessary conditions for an operative, prompt, complete and impartial investigation and trial on the merits. The application of measures to ensure criminal proceedings that restrict the rights and freedoms of a People's Deputy of Ukraine is allowed only if the Verkhovna Rada of Ukraine has given its consent to bring him/her to criminal liability.

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Станіслав Свириденко,
кандидат юридичних наук, старший викладач кафедри кримінального процесу, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, svyrydenkostanislav@ukr.net
ORCID: *orcid.org/0009-0009-2542-8357*

ОСОБЛИВОСТІ ЗАСТОСУВАННЯ ЗАХОДІВ ЗАБЕЗПЕЧЕННЯ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ ДО ОСІБ, ЯКІ КОРИСТУЮТЬСЯ НЕДОТОРКАННІСТЮ

Анотація. ***Мета.*** Метою статті є визначення особливостей застосування заходів забезпечення кримінального провадження до осіб, які користуються недоторканністю. ***Результати.*** У роботі зазначено, що наявний на сьогодні правовий механізм застосування заходів забезпечення кримінального провадження стосовно осіб, які користуються недоторканністю, має низку неврегульованих аспектів, які потребують свого унормування. У цьому напрямі нагальним питанням є приведення національного законодавства у відповідність до основних засад здійснення кримінального судочинства, а також реалій сьогоденного життя суспільства. Перші кроки в окресленому напрямі вже здійснено, зокрема прийнято нові закони щодо здійснення правосуддя, при цьому вони потребують узгодження з іншим законодавством України щодо порушених питань. Зазначено, що специфіка підстав і порядку застосування заходів забезпечення кримінального провадження до осіб, які користуються недоторканністю, полягає в тому, що деякі з них (зокрема, привід, затримання, обрання запобіжного заходу у вигляді тримання під вартою чи домашнього арешту) можуть бути реалізовані лише в разі отримання згоди відповідного компетентного органу. При цьому варто враховувати мету заходів забезпечення кримінального провадження, якою є створення необхідних умов для проведення оперативного, максимально швидкого, повного й неупередженого розслідування та судового розгляду справи по суті. ***Висновки.*** Специфіка підстав і порядку застосування заходів забезпечення кримінального провадження до осіб, які користуються недоторканністю, полягає в тому, що деякі з них можуть бути реалізовані лише в разі отримання згоди відповідного компетентного органу. При цьому потрібно враховувати мету заходів забезпечення кримінального провадження, якою є створення необхідних умов для проведення оперативного, максимально швидкого, повного та неупередженого розслідування й судового розгляду справи по суті. Зокрема, застосування до народного депутата України заходів забезпечення кримінального провадження, які обмежують його права та свободи, допускаються лише в разі, якщо Верховною Радою України надано згоду на притягнення його до кримінальної відповідальності.

Ключові слова: кримінальне провадження, заходи забезпечення, особи, які користуються недоторканністю, особливості застосування.

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Iryna Soroka,
PhD in Law, Lecturer at the Department of Criminalistics and Forensic Medicine, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, sorokairyna@ukr.net
ORCID: *orcid.org/0000-0003-1536-6745*

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ORGANISATION AND TACTICS OF INVESTIGATIVE EXPERIMENT ON FACTS OF JUVENILE THEFT

Abstract. ***Purpose.*** The purpose of the article is to characterise the particularities of organisation and tactics of an investigative experiment on the facts of theft committed by juveniles. ***Results.*** In the context of Ukraine's integration into the European Community and the deterioration of the socio-economic situation, there has been a significant decline in living standards and social protection of the population and a rise in unemployment, which affects the state of affairs in the crime situation in the country. Nowadays, crime has reached its highest level in the history of the independent state. The Constitution of Ukraine enshrines the inviolability of private property rights and the inviolability of housing from any unlawful encroachment. In view of this, ensuring the protection of private property and its defence against criminal encroachments is one of the priority tasks of law enforcement bodies. However, the high level of criminalisation of the population of Ukraine, the lack of qualified personnel in law enforcement bodies, the destruction of the crime prevention system, and the poor quality of crime detection and investigation have enabled a significant increase in the number of property thefts, especially those committed by juveniles, which are becoming increasingly dangerous. The article emphasises the particularities of conducting an investigative experiment on the facts of property theft committed by juveniles. The author emphasises that in order to ensure the reliability of the conclusions obtained during research activities, it is necessary that the conditions under which the investigative experiment is conducted are as close as possible to those in which the event under investigation took place. In addition, it is necessary to ensure that the experimental actions, which sometimes need to be performed many times and with appropriate variations, are reconstructed in a complete and accurate manner. ***Conclusions***. The author concludes that an investigator should be critical of the results of an investigation in general and in particular. Despite the fact that in the organisational and tactical aspect this procedural action is quite complex, it is indispensable with any other investigative (search) action. In addition to the records, it is advisable to record the proceedings with the help of photos and video. Each procedural action should be carried out at a high level. This will ensure the collection of as much evidence as necessary for impossibility to question the involvement of the relevant persons in the crime.

Key words: theft, juvenile, organisation, tactics, investigative experiment.

1. Introduction

An investigative experiment is of no less importance for establishing the circumstances of the incident at the subsequent phase of the investigation of property thefts committed by juveniles. Determining the moment of its conduct, along with other investigative (search) actions, can significantly affect the results of establishing all the circumstances of criminal proceedings. Despite the fact that this procedural action has been under focus by forensic scientists, some of its features in cases of property theft committed by juveniles require additional attention. Frequently, it is difficult and sometimes impossible to establish the circumstances of a criminal offence without conducting an investigative experiment.

On the other hand, the number of investigative experiments conducted on crimes under study is, in our opinion, insufficient. For example, the study of forensic practice reveals that the investigative experiment is conducted to establish: 1) the sequence of development of a certain event and the mechanism of the crime or its individual elements (57 %); 2) the ability to perform an action in certain conditions – to penetrate a small opening, climb over a fence (37%); 3) the ability to observe or perceive a fact or phenomenon in the appropriate lighting conditions from a certain distance, to hear sounds (27%); 4) the presence or absence of relevant professional skills and abilities of a particular person may be checked to verify the ability of a juvenile to open or break

locking devices – 3%; 5) the ability to perform certain actions within a certain time – 3%.

An investigative experiment is also worthy of attention, as it is conducted by recreating the actions, environment, and circumstances of a particular event. Forensic practice determines its conduct in 16 % of cases out of the total number of investigative experiments conducted by investigators. We believe that this procedural action should be used by investigators on a wider scale, which will ensure that the evidence necessary to establish the circumstances of a criminal offence is obtained. In our opinion, the abandonment of the investigative experiment is due, among other things, to the fact that investigators experience difficulties in the organisational and tactical aspects of its conduct with the participation of persons under the age of majority. Therefore, we consider it appropriate to highlight the particularities of conducting an investigative experiment on the facts of property theft committed by juveniles.

Theoretical and practical issues related to the investigation of theft crimes committed by juveniles have been addressed by well-known domestic and foreign scholars in various fields, in particular: L.P. Bakanova, V.D. Bernaz, P.D. Bilenchuk, V.V. Biriukov, A.F. Volobuiev, O.Yu. Drozd, O.A. Kyrychenko, A.A. Kravchenko, O.V. Kravchuk, M.N. Kurko, Ye.I. Makarenko, Z.I. Mytrokhyna, H.Ye. Morozov, N.I. Nykolaichyk, S.O. Pavlenko, S.Ye. Petrov, B.V. Romaniuk, V.H. Sevruk, P.N. Sydoryk, S.M. Stakhivskyi, Yu.D. Fedorov, Yu.V. Tsyhaniuk, M.H. Shcherbakovskyi, A.I. Yuryn, and others.

The purpose of the article is to characterise the particularities of organisation and tactics of an investigative experiment on the facts of theft committed by juveniles.

2. Investigations into thefts

In order to verify and clarify information relevant to establishing the circumstances of a criminal offence, the investigator or prosecutor shall conduct an investigative experiment by reconstructing the actions, situation, circumstances of a particular event, conducting necessary experiments or tests.

While the criminal procedure legislation defines this investigative (search) action as an investigative experiment, the forensic literature distinguishes two forms of it: an investigative experiment, and verification and clarification of testimony on the spot. This requires to distinguish between their tactical features in the investigation of thefts of other people's property committed by juveniles.

During an investigation into property thefts committed by juveniles, the investigator shall conduct a comprehensive examination of all possible evidence in order to confirm or refute the involvement of the person. In many cases, objective verification and assessment of the evidence obtained is possible only during an investigative experiment, which allows the investigator to legally verify the reliability of the information obtained during the investigation, the correctness of his or her hypotheses and conclusions, as well as to recreate the picture of the event in its entirety, allowing for the interrelationships, various details and features. The success of this procedural action largely depends on how well the investigator plans the experimental actions. In addition, when investigating thefts of other people's property committed by juveniles, investigators do not fully use the possibilities of an investigative experiment, and in the course of its conduct, mistakes are often made that do not allow the results to be used in court.

As with any investigative (search) action, the procedural action in question is preceded by preparation. Preparation for the investigative experiment in criminal proceedings on the facts of property theft committed by juveniles is a comprehensive study of the materials, outlining the range of persons to be involved, and clarifying the circumstances that need to be established in the course of the investigative (search) action. Moreover, the investigator decides what additional items (dummy, model, etc.) should be used during the investigative experiment.

Recently, the forensic literature has identified eight organisational issues that need to be addressed during preparation: 1) detailed questioning of all circumstances related to the place of interest; 2) determination of the most favourable time for the investigative action; 3) preparation of the investigative team; 4) preliminary familiarisation with the place; 5) if necessary, measures taken to ensure the safety of participants and additional security of the person whose testimony is being verified; 6) preparation of transport and technical means; 7) preparation and testing of the means of communication between the investigator and the district department (office) of the MIA; 8) a plan of investigative (search) action (Karahodin, Nikitina, Zashliapin, 2003, p. 33).

In addition, it should be considered that a delay in conducting an investigative experiment may lead to a loss of psychological contact with the suspect, who has already been interrogated and whose testimony will be verified.

This, in turn, will complicate the conduct of the investigative experiment and negatively affect the achievement of positive results.

In our opinion, the participants in these procedural actions should be considered. Undoubtedly,

the main figure who directly conducts the investigative experiment is the investigator. In practice, prosecutors do not exercise their right to conduct procedural actions, including investigative experiments.

It should be noted that investigators do not entrust the conduct of the investigative experiment to employees of other units. The study of forensic practice does not reveal any case of an investigative experiment conducted by officers of operational units. The explanation for this may be that this procedural action is complex in organisational and tactical aspects and requires appropriate expertise and knowledge, and its results may be of importance to the investigation. The latter can be both negative and positive. Aware of the negative results that may be obtained with a high probability during the conduct of this investigative (search) action by employees of operational units, investigators refuse to order its conduct.

In accordance with the current criminal procedure legislation of Ukraine, the investigator is the leader and organiser of the investigative experiment (Honcharenko, Nora, Shumylo, 2012). It is the investigator who checks various versions in order to establish the factual data obtained as a result of interrogation of a suspect, witness, victim, and other investigative (search) actions.

In order to conduct a comprehensive investigative experiment, the investigator is authorised to invite a specialist who will help the investigator study in more detail the specific phenomena, signs and condition of various objects.

Providing explanations and consultations, a specialist should not go beyond his/her competence, substitute an expert and not establish new facts of evidentiary value in criminal proceedings.

On behalf of the investigator or prosecutor, a specialist may take measurements, photographs, sound or video recordings, draw up plans and diagrams, make graphic images of a place or individual things, make prints and casts, inspect and seize things and documents relevant to criminal proceedings. A specialist involved in an investigative action has the right to make statements that are to be entered into the records of this investigative action (Honcharenko, Nora, Shumylo, 2012).

In order to ensure the reliability of the conclusions obtained during research activities, it is necessary that the conditions under which the investigative experiment is conducted are as close as possible to those in which the event under investigation took place. In addition, it is necessary to ensure that the experimental actions, which sometimes need to be performed many times and with appropriate variations, are reconstructed in a complete and accurate manner.

The person with whom the experiment is conducted is given the opportunity to accompany his or her testimony with a demonstration of certain actions, skills, indicate the location of caches, traces, certain signs or marks that help orientation, etc.

In order to clarify certain important details, fill in gaps, and eliminate contradictions after a free narrative and demonstration, the investigator has the right to ask the person giving evidence about the circumstances of a particular event. Leading questions are not allowed (Belkin, 1997, p. 36).

During investigative actions, it is advisable to use the same instruments, mechanisms, devices and materials that were used in the commission of crimes. It is inappropriate to use objects that are material evidence in the proceedings during experimental actions, due to the possibility of their destruction or damage. If it is not possible to use these objects in the experiment, the investigator may use analogue objects or full-scale models. This may in some way affect the psychological positions of the offenders and cause them to experience feelings similar to those they experienced during the commission of the offences, which may contribute to a sincere confession.

Directly at the place of the investigative (search) action, the investigator or prosecutor must explain to its participants the purpose and procedure for performing experimental actions, explain the rights and duties of each person present; ask the person, whose testimony will be checked, or the suspect, whether they agree to participate in the investigative action; explain their constitutional right not to testify against themselves and their close relatives (Article 63 of the Constitution of Ukraine, Article 18 of the CPC of Ukraine). Witnesses and victims who have reached the age of criminal responsibility are warned of criminal liability for giving false testimony, and the witness is also warned of criminal liability for refusing to testify (Honcharenko, Nora, Shumylo, 2012).

This can be greatly facilitated by the involvement of persons such as psychologists or teachers in the investigative experiment.

Forensic practice shows that specialists were involved in the conduct of the investigative experiment in 31% of cases. At the same time, psychologists were involved in 64% of cases and teachers in 36% of cases during procedural actions involving juveniles.

However, a suspect's consent to participate in an investigative experiment should also be viewed critically. This is especially true when the suspect is in custody and expects to escape, influence accomplices, or destroy possible traces during the investigative (search) action. There are cases when sus-

pects request that an investigative experiment be conducted with their participation. In each case, it is advisable for the investigator to try to answer why the person voluntarily agreed to participate in the investigative experiment. It is possible that the person who is subject to the investigative experiment may later take the position of an unfair participant.

The investigator should not hope that the investigation is conducted with a juvenile who confesses to the offence and no problems can arise.

Frequently, this is the main mistake of investigators who, being in favourable conditions, are slow to conduct investigations. The lack of critical attitude to the evidence and other materials of the proceedings does not contribute to the comprehensiveness of the latter. As a result, the investigation becomes a formality. If a juvenile denies involvement in a criminal offence, the criminal proceedings "fall apart like a house of cards" because the suspicion is based on the testimony of this person, and there is neither additional evidence nor sufficient evidence to convict.

The pattern we have given is quite common in legal practice. For example, during the pretrial investigation, a juvenile confesses, which leads to the investigator's vigilance being lulled and sloppy investigation. In court, the defence claims that law enforcement officers used coercive measures to obtain confessions. As a result, judges decide to return the criminal proceedings for additional investigation. As no traces of witnesses can be found over time, it becomes impossible to prove the guilt of the offenders. As a result, juvenile offenders avoid responsibility and continue to commit more serious and brazen criminal offences.

Therefore, we believe that every procedural action in general and the investigative experiment in particular should be conducted at a high level. This will ensure the collection of as much evidence as necessary for impossibility to question the involvement of the relevant persons in the crime.

The investigative (search) action in question must be carried out qualitatively, finding out all the circumstances of the actions taken, carefully recording the progress and results.

Another category of participants in an investigative experiment, attesting witnesses, should be considered. Unlike other investigative (search) actions, during which the number of witnesses usually does not exceed two, during investigative experiments the number of witnesses may vary. In general, the number of attesting witnesses during an investigative experiment depends on the number of places where the event that is the subject matter of the investigative experiment must be perceived simultaneously. If the possibility of hearing a gunshot by people in four different locations is being tested, then there should be at least four attesting witnesses (Belkin, 1997, p. 37).

The focus should be on determining the circle of attesting witnesses during an investigative experiment with juveniles in multi-episode criminal proceedings.

For example, the investigator can involve witnesses who will participate in several investigative experiments consecutively or involve attesting witnesses for each experiment separately.

Each of these methods has both advantages and disadvantages. For example, if the same attesting witnesses are involved in all episodes, the investigator runs too much risk. This is due to a number of reasons: attesting witnesses may leave the locality, the state, or be influenced by parties concerned. As a result, it will be impossible to interrogate the attesting witness on the fact of his/her participation in the investigative experiment.

It should be noted that we are considering a situation where an investigative action is carried out with one person. That is, for each participant with whom an investigative experiment is conducted, different attesting witnesses are involved.

Attesting witnesses, by their procedural status, are specific witnesses to the actions of the investigator (prosecutor) aimed at identifying or verifying evidence. Attesting witnesses testify to the objectivity of the content of investigative acts, compliance with the content of the law, and the sequence of procedural actions taken by the investigator. If necessary, the testimony of attesting witnesses may serve as a source of information about facts related to the investigator's activities in criminal proceedings.

Eyewitnesses and victims may participate in the investigative experiment. Their role is to help the investigator (prosecutor) correctly reconstruct the situation of the event they witnessed and provide the necessary explanations about the course of the event. In cases where an investigative experiment is conducted to verify the testimony of witnesses, they may personally demonstrate certain actions, i.e. directly participate in the experiments. However, it would be wrong to categorically require the participation in the experiment of a witness or other person whose testimony is being verified experimentally. Not to mention that this requirement does not stand up to criticism from a procedural perspective. It should be noted that in some cases, the participation of these persons can only distort the results of the experiment.

Witnesses involved in an investigative experiment can be divided into witnesses to the fact under investigation and witnesses to the investigator's actions, that is, persons who performed the duties of attesting witnesses during other investigative actions (usually examination). The latter are involved in the experiment when it is to be conducted in an environment as similar as possible to the scene of the event in which the attesting witnesses were involved.

Furthermore, the experiment can be conducted in the absence of the person whose testimony is being verified, and in some cases it is not necessary to conduct it at the same place where the event under investigation took place (Saltevskyi, 2001, p. 225). For example, if the ability of the juvenile to open the door lock of the car from which he or she committed the theft is checked, it does not matter whether the vehicle is located near the police station or at the scene of the criminal offence.

Sometimes it is difficult for investigators to determine when an investigative experiment can be conducted without the participation of a juvenile offender. For example, if the investigative experiment is not related to the testimony of the suspect, the latter is usually not involved in this investigative action (Ruban, 2009, p. 80).

Participation in an investigative experiment cannot be compulsory for a suspect. The investigator may not force the suspect to perform certain actions in the course of the investigative experiment against his or her will. Moreover, an accused or suspect who denies committing a particular act cannot be forced to perform that act during the experiment (Chernenko, 2004, p. 105).

The defence counsel may also participate in the investigative experiment. It is known that the defence counsel shall use all remedies and methods of defence specified in the law in order to clarify the circumstances that acquit the accused or mitigate his/her responsibility, and to provide the accused with the necessary legal assistance (Article 46 of the CPC of Ukraine). One of such remedies is the participation of a defence counsel in certain investigative actions, including investigative experiments (Belkin, 1997, p. 36).

The following types can be distinguished: to determine the possibility of observation, perception of a fact or phenomenon; to determine the possibility of performing a specific action; to determine the possibility of the existence of a phenomenon; to determine the details of the mechanism of the event and to determine the process of formation of traces of crime (Belkin, 1964, p. 223).

Along with checking the possibility of the thief committing any actions, the investigator's versions of the possibility of perceiving a fact or phenomenon with the help of human senses under certain conditions can often be checked and evaluated (for example, whether an eyewitness to the theft, who has recognised the thief, to see and remember his facial features, taking into account a certain distance or degree of illumination, etc.) (Makarenko, 2010, p. 35).

If the essence of the investigative experiment is to obtain factual data by experimental means, the prerequisites for its conduct are: a) the need to obtain relevant factual data; b) the availability of data that such data will be obtained by experimental means; c) the impossibility of obtaining them by other investigative actions; d) the possibility of reconstructing the conditions in which the real event took place (Kotiuk, 2013).

For tactical reasons, the following rules should be followed to ensure the objectivity of the results of the experiment: 1) Conditions and environment should be as close as possible to those in which the event occurred (at the same place and time, in the same environment, using the same or similar tools and means used in the commission of the crime), which ensures the objectivity of its results; 2) The conditions that cannot be reconstructed should be taken into account; 3) The participants in the investigative experiment should be determined, taking into account which persons' participation in this investigative (search) action is mandatory; 4) The number of attesting witnesses should be involved depending on the conditions of the experiment; 5) The participants should be arranged exactly as they reported it; 6) Experiments should be repeated several times, changing their conditions (simplifying or complicating them) in order to exclude the possibility of an accidental result; 7) Experimental actions should be carried out in phases, which facilitates the perception of the experiment in all its details, facilitates the evaluation of both the experiments and the results achieved, and contributes to the accurate and complete recording of its course and results (Panov, Shepitko, Konovalov, 2003).

The investigator shall take the following organisational measures at the site of experimental actions:

– preliminarily inspect the place of investigative actions, establish the changes that occurred before the investigative action, organise the protection of the place of the investigative experiment and ensure the safety of its participants;

– record the environment in which the experimental tests will take place;

– remove all unauthorised persons who are not directly related to the experiment from the scene of investigation;

– check the compliance (similarity) of the conditions of the investigative experiment with those in which the event to be checked took place;

– if necessary, carry out a new reconstruction of the situation;

– explain to all participants of the investigative experiment their rights and duties;

– hold an instructional meeting among all participants of the investigative (search) action (in particular, to explain the purpose and content of the examination, the procedure for experimental actions, the responsibilities of the participants, to warn about the inadmissibility of disclosing the data of the investigative experiment, etc.);

– determine the means of recording the investigative action and the methods of communication between the participants of the investigative experiment;

– determine the procedure for the experiment.

After all the necessary organisational and preparatory measures, the investigator invites all participants in the investigative action to take designated places and, in accordance with the tasks, type and content of the tests, proceeds to the working stage of the investigative experiment (Konovalova, 2008).

If necessary to establish the content of a certain fact or circumstance or the process of their origin, for example, how a certain event or its traces appeared, the results of such an experiment can be either probable or possible. Moreover, if the experimental actions have established the only possible variant of the development of the event, then such an outcome is probable, and if the results of the experiment give grounds for concluding that the content of the circumstance or the process of its occurrence could have had different variants, then such an outcome is only possible (Panov, Shepitko, Konovalov, 2003).

According to K.O. Chaplynskyi, experimental actions with the participation of several criminals at the same time is unacceptable, as it entails the possibility of coordination between them of their positions and actions. In addition, the explanations of one participant in the experiment will be indicative in respect of others (Chaplynskyi, 2010). It should be noted that persons under the age of majority are prone to the suggestibility. Therefore, one juvenile with stronger moral, volitional and physical traits can influence others with weaker ones. This, in turn, will inevitably lead to mistakes and the impossibility of establishing the circumstances and role of each participant in the criminal offence.

R.S. Belkin proposes to use as a tactic a combination of an investigative experiment with the study of the environment or objects mentioned in the testimony, as well as traces indicating the person's presence in this place (Belkin, 1966, p. 200).

The tactic of combining a story and showing the situation by the person whose testimony is being verified is based on the regularity of the psychological impact of the situation on this person, who is repeatedly at the scene of the event, which contributes to the recollection of the forgotten. We advocate V.O. Konovalova that such clarification helps the investigator to form a more accurate and complete picture of the event that took place (Konovalova, 1978, p. 19).

Since the investigative experiment examines the material situation at the scene, this procedural action should include tactics designed to work with material sources of evidence. Referring to the term "tactic", V.Y. Shepytko considered it as a method of procedural action aimed at achieving a specific goal, based on the psychological mechanism of implementation, which is the most rational and effective in the relevant situations (Shepytko, 2001, p. 107).

In our opinion, during this investigative (search) action, in accordance with its purpose, certain tactics of examining the scene may be used. In particular, during the verification of testimony on the spot, the tactic of examining the scene - the analysis of individual traces (objects) - can be used.

Therefore, the investigative experiment is a specific investigative (search) action, during which both material sources of information and ideal traces (traces of human memory) interacts. Accordingly, during an investigative experiment, tactics are used to work with both material sources of information and a person. Therefore, the investigative experiment is characterised by a variety of tactics used during its conduct and has a rather large evidentiary value in court proceedings, which, unfortunately, is not always used by pre-trial investigation authorities in a timely manner.

The timing of an investigative experiment is determined by a number of factors. By conducting an investigative experiment prematurely, the investigator can expose the available evidence to the criminals. If the investigator is late in choosing the right time, he or she will not receive the necessary information. This will affect the ability of juvenile offenders, including with the help of defence attorneys, to develop a line of defence, form an alibi, or leave their place of residence. The above fully applies to juveniles who are sent by their parents to other regions of our country or to relatives abroad. Given the current relations between our countries, criminals expect to avoid extradition.

The next circumstance that the investigator should consider is whether all participants in the criminal offence have been identified and their positions taken. For example, if all participants in the criminal offence have not been identified, the investigator should be careful about the possibility of exposing a person who cooperates with the investigation. This can lead to pressure on a bona fide participant and his/her refusal to cooperate with law enforcement bodies. The time of the investigative experiment should be chosen in this way that none of the accomplices can see the juvenile with whom the procedural action is being carried out.

The above circumstances should be observed by investigators during an investigative experiment in the investigation of property thefts committed by juveniles.

3. Reconstruction of actions, environment, circumstances of a particular event

Another form of conducting an investigative experiment, namely by reconstructing the actions, environment, and circumstances of a particular event, is also noteworthy.

The actions, environment, and circumstances of a particular event are reconstructed with the person who directly perceived the event. The actor reveals an imaginary method by demonstrating (showing) it on real objects of the material environment in the same place. In an investigative experiment, on the contrary, examination actions constitute its essence and serve as a method of obtaining and verifying information.

Investigative (search) actions in cases being analysed are extremely important, as they are carried out with witnesses if the crime scene (for example, identification of the area) should be established, weapons, clothing and other items abandoned by criminals after committing a crime should be identified; and with victims, if the picture of the crime should be fully reconstructed (Hlyncov, 1971).

According to K.O. Chaplynskyi, verification of testimony on the spot is an investigative action that consists in comparing testimony about the circumstances of a crime related to a certain place with the actual situation at that place, shown to the investigator in the presence of attesting witnesses by the person who gave the testimony, in order to establish their reliability (Chaplynskyi, 2010).

This classification should be considered in the investigation of property thefts committed by juveniles in the first place in cases where a socially dangerous act is committed in a group, but later one or more participants take the blame, or there are contradictions in the testimony of accomplices.

For example, if certain testimonies are found to be inconsistent with other materials of the criminal proceedings, the investigator may be asked to determine the reasons for the relevant circumstances and the ways to resolve them. In this and other cases, the investigator may conduct the investigative (search) action under study.

In accordance with the established procedure, a prerequisite for the verification and clarification of testimony on the spot is the preliminary interrogation of the person whose testimony is to be verified. Some forensic scientists believe that preparation for the verification of testimony on the spot should begin during the interrogation and inspection of the scene (Uvarov, 1982, p. 15).

One cannot disagree with this, since already during the interrogation, the investigator thinks several steps ahead and is not limited to conducting a particular investigative (search) action. In some cases, the analysis and evaluation of the results obtained may begin as early as during the course of the procedural action. This has a significant impact on the course of the proceedings. For example, not only the circumstances of the event are clarified, but also the possibility of their reconstruction with a particular participant.

In addition, it is advisable to offer him/her to draw up a detailed diagram, which would also indicate the circumstances relevant to the case; the route to the place of theft, the place of entry into the apartment, the particularities of the housing environment, from which places and in what sequence certain valuables were taken, the route of escape from the place of theft, etc. The coincidence or difference between the details of this diagram and the diagram made as a result of the on-the-spot testimony (especially with each of the accomplices) to some extent indicates that the suspect's testimony is true or false (Makarenko, 2009, p. 96).

Frequently, criminals recant their testimony in court during the pre-trial investigation, mentioning the influence of law enforcement officers. It will be much more difficult for a criminal to convince the court of violations during an investigative experiment if there is a video recording of its conduct. For example, a tactically correct procedural action entered in the records and its annexes will not leave or significantly reduce the chances of the perpetrators avoiding criminal liability.

In cases when the verification of on-the-spot testimony reveals caches with stolen goods, places where thieves left their tools, clear and logical coverage of the criminal offence cannot be considered only as a repetition of on-the-spot testimony and "self-deception". In this

case, the investigator and other participants in the procedural action are convinced not only that the person has information about the criminal offence, but also that he or she is possibly involved in it. That is, if during the reconstruction of the circumstances of the event, the juvenile demonstrates hiding places, tools that were not found during other procedural actions, highlights the mechanism of the commission, circumstances that can only be known to a person who experienced the relevant event and did not hear from someone else and takes the blame of the perpetrator, a reasonable assumption can be made about the involvement of the person in question in the fact under investigation. This is of particular importance when investigating thefts committed by juveniles. The latter are quite easily influenced, manipulated, mistakenly perceive friendships, wish to appear necessary and gain authority among peers or in a group. The above should be taken into account by the investigator and can be detected, first of all, during the investigative experiment.

It is not difficult to see the incompetence of a juvenile at the scene. This can be manifested in confusion, difficulties in determining the ways of approaching and leaving the scene of the theft, details that do not match the real picture of the scene, etc. A common truth of detecting falsehoods in the testimony of persons is the need to cover the event in detail. The inability to provide details and superficial coverage of the circumstances of the criminal offence should raise reasonable doubts about the person's involvement in the event.

For example, it is possible that a juvenile is confused in testifying in multi-episodic proceedings, when some facts are superimposed on others. This can be especially evident in the case of thefts of other people's property by similar means, in similar circumstances, for example, from the houses of garden associations, private households. The investigator should take this circumstance into account when assessing the results of this procedural action.

Investigating thefts committed by juveniles requires tactical competence on the part of the investigator. The investigator shall artificially reconstruct an environment that will encourage a person to voluntarily perform actions that reveal the content of information known only to him or her, in particular, about the preparation, commission and concealment of crimes, the existence of a previous criminal conspiracy, etc. (Saltevskyi, 2001, p. 234).

In addition, viewing the video recording can help to identify the emotional manifestations and reactions of the juvenile to the relevant circumstances of the place of the investigative experiment.

Of great importance during the investigative (search) action under study is the use of means of recording its course, the main of which is the records. According to D.D. Zaiets, it should reflect the following data: routes of arrival at the place of reconstruction of the situation and circumstances of the event and the content of the testimony to be verified; the content and nature of the actions of the participants to clarify the testimony and their results (Zaiets, 2008, p. 219).

The quality of the records should not raise any doubts about the legality of the investigative experiment. It should be noted that investigators may make mistakes in drafting a procedural document. A properly conducted experiment, but an incorrectly drawn up records based on its results, cannot be given due weight in criminal proceedings.

In addition, the use of additional means of recording and writing of relevant annexes during the investigative experiment should be under focus.

The study of forensic practice did not reveal any cases of video recording during the investigative experiment on the facts of investigations into property thefts committed by juveniles. At the same time, in all cases, photography was used and photo tables were compiled.

We believe that the course of an investigative experiment with a juvenile should be entered in the records and with the use of photo or video recording. In the records of the investigative experiment, drawn up personally by the investigator, the latter determines the final wording of certain issues resolved by the investigative experiment. Correct recording of the results of an investigative experiment requires the investigator to know the accepted terminology, attention, observation, lack of bias, ability to think logically, and a critical attitude to the results obtained.

The choice of the moment of conducting an investigative experiment should allow for the circumstances of the crime, the current investigative situation, the availability of collected evidence, etc.

A person subjected to an investigative experiment may recant his or her testimony in court, so the quality of the experiment and its recording should not raise any doubts about the involvement of the relevant persons in the crime.

4. Conclusions

The investigator should be critical of the results of an investigation in general and in particular. Despite the fact that in the organisational and tactical aspect this procedural action is quite complex, it is indispensable with any other investigative

(search) action. In addition to the records, it is advisable to record the proceedings with the help of photos and video. Each procedural action should be carried out at a high level. This will ensure the collection of as much evidence as necessary for impossibility to question the involvement of the relevant persons in the crime.

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Ірина Сорока,
кандидат юридичних наук, викладач кафедри криміналістики та судової медицини, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, sorokairyna@ukr.net
ORCID: *orcid.org/0000-0003-1536-6745*

ОРГАНІЗАЦІЯ ТА ТАКТИКА ПРОВЕДЕННЯ СЛІДЧОГО ЕКСПЕРИМЕНТУ ЗА ФАКТАМИ КРАДІЖОК, УЧИНЕНИХ НЕПОВНОЛІТНІМИ

Анотація. ***Мета.*** Метою статті є характеристика особливостей організації та тактики проведення слідчого експерименту за фактами крадіжок, учинених неповнолітніми. ***Результати.*** В умовах інтеграції України до європейського співтовариства, загострення соціально-економічної ситуації спостерігається суттєве зниження рівня життя й соціального захисту населення та поширення безробіття, що впливає на стан криміногенної ситуації в державі. На сьогодні злочинність досягла найвищого рівня за весь період існування незалежної держави. Конституція України закріплює непорушність права приватної власності та недоторканність житла від будь-яких протиправних

посягань. З огляду на це забезпечення охорони приватної власності, її захист від злочинних посягань є одним із пріоритетних завдань правоохоронних органів. Проте високий рівень криміналізації населення України, відсутність кваліфікованих кадрів у правоохоронних органах, руйнування системи попередження й профілактики злочинів, низька якість їх розкриття та розслідування створили підґрунтя для суттєвого збільшення кількості крадіжок майна громадян, особливо тих, що вчиняються неповнолітніми, і це набуває дедалі більш загрозливих форм. У статті розглянуто особливості проведення слідчого експерименту за фактами крадіжок чужого майна громадян, учинених неповнолітніми. Наголошено на тому, що для забезпечення достовірності висновків, які отримуються під час проведення дослідницьких дій, необхідно, щоб умови, у яких проводиться слідчий експеримент, були максимально наближені до тих, у яких відбувалася подія, що перевіряється. Крім того, необхідно забезпечити належну повноту й точність відтворення самих експериментальних дій, які іноді потрібно виконати багато разів, а також із відповідними варіаціями. ***Висновки.*** Зроблено висновок, що слідчий має критично ставитися до результатів розслідування загалом і проведеного слідчого експерименту зокрема. Незважаючи на те, що в організаційно-тактичному аспекті ця процесуальна дія є досить складною, її неможливо замінити жодною іншою слідчою (розшуковою) дією. Фіксацію проведення, окрім протоколу, доцільно здійснювати за допомогою фотографування та відеозапису. Кожна процесуальна дія має проводитися на високому рівні. Цим буде забезпечений збір такої кількості доказів, які у своїй сукупності не могли би піддати сумніву причетність відповідних осіб до вчиненого злочину.

Ключові слова: крадіжка, неповнолітній, організація, тактика, слідчий експеримент.

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Maksym Tsutskiridze,
Doctor of Law, Associate Professor, Professor at the Department of Criminal Procedure, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, Tsutskiridzemaksym@ukr.net
ORCID: *orcid.org/0000-0002-5880-8542*

Artem Shevchyshen,
Doctor of Law, Associate Professor, Professor at the Department of Criminal Procedure, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, Shevchyshenartem@ukr.net
ORCID: *orcid.org/0000-0002-1342-6639*

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CONTROL OF THE INVESTIGATOR'S CRIMINAL PROCEDURE ACTIVITIES AS AN INTEGRAL PART OF MANAGERIAL ACTIVITIES

Abstract. ***Purpose.*** The purpose of the article is to study the content of management of the investigator's procedural activities with regard to the exercise of control functions by managers. ***Results.*** The article examines the particularities of control of criminal procedure activities of an investigator, which is considered as a part of investigation management and reflects a legal management, the types thereof are procedural control and organisational control. It is noted that since control is one of the functions of public administration, the management of investigative activities is practically the control provided by the higher departmental leadership and procedural supervisor, and accordingly, the management of investigative activities in criminal procedure is represented by the procedural guidance of the prosecutor and departmental control of the head of the investigative unit. The author proves that a prosecutor's procedural guidance is a type of managerial procedural activity, the object thereof is investigative activity in criminal proceedings, which includes managerial and organisational elements (but relates exclusively to a specific criminal proceeding in which the prosecutor is a procedural supervisor). ***Conclusions***. The management of investigative activities in criminal proceedings is represented by the procedural guidance of the prosecutor and departmental control of the head of the investigative unit. The position of the prosecutor in relations with the investigator in the course of procedural guidance corresponds to the position of the organising manager. The departmental control of the head of the investigative unit is one of the types of managerial activities, the object thereof is the investigator's performance in relation to criminal proceedings, which covers control of the compliance with the law by the investigator and components that are implemented outside the criminal procedure. However, contrasting prosecutor's control (procedural guidance and supervision), it is carried out when the investigator fails to achieve the set goal and is implemented in the following actions: directing investigators to fulfil the goals and objectives of criminal proceedings; identifying shortcomings and correcting them. Judicial control of the investigator's procedural performance can be considered as passive control not related to the functions of subordination.

Key words: managerial activities, criminal procedure activities, investigator, prosecutor, head of an investigative unit, control, supervision.

1. Introduction

An important area of making criminal proceedings more effective is the improvement of management in terms of control of criminal procedure activities. Improvement of control in the system of criminal proceeding will lead to an increase in the efficiency of the actors involved in criminal procedure. These actors are the investigator, who is subject to managerial influence in the form of control and supervision. In addition, the basis of the investigator's performance is the management theory, since the criminal procedure system is permeated with managerial-subordinate relations, one

of the participants thereof is the investigator. As an object of managerial influence of "actors-managers", the investigator also performs activities that contain managerial and organisational elements that are characteristic of managerial influence, including control (for example, over the execution of assignments). In other words, the investigator in this case both is subject to managerial influence and exercises managerial influence. Elements of managerial activities in relation to the investigator are manifested in his/her relations with the prosecutor, the head of the investigative unit and the investigating judge. However, the managerial relations among these actors are somewhat confusing and are not always clearly reflected in the system of subordination and control, which necessitates the study of the relations between these managers in view of the methodological basis defined in the management theory.

Researchers who study administration argue that social management is present in any variant of joint activity of people: in the state, public, private, family activities (Kuzmenko, 2007). Depending on an aspect of managerial activities as the subject matter of research, the authors focus on administration in the form of public administration, control, guidance, etc. For example, in the general theory of law, control is associated with the management of certain activities, systems, and processes (Khimicheva, 2004). V.S. Chaiko focuses on the provision of information about the state of the controlled object, feedback in management (based on the information received, the actor makes a management decision) (Chaiko, 2008). D.V. Lisnyi studies the methodological foundations of personnel management in internal affairs bodies and testifies to the exercise of managerial influence by the manager (supervisor) on a certain object (personnel of the organisation) (Lisnyi, 2008). O.V. Khimicheva considers the conceptual foundations of procedural control and supervision at the pre-trial stages and argues that procedural control and supervision is an independent management function, which includes some levels such as: statement, detection, analysis and evaluation of deviations or trends leading to them, correction (Khimicheva, 2004). V.D. Sushchenko argues that the formation of the management goal is the definition of the desired, possible and necessary state of the system, the process of separating it from the impossible, undesirable and unnecessary state of the system where the possible state of the system must be compared with the desired and undesirable state, and the desired state of the system must be compared with the possible and unnecessary, possible but undesirable state (Sushchenko, Prysiazhnyi, Kovalenko, 1999). Given the above theoretical developments, it can be stated that the relations of control of the criminal procedure activities of an investigator as an integral part of managerial activities are also of scientific interest.

The purpose of the article is to study the content of management of the investigator's procedural activities with regard to the exercise of control functions by managers.

2. Control of the investigator's performance by the head of the investigative unit

The methodological basis of the investigator's performance is implemented in the procedural guidance relations to which he/she is a party. The managerial activities of an investigator and the management of investigative activities reflects a legal management, the types thereof are procedural control, supervision, guidance and organisation. Departmental management, procedural control and procedural guidance can be considered as separate types of management, the actor thereof is the investigator.

Every activity is subordinated to the achievement of a certain goal. Managerial activities are particularly vivid in this regard, as the organisation and direction of the activities of another entity is clearly subordinated to the achievement of a certain result in the form of an ultimate goal. Similarly, procedural control, supervision, and guidance of investigative activities are aimed at effective pre-trial investigation under the legislation in force. V.D. Sushchenko emphasises that the manager should use such measures that stimulate the achievement of goals and objectives, considering the goal-orientation and goals of the system itself (Sushchenko, Prysiazhnyi, Kovalenko, 1999). The author also notes that in social management, the goal can never be identical to the result. When interacting with the means of achieving it, even when the goal is achieved, the result includes other effects that do not coincide with the initial intended result. Therefore, when formulating a goal, potential effects should be allowed for (Sushchenko, Prysiazhnyi, Kovalenko, 1999). For example, an investigator may aim to complete the pre-trial investigation at any cost but may not aim to comply with all procedural rules, as their implementation has a significant subjective component. In order to avoid such excesses, the criminal justice system provides for multi-level control.

In fact, the control function refers to one of the mechanisms of social management, which contains a number of elements: structural and functional mechanism, structural and organisational mechanism, mechanism of managerial activities, mechanism of self-management. The structural and organisational mechanism

is formed by the elements of the social system: elements of the manager, elements of the object of management and manager-object (managerial) relations (Kuniev, 2006). The result of the system's functioning depends on: compliance of the rules of activities with the set goal; compliance of officials' activities with the established rules. The distinction between the concepts of quality and efficiency helps to identify problematic situations when the employee's conscientious performance of his/her duties does not lead to the desired result, or, conversely, such a result is achieved only due to violation of the established rules (Sushchenko, Prysiazhnyi, Kovalenko, 1999). Therefore, with regard to the activities of the investigator, it can be noted that its result depends on: the relevance and sufficiency of the procedural powers provided for by law to achieve the goal of criminal proceedings and on the consistency of the investigator's performance with the powers prescribed.

Procedural control and supervision at the pre-trial investigation has a number of specific features that are determined by the nature of the activities under control: investigation of crimes, procedural independence of investigators, regulating of the limits of influence on the activities of investigators (Khimicheva, 2004). As a result of exercising control of an investigator, for example, by the head of an investigative unit or a prosecutor, these actors obtain certain information about the need to make certain adjustments to the investigators' activities, and, accordingly, about the need to make certain decisions, that is, departmental control has a somewhat broader scope than the statement of whether or not the tasks of the pre-trial investigation are fulfilled.

In management theory, general managerial functions are grouped into two types: cognitive-programming (including analysis, prognostication, planning) and organisational-regulatory (organising, regulating, controlling) (Plishkin, 1999). Scholars associate this grouping with the approach to the functions of managerial activities as successive stages (phases) of the managerial process (Kuniev, 2006). A direct example of the types of managerial functions in criminal proceedings is given by S.V. Valov, who, in addition to the functions of procedural control and management, identifies the following functions of the head of the investigative department: informational, organisational and regulatory. Among the managerial functions of the head of the investigative department, the author underlines the analytical, prognostication, planning and accounting functions, which, although directed to the executors of procedural activities, are not regulated by criminal procedure rules (Valov, 2006).

To sum up, it can be noted that one of the functions of public administration is control, and the function of control is to preserve the established public order. In other words, the function is defined through the activities that is specified - conducting a pre-trial investigation. Therefore, the management of the investigator's performance is carried out through the control of the criminal procedure activities of an investigator since the latter is thus controlled and ensured by the higher departmental management and procedural supervisor.

In order to determine the types of control of the investigator's performance, it is necessary to consider the influence that the investigator is subjected to in the course of criminal proceedings. With regard to such influence, the focus should be on judicial control, procedural guidance of the prosecutor and departmental control.

In the criminal procedure theory, there is a position on the multifunctionality of the court in connection with the separation of its functions of justice and judicial control. From this perspective, the latter is auxiliary to justice. This is proved by the legislator's perspective on the prohibition of a judge who decided on the use of procedural coercion during the pre-trial investigation to participate in the consideration of this case in the future (Melnik, 2004). However, it should be noted that judicial control is carried out mainly on the initiative of the "controlled" participant, the investigator; the court does not proactively manage the investigator's performance, does not give guidelines, does not apply sanctions to the investigator, and therefore judicial control is passive.

3. Particularities of control of investigative activities

Control of investigative activities in criminal procedure is represented by the prosecutor's functions (prosecutorial control, prosecutorial supervision and procedural guidance) and departmental control of the head of the investigative unit.

When considering the influence of the prosecutor on the investigator's procedural activities, it is necessary to dwell on an issue of freedom and independence of procedural decision-making. Analysing the discretion in decision-making in criminal proceedings, proceduralists note that the scope of possible prosecutorial discretion during pre-trial proceedings is greater than the scope of investigator's discretion, since the prosecutor is entitled not only to choose a decision at his/her own discretion, but also to express disagreement with the decisions of investigators. In case of disagreement, the prosecutor may cancel the investigator's decision, with-

hold consent to the investigator's application to the court for permission to conduct certain investigative actions, or not authorise certain investigative actions (Lupinskaia, 2006). Therefore, a decision in criminal proceedings is an act expressed in the procedural form established by law, in which the investigator, within his/her competence, in accordance with the procedure established by law, answers legal issues arising in the case and expresses the will of the authorities regarding actions resulting from the established circumstances and provisions of law aimed at achieving the objectives of criminal proceedings (Boikov, Karpec, 1989).

I.I. Shulhan defines procedural guidance as the organisation of the pre-trial investigation process, determination of its direction, coordination of procedural actions of investigative and operational units, as well as ensuring compliance with the requirements of the laws of Ukraine during the receipt of evidence and making procedural decisions during the pre-trial investigation of a specific, individual criminal proceeding (Shulhan, 2016). According to the author, the prosecutor must have the entirety of the evidence collected in criminal proceedings and be convinced of its admissibility, reliability and legality. The procedural supervisor has full access to documents and other information contained in the criminal proceedings. It has the right to appoint audits and inspections, make procedural decisions in cases provided for by the CPC of Ukraine, commission investigative actions and covert investigative (detective) actions, give instructions on their conduct and participate in them, and, where necessary, personally conduct investigative actions. However, the prosecutor should not perform the functions of an investigator, but only organise the process of investigating criminal proceedings. The prosecutor's procedural guidance of the pre-trial investigation is an effective way to ensure the legality of actions and decisions of the pre-trial investigation bodies (Shulhan, 2016). Therefore, it can be noted that the position of the prosecutor in relations with the investigator corresponds to the position of the organising manager.

Some scholars deny a managerial nature of the prosecutor's activities in relation to the investigator's performance in criminal proceedings. For example, in his publication, V.V. Pavlovskyi states as if it were a well-known provision that prosecutorial supervision differs from control in that it does not contain elements of direct order and management, such as the cancellation of legal acts, imposition of an obligation on pre-trial investigation bodies to perform a particular action, imposition of sanctions, etc. He notes that the prosecutor's intervention in the activities of supervised bodies is permissible only in order to establish violations of the law, the causes of violations and the conditions that contributed to such violations (Pavlovskyi, 2015). However, it should be noted that such statements are in a significant minority among criminal procedure theorists. The majority of proceduralists agree with the managerial nature of the prosecutor's influence on the investigator's performance, which does not exclude the critical attitude of some of them in this regard. Therefore, the prosecutor's procedural guidance is one of the types of managerial procedural activity, the object of which is the investigator's performance in criminal proceedings, which includes managerial and organisational elements.

Another type of managerial activities aimed at the investigator is departmental control of the head of the investigative unit. With regard to departmental control, heads of pre-trial investigation bodies have organisational, control and procedural powers. The organisational powers of the head of the relevant pre-trial investigation body are determined by departmental regulations (Kovalov, 2014). The legal literature emphasises the important place of departmental control "in the system of supervision over the observance of human rights and freedoms in the process of exemption from criminal liability" (Kozak, 2005).

M.A. Pohoretskyi argues that the head of the investigative department exercises procedural and administrative control of both the organisation of criminal investigation in general in his/her unit and in each specific criminal case under proceedings by investigators of the department, and that the term "control" enshrined in Article 114-1 of the CPC of 1960 is not entirely appropriate, as it does not reflect the reality (Pohoretskyi, 2002). In the current CPC of Ukraine, the scientist's position was partially implemented in Article 39, Part 1 thereof establishes that the head of the pre-trial investigation body organises the pre-trial investigation but does not control it.

Z.M. Onishchuk proposes to give the head of the investigative department additional powers: to cancel illegal or unreasonable decisions of investigators subordinate to him/her, to remove an investigator from further investigation if he violates the law during the investigation; to transfer the case from one investigator to another in order to ensure the most complete and objective investigation of the case (Onishhuk, 1964).

Opponents of expanding the powers of the head of the investigative department as regards the right to cancel illegal and unjustified decisions of investigators suggest that the law

should only clarify and enshrine his/her duty to immediately contact the prosecutor if an illegal and unjustified decision of an investigator is discovered. Granting the head of the investigative department the power to cancel the said decisions of the investigator would reduce prosecutorial supervision to supervision of the head of the investigative department rather than the investigator and would significantly narrow the procedural independence of the investigator (Seleznev, 1999).

In our opinion, departmental control of the investigator's performance is actually combined (constitutes a single mechanism) with procedural guidance, which consists in organising the most efficient conduct of the pretrial investigation. However, the intervention of the head of the investigative unit is necessary only when the investigator fails to achieve the goal. The essence of his/her leadership is that the head of the investigative unit:

– directs investigators to fulfil all goals and objectives of criminal proceedings using the powers vested in him/her;

– identifies shortcomings (checks materials on verification of crime reports and materials of criminal proceedings, approves the initiation of a petition by the investigator before the court to make a number of decisions);

– corrects the identified deficiencies (takes the criminal case from the investigator and transfers it to another investigator, cancels an illegal and unjustified decision of the investigator, gives instructions to the investigator, removes the investigator from further investigation) (Pobedkin, Novikov, 2010).

That is, the departmental control of the head of the investigative unit is one of the types of managerial activities, the object thereof is the investigator's performance in relation to criminal proceedings, which covers control of the compliance with the law by the investigator and guidelines for directing activities in case of shortcomings identified in the investigator's performance and components that are sometimes outside the criminal procedure.

4. Conclusions

The management of investigative activities reflects a legal management, the types thereof are procedural control (supervision, guidance) and organisational control and organisational control. Moreover, control is one of the functions of public administration, since the function of control is to maintain the established state order, therefore the management of investigative activities is the control provided by the higher departmental leadership and the procedural supervisor.

The management of investigative activities in criminal procedure is represented by the procedural guidance of the prosecutor and departmental control of the head of the investigative unit. The position of the prosecutor in relations with the investigator in the course of procedural guidance corresponds to the position of the organising supervisor. A prosecutor's procedural guidance is a type of managerial procedural activities, the object thereof is investigative activity in criminal proceedings, which includes managerial and organisational elements (but relates exclusively to a specific criminal proceeding in which the prosecutor is a procedural supervisor). The departmental control of the investigator's performance is combined (constitutes a single mechanism) with procedural guidance, which is to organise the most efficient conduct of the pre-trial investigation. The departmental control of the head of the investigative unit is one of the types of managerial activities, the object thereof is the investigator's performance in relation to criminal proceedings, which covers control of the compliance with the law by the investigator and components that are implemented outside the criminal procedure. However, contrasting prosecutor's control (procedural guidance and supervision), it is carried out when the investigator fails to achieve the set goal and is implemented in the following actions: directing investigators to fulfil the goals and objectives of criminal proceedings; identifying shortcomings and correcting them. Judicial control of the procedural investigator's performance can be considered as passive control not related to the functions of subordination.

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Максим Цуцкіридзе,
доктор юридичних наук, доцент, професор кафедри кримінального процесу, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, Tsutskiridzemaksym@ukr.net
ORCID: *orcid.org/0000-0002-5880-8542*

Артем Шевчишен,
доктор юридичних наук, доцент, професор кафедри кримінального процесу, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, Shevchyshenartem@ukr.net
ORCID: *orcid.org/0000-0002-1342-6639*

КОНТРОЛЬ ЗА КРИМІНАЛЬНОЮ ПРОЦЕСУАЛЬНОЮ ДІЯЛЬНІСТЮ СЛІДЧОГО ЯК СКЛАДОВА ЧАСТИНА УПРАВЛІНСЬКОЇ ДІЯЛЬНОСТІ

Анотація. ***Мета.*** Метою статті є дослідження змісту управління процесуальною діяльністю слідчого щодо реалізації функцій контрольних повноважень суб'єктами управління. ***Результати.***

У статті розглядаються особливості контролю за кримінальною процесуальною діяльністю слідчого, який позиціонується як частина управління слідчою діяльністю та є відображенням певного правового менеджменту, видами якого є процесуальний контроль та організаційний контроль. Зазначено, що оскільки контроль є однією з функцій державного управління, то управління слідчою діяльністю практично полягає в контролі, який забезпечується вищим відомчим керівництвом і процесуальним керівником. Відповідно, управління слідчою діяльністю у кримінальному процесі представлене процесуальним керівництвом прокурора та відомчим контролем керівника слідчого підрозділу. Доведено, що процесуальне керівництво прокурора є видом управлінської процесуальної діяльності, об'єктом якої є слідча діяльність щодо кримінального провадження, що включає керівні та організаційні елементи (проте стосується виключно конкретного кримінального провадження, у якому певний прокурор є процесуальним керівником). ***Висновки.*** Управління слідчою діяльністю у кримінальному процесі представлене процесуальним керівництвом прокурора та відомчим контролем керівника слідчого підрозділу. Позиція прокурора у відносинах зі слідчим у ході процесуального керівництва відповідає позиції керівника-організатора. Відомчий контроль керівника слідчого підрозділу є одним із видів управлінської діяльності, об'єктом якої є діяльність слідчого щодо кримінального провадження, що охоплює контролювання за дотриманням законності слідчим та складники, які реалізуються поза сферою кримінального процесу. Однак, на відміну від контролю прокуратури (процесуального керівництва та нагляду), контроль діяльності слідчого здійснюється, коли слідчий своєю діяльністю не досягає поставленої мети, і реалізується в таких діях: спрямовуванні слідчих на виконання цілей і завдань кримінального судочинства, виявленні недоліків та їх виправленні. Що стосується судового контролю за процесуальною діяльністю слідчого, то його можна позиціонувати як пасивний контроль, не пов'язаний із функціями підпорядкування.

Ключові слова: управлінська діяльність, кримінальна процесуальна діяльність, слідчий, прокурор, керівник слідчого підрозділу, контроль, нагляд.

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Dmytro Shumeiko,
Doctor of Law, Associate Professor, Associate Professor at the Department of Criminal Procedure, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, shumeikodmytro@ukr.net
ORCID: *orcid.org/0000-0002-3185-9956*

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PARTICULARITIES OF ESTABLISHING THE FACT OF A PERSON'S CONCEALMENT FROM INVESTIGATION AS A BASIS FOR PUTTING ON THE WANTED LIST

Abstract. ***Purpose.*** The purpose of the article is to formulate new and improve the existing legal and organisational measures regarding the activities of authorized bodies in case of evasion of a suspect or an accused person from participation in criminal proceedings. ***Results.*** The article underlines an imbalance between the provisions governing the same procedure, in particular, with regard to determining the type of search for persons (on the territory of Ukraine and international search) due to different grounds for their notification, and, accordingly, the use of the fact of being put on the wanted list as a ground for applying criminal proceedings in absentia. Putting a suspect on the wanted list does not automatically mean that he or she is evading the investigation (this is also confirmed by the concept of "search" and its tasks), it is necessary to establish the existence and intentional nature of these actions, as well as that the person has committed certain actions to conceal his or her whereabouts from the investigation or court, and that measures are being taken to establish his or her whereabouts. The latter is particularly relevant, since in each case of consideration of a motion for a special pre-trial investigation, the court pays attention to such circumstances. This is due to the existence of a number of problems related to the search, which are caused by various reasons. ***Conclusions.*** The author concludes that a person's concealment from the investigation should be understood as any intentional actions committed by a person with the aim of evading criminal liability for a crime, which forces law enforcement bodies to take measures to find and apprehend the offender (failure to appear without good reason when summoned to an investigator or court, non-compliance with the conditions of a measure of restrain, change of identity documents, change of appearance, transition to an illegal position, imitation of death, etc.) The indication that the prosecution shall prove that the search is ongoing will allow, in the case of a domestic search, to determine the scope, nature and effectiveness of the prosecution's actions to establish the location of the suspect, accused and the probable cause of his or her absence, and in cases of international search, in addition to the above-mentioned, to obtain confirmation that this search is ongoing.

Key words: criminal proceedings in absentia, special pre-trial investigation, grounds, a person's concealment from the investigation, putting on the wanted list.

1. Introduction

Following the institution of criminal proceedings in absentia into the pre-trial investigation system, its application and regulatory framework are being improved comprehensively. Due to the large number of scientific and other works, and, consequently, the diversity of their methods, there is already a certain scientific body of work that is of significant theoretical and practical importance. However, this diversity not only enriches, expands, and supplements scientific knowledge quantitatively and qualitatively, but also increases terminological inconsistency, enabling numerous contradictions in scientific approaches to exist simultaneously, which complicates the work of law application and to some extent affects the chaotic nature of legislative initiatives. For example, one of the problematic issues in the practical implementation of the mechanism of special pre-trial investigation in terms of determining the grounds for conducting criminal proceedings in absentia is the establishment of the fact of evasion from the investigation. One of the conditions for a special pre-trial investigation is to put a person on

the "international wanted list" (Article 297-4 of the CPC of Ukraine), but according to the CPC, Article 281, Part 1, the investigator or prosecutor announces a person "wanted". In other words, there is a certain imbalance even between the perception of terminology in the provisions governing the same procedure (for example, an international wanted list is issued after a wanted list is issued on the territory of Ukraine and a number of doubts arise that it can be established for certain that the person is in the occupied territory and not abroad, which significantly changes the grounds for the wanted list and its type). Moreover, a ground for announcing a wanted list during the pre-trial investigation such as "the suspect's whereabouts are unknown" may occur both if the suspect evades the investigation and if his or her whereabouts are not established for other reasons, but the meaning of the concepts of "evasion of investigation or trial" and "evasion of criminal liability" is subjectively determined by the investigator or prosecutor in each case, which is a matter of dispute and the basis for various types of appeals against the actions of the prosecution. Therefore, the mechanism of criminal proceedings in absentia should include not only a system of knowledge and scientific positions, but also an objective assessment of the legal, social and political situation and the potentials of legal means to ensure the fulfilment of the tasks of criminal proceedings in case of evasion of the suspect or accused from participation in the proceedings, as well as identification of directions and ways to improve legislation and law application.

A number of scholars have considered the issue of compliance with the content of the terms, their use in certain situations, when a person is announced wanted. O.O. Dudorov and Ye.O. Pysmenskyi study the content of the concept of "evasion from pre-trial investigation" in the context of exemption from criminal liability due to the expiration of the statute of limitations (Dudorov and Pysmenskyi, pp. 87-99); V.V. Zuiev defines a clear mechanism for putting a person on the international wanted list as criminal procedural guarantees of a person's rights in international cooperation in criminal proceedings (Zuiev, 2017, pp. 112-114); I. Hloviuk considers the fact of absence of a suspect or accused as a ground for commencing a pre-trial investigation in absentia in the criminal proceedings of Ukraine (Hloviuk, 2015, pp. 16-25). That is, various scholars have expressed the opinion that the term evasion of a person from the investigation (as a ground for putting him/her on the wanted list) is used, but have not considered its content in the context of criminal proceedings in absentia.

The purpose of the article is to formulate new and improve the existing legal and organisational measures regarding the activities of authorized bodies in case of evasion of a suspect or an accused person from participation in criminal proceedings.

2. Particularities of establishing the fact of a person's concealment from the investigation

Putting a suspect on the wanted list does not automatically mean that he or she is evading the investigation (this is also confirmed by the concept of "search" and its tasks), it is necessary to establish the existence and intentional nature of these actions, as well as that the person has committed certain actions to conceal his or her whereabouts from the investigation or court, and that measures are being taken to establish his or her whereabouts. The latter is particularly relevant, since in each case of consideration of a motion for a special pre-trial investigation, the court pays attention to such circumstances. This is due to the existence of a number of problems related to the search, which are caused by various reasons. Annually the units of the National Police of Ukraine search for about 30 thousand people, and the number of wanted persons has increased significantly as a result of hostilities and the evacuation of citizens (their movement within the country and abroad). In most cases, the concealment of a suspect (accused) leads to the suspension of pre-trial investigation or court proceedings. Practice shows that the accumulation of such criminal proceedings in which the suspect (accused) is wanted leads to the fact that no one is actually searching for such persons. Investigators and operational units of law enforcement bodies formally take certain measures aimed at establishing the whereabouts of wanted persons, which do not lead to the desired result. An analysis of the materials of the activities of law enforcement bodies on the organisation of the search for persons and the establishment of their whereabouts shows the following main shortcomings: the formal issuance by the investigator of a resolution to put a suspect on the wanted list without proper organisation of the actual search; entrusting the search for a suspect to operational units without proper control by the investigator over the content and results of the search; formal implementation by operational units of measures to identify the wanted person in the absence of proper interaction with pre-trial investigation authorities and exchange of relevant information on the circumstances of the search; failure of investigators to take appropriate procedural measures in case of establishing the whereabouts of a person concealment from pre-trial investigation and court; unreasonable delay in opening

or unreasonable closure of an operational search case of the relevant category and deregistration of wanted persons without appropriate consent of the investigative units; choosing a measure of restrain not related to custody against a suspect or accused person whose whereabouts have been established etc. (Lysenko, 2017). In addition, these organisational problems are related to the existence of a number of problems in the regulatory framework for these processes.

3. Problematic issues of proving a suspect's intent to evade criminal liability

One of the unresolved issues has been identified the problem (Shumeiko, 2019, pp. 88-93) of proving the suspect's intent to evade criminal liability, because in any case, the person will try to avoid such a formulation and will insist that the reasons for his or her absence, inaccessibility to the investigation and court are different, for example, fear for his or her life, lack of faith in the justice system, receiving threats, etc. Therefore, it is only possible to make an assumption about the true purpose of such person's actions, which is almost impossible to find out for sure, moreover in cases where there is no suspect. From the content of the analysed and other examples of judicial practice, it is clear that the purpose of concealment, "evasion of criminal liability" is not separately investigated and established, the entire formula defined by the legislator is applied, that is, "concealment of a suspect with the aim of evading criminal liability". For example, the ruling of the investigating judge should contain a separate structural element of the document "On the fact of the suspect's concealment from the investigation and court" (Decision of the investigating judge of the High Anti-Corruption Court, 2020), but in practice there are no examples when it has been established that the suspect concealed from the investigation and court but not for the purpose of evading criminal liability (and therefore there are no grounds for a special pre-trial investigation).

O.V. Sachko is sceptical regarding the above legislative formula: it is logical to assume that "the statement of circumstances that the suspect conceals from the investigation and court authorities in order to evade criminal liability" has signs of legal fiction. First, it is possible to find out the purpose of the person in general, as well as the purpose of "evasion of criminal liability," only when interrogating such a person or obtaining other information from him/her (for example, by listening to his/her conversations), but at the same time knowing where such a person is. Second, if a person is in absconding, his or her whereabouts are unknown, and therefore it is virtually impossible to find out the purpose of his or her concealment (Sachko, 2019, p. 218).

So what exactly is the significance of proving the purpose of the absconding suspect – evasion of criminal liability, as provided for in the CPC of Ukraine, Article 297-2, part 2? What other purpose of concealment can there be and what is its significance for making a decision to conduct a special pre-trial investigation? How can such purpose be established with certainty since it is subjective and there is no direct communication with the suspect? If it is a matter of a person's fear for his or her safety or life, the law provides for mechanisms to ensure security for such persons. "Disbelief in justice", "political reprisals" and other subjective motives cannot be considered in the absence of relevant evidence (Shumeiko, 2019, pp. 88-93).

This subjective assessment is not removed from the text of the CPC of Ukraine, Article 297-2, part 2, but at present, the ground is also defined as the presence of information that the suspect has left and/or is in the temporarily occupied territory of Ukraine, in the territory of the state recognised by the Verkhovna Rada as the aggressor state with the aim of evading criminal liability and/or information about being put on the international wanted list, that is, this ground can already be confirmed by establishing objective facts, unlike the ground of "the purpose – evasion of criminal liability". It should be noted that the purpose of "evasion of criminal liability" is specified by the legislator only for cases of special pre-trial investigation and apprehension by an authorised official (Article 208 of the CPC of Ukraine). According to the CPC of Ukraine, Article 208, part 1, clause 3, an authorised official has the right to apprehend a person suspected of committing a crime punishable by imprisonment without a ruling of the investigating judge or court only if there are reasonable grounds to believe that a person suspected of committing a grave or especially grave corruption crime (but only those that are within the jurisdiction of the NABU) may abscond with the intent to evade criminal liability. This also raises the question: what other purpose, other than evasion of criminal liability, may such a person intend to abscond for and whether this purpose is relevant for the decision to apprehend him/her in accordance with Article 208 of the CPC of Ukraine? The purpose of the application of measure of restrain (Drozd, Ponomarenko, Vakulenko, 2017, pp. 34-35) is to prevent attempts to conceal from pre-trial investigation and/or court (CPC of Ukraine, Article 177, part 1, para.1) without indicating evasion of criminal liability, and according to the CPC of Ukraine, Article 186, part 2, paragraphs 2, 3, a measure of restrain in the form of detention may be applied only if (except for the grounds provided

for in Article 177 of the CPC of Ukraine) it is proved that, while at large, the person concealed from the pre-trial investigation body or court (Criminal Procedure Code of Ukraine, 2012). According to the CPC of Ukraine, Article 189, Part 4, the investigating judge or court shall refuse to grant permission to apprehend a suspect or accused person for the purpose of compelled appearance unless the prosecutor proves that the circumstances specified in the motion for a measure of restrain indicate that there are grounds for keeping the suspect or accused in custody, and there are sufficient grounds to believe that the suspect or accused abscond from the pre-trial investigation or court. Other cases that require the establishment of the fact of a person's concealment also do not provide for the purpose of such actions (CPC of Ukraine, Article 249, part 4). The wording "with the purpose of evading criminal liability" is also not used. We assume that the wording "abscond for the purpose of evading criminal liability" was reproduced in the CPC of Ukraine, Article 297-1, part 4 in accordance with the purpose of the law that amended the CPC of Ukraine, but without harmonisation with other provisions of the CPC of Ukraine and without assessing possible problems of law application.

A person who evades investigation or trial is a person known to these authorities (as evidenced by the materials of a criminal case) as having committed a certain crime and taken actions to conceal his or her whereabouts from the investigation or trial. The statute of limitations is personalised, and therefore, a person's evasion from the investigation can only be said to have occurred when the investigation is conducted in relation to a specific person. Therefore, evasion can be said to have occurred in relation to a person who is aware that an investigation is being conducted against him or her, i.e. the perpetrator has been identified and measures are being taken to establish his or her whereabouts (Resolution of the Supreme Court, 2019), including a search for him or her.

One of the conditions for a special pre-trial investigation is to put a person on the wanted list, but Article 297-4 of the CPC of Ukraine stipulates that the investigating judge shall dismiss the motion for a special pre-trial investigation unless the prosecutor or investigator proves that the suspect is ... on the international wanted list, however, according to the CPC, Article 281, part 1, if during the pre-trial investigation the suspect's whereabouts are unknown or the person is in the temporarily occupied territory of Ukraine or outside Ukraine and does not appear without good reason at the summons of the investigator or prosecutor, provided that he or she has been duly notified of such a summons, the investigator or prosecutor shall announce him or her wanted. Since the international wanted list is announced after the wanted list is announced on the territory of Ukraine, this significantly changes the grounds for the wanted list and its type.

Therefore, in order to harmonise the legal provisions relating to the institution of special pre-trial investigation and prevent unequal understanding of the law, it seems appropriate to amend a number of provisions of the CPC to be read as follows:

– Article 297-2, part 4: Information on putting a person on *the wanted list, measures and actions taken for the purpose of search*;

– Article 297-4, part 1: The investigating judge shall dismiss the motion for a special pre-trial investigation unless the prosecutor or investigator proves that the suspect *evades appearing at the summons of the investigator, prosecutor or court summons of the investigating judge or court (failure to appear without a valid reason more than twice),* is put *on the wanted list and actions are being taken to search for him/her;*

– Article 297-4, part 3, para. 3: Repeated application for a special pre-trial investigation to the investigating judge in the same criminal proceedings is not allowed, unless there are new circumstances confirming that the suspect *evades appearing at the summons of the investigator, prosecutor or court summons of the investigating judge, court (failure to appear without a valid reason more than twice)* and is put *on the wanted list and actions are being taken to implement it*;

– Article 323, Part 3: a trial in criminal proceedings concerning the offences referred to in this Code, Article 297-1, part 2, may be conducted in the absence of the accused, except for a minor who *evades the summons of an investigator, prosecutor or court summons of an investigating judge, court (failure to appear without a valid reason more than twice)* (special court proceedings) and is put *on the wanted list and actions are being taken to implement it*;

– Article 193, part 6: The investigating judge or court may consider a motion for a measure of restrain in the form of detention and impose such a measure in the absence of the suspect or accused only if the prosecutor, in addition to the grounds provided for in Article 177 of this Code, proves that the suspect or accused is put *on the wanted list and actions are being taken to implement it*.

4. Conclusions

A person's concealment from the investigation should be understood as any intentional actions committed by a person with the aim of evading criminal liability for a crime, which

forces law enforcement bodies to take measures to find and apprehend the offender (failure to appear without good reason when summoned to an investigator or court, non-compliance with the conditions of a measure of restrain, change of identity documents, change of appearance, transition to an illegal position, imitation of death, etc.) The indication that the prosecution shall prove that the search is ongoing will allow, in the case of a domestic search, to determine the scope, nature and effectiveness of the prosecution's actions to establish the location of the suspect, accused and the probable cause of his or her absence, and in cases of international search, in addition to the above-mentioned, to obtain confirmation that this search is ongoing.

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Дмитро Шумейко,
доктор юридичних наук, доцент, доцент кафедри кримінального процесу, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, shumeikodmytro@ukr.net
ORCID: *orcid.org/0000-0002-3185-9956*

ОСОБЛИВОСТІ ВСТАНОВЛЕННЯ ФАКТУ ПЕРЕХОВУВАННЯ ОСОБИ ВІД СЛІДСТВА ЯК ПІДСТАВИ ОГОЛОШЕННЯ В РОЗШУК

Анотація. ***Мета.*** Метою статті є формулювання нових і вдосконалення наявних правових та організаційних заходів щодо діяльності уповноважених органів у випадку ухилення підозрюваного, обвинуваченого від участі в кримінальному провадженні. ***Результати.*** У статті зазначено, що спостерігається дисбаланс між нормами, які регламентують одну й ту саму процедуру, зокрема щодо визначення виду розшуку осіб (на території України та міжнародного розшуку), у зв'язку з різними підставами їх оголошення та, відповідно, використання факту оголошення в розшук

як підстав для застосування заочного кримінального провадження. Оголошення підозрюваного в розшук автоматично не означає його ухилення від слідства (ця позиція також підтверджується поняттям «розшук» і його завданнями), потрібно встановити наявність та умисний характер цих дій, а також те, що особа вчинила певні дії з метою приховування місця свого перебування від слідства або суду, що здійснюються заходи, спрямовані на встановлення її місцезнаходження. Останнє особливо актуально, адже в кожному випадку розгляду клопотання про здійснення спеціального досудового розслідування суд звертає увагу на такі обставини. Це пояснюється наявністю низки проблем, пов'язаних із розшуком, що зумовлені різними причинами. ***Висновки.*** Зроблено висновок, що під переховуванням особи від слідства варто розуміти будь-які умисні дії, вчинені певною особою з метою уникнути кримінальної відповідальності за вчинений злочин, що змушує правоохоронні органи вживати заходів, спрямованих на розшук і затримання правопорушника. Це, зокрема, нез'явлення без поважних причин за викликом до слідчого або суду, недотримання умов запобіжного заходу, зміна документів, які посвідчують особу, зміна зовнішності, перехід на нелегальне становище, імітація своєї смерті тощо. Вказівка на обов'язковість доведення стороною обвинувачення того, що розшук здійснюється, дасть змогу в разі внутрішньодержавного розшуку з'ясувати обсяг, характер і результативність дій сторони обвинувачення щодо встановлення місця знаходження підозрюваного, обвинуваченого та вірогідну причину його відсутності, а в разі міжнародного розшуку, окрім зазначеного, – отримати підтвердження, що такий розшук здійснюється.

Ключові слова: заочне кримінальне провадження, спеціальне досудове розслідування, підстави, переховування особи від слідства, оголошення в розшук.

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