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THE SYSTEM OF GUARANTEES OF NOTARIAL ACTIVITIES IN UKRAINE: THEORETICAL AND PRACTICAL ASPECTS

Abstract. Purpose. The purpose of the article is to study the theoretical and practical aspects of the system of guarantees of notarial activities in Ukraine as qualified legal support. **Results.** The article deals with theoretical and practical aspects of the system of guarantees of notarial activities in Ukraine as a qualified legal support. Relying on the study of domestic and foreign legal literature, the author formulates the definition of the concept of "guarantees of notarial activities". The system of guarantees of domestic notarial activities is characterised. The article analyses the problematic issues of ensuring the system of guarantees of notarial activities in Ukraine with due regard to current legislation and legal practice. The legal guarantees of notary independence include, in particular, the perpetual validity of the certificate of the right to practice notary, and the judicial procedure for appealing against notary's actions. However, 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. **Conclusions.** The author concludes that notarial activities should be an effective mechanism for protecting the rights of participants in legal relations by expanding the powers of notaries in this field, rather than by vesting them with new and uncharacteristic functions of notarial activities. The effectiveness of the notary's tasks and its functional capabilities should be ensured by adequate regulation framework of the organisational principles of this jurisdictional body, as well as of procedural and legal aspects of notarial activities. In particular, the problems that urgently require to be legally regulated are the problems of the system of actors of the notarial procedure, quota of notaries' positions, payment for notarial acts, and regulation framework of notarial activities guarantees. Guarantees of notarial activities as qualified legal support are a legally significant mechanism for ensuring the activities of notary bodies, which is implemented strictly on the basis of the constitutional right of a citizen to qualified legal aid at both the legislative and law application levels. The system of guarantees of notarial activities includes: first, impartiality; second, independence; third, governance 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; fourth, notarial secrecy; fifth, judicial protection of notarial activities.

Key words: notary, notary office, notarial activities, guarantees, guarantees of notarial activities, system of guarantees of notarial activities.

1. Introduction

The notary office plays a significant role in the legal system as a body of indisputable civil jurisdiction and preventive justice. The Latin expression "consensus facit ius", which means "consent makes the law" (i.e., the parties make the law for themselves through consent), emphasises the importance of notarial activities, through which such consent of the parties is formulated and formalised in notarial acts that

have evidentiary value and public recognition. Society needs efficient and highly professional notaries. Unfortunately, the process of updating the legislative framework for the notary institution and notarial activities is currently ineffective due to the lack of clear approaches to determining the legal nature and essence of notarial activities and, as a result, the inability to solve the most complex and pressing issues of notarial practice today (Komarov,

Barankova, 2020, p. 44). Meanwhile, the comprehensive transformation processes currently taking place in the state and legal life of Ukraine necessitates scientific and theoretical research into not only individual issues, associated with the formation of certain legal and state institutions, improvement of certain branches of domestic legislation, but also systematic development of issues that are significant in terms of their content, which intertwines several problems that are sometimes studied separately from each other (Pushkina, Shkabaro, Zavorotchenko, 2011, p. 5). One of such issues is the system of guarantees of notarial activities in Ukraine in the context of implementation of the constitutionally defined benchmarks of state and legal progress, namely, the development of a legal and democratic state.

In general, the purpose of notarial activities guarantees are to make the notary independent from other participants in civil legal relations who have applied to him/her, to defining him/her as a holder of public power and an independent arbitrator. On the other hand, the very activities of notary bodies aimed at realisation of the fundamental rights and freedoms of individuals and legal entities are a legal guarantee of their rights. In this regard, it is of particular importance to study the theoretical and practical aspects of the system of guarantees of notarial activities in Ukraine as qualified legal support, and this is the purpose of this article. For its successful implementation, the following tasks are expected to be solved: first, to formulate a definition of the concept of "guarantees of notarial activities," relying on the study of domestic and foreign legal literature; second, to characterise the system of guarantees of domestic notarial activities; third, to analyse the problematic issues of ensuring the system of guarantees of notarial activities in Ukraine, allowing for legislation in force and legal practice.

2. Guarantees of notarial activities

In theoretical works, guarantees are understood as ways and means of achieving something. Moreover, general and special guarantees are distinguished. General guarantees include such phenomena that do not have their own legal form, but significantly affect the implementation of a particular provision of law, including social, economic, political, ideological and other guarantees. Special guarantees are considered as legal ways and means of achieving something (Tsvik, 2011, p. 211). Approaches to understanding guarantees vary from a complete denial of the presence of this element in law to its detailed study, determination of the structure, classification, and justification as a necessary feature of any provision of law. The nature

of guarantees is considered in the following areas: a means of implementing legal provisions, a mechanism for realising human and civil rights and freedoms, and the implementation of any law application activities (Chyzhmar, 2017, p. 62).

The Law of Ukraine "On Notaries" No. 3425-XII of September 2, 1993, which is in force, enshrines provisions on guarantees of notarial activities as qualified legal support. In other words, the focus of notarial activities is law enforcement, which mediates state protection. Guarantees of notarial activities should ensure reliable protection of human rights and freedoms.

According to V.V. Komarov and V.V. Barankova, guarantees of notarial activities are a set of requirements for the performance of notarial activities that ensure the fulfilment of its tasks and reflect its essence. The guarantees of notarial activities are a set of measures and means enshrined in the provisions of notarial law that are designed to ensure that all parties to notarial legal relations are able to exercise the rights granted to them and perform the duties imposed on them (Komarov, Barankova, 2011, p. 245). In addition, 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 in 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. The guarantees of notarial activities are equally important for all participants in notarial legal relations, as they are designed to ensure compliance with and exclude the possibility of violation of their rights (Barankova, 2010, p. 297).

K.F. Dosinchuk notes that the legal guarantees of the notary organisation are the legal means established in the Constitution and laws of Ukraine aimed at ensuring the organisation and functioning of the notary system, its independence and efficiency. A component of ensuring the activities of the notary in Ukraine is a set of certain guarantees (general and special) and a regulatory framework made by the state through legal prescriptions and means for social relations in the field of notary offices regarding their legal consolidation, implementation, control, protection and defence (Dosinchuk, 2014, p. 211).

In M.S. Dolynska's opinion, guarantees of the notarial procedure as an integral part of guarantees of notarial activities is a new phenomenon in Ukraine and requires further improvement. In order to effectively ensure the notarial activities and its component – the notarial procedure, it is necessary to amend the Ukrainian notarial legislation in force to

cover three types of guarantees: 1) guarantees of the notarial procedure for the performance of notarial acts; 2) guarantees of the performance by notaries of other acts that are not notarial in order to give them legal probability; 3) guarantees of the performance of acts that are equated to notarised acts by quasi-notarial bodies of the state. The main purpose of guaranteeing the performance of notarial activities is to fully protect all participants in the notarial procedure. Moreover, part 3 of Article 8-1 "Guarantees of notarial activities" of the Law of Ukraine "On Notaries" should be brought into line with the provisions of the new Criminal Procedure Code of Ukraine (Dolynska, 2018, p. 73).

Relying on the review of various perspectives in the professional literature, we propose to understand the guarantees of notarial activities as a legally significant mechanism for ensuring the activities of notary bodies, which is strictly implemented on the basis of the constitutional right of a person and a citizen to qualified legal support at both the legislative and law application levels. Article 8-1 "Guarantees of Notarial Activities" of the Law of Ukraine "On Notaries" of September 2, 1993, provides for the rules of law that prevent violations of notaries' rights and protect their activities from unlawful interference and influence. Meanwhile, the issue of protecting the rights of a notary is outside the notarial procedure and should be addressed by notarial legislation only in terms of implementing the principle of independence and impartiality of a notary as a participant in notarial proceedings. Therefore, the concept of guarantees of notarial activities is broader in scope than stipulated by the provisions of the above article of the Law of Ukraine "On Notaries" of September 2, 1993 (Law of Ukraine On Notaries, 1993).

The current legislation of Ukraine on notaries does not clearly define the system of guarantees of notarial activities, but they can be identified based on the content of various provisions of the Law of Ukraine "On Notaries" of September 2, 1993. Therefore, in our opinion, it is appropriate to highlight the following guarantees of notarial activities: 1) impartiality; 2) independence; 3) governance only by the Constitution and laws, legal regulations of state authorities and local self-government bodies adopted within their competence, as well as international legal acts; 4) notarial secrecy; 5) judicial protection of notarial activities. Unfortunately, not all of the above provisions have been directly objectified in the legislation on notaries in force. For example, no separate provision enshrines the principles of independence and impartiality of a notary. However, the content of these principles of notarial activ-

ities can be traced from a number of other legal provisions of the Law of Ukraine "On Notaries" of September 2, 1993.

The principle of notary impartiality is not clearly defined in the current legislation of Ukraine. Article 9 of the Law of Ukraine "On Notaries" of 2 September 1993 is of an applied nature. According to the provisions of this Article, a notary and an official of a local self-government body performing notarial acts may not perform notarial acts in their own name and on their own behalf, in the name and on behalf of his/her spouse, his/her spouse's or his/her own relatives (parents, children, grandchildren, grandparents, brothers, sisters), as well as in the name and on behalf of employees of the notary's office, employees who are in labour relations with a private notary, or employees of the executive committee. Local government officials are not entitled to perform notarial acts also in the name and on behalf of this executive committee (Law of Ukraine On Notaries, 1993).

In addition, a notary shall prevent, in the performance of his or her duties, granting of preferences or facilitating of granting of preferences to any persons, groups of persons on the basis of gender, race, nationality, language, origin, property and official position, place of residence and attitude to religion, beliefs, 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. When performing a notarial act, a notary shall not give preference to any of the interested parties. The requirements of impartiality determine a notary's obligation to explain to the interested parties, participants of a notarial act, their rights and duties, the essence and sequence of the notarial act 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 a subject of the notarial procedure and is a guarantee not only for the interested parties, 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, in fact, can be traced from the content of Article 8-1 of the Law of Ukraine "On Notaries" of September 2, 1993.

The principle of notary independence should be based on ensuring the notary's functional activities. The notary shall be free from opportunistic considerations, political situation and opinions of the head of the judicial authority and other officials. The legal guarantees of notary independence include, in par-

particular, the perpetual validity of the certificate of the right to practice notary, and the judicial procedure for appealing against notary's actions. However, 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. 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.

The financial basis for the notary's independence is economic support guaranteed for his or her activities. The source of financing for the activities of a notary engaged in private practice is the money received by him/her for 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/her to pay the relevant taxes and other mandatory payments. In this case, the notary's income serves to ensure financial independence and guarantee compensation for damage caused by the notary's actions (Dun, 2009, p. 20). Notary public's offices are provided from the state budget. A notary working in a notary public's office receives a salary. It follows that the issue of practical realisation of the independence of the notary institution necessitates addressing the issue of its financial support.

One of the main guarantees of notarial activities is that it is guided by the Constitution and legislation in force. However, a logical question arises in this case: does the practical implementation of this principle mean that a notary shall evaluate legal acts? Some legal scholars note in this regard that when applying orders and instructions of ministries and departments, regulations of local state authorities and 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 (Chyzhmar, 2017, p. 63). At the same time, given the certain chaotic nature of modern legislation, it is quite difficult for a notary, like any other lawyer, to assess the legal significance of a bylaw.

It should be noted that in the legal literature, the principle of rule by the Constitution and law is often identified with the principle of legality. That is why, when characterising the guarantees of notarial activities, emphasis is placed on

the obligation to refuse to perform a notarial act if it contradicts the law (Article 5 of the Law of Ukraine "On Notaries"). The author's perspective on this issue enables to distinguish between these two principles on the following grounds.

The principle of rule by the Constitution and law refers to the procedural activities of the notary and is primarily a continuation of his/her independence. The principle of rule by the Constitution and law stipulates that a notary shall not take into account administrative or any 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 by law.

An important component of the guarantees of the notary bodies in Ukraine is notarial secrecy. According to V.M. Parasiuk, notarial secrecy, along with attorney-client privilege, banking secrecy and medical privacy, 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 that may not be disclosed in any form. According to Article 8 of the Law of Ukraine "On Notaries" of September 2, 1993, notarial secrecy is any of information obtained in the course of performance of notarial acts or when an interested person applies to a notary, including information about a person, his or her property, his or her property rights and obligations, etc. Therefore, the subject matter of notarial secrecy is any information that has become known to the notary in the course of performance of notarial activities.

In order to be recognised as an object of legal protection as a notarial secrecy, information shall meet the following essential features: it shall be related to the person who applied to the notary, his or her property; the law shall not contain restrictions on the possibility of classifying such information as a notarial secrecy; the information is not classified by law as generally known and publicly available; the notary's knowledge of such information is the result of professional activities.

One of the elements of the principle of notarial secrecy should be the need to take measures to preserve confidential information by persons to whom such information has been entrusted. This aspect of the principle of notarial secrecy implements in the impossibility of disclosing information that constitutes the subject matter of notarial secrecy to other persons without the owner's consent. We believe that the obligation to keep notarial secret (Law of Ukraine On Notaries, 1993) implies the impossibility of disclosing such secrecy without the consent

of the owner, which shall be formally expressed. An 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 act are negative and are associated with bringing the guilty party involved in the notarial act to legal liability.

3. Particularities of judicial control of notaries

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

Judicial control of performance of notarial acts is generally divided into direct and indirect control. Direct control is exercised when courts consider cases during appeal against notarial acts or refusals to perform them, notarial deeds. This category of cases is considered by the courts in civil proceedings in the course of action, and the defendant in such cases is the notary who performed the relevant notarial act (refused to perform it). The result of a court hearing of such a case is a court review of the notary's compliance with the law when performing a notarial act and a court opinion on the legality or illegality of the notarial act (refusal to perform it, notarial deed). The main purpose and end 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 the notary's actions is provided in the operative part of the court decision.

Indirect judicial control is exercised when the court considers other civil cases related to challenging notarial deeds and other notarial documents in court, in other cases where the disputed legal relations of the parties are related to 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 complies 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 the dispute between the parties. In this case, the court usually assesses notarial acts in the reasoning part of the court decision.

In both cases, the court has the right to respond to the violations of the law by

the notary by issuing a separate ruling. For example, pursuant to Article 211 of the Civil Procedure Code of Ukraine of March 18, 2004, the court in the course of consideration of a case shall identify the causes and conditions that contributed to the violation of the law and issue separate rulings on them and send them to the relevant authorities and persons, who shall notify the court that sent it of the measures taken within one month from the date of receipt of the separate ruling. Separate rulings may also be issued at the end of the proceedings without a decision (closure of the proceedings, leaving the application without consideration), as well as under certain conditions and before the end of its consideration. Therefore, judicial control of 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 law when performing a notarial act.

Notarial activities involve a rather significant range of legal actions performed within notarial proceedings regarding the consideration and resolution of a particular notarial case. From this perspective, notary legislation should not only carefully regulate general and special rules of notarial acts, i.e. procedural aspects, but also regulate such grounds for the revocation of a notarial act as its illegality and groundlessness. This would benefit both notaries, who would have guarantees that their actions, which are performed in compliance with procedural rules, will not be found to be in violation of law, and interested parties, who would receive a permanent notarial deed, the content of which could not be challenged by witness testimony. All of the above indicates the need to considerably improve the legal regulatory framework for organisational issues of notarial activities and notarial and procedural legal relations. In view of this, it would be advisable to adopt two legal regulations rather than a new Law on the Notary: The Law on the Organisation of the Notary and The Notary Procedure Code, which would reflect the procedural nature of notarial activities, regulate the procedure for performing notarial acts and provide guarantees for the functioning of the notary (Komarov, Barankova, 2020, pp. 59-60).

4. Conclusions

Based on the above, the following conclusions can be drawn:

Notarial activities should be an effective mechanism for protecting the rights of participants in legal relations by expanding the powers of notaries in this field, rather than by vesting them with new and uncharacteristic functions of notarial activities

The effectiveness of the notary's tasks and its functional capabilities should be ensured

by adequate regulation framework of the organisational principles of this jurisdictional body, as well as of procedural and legal aspects of notarial activities. In particular, the problems that urgently require to be legally regulated are the problems of the system of actors of the notarial procedure, quota of notaries' positions, payment for notarial acts, and regulation framework of notarial activities guarantees.

Guarantees of notarial activities as qualified legal support are a legally significant mechanism for ensuring the activities of notary bod-

ies, which is implemented strictly on the basis of the constitutional right of a citizen to qualified legal aid at both the legislative and law application levels. The system of guarantees of notarial activities includes: first, impartiality; second, independence; third, governance 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; fourth, notarial secrecy; fifth, judicial protection of notarial activities.

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СИСТЕМА ГАРАНТІЙ НОТАРІАЛЬНОЇ ДІЯЛЬНОСТІ В УКРАЇНІ: ТЕОРЕТИЧНІ ТА ПРАКТИЧНІ АСПЕКТИ

Анотація. Мета. Метою статті є дослідження теоретико-практичних аспектів системи гарантій нотаріальної діяльності в Україні як кваліфікованої юридичної допомоги. **Результати.** У статті розглянуто теоретико-практичні аспекти системи гарантій нотаріальної діяльності в Україні як кваліфікованої юридичної допомоги. На підставі опрацювання вітчизняної та зарубіжної юридичної літератури сформульовано визначення поняття «гарантії нотаріальної діяльності». Охарактеризовано систему гарантій вітчизняної нотаріальної діяльності. Проаналізовано проблемні питання забезпечення системи гарантій нотаріальної діяльності в Україні з урахуванням чинного законо-

давства та юридичної практики. Юридичними гарантіями забезпечення незалежності нотаріуса є зокрема безстроковість дії свідоцтва про право на заняття нотаріальною діяльністю, судова процедура оскарження дій нотаріуса. Однак вони не можуть бути визнані належними та достатніми. У цьому зв'язку, по-перше, доречно було б передбачити обов'язковий судовий порядок зупинення та припинення нотаріальної діяльності. По-друге, суттєвого вдосконалення потребує механізм контролю за нотаріальною діяльністю з тим, щоб питання про порушення закону під час вчинення нотаріальних дій вирішувалися б також виключно судом. **Висновки.** Зроблено висновок, що нотаріальна діяльність має бути дієвим механізмом з охорони прав суб'єктів правовідносин завдяки розширенню повноважень нотаріусів у цій сфері, а не наділенню їх усе новими і не властивими нотаріальній діяльності функціями. Ефективність виконання завдань нотаріату та його функціональних можливостей мають бути забезпечені адекватним унормуванням організаційних засад цього юрисдикційного органу, а також процесуально-правових аспектів нотаріальної діяльності. Зокрема, проблемами, що потребують нагального правового врегулювання, є проблеми системи суб'єктів нотаріального процесу, квотування посад нотаріусів, оплати вчинення нотаріальних дій, унормування гарантій нотаріальної діяльності. Гарантії нотаріальної діяльності як кваліфікованої юридичної допомоги – це юридично значимий механізм забезпечення діяльності органів нотаріату, що неухильно реалізується на основі конституційного закріплення права громадянина на кваліфіковану юридичну допомогу як на законодавчому, так і на правозастосовному рівнях. До системи гарантій нотаріальної діяльності належать: по-перше, неупередженість; по-друге, незалежність; по-третє, керівництво лише Конституцією і законами, правовими актами органів державної влади та місцевого самоврядування, прийнятими в межах їх компетенції, а також міжнародними нормативними актами; по-четверте, нотаріальна таємниця; по-п'яте, судовий захист нотаріальної діяльності.

Ключові слова: нотаріус, нотаріат, нотаріальна діяльність, гарантії, гарантії нотаріальної діяльності, система гарантій нотаріальної діяльності.

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