10 2022 (320)

ENTREPRENEURSHIP, ECONOMY and LAW

A monthly scientific-practical law journal has been issued since January 1, 1996

ACADEMICIAN F.H. BURCHAK SCIENTIFIC RESEARCH INSTITUTE OF PRIVATE LAW AND ENTREPRENEURSHIP OF NALS OF UKRAINE

HELVETICA PUBLISHING HOUSE

Monument to the Magdeburg Rights in Kyiv is on the cover

Co-founders:
Academician F.H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine
Garantia Ltd., Gestors Attorneys' Association

ISSN 2663-5313 (print)
ISSN 2663-5321 (online)

Based on the Order of the Ministry of Science and Education of Ukraine № 409 (annex 1) dated 17.03.2020, the journal is included in the list of professional publications of the "B" category (081 "Law", 293 "International Law")

The journal is indexed in the international scientometric databases Index Copernicus International (the Republic of Poland)

The articles are checked for plagiarism using the software StrikePlagiarism.com developed by the Polish company Plagiat.pl.

Certificate of the state registration of the print media: KV 15779-4251 ПР dated 02.11.2009

The journal is recommended for printing and distributing over the Internet by the Academic Council of Academician F.H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine (Minutes No. 8 dated 31.08.2022)

Official web-site: pgp-journal.kiev.ua

Passed for printing 05.09.2022. Format 70×108 1/16. Offset paper.
Offset printing. Conventional printed sheet 4,77. Published sheets 9,40.
Print run – 255 copies. Order No. 1023/653
Publisher: Publishing House "Helvetica"
6/1 Inglezi St., Odesa, 65101
Certificate of publishing business entity ДК № 7623 dated 22.06.2022

Certificate of the state registration of the print media
Series KB No. 15779-4251 ПР dated 02.11.2009
Postal address of the editorial office: 7-B Nazarivska St., office 4, Kyiv, 01032
Tel./fax (044) 513-33-16.

10 2022 (320)

Щомісячний науково-практичний юридичний журнал видається з 1 січня 1996 р.

ПІДПРИЄМНИЦТВО, ГОСПОДАРСТВО І ПРАВО

НАУКОВО-ДОСЛІДНИЙ ІНСТИТУТ ПРИВАТНОГО ПРАВА І ПІДПРИЄМНИЦТВА
ІМ. АКАДЕМІКА Ф. Г. БУРЧАКА НАПрН УКРАЇНИ

ГЕЛЬВЕТИКА
ВИДАВНИЧИЙ ДІМ

ЦИВІЛЬНЕ ПРАВО І ПРОЦЕС

ТРУДОВЕ ПРАВО

АДМІНІСТРАТИВНЕ ПРАВО І ПРОЦЕС

На першій *сторінці обкладинки* – пам'ятник Магдебурзькому праву в м. Києві

КРИМІНАЛЬНЕ ПРАВО

КРИМІНАЛЬНИЙ ПРОЦЕС

Співзасновники:
Науково-дослідний інститут приватного права і підприємництва ім. академіка Ф. Г. Бурчака Національної академії правових наук України, ТОВ «Гарантія», Адвокатське об'єднання «Gestors»
ISSN 2663-5313 (print)
ISSN 2663-5321 (online)
На підставі Наказу Міністерства освіти та науки України № 409 від 17.03.2020 р. (Додаток 1) журнал внесений до переліку фахових видань категорії "Б" у галузі юридичних наук (081 "Право", 293 "Міжнародне право")
Журнал включено до міжнародної наукометричної бази Index Copernicus International (Республіка Польща)

Статті у виданні перевірені на наявність плагіату за допомогою програмного забезпечення StrikePlagiarism.com від польської компанії Plagiat.pl

Свідоцтво про державну реєстрацію друкованого засобу масової інформації серія КВ № 15779-4251ПР від 02.11.2009 р.
Журнал рекомендовано до друку та поширення через мережу Internet вченою радою Науково-дослідного інституту приватного права і підприємництва ім. академіка Ф. Г. Бурчака НАПрН України (Протокол № 8 від 31.08.2022 року)
Офіційний сайт: pgp-journal.kiev.ua

Підписано до друку 05.09.2022. Формат 70x108 1/16. Папір офсетний.
Друк офсетний. Ум. друк. арк. 4,77. Обл.-вид. арк. 9,40.
Тираж – 255. Замовлення № 1023/653
Видавець: Видавничий дім «Гельветика»,
65101, м. Одеса, вул. Інглезі, 6/1
Свідоцтво суб'єкта видавничої справи ДК № 7623 від 22.06.2022 р.

Свідоцтво про державну реєстрацію друкованого засобу масової інформації серія КВ № 15779-4251 ПР від 02.11.2009 р.
Поштова адреса редакції: 01032, м. Київ, вул. Назарівська, 7-Б, оф. 4.
Тел./факс (044) 513-33-16.

UDC 347.961
DOI https://doi.org/10.32849/2663-5313/2022.10.01

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Chyzhmar, Kateryna (2022). The system of guarantees of notarial activities in Ukraine: theoretical and practical aspects. *Entrepreneurship, Economy and Law, 10*, 5–11, doi https://doi.org/10.32849/2663-5313/2022.10.01

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 activities 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-

ticular, 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 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.

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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.

The article was submitted 18.07.2022
The article was revised 08.08.2022
The article was accepted 29.08.2022

UDC 349.2
DOI https://doi.org/10.32849/2663-5313/2022.10.02

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Melnyk, Valentyn (2022). The current status of labour law regulatory mechanism for compensation for damages in Ukraine. *Entrepreneurship, Economy and Law, 10*, 12–17, doi DOI https://doi.org/10.32849/2663-5313/2022.10.02

THE CURRENT STATUS OF LABOUR LAW REGULATORY MECHANISM FOR COMPENSATION FOR DAMAGES IN UKRAINE

Abstract. *Purpose*. The purpose of the article is to assess the current status of labour law regulatory framework for compensation for damages in Ukraine. ***Results*.** The article analyses the provisions of the current legislation aimed at regulating social relations in the field of compensation for damages. As an element of the regulatory mechanism for compensation for damage, bylaws are aimed at specifying the procedure for determining and covering damage. However, it should be noted that currently a significant gap exists in this area, as most of these documents are not in force and no new ones have been adopted. The provisions of bylaws derive from laws. This is universally recognised and no one doubts it. That is why all bylaws, without exception, have less legal force than any law and cannot contradict it, nor can they amend or repeal the provisions of laws. Otherwise, the by-laws shall be deemed invalid from the moment of their adoption and shall be cancelled. The existence of bylaws in the legal system is due to the multi-level structure of social relations themselves, which require to be regulated both by laws and bylaws, as well as need prompt, competent and professional resolution of issues in various spheres of society. The study of legal provisions as one of the key elements of the regulatory mechanism for compensation for damages in labour law enables to find out the rules and the legal regime, under which the said compensation should be made, to identify gaps, duplications, ambiguities and other shortcomings in these rules that negatively affect the ability of parties to labour relations to obtain appropriate compensation. ***Conclusions*.** The author concludes that the current labour regulatory mechanism for compensation for damages in Ukraine is not holistic and complete and requires significant improvement in both formal (systematisation) and substantive terms. Streamlining the legislation under study, eliminating gaps and other shortcomings in its content is a prerequisite for ensuring high-quality regulatory mechanism for compensation for damages.

Key words: regulatory mechanism, labour law, compensation, damage, labour legislation.

1. Introduction

At present, numerous gaps exist in the current Ukrainian labour legislation in terms of defining key conceptual and terminological constructs (such as damage, material and moral damage, extreme necessity, etc.), a clear and unambiguous understanding of which is very important for the correct resolution of issues related to compensation for damages in labour law. However, a much more important issue is to find out the current state of the regulatory mechanism for compensation for damages under the labour law of Ukraine in order to establish its quality and efficiency, and to identify any gaps and other shortcomings.

The issue of the regulatory mechanism for compensation for damages in Ukrainian labour law has been repeatedly under the focus in scientific research by a number of scholars. For example, these are: M.I. Baru, V.V. Haievyi, S.L. Ivanov, S.S. Karynskyi, R.Z. Lyvshyshch, N.M. Khutorian, O.M. Korotka, T.Ye. Krysan, O.Yu. Kostiuchenko, Ye.Yu. Podorodnii, I.A. Rymar, S.V. Selezen, P.R. Stavysskyi, and many others. However, despite considerable scientific achievements, there are still many theoretical and practical problems in the relevant field.

As a result, the purpose of the article is to assess the current status of labour law regulatory framework for compensation for damages in Ukraine.

2. Fundamental principles of the regulatory mechanism

The regulatory mechanism is a complex multidimensional phenomenon, which includes

a number of constituent elements (legal means), such as: the rule of law; a legal act; a legal fact; the implementation of law; legal consciousness, awareness of legal provisions by actors; legal culture; lawful behaviour; unlawful behaviour; legal responsibility; measure of state coercion applied to an offender (Jakutova, 2004, pp.24–28).

In the present study, we are particularly interested in elements of the regulatory mechanism such as provisions of law and regulations. The legal norms are the primary integral structural element of the regulatory mechanism. According to M.V. Tsvik and other legal scholars, a legal norm is a primary, individual smallest structural element of law, a rule of conduct recognised and protected by the State. A legal norm directly regulates, gives legal meaning to social relations and finds its external expression in a legal provision (Tsvik, Tkachenko, Bohachova, 2002, p. 258). Ye.V. Bilozorov, V.P. Vlasenko and O.B. Horova argue that the legal state regulates social relations primarily through the provisions of law, since extra-legal regulators of social behaviour have never been sufficient to regulate and reconcile human interests, to keep a person within the requirements established by society. That is why legal provisions play is of extreme importance in the system of social provisions. From their point of view, a provision of law is a formally defined rule of a general nature established or authorised by the state or other authorised lawmaker with the aim of regulating or protecting public relations and ensured by the possibility of coercion (Bilozorov, Vlasenko, Horova, Zavalnyi, Zaiats, 2017, p. 132). Ye.Yu. Podorozhnii believes that a legal norm is an officially approved, formalised (standardised) rule of social behaviour, which, from the perspective of the state, is the most appropriate and useful in the current conditions of social development, and therefore this rule is comprehensively enforced by the state, including, if necessary, by using coercion (Podorozhnii, 2015).

Thus, the study of legal norms as one of the key elements of the regulatory mechanism for compensation for damages in labour law enables to find out the rules and the legal regime, under which the said compensation should be made, to identify gaps, duplications, ambiguities and other shortcomings in these rules that negatively affect the ability of parties to labour relations to obtain appropriate compensation.

The study of specific legal norms is inextricably linked to the study of the relevant system of legal regulations that are the sources of the former (i.e. legal provisions). A legal regulation is an official written document adopted by an authorised state body that establishes, amends, terminates or specifies a certain legal norm. This document reflects the will of the authorised actor of law, is binding, has a documentary form of consolidation, and is enforced by the state, including by coercive means (Shemshuchenko, 2003, p. 192). At the official level, the concept of a legal regulation is enshrined in the Code of Administrative Procedure of Ukraine, where it is defined as a management act (decision) of a public authority that establishes, changes, terminates (cancels) general rules regulating similar relations and is intended for long-term and repeated use (Code of Administrative Procedure of Ukraine, 2005). Therefore, the study of the system and content of legal regulations containing provisions on compensation for damages in labour law enables to establish the quality of legislative regulatory mechanism for the issues of compensation under study at different levels of the hierarchy of legislation in force in our country.

3. Legal force of legal regulations

When studying the state of the regulatory mechanism for compensation for damages by the labour law provisions of Ukraine, we will rely on such a criterion as the legal force of legal regulations, i.e., the property of legal regulations which determines their mutual hierarchical subordination and the ratio of binding force between them in the system of legislation (Draft Law of Ukraine On Regulatory Acts, 2008).

In terms of legal force, the Constitution of Ukraine is the pinnacle of Ukrainian legislation. Moreover, it (the Constitution) is also the basis of national legislation, since it enshrines the fundamental, most important and general values and principles on which social life in our country is based. These basic principles of the organisation and functioning of public life in Ukraine include compensation for damages, the right to which is enshrined in several articles of the Basic Law of the State, in particular, Articles 32, 41, 50, 56, 62, 66, 152. However, the provisions of these articles do not directly relate to labour and labour relations, however, the Constitution stipulates that an individual, his life and health, honour and dignity, inviolability and security shall be recognised in Ukraine as the highest social value. Human rights and freedoms, and guarantees thereof shall determine the essence and course of activities of the State. The State shall be responsible to the individual for its activities. Affirming and ensuring human rights and freedoms shall be the main duty of the State (Constitution of Ukraine, 1996). The analysis of constitutional provisions clearly reveals that the State guarantees, protects and defends a number of other civil, economic and social rights, which include the right to property, the right to work, and the right to

protect one's rights and legitimate interests, including compensation for damage. The Constitution explicitly states that everyone has the right to protect their rights and freedoms from violations and unlawful encroachments by any means not prohibited by law (Constitution of Ukraine, 1996).

Although the Constitution of Ukraine does not explicitly provide for compensation for damages in labour relations, it follows from the provisions of the Basic Law that each participant in these relations has the right to protect his or her rights, freedoms and legitimate interests that constitute the content of labour relations. For example, this includes the right to restore justice in the event of a breach of it by a party (parties) to the employment relationship and to compensation for damage caused as a result of such unlawful actions (inaction). In addition, the parties to labour relations may exercise their right to compensation for the said damage in both jurisdictional and non-jurisdictional forms.

International legal instruments are of importance in the system of guaranteeing the right to compensation for damage. International legal acts generally do not explicitly establish the right to compensation for damage to employees and/or employers, but their provisions do provide for that a State that has acceded to the relevant international treaties guarantees the right to work and to favourable and just conditions for its realisation. For example, Article 23 of the Universal Declaration of Human Rights (1948) states that everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interests (Universal declaration of human rights: international document, 1948). In accordance with the International Covenant on Economic, Social and Cultural Rights (1966), the States Parties to the present Covenant recognise the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. The steps to be taken by a State Party to the present Covenant to achieve the full realisation of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual. The States Parties to the Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: a) Remuneration which provides all workers, as a minimum, with:(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work; ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant; b) Safe and healthy working conditions; c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence; d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays (International Covenant on Economic, Social and Cultural Rights 1966). A significant number of important labour standards, in particular those related to labour safety, are provided for in the European Social Charter (European Social Charter (revised), 1996). Obviously, the obligations of state parties under international treaties to ensure an appropriate level of fairness and safety in the field of labour cannot be considered properly fulfilled if the country does not have a mechanism for compensation for damage within the relevant labour relations. And the provisions of a number of these treaties (declarations, covenants, charters, etc.) are aimed at drawing the attention of States to the relevant issues and establishing key principles for their resolution.

4. Systems of legal regulations of Ukraine

Next, in the hierarchy of the system of legal regulations of Ukraine, laws are distinguished by their legal force in legal theory. A law is a legal regulation of a representative supreme body of state power (or civil society/directly of the people) that regulates the most important issues of public life, establishes the rights and obligations of citizens, has supreme legal force and is adopted in compliance with a special legislative procedure (Skakun, 2011, p. 316). The law is the main means of external public fixation and legal consolidation, enabling to clearly define its specific content and further protection (Surmin, Bakumenko, Mykhnenko, 2010, pp. 244-245). Among the laws that regulate labour relations, the most important sectoral codified legal regulation is the Labour

Code of Ukraine. The state of regulatory mechanism for compensation issues in this Code is far from ideal and is characterised by a number of problems:

1) only the mechanism for compensation for damage caused by unlawful acts (omissions) of employees has found more or less meaningful consolidation in the Labour Code of Ukraine. For example, the provisions on this compensation are enshrined in Chapter IX of the Code, devoted to the material liability of employees, which deals with the procedure for determining the amount of damage and its compensation, as well as guarantees of the rights of employees in covering damage. However, even here there are shortcomings, for example, the lack of definitions of important concepts such as "extreme necessity", "direct actual damage", "industrial and economic risk", and "employee fault";

2) issues related to compensation by the employer in favour of the employee are rather superficially regulated, as well as the provisions on this type of compensation are not systematised – they are scattered in a number of articles (Articles 22, 117, 173, 235-237-1, etc.) of different chapters of the Code, unlike compensation provided by employees;

3) the criteria and procedure for determining non-pecuniary damage are absent;

4) provisions that would allow employees to protect their right to compensation out of court (e.g., self-defence, mediation, etc.) are absent.

In addition to the Labour Code of Ukraine, to a certain extent, the issues of compensation for damages in labour law are regulated by other laws, such as "On labour protection" (Law of Ukraine on labour protection, 1992); "Fundamentals of Ukrainian legislation on compulsory state social insurance" (Fundamentals of the legislation of Ukraine on compulsory state social insurance, 1998); "On Compulsory State Social Insurance (Law of Ukraine On Compulsory state social insurance, 1999); "On determining the amount of damages caused to an enterprise, institution or organisation by theft, destruction (damage), shortage or loss of precious metals, precious stones and currency valuables" (The Law of Ukraine On Determining the Amount of Damages Caused to Enterprises, Institutions, Organizations by Theft, Destruction (damage), Lack or Loss of Precious Metals, Precious Stones, and Currency Valuables, 1995), etc.

The most extensive level is the bylaw level. A bylaw is a document issued by a competent authority or official on the basis of the law, in accordance with it, to specify and implement legislative requirements and contains legal provisions. It is important to understand that the subordinate nature of such regulations does not mean that they are less legally binding. They have the necessary legal force, but it does not have the universality and supremacy inherent in laws. The legal force depends on the status of state bodies, the nature and purpose of these regulations (Vediernikov and Papirna, 2008). The provisions of bylaws derive from laws. This is universally recognised and no one doubts it. That is why all bylaws, without exception, have less legal force than any law and cannot contradict it, nor can they amend or repeal the provisions of laws. Otherwise, the by-laws shall be deemed invalid from the moment of their adoption and shall be cancelled. The existence of bylaws in the legal system is due to the multi-level structure of social relations themselves, which require to be regulated both by laws and bylaws, as well as need prompt, competent and professional resolution of issues in various spheres of society (Kyrychenko, Kurakin, 2010).

As an element of the regulatory mechanism for compensation for damage, bylaws are aimed at detailing the procedure for determining and covering damage. However, it should be noted that currently a significant gap exists in this area, as most of these documents are not in force and no new ones have been adopted.

Finally, the last level of the regulatory mechanism for compensation for damage in labour law is contractual, which is also generally by-law, but its specificity is that the provisions established therein are adopted not in a centralised manner, but by contractual agreement between the parties to the labour relations. The current Labour Code of Ukraine provides for fairly broad opportunities for the parties to labour relations to regulate their rights and obligations, in particular, separate written agreements define full financial liability of the employee and collective (team) financial liability. However, we are convinced that the possibilities of the contractual form of compensation settlement are not being used to the fullest extent today. In particular, we believe that a contract can and should be used as a non-jurisdictional form of protection of employees' right to compensation for damages.

5. Conclusions

To sum up, the current labour regulatory mechanism for compensation for damages in Ukraine is not holistic and complete and requires significant improvement in both formal (systematisation) and substantive terms. Streamlining the legislation under study, eliminating gaps and other shortcomings in its content is a prerequisite for ensuring high-quality regulatory mechanism for compensation for damages.

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СУЧАСНИЙ СТАН ПРАВОВОГО РЕГУЛЮВАННЯ ВІДШКОДУВАННЯ ШКОДИ НОРМАМИ ТРУДОВОГО ПРАВА УКРАЇНИ

Анотація. ***Мета.*** Мета статті – надати оцінку сучасному стану правового регулювання відшкодування шкоди нормами трудового права України. ***Результати.*** У статті здійснено аналіз норм чинного законодавства, положення якого спрямовані на регулювання суспільних відносин у сфері відшкодування шкоди. Як елемент механізму правового регулювання відшкодування шкоди підзаконні нормативно-правові акти спрямовані на деталізацію порядку визначення та покриття шкоди. Однак слід констатувати, що на сьогодні тут є суттєві прогалини, оскільки більшість із таких документів натепер не чинні, а нові не прийняті. Приписи підзаконних актів є похідними від законів. Це є загальновизнаним і ні в кого не викликає будь-яких сумнівів. І тому всі без винятку підзаконні акти мають меншу юридичну силу, ніж будь-який закон, і не можуть протирічити йому, а також не можуть змінювати або скасовувати норми законів. В іншому разі підзаконні акти визнаються недійсними з моменту їх прийняття і підлягають скасуванню. Існування підзаконних нормативно-правових актів у правовій системі зумовлено багаторівневою структурою самих суспільних відносин, які потребують як законодавчого, так і підзаконного нормативного регулювання, а також необхідністю оперативного, компетентного і професійного вирішення питань у різних сферах життєдіяльності суспільства. Вивчення правових норм як одного із ключових елементів механізму правового регулювання відшкодування шкоди у трудовому праві дозволяє з'ясувати ті правила, той юридичний режим, за якими має відбуватися зазначене відшкодування, виявити наявні у цих правилах прогалини, дублювання, нечіткості та інші недоліки, що негативним чином позначаються на можливостях учасників трудових відносин щодо отримання відповідного відшкодування шкоди. ***Висновки.*** Зроблено висновок, що наявне на сьогодні трудо-правове регулювання відшкодування шкоди в Україні не має цілісного та завершеного вигляду і потребує суттєвого доопрацювання як у формальному (проведення систематизації), так і змістовому сенсі. Упорядкування досліджуваного законодавства, усунення у його змісті прогалин та інших недоліків є необхідною умовою забезпечення якісного правового регулювання відшкодування шкоди.

Ключові слова: правове регулювання, трудове право, відшкодування, шкода, трудове законодавство.

The article was submitted 18.07.2022
The article was revised 08.08.2022
The article was accepted 29.08.2022

UDC 342.9 (477)
DOI https://doi.org/10.32849/2663-5313/2022.10.03

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Berezhnoi, Serhii (2022). Foreign experience in protecting state sovereignty and territorial integrity and potentials of its application in Ukraine. *Entrepreneurship, Economy and Law, 10*, 18–24, doi https://doi.org/10.32849/2663-5313/2022.10.03

FOREIGN EXPERIENCE IN PROTECTING STATE SOVEREIGNTY AND TERRITORIAL INTEGRITY AND POTENTIALS OF ITS APPLICATION IN UKRAINE

Abstract. ***Purpose.*** The purpose of the article is to analyse the foreign experience in protecting State sovereignty and territorial integrity and feasibility of its application in Ukraine. ***Results.*** The author proves the need for scientific research on the foreign experience in protecting State sovereignty and territorial integrity. It is noted that each State has formulated its own special approach to protecting State sovereignty and territorial integrity due to: first, the specifics of historical and legal development of each individual State; second, its social, economic and political development; and third, the geographical location of the State. The author summarises the experience in protecting the State sovereignty and territorial integrity of the leading European countries, in particular, Great Britain, Germany and France. The author argues that these countries' membership in the European Union and the United Nations has a significant impact on the development of their legislation. The author offers his own vision of possible trends in implementing the most positive foreign experience in protecting State sovereignty and territorial integrity in the national realities. ***Conclusions.*** To sum up, the following foreign experience in protecting State sovereignty and territorial integrity in the Ukrainian state is most appropriate: 1) Ukraine should bring its domestic legislation in line with the requirements of the European Union in the field of protection of State sovereignty and territorial integrity as soon as possible, as the experience of a number of European countries shows that their legislation is based on the principles of sovereignty enshrined in the EU's regulatory sources; 2) The Ukrainian legislator should review the organisational structure of the system of entities whose activities are aimed at protecting the State sovereignty and territorial integrity of Ukraine; 3) It is advisable to create an effective mechanism of interaction between the relevant actors; 4) It is necessary to adopt the experience of states in terms of full financial and logistical support of the relevant agencies; 5) It is essential to develop an effective Strategy for the protection of State sovereignty and territorial integrity, which has been effectively implemented in leading countries, for example, the UK.

Key words: state sovereignty, territorial integrity, protection, administrative and regulatory framework, tasks, functions, powers, foreign experience, improvement, administrative legislation.

1. Introduction

Nowadays, it is undisputed that the modern Ukrainian State is characterised by numerous destabilising processes, including economic, social and political ones. The fact that part of our country's territory was annexed in 2014 and Russia's large-scale invasion began in February 2022 significantly worsens the situation, as a result of which Ukraine lost not only territory but also an invaluable resource – its citizens, who were also taxpayers. In this regard, in the current realities, the legislator faces a number of problems that require immediate resolution, the most important thereof is the protection of Ukraine's State sovereignty. However, it is impossible to fully address the issue without improving the activities of the Security Service of Ukraine (hereinafter referred to as the SSU) as a key entity for the protection of State sovereignty and territorial integrity. But, in the context of the ongoing European integration processes in Ukraine, the improvement of virtually all state institutions cannot be complete without studying foreign experience. The SSU's activities in this context cannot be an exception.

Before considering the experience of individual states, the activities of the United Nations (hereinafter – the UN), established

at the end of World War II, should be under focus. In June 1945, at a conference in San Francisco, the UN Charter was signed as a political universal organisation for the maintenance of international peace and collective security. 75 years have passed since then, so we can confidently state that today's realities are largely different from those of the UN's founding. New trends and processes in the system of international relations have been initiated, the configuration of forces has changed, and new threats and challenges have appeared on the agenda. All of this has put forward new demands on the UN, to which it responds within an outdated functional and structural system that does not produce the expected results and leads to the loss of its members' trust. The only way to restore the role of the UN, as the Member States have already realised, is to reform it profoundly (Korniichuk, 2011, p. 148).

2. The role of the United Nations in the protection of State sovereignty and territorial integrity

Today, the overwhelming majority of states demand that the UN find a balance between the basic principle of State sovereignty and the need to protect human rights, as the Security Council held a one-day debate on the principles of the UN Charter. However, at the last meeting of the Member States, most speakers differed in their interpretations of this fundamental document: some emphasised the principle of non-interference in internal affairs, while others stated that measures should be taken when states fail to protect their people or are themselves guilty of human rights violations. "For millions of people living in war and extreme poverty, and for countless others whose rights are violated or otherwise ignored, the ideals and values of the [United Nations] Charter remain elusive," said Secretary-General Ban Ki-moon, addressing the 15-member panel.

While the primary responsibility for conflict prevention and human rights protection lies with Member States, the United Nations can help countries address their national challenges and fulfil their responsibility to protect. According to him, among other things, the Organisation offered assistance in building national capacity to identify and eliminate the precursors of genocide and other serious crimes. Therefore, it is each state that is responsible for ensuring the protection of State sovereignty and territorial integrity.

3. Protection of State sovereignty and territorial integrity in the UK

In view of this, we consider it appropriate to focus on the experience of the leading European countries, among which the United Kingdom should be singled out. In this country, the concept of sovereignty was often mentioned during the EU referendum debate by people from all strata of society. Scepticism towards globalisation and the erosion of sovereignty was evident in the campaign's calls to restrict migration and return power from Brussels to Westminster. Indeed, sovereignty also seems to have been important to the referendum outcome. Almost half of those who voted for Brexit said it was because "decisions about the UK should be made in the UK", showing that the idea of parliamentary sovereignty, linked to the legislative powers of parliament, was very relevant to the vote. This is the type of sovereignty that former British Prime Minister Theresa May also spoke about. In her first Brexit speech, she pledged to pursue a Brexit that would allow the country to do "what independent, sovereign countries do... decide for ourselves how we control immigration... be free to pass our own laws for ourselves".

Sovereignty is particularly specific in the UK – the protection of its national interests and security after the Second World War are closely linked to its special relationship with the United States. As part of this concept, the British State allows for broad American participation in its defence policy. In this field, the process of withdrawal from the EU political union has become particularly relevant. London seeks to organise it in such a way as to remain a key player in the Euro-Atlantic region, to increase its influence in international affairs and military power. In connection with Brexit, a debate has been launched on the correlation between State sovereignty and national interests. Scepticism about globalisation and problems related to the erosion of State sovereignty before the June 2016 referendum was reflected in Brexiteers' calls for restrictions on immigration and the "repatriation" to Westminster of powers it had previously transferred to Brussels. This largely determined their success in the vote, while the tension between national interests and State sovereignty was highlighted, but never resolved (Nosach, 2019).

A key actor in the protection of State sovereignty and territorial integrity is the UK Secret Intelligence Service (or MI6, as it is commonly known), which was founded in 1909. SIS (or MI6) exists to protect the UK's people, economy and interests of the from external threats. In addition, it helps other countries with whom the UK shares values of democracy, international law and universal human rights. MI6 is governed by British law and has independent oversight to balance the fundamental freedoms of citizens with their right to be secure and prosperous. The checks and balances that SIS operates are among the most comprehensive

and stringent in the world. SIS is accountable to the government, and the Prime Minister has overall responsibility for intelligence and security matters, however day-to-day ministerial responsibility for SIS lies with the Foreign and Commonwealth Development Secretary. Along with GCHQ and MI6, SIS is responsible for the majority of the UK's operational intelligence and security work. The Joint Intelligence Committee (JIC) assesses intelligence gathered by the agencies and presents it to ministers to enable informed policy-making (Secret Intelligence Service, 2020). (Secret Intelligence Service, 2020).

The activities of the UK Secret Intelligence Service are governed by several pieces of legislation:

– The Intelligence Services Act 1994 sets out SIS function as a foreign-focused intelligence agency;

– The Investigatory Powers Act 2016 provides a modernised framework for the use and oversight of investigatory powers by law enforcement and the security and intelligence agencies;

– The Human Rights Act 1998 protects citizens' rights under the European Convention on Human Rights.

Parliament and the judiciary provide rigorous oversight of SIS and its operations. The Investigatory Powers Commissioner's Office of the (IPCO) oversees the use of powers used by the Service to conduct operations. The Investigatory Powers Tribunal (IPT) is a judicial body that offers a route to redress for anyone who believes they have been the victim of unlawful acts of covert investigative techniques. The Intelligence and Security Committee (ISC) provides oversight of SIS operations, policy, expenditure and administration to Parliament (Secret Intelligence Service, 2020).

The UK Security Service (or MI5) should under focus when studying the UK's experience in protecting State sovereignty and territorial integrity. MI5 is formally the Security Service, an intelligence agency responsible for internal security and domestic counterintelligence activities in the United Kingdom. Although MI5 is responsible for domestic counterintelligence, it does not have powers to arrest, which are instead delegated to Scotland Yard. MI5 enjoyed great success during the Second World War. The secret organisation first publicly named its head in 1991. At the same time, it also released some previously classified information, such as the number of its employees and its organisational structure. Counter-terrorism operations make up the bulk of MI5's activities, which report to the Home Office (MI5 – British government, 2022).

The main objectives of MI5 are:

– To prevent damage to the UK from intelligence and other covert activities of other states;

– To safeguard the economic well-being of the United Kingdom from threats arising from the acts or intentions of persons residing outside the UK;

– To detect and monitor new and emerging threats to the security of the state by collecting, analysing and summarising counterintelligence information; to inform the country's leadership about the threats detected and measures taken to eliminate them;

– To take measures to terminate the activities of foreign intelligence representatives in case of a real threat to the national interests of the state through special operations;

– To protect sensitive information and assets of the government, as well as Critical National Infrastructure (CNI);

– To take measures to inform the management and staff of "closed" enterprises and organisations about the possible access by foreign intelligence;

– To conduct investigations related to the "leakage" of classified information, to support the police and other law enforcement agencies in preventing and solving serious crimes

– To assist the Secret Intelligence Service (MI6) and the UK Government Communications Headquarters (GCHQ) in the performance of their statutory functions (Petryk, 2015).

MI5 performs counter-intelligence activities in the armed forces, public and private agencies, among the population of the country and its overseas possessions, and conducts covert surveillance of foreign nationals, immigrants, etc. In addition, the security service also deals with propaganda and counter-propaganda, censorship, conducts covert surveillance of diplomatic and trade missions of foreign countries, socio-political organisations, and controls airports, seaports and important railway stations. The Security Service relies on an extensive network of informants working in virtually all-important government agencies and private companies (Petryk, 2015).

4. Protection of State sovereignty and territorial integrity in Germany

Next, we will focus on the positive experience of another leading European state – Germany. First of all, it should be noted that ensuring the national security and territorial value of Germany has a characteristic feature that not only the state itself creates security for the population, but also its individual citizens. For example, the Constitution allows the citizens of this country to resist anyone who intends to over-

throw the established state system in case other means cannot be used (Murashko, 2020; Kobko and Dauhulie, 2018). Moreover, Article 18 of the German Constitution states that citizens who engage in activities against the foundations of the constitutional order lose their rights to freedom of expression, to form associations, and to organise meetings, according to a decision of the Federal Constitutional Court. Another interesting fact is that in the event of a threat to the foundations of the constitutional order of the whole country or one of its states, an internal state of emergency is declared in the state. Germany considers the following threats to be examples of such threats: threats to public order and national security, the existence or free democratic system of the whole country or one of its states (Murashko, 2020; Kobko, Dauhulie, 2018).

A key actor in the protection of State sovereignty and territorial integrity is the Federal Intelligence Service (BND), which is Germany's foreign intelligence service. It is present all over the world and is engaged in foreign economic, political and military intelligence. In this context, it provides the federal government with information for its foreign and security policy decisions. The BND works on behalf of the federal government. It is responsible for gathering information that goes beyond publicly available facts and opinions. Intelligence services often work in secret. The BND is headquartered in Berlin. Some employees still work at the former headquarters in Pullach.

Germany's foreign intelligence service monitors terrorist groups, provides the German government with information on cyberattacks and ensures that German diplomats have a voice in international conflicts. The federal government sets out in the job profile the objectives that the BND should address with what resources, ranging from priority 1 ("comprehensive information need") to 4 ("low information need"). The assessment of the documents available to *BR* and *Spiegel* shows the efforts made by one of Germany's most influential media outlets to filter, remove and above all assess the amount of data and report the results to the federal government. However, the assessment also shows where the filtering system reaches its limits.

In October 2016, the Bundestag passed a new BND law, which has since been criticised as providing wider access to data. The opposition unanimously voted against the amendment, fearing a violation of the constitution. Nevertheless, it came into force in January 2017. Snowden's so-called revelations became a trigger for legal reform. The German Bundestag established a commission to investigate the NSA, which was to examine, among other things, the extent to which the Federal Intelligence Service was involved in wiretapping by the US NSA. The investigation revealed that the BND used monitoring methods that in some cases lacked legal grounds. As a result, the federal government stated that it wanted to better control the intelligence agency and review the legal basis for its work. In June 2016, the government presented a bill to this effect, which generated many critical headlines in the media.

Finally, with regards to the above-mentioned country's experience, V.S. Murashko, using the example of Germany, identifies and substantiates five main institutional principles of formation of national security mechanisms for a broader understanding of modern factors of State security management in the context of various challenges and threats, such as: the system of governmental and parliamentary control over the work of special services, which helps verify the legality of their actions and ensures that external security is provided by intelligence agencies and internal security by counterintelligence and police agencies; and the introduction of a mechanism to ensure coordination of all agencies, responsible for the security of the state and the existence of special purpose bodies with the provision of their regulatory framework; each body has functions and tasks defined by law, as well as operational tools and methods that it uses to perform its tasks; intelligence and counterintelligence activities are performed separately from operational and investigative actions; a clear division of powers between police, intelligence and counterintelligence units (Murashko, 2020, pp. 151-152).

5. Protection of State sovereignty and territorial integrity in France

The experience of the French Republic, which was one of the last Western countries without such framework, should be underlined. The current legislation in the field of territorial integrity and State sovereignty is aimed at both providing resources to intelligence services and guaranteeing the protection of civil liberties by subordinating the use of surveillance measures to the authority of the political authorities and double control – that of an independent authority. Methods used may include listening to telephone conversations, capturing images in a secluded location, or capturing computer data. A particular solution may also allow access to a private place, including a home, to install or remove a marking or recording device. The objectives that may justify the use of these methods are as follows:

– National independence, territorial integrity and national defence;

– Key foreign policy interests, the fulfilment of France's international obligations and the prevention of foreign interference in any form;

–Main economic, industrial and scientific interests of France;

– Prevention of terrorism;

– Prevention of attacks on republican institutions, actions aimed at preventing collective violence;

– Prevention of organised crime and offences;

– Prevention of the proliferation of weapons of mass destruction (Renseignement français: quelle organisation et quel cadre légal?, 2022).

At present, the backbone of the national security system is the intelligence services that are part of the French Ministry of Defence. They provide the country's top leadership with important information on a wide range of national foreign policy and security issues, allowing timely military and political decision-making. Today, the intelligence services of the French Armed Forces are represented by two bodies: The General Directorate for External Security (La Direction Generale de la Securite Exterieure – DGSE) and the Directorate of Military Intelligence (Direction du Renseignement Militaire – DRM) (Conseil national du renseignement, 2021). The specificities of these intelligence services' activities are that they are regulated by presidential decrees and departmental orders that do not require approval by the National Assembly (lower house of parliament). Parliament is hardly involved in determining the legal basis for the work of these intelligence services and has little or no influence on them. The National Assembly's control over intelligence allocations is indirect, as it is exercised as part of the review and approval of the main items of the MoD budget (Conseil national du renseignement, 2021).

The DGSE was formed by integrating the various French intelligence agencies of the Second World War. The Free French Forces created the Central Bureau of Information and Action (BCRA) in 1942, which moved to Algiers in November 1943 as the General Directorate of Special Services (DGSS). On 6 November 1944, the intelligence networks of the French Resistance were integrated into the DGSS, which was renamed the Directorate of Research and Studies (DGER). This merger included a limited number of communist networks, which was not entirely satisfactory in the post-war environment. Therefore, in 1946, the government of the Fourth Republic created the Service for External Documentation and Counterintelligence (SDECE), subordinated to the Prime Minister (DGSE – General Directorate for External Security Direction Generale de la Securite Exterieure, 2021). Following the abolition of the French monopoly on opium in Indochina in 1950, the SDECE introduced centralised covert drug trafficking controls that linked Hmong poppy fields in Laos to opium dens operating in Saigon. It generated profits that were used to finance France's covert operations in the Vietnam War. With the advent of the Fifth Republic and until 1962, SDECE was used by Prime Minister Michel Debray as a strategic intelligence service and was particularly effective in fighting the Algerian uprising. In 1962, after the Ben Barca affair, General de Gaulle decided to place SDECE under the authority of the Minister of Defence, and this institution adapted to the military environment (DGSE – General Directorate for External Security Direction Generale de la Securite Exterieure, 2021).

6. Conclusions

Therefore, it can be concluded that to date, different European countries have developed their own special approach to the protection of State sovereignty and territorial integrity. This was due to: first, the specifics of historical and legal development of each individual State; second, its social, economic and political development; and third, the geographical location of the State. Therefore, relying on the above analysis, we believe that the following foreign experience in protecting State sovereignty and territorial integrity may be of most interest to our country:

– Ukraine should bring its domestic legislation in line with the requirements of the European Union in the field of protection of State sovereignty and territorial integrity as soon as possible, since, as the experience of a number of European states has shown, their legislation is based on the principles of sovereignty enshrined in EU regulations;

– The Ukrainian legislator should review the organisational structure of the system of actors whose activities are aimed at protecting the State sovereignty and territorial integrity of Ukraine. In particular, it seems advisable to create a single coordination centre responsible for organising the work of the relevant institutions, which, in turn, will avoid duplication of their powers and ensure the quality of their tasks and functions in the relevant field;

– An effective mechanism for interaction between the relevant actors should be made;

– It is imperative to adopt the experience of states in terms of full financial and logistical support for the relevant agencies;

– An effective Strategy for the protection of state sovereignty and territorial integrity, which has been effectively implemented in a number of leading countries, including the UK and the USA should be developed.

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ЗАРУБІЖНИЙ ДОСВІД ЗАХИСТУ ДЕРЖАВНОГО СУВЕРЕНІТЕТУ Й ТЕРИТОРІАЛЬНОЇ ЦІЛІСНОСТІ ТА МОЖЛИВОСТІ ЙОГО ВИКОРИСТАННЯ В УКРАЇНІ

Анотація. ***Мета.*** Метою статті є аналіз зарубіжного досвіду захисту державного суверенітету та територіальної цілісності та можливості його використання в Україні. ***Результати.*** Обґрунтовано необхідність проведення наукових досліджень, присвячених зарубіжному досвіду захисту державного суверенітету та територіальної цілісності. Відзначено, що в кожній державі було сформульовано власний особливий підхід до захисту державного суверенітету та територіальної цілісності, що було зумовлено: по-перше, специфікою історико-правового розвитку кожної окремої держави; по-друге, її соціальним, економічним та політичним розвитком; по-третє, географічним положенням держави. Узагальнено досвід захисту державного суверенітету та територіальної цілісності провідних країн Європи, зокрема Великобританії, Німеччини та Франції. Відзначено, що суттєвий вплив на розвиток законодавства цих країн має те, що вони є членами Європейського Союзу та Організації Об'єднаних Націй. Запропоновано власне бачення щодо можливих напрямів імплементації найбільш позитивного зарубіжного досвіду захисту державного суверенітету та територіальної цілісності у вітчизняних реаліях. ***Висновки.*** Узагальнено, що найбільш доцільним є запровадження такого зарубіжного досвіду захисту державного суверенітету та територіальної цілісності в українській державі: 1) Україні слід якомога швидше адаптувати вітчизняне законодавство до вимог Європейського Союзу у сфері захисту державного суверенітету та територіальної цілісності, адже, як свідчить досвід низки європейських держав, їхнє законодавство побудоване саме на тих принципах суверенітету, що були закріплені у нормативних джерелах ЄС; 2) українському законодавцю слід переглянути організаційну структуру системи суб'єктів, діяльність яких полягає у захисті державного суверенітету та територіальної цілісності України; 3) вбачається доцільним

створити ефективний механізм взаємодії відповідних суб'єктів; 4) обов'язково слід перейняти досвід держав у частині повноцінного фінансового та матеріально-технічного забезпечення відповідних відомств; 5) слід розробити дієву Стратегію захисту державного суверенітету та територіальної цілісності, яка була ефективно впроваджена в провідних державах, зокрема у Великобританії.

Ключові слова: державний суверенітет, територіальна цілісність, захист, адміністративно-правове регулювання, завдання, функції, повноваження, зарубіжний досвід, удосконалення, адміністративне законодавство.

The article was submitted 21.07.2022
The article was revised 11.08.2022
The article was accepted 30.08.2022

UDC 342.9
DOI https://doi.org/10.32849/2663-5313/2022.10.04

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Voskoboinikov, Vadym (2022). Specifics of business support and development under martial law in Ukraine. *Entrepreneurship, Economy and Law, 10,* 25–29, doi https://doi.org/10.32849/2663-5313/2022.10.04

SPECIFICS OF BUSINESS SUPPORT AND DEVELOPMENT UNDER MARTIAL LAW IN UKRAINE

Abstract. ***Purpose.*** The purpose of the article is to identify the specifics of business support and development under martial law in Ukraine. ***Results.*** It is emphasised that since the beginning of hostilities, the efficiency of the public sector of the economy has significantly declined, due to: the suspension of operations of enterprises in the area of active hostilities as a result of their partial or complete destruction; the blockade of seaports, which negatively affected exports; the suspension of transport links in the areas of active hostilities and the complete cancellation of air traffic; the destruction of the logistics system for the supply of certain production components; changes in the structure of demand and production; loss of sales and supply markets; lower tax revenues; a drop in the country's gross domestic product and a budget deficit. In this regard, it is emphasised that such a situation requires the state to develop a set of measures to facilitate an enabling environment for functioning of the economy in times of war, focused primarily on the preservation and restoration of industry, production and jobs, to support purchasing power and domestic demand, ensuring macroeconomic stability, to introduce government support and create favourable conditions for small and medium-sized businesses. ***Conclusions.*** It is concluded that today, the priority sectors where the functioning of enterprises under martial law should be regulated are the agricultural sector, food industry, pharmaceuticals, light industry, trade and provision of resources. The author analyses the measures taken at the national and regional levels to stabilise the economic situation in the country, including those aimed at increasing entrepreneurial mobility and organising business in the territories, where active hostilities are not taking place, as well as facilitating an enabling environment for a rapid economic recovery, including the return of businesses forced to suspend operations. The author offers original perspective on the list of measures that should be implemented to ensure support and development of business in Ukraine in the context of the introduction of the martial law regime.

Key words: legal regime, martial law, public sector of the economy, business, entrepreneurship, state support, stabilisation of the economic situation.

1. Introduction

The imposition of martial law throughout Ukraine on 24 February 2022 necessitated the introduction of a special procedure for the activities of state authorities, military commanders, military administrations and local governments, and the proper functioning of all sectors of society. The national economy should be under focus, since ensuring the economic stability of the state enables to attract as many resources as possible to fight the enemy and ensure victory in a military confrontation.

As of today, Ukraine's critical infrastructure enterprises providing services to the population in the fields of healthcare, water supply, energy supply, gas supply, production and sale of food and other groups of everyday goods are operating relatively smoothly (Sakun, Shchur, Matskiv, 2022). However, this applies only to those enterprises located in the government-controlled territory of Ukraine in regions that are not in the area of active hostilities. As for other regions, the operation of these enterprises is either completely paralysed (including as a result of their complete liquidation) or complicated by constant shelling, rocket and bomb attacks and occupation. In addition, it should be noted that since the beginning of hostilities, the efficiency of the public sector of the economy has significantly declined, due to: the suspension of operations of enterprises in the area of active hostilities as a result of their partial or complete destruction (Ilyich Iron and Steel Works of Mariupol and Azovstal, as

well as Zaporizhstal and ArcelorMittal Kryvyi Rih); the blockade of seaports, which negatively affected exports(wheat, oil, iron ore); the suspension of transport links in the areas of active hostilities and the complete cancellation of air traffic; the destruction of the logistics system for the supply of certain production components; changes in the structure of demand and production; loss of sales and supply markets; lower tax revenues; a drop in the country's GDP and budget deficit, etc. As a result, the above factors have had a negative impact on the population's spending power due to job losses and a significant decline in income (in most cases, the loss of income sources altogether). This situation requires the State to develop a set of measures to facilitate an enabling environment for functioning of the economy in times of war, focused primarily on the preservation and restoration of industry, production and jobs, to support purchasing power and domestic demand, ensuring macroeconomic stability, to introduce government support and create favourable conditions for small and medium-sized businesses. This is what makes this study relevant.

2. Doing business under martial law

It should be noted that the issue of facilitating an enabling environment for doing business under martial law affects a significant number of areas of society (legislative, economic, tax, medical, military, educational, etc.), therefore, a sufficient number of researchers, not only in the field of law, but also in the field of economics, have conducted relevant scientific research on the development of an optimal mechanism for business support and development. In our opinion, before proceeding directly to specific steps towards facilitating an enabling environment for doing business in various spheres of public life, it is necessary to develop a conceptually new approach to making public policy business development, providing legal, institutional and organisational guarantees for business development (primarily for medium and small businesses), which requires special attention to the work of experts in administrative law in this field. It should be noted that a large number of scholars have focused on the development and conduct of business in peacetime, but with regard to the specifics of the introduction of the martial law regime, this issue has only become extremely relevant in 2022. Therefore, given the lack of scientific research on the issue of maintaining and doing business under martial law, as well as economic recovery after the war, this topic requires special scientific attention and study.

It should be noted that the functioning of small and medium-sized businesses has a direct impact on the development of the country's economic and financial system. According to the Law of Ukraine "On the development and state support of small and medium-sized enterprises in Ukraine" of 22 March 2012, public policy in this field should be aimed at: 1) facilitating an enabling environment for the development of small and medium-sized enterprises; 2) ensuring the development of small and medium-sized enterprises in order to create a competitive environment and increase their competitiveness; 3) stimulating investment and innovation activity of small and medium-sized enterprises; 4) facilitating the activities of small and medium-sized businesses to promote their goods (works, services) and intellectual property to domestic and foreign markets; 5) ensuring employment by supporting the entrepreneurial initiative of citizens. Of course, in the context of the introduction of the legal regime of martial law, these areas of public policy do not lose their relevance and significance but need to be supplemented and adjusted to take into account threats to the economic security of the state in general.

Since the introduction of the legal regime of martial law, the vast majority of businesses, both those in the area of active hostilities and those in the rear, have faced a number of problems. This had a negative impact on the efficiency of their operation. These include complications in logistics, shortages of fuel, raw materials and components, and a drop in demand for certain groups of goods and services due to a decline in the purchasing power of the population and changes in consumption priorities; lack of labour resources due to the massive forced displacement of people abroad and mobilisation (Sakun, Shchur, Matskiv, 2022). Today, the priority sectors where the functioning of enterprises under martial law should be regulated are the agricultural sector, food industry, pharmaceuticals, light industry, trade and provision of resources.

One of the negative consequences of the large-scale invasion to our country is a sharp reduction in the number of jobs, which has led to the loss of a significant part of the population's source of income. According to the sociological group "Rating" (The sixth national survey: adaptation of Ukrainians to the conditions of war? 2022), as of the beginning of April 2022, about half (53%) of Ukrainians lost their jobs due to the war, 22% work as usual, 21% work remotely or partially, and only 2% have found a new job. According to the information provided by the State Employment Service of Ukraine, as of 1 April 2022, the number of unemployed persons was 286,879, and the number of vacancies was only 33,528; accordingly, the number of appli-

cants for 1 vacancy is 9 persons (The website of the State Employment Service, 2022).

3. Support for and development of business in Ukraine in the context of martial law

It should be noted that since the beginning of Russia's large-scale aggression against Ukraine, the Government has taken a number of measures to stabilise the economic situation in the country, for example, increasing business mobility and organising business in the territories, where active hostilities are not taking place, as well as facilitating an enabling environment for a rapid economic recovery, including the return of businesses forced to suspend operations. These measures include the following:

– The Government has amended the State Programme "Affordable Loans 5-7-9%", which provides for a number of measures to support agricultural producers during the sowing campaign for lending purposes, in particular, the purchase of agricultural machinery, replenishment of working capital for the purchase of seeds, fertilisers and fuel and lubricants;

– The Government approved the allocation of an additional amount of state guarantees to ensure lending to farmers in the spring of 2022, namely: the possibility of providing state guarantees on the portfolio of loans for micro, small and medium-sized businesses to 17 selected lending banks was established; the NBU approved the maximum amount of state guarantees to be provided on a portfolio basis in the total amount of UAH 18.8 billion; amendments were made to the State Budget for 2022: restrictions on the amount of state guarantees provided on a portfolio basis, which are provided by a decision of the Cabinet of Ministers of Ukraine, were cancelled;

– The Ministry of Justice of Ukraine has resumed the operation of the Unified State Register, which contains information on companies and individual entrepreneurs, the possibility of urgent registration actions was implemented, and banks and financial institutions were given the opportunity to use the application software interface to obtain the necessary information from the Unified State Register;

– The State Enterprise "National Information Systems" has resumed the operation of the State Register of Encumbrances on Movable Property by providing a service in the form of an application software interface;

– The government has launched a programme to temporarily relocate businesses from war-affected regions, under this programme, enterprises can receive assistance from the state in selecting locations for their production facilities, organising transportation, resettlement of personnel and recruitment of personnel with the necessary professions (Overview of business support tools during the period of martial law in Ukraine, 2022).

These measures were implemented at the national level as part of public policy on stabilisation of the economic situation in the country. In addition, the focus should be on the experience of certain regions of our country, where a set of priority tasks was developed and implemented in a timely manner to support micro, small and medium-sized businesses, innovative development, preservation of strategically important industries and jobs, relocation of enterprises from the territories of Ukraine where active hostilities are taking place. For example, the Business Support Programme in Lviv Oblast for the period of martial law aims to provide support to businesses under martial law, in particular, creating the necessary conditions for the location and operation of businesses relocated to Lviv region from other regions of Ukraine, supporting export-oriented enterprises, supporting enterprises producing socially important goods and military goods (Business support program in the Lviv region during the period of martial law, 2022). The main objectives of this Programme, focused on achieving its goal, are as follows: a) non-repayable financial assistance to businesses that have relocated to and registered in the Lviv region; b) voucher support for business for marketing purposes and product certification; c) non-repayable financial assistance for the purchase of equipment to food, light and machine-building enterprises (Business support program in the Lviv region during the period of martial law, 2022).

It should be noted that the measures envisaged in this programme are aimed at promoting the development of small and medium-sized businesses using various tax instruments, its restoration after the termination of the legal regime of martial law by combining the financial and material and technical resources of local state authorities, local self-government bodies and other sources, permitted by law. In our opinion, similar programmes should be adopted and implemented in those areas where active hostilities are not taking place (the so-called "rear" areas), as this will facilitate an enabling environment for the maximum possible use of the potential of those enterprises that were forced to relocate to them. As a result, this will ensure the legal relocation and registration of enterprises displaced from other regions, preserve the geography of exports and industrial production, preserve and create new jobs, and ensure tax revenues from relocated enterprises. Of course, the adoption of these programmes cannot be mandatory for every region, as there are other factors to consider, firstly,

whether a particular region belongs to a region where there are no active hostilities, but there is a risk of Russian troops approaching, a region far from the frontline, and a region on the frontline.

Therefore, in our opinion, the following measures are of particular relevance in order to ensure the support and development of business in Ukraine in the context of the introduction of the martial law regime:

– Implementation of donor programmes and private initiatives aimed at supporting entrepreneurs in times of war and preserving jobs;

– Introduction of joint financial and credit support programmes for small and medium-sized businesses of local authorities and local self-government bodies in cooperation with the Entrepreneurship Development Fund;

– Improvement of the logistics component, enabling to restore broken supply chains and establish communication between Ukrainian producers and entrepreneurs not only in our country but also abroad;

– State support to enterprises products thereof are oriented towards the needs of the population, production of critical goods and services, primarily the construction of modular towns for IDPs, restoration of damaged buildings, furniture production, agricultural sector, pharmaceutical sector, clothing and footwear production;

– Additional funding, subsidies, grants and microgrants for entrepreneurs who have lost their businesses in the area of active hostilities, in the temporarily occupied territories and a special (preferential) mechanism for business recovery in other regions of the country;

– A mechanism for evacuating enterprises from the zone of hostilities and transporting production facilities and employees, allowing for the security component;

– Simplification of customs clearance for raw materials and supplies required for the production of Ukrainian goods and to cancel import duties on them;

– Given that the effective functioning of business contributes to the timely filling of the state budget, it is advisable to review the practice of mass conscription of citizens from the mobilisation and civilian reserves working for enterprises of strategic importance;

– A review of legislation on hiring and dismissing employees, facilitation of an enabling environment for high-quality remote work and proper remuneration;

– Benefits to entrepreneurs for employing internally displaced persons;

– State control over pricing in the real estate market, in particular, the reasonable pricing of real estate leases and payment of commissions to real estate agencies;

– Information support mechanisms for business representatives within territorial communities, etc.

Furthermore, it is important to strengthen cooperation with international organisations to expand financial and advisory support for small and medium-sized businesses, including the International Bank for Reconstruction and Development, the International Finance Corporation, the European Investment Bank, and the United States Agency for International Development. It should be noted that such interaction should be focused on the implementation of comprehensive measures at both the national and regional levels.

4. Conclusions

To sum up, during martial law throughout the country, the importance of facilitating an enabling environment for business representatives to realise their entrepreneurial potential should be emphasised, as it will preserve Ukraine's economic potential and create the preconditions for new jobs. In turn, this will become a high-quality foundation for the post-war recovery of our country and strengthening the capacities of enterprises in the context of sectoral business transformation.

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ОСОБЛИВОСТІ ПІДТРИМКИ ТА РОЗВИТКУ БІЗНЕСУ В УМОВАХ ВОЄННОГО СТАНУ В УКРАЇНІ

Анотація. ***Мета.*** Метою статті є визначення особливостей підтримки та розвитку бізнесу в умовах воєнного стану в Україні. ***Результати.*** Акцентовано увагу, що з початку ведення воєнних дій спостерігається істотне зниження ефективності функціонування державного сектору економіки, що зумовлено, зокрема: зупинкою роботи підприємств у зоні активних бойових дій внаслідок їх часткового або повного руйнування; блокадою морських портів, що негативно вплинула на рівень експорту; зупинкою транспортного сполучення у зонах активних бойових дій та повною відміною авіаційного сполучення; руйнацією системи логістичного забезпечення постачань окремих компонентів виробництв; зміною структури попиту та виробництва; втратою ринків збуту та постачання; зниженням податкових надходжень; падінням валового внутрішнього продукту країни та дефіцитом бюджету. У зв'язку з цим наголошено, що така ситуація вимагає від держави вироблення комплексу заходів, спрямованих на створення умов для функціонування економіки в умовах війни, орієнтованих насамперед на збереження і відновлення промисловості, виробництва та робочих місць, підтримку купівельної спроможності та внутрішнього попиту, забезпечення макроекономічної стабільності, запровадження державної підтримки та створення пільгових умов для функціонування малого та середнього бізнесу. ***Висновки.*** Зроблено висновок, що нині пріоритетними сферами упорядкування функціонування підприємств, у межах яких в умовах воєнного стану набуває першочергового значення, є аграрний сектор, харчова промисловість, фармацевтика, легка промисловість, торгівля та забезпечення ресурсами. Проаналізовано заходи, що вживаються на загальнодержавному та регіональному рівнях у напрямі стабілізації економічної ситуації в державі, у тому числі щодо підвищення підприємницької мобільності та організації ведення бізнесу на територіях, де не ведуться активні бойові дії, а також створення умов для швидкого економічного відновлення, у тому числі повернення бізнесу, який був змушений перервати роботу. Запропоновано власне бачення переліку заходів, що мають реалізовуватися з метою забезпечення підтримки та розвитку бізнесу в Україні в умовах запровадження правового режиму воєнного стану.

Ключові слова: правовий режим, воєнний стан, державний сектор економіки, бізнес, підприємництво, державна підтримка, стабілізація економічної ситуації.

The article was submitted 21.07.2022
The article was revised 11.08.2022
The article was accepted 30.08.2022

UDC 342.9 (477)
DOI https://doi.org/10.32849/2663-5313/2022.10.05

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Yevdokimov, Dmytro (2022). The National Police of Ukraine as an authorised entity of conducting administrative investigation. *Entrepreneurship, Economy and Law, 10*, 31–36, doi: https://doi.org/10.32849/2663-5313/2022.10.05

THE NATIONAL POLICE OF UKRAINE AS AN AUTHORISED ENTITY OF CONDUCTING ADMINISTRATIVE INVESTIGATION

Abstract. ***Purpose.*** The purpose of the article is to define the fundamental principles of conducting an administrative investigation by the National Police of Ukraine as an authorised entity. ***Results***. The conduct of an administrative investigation in proceedings on administrative offenses is the competence of authorised entities, in particular, the National Police of Ukraine. Officials of the National Police are civil servants, and therefore act on behalf of the State, within their powers and in the manner prescribed by law, and express the position of state institutions, i.e., act publicly. In this way, the principle of publicity inherent in the conduct of an administrative investigation in proceedings on administrative offenses is implemented in this process. The author proposes to consider "the conduct of an administrative investigation" as the implementation by the bodies vested with administrative and jurisdictional powers of a set of procedural actions to identify and verify the circumstances and facts relevant to the preliminary qualification of an offense committed, and the grounds for commencing proceedings at the stage of administrative investigation. Therefore, the conduct of an administrative investigation by the National Police is an independent cycle of exercising competence by the authorised police bodies, which has its own specific purpose, tasks and features. ***Conclusions.*** The author concludes that the system of principles for the conduct of an administrative investigation consists of general and special principles. The implementation of these principles is essential for the effective operation of authorised entities, in particular, the National Police, in conducting administrative investigations in cases of administrative offenses. Thus, as of today, the fundamental principles of the conduct of an administrative investigation by the National Police as an authorised entity cannot be assessed unambiguously as positive or negative. This is due to the fact that, on the one hand, this issue is regulated sufficiently at the legislative level. On the other hand, this regulatory framework has a number of gaps and shortcomings which prevent the police from a full, efficient and effective exercise of their administrative and legal status in the relevant area.

Key words: principles, administrative proceedings, administrative offenses, evidence, powers.

1. Introduction

An analysis of the current legal regulations of Ukraine defining the competence of the National Police bodies suggests that one of the main areas of their activities is administrative activity, which is aimed, in particular, at providing police services in the field of human rights and freedoms, interests of society and the state, ensuring public safety and order, combating crimes and other offenses (Bezpalova, Dzhafarova, Kniaziev, 2017, p. 16). Therefore, a large share of the administrative activities of the police is proceedings on administrative offenses.

Despite certain differences in the views of administrative law scholars on the legal nature, essence and content of proceedings on administrative offenses, their perspectives coincide in one thing: that this type of administrative process consists of several phases of development that change each other (Kolomoiets, Sokolenko, Pryimachenko, 2017, p. 160). That is, in our opinion, the staging is one of the features of proceedings on administrative offenses. V. Ishchenko understands the stage of proceedings in the administrative procedure literature as "...a relatively independent part of the proceedings, which, along with its general tasks,

has its own specific, inherent features and tasks that determine its content and procedural purpose" (Ishchenko, 2011, p. 229).

Thus, in order to separate a certain part of the proceedings on administrative offenses into a separate stage of proceedings, it is necessary to establish that this part meets certain criteria, such as: independence; realisation within the framework of the procedure prescribed by law, i.e., by performing functions and tasks defined by law, which are reduced to a single goal, failure to fulfil thereof constitutes an obstacle to the sequence of actions in the proceedings; issuance of a procedural document; logical sequence of a number of procedural actions (system of interrelated actions); a definite circle of participants; issuance of a separate procedural document.

2. Particularities of the commencement of administrative proceedings

Currently, national legislation does not specify the moment from which bodies vested with administrative and jurisdictional powers are authorised to carry out a set of procedural actions to verify information, establish facts, collect evidence and make decisions. Scholars believe that the grounds for launching a case are the commission of an administrative offense, and the reasons are statements of citizens, reports of state bodies and officials, media reports, etc. (Bandurka, Tishhenko, 2001, p. 177).

The commencement of an administrative offense case is preceded by establishment of the reasons for this. The Code of Ukraine on Administrative Offenses does not define the reasons for commencing proceedings on administrative offenses. Considering the above and using criminal procedural approaches to understanding the reasons for commencing a case, the authors of the textbook *Administrative Procedure Law* under the general editorship of T. Minke suggest that such information may be: direct detection of an administrative offense by an authorised person; statements of citizens, reports of representatives of the public, institutions, organisations, mass media in the press, on radio, television, other reports; reports of an offense received from other law enforcement and control and supervisory authorities; reports of an offense received from customs, border and law enforcement authorities of foreign countries, as well as international organisations, etc. (Kolomoiets, Sokolenko, Pryimachenko, 2017, p. 162).

According to A.V. Chervinchuk, a reason is usually understood as information about an act that has signs of an administrative offense (a latent violation of a rule of law does not cause administrative procedural relations). It is the reason for commencing a case that determines the application of procedure provisions (Chervinchuk, 2019, p. 30). M.V. Zavalnyi rightly notes that the legal significance of the reason for commencing and investigating an administrative case is that it initiates public activity of public administration bodies, requires that these bodies respond appropriately to each signal of an administrative offense. It is the reason for commencing a case that necessitates the application of the administrative procedure provision (Zavalnyi, 2006).

Proceedings on administrative offenses are commenced without drawing up a relevant procedural document. However, the Code of Ukraine on Administrative Offenses mentions a material circumstance under which a case shall be initiated. Such circumstances are the signs of an administrative offense, in particular: act or omission; unlawfulness; encroachment on public order, property, rights and freedoms of citizens; guilt; criminality, etc. (Code of Ukraine on Administrative Offenses:, 1984).

Focusing on the signs of an administrative offense, it is advisable to consider the "grounds for initiating a case". The grounds for initiating proceedings on an administrative offense are sufficient data or information indicating the presence of signs of an administrative offense (misdemeanour). The legal significance of the grounds for commencing a case is that it initiates the procedural activity of the authorised bodies, and therefore requires these bodies to respond appropriately to the signal of the committed act (Hnatiuk, 2011, p. 65). In other words, the conclusion about the sufficiency of the grounds for commencing an administrative offense case can be made based on a certain set of data indicating the presence of signs of an administrative offense.

In order to commence an administrative offense case, not only reasons and grounds are required, but also the absence of circumstances that impede this. The list of these circumstances is provided for in Article 247 of the Code of Ukraine on Administrative Offenses (Code of Ukraine on Administrative Offenses, 1984). If any of these circumstances are known at the time of the commencement of an administrative case, the case is not allowed to be commenced. However, given that an administrative case may be commenced not only in respect of a person, but also on the basis of a fact, a circumstance preventing the commencement of a case may be discovered only during the conduct of an administrative investigation. In such case, the investigating authority may terminate the administrative investigation by notifying the concerned party in writing, without a formal decision. The main purpose of an adminis-

trative investigation is to establish the objective truth in a case. Therefore, the circumstances relevant to the resolution of the case shall be thoroughly investigated. This does not mean that in this case evidence shall be collected by any means. However, the conclusion about the presence or absence of the facts under investigation should be based on evidence that would leave no doubt about the reliability of the conclusions and their compliance with the objective truth in the case (Zavalnyi, 2006). Thus, only after receiving information about an administrative offense (statement, oral appeal, complaint, media reports, etc.), its verification begins and, if it is confirmed, the official, for example, of the National Police, continues to clarify the circumstances of the administrative offense – this is the initial stage of the administrative investigation in cases of administrative offenses.

In addition, it should be noted that at the stage of administrative investigation, legally significant actions may take place even before the procedural formalisation of the commencement of proceedings on administrative offenses, such as the moment when officials of the National Police of Ukraine exercise administrative and jurisdictional competence provided for by law to verify information, collect evidence, and find out the information necessary to establish the fact and preliminary qualification of an administrative offense. Therefore, the purpose of the conduct of an administrative investigation is to establish the presence or absence of an administrative offense, to identify suspects, and collect and analyse evidence of the offense.

Furthermore, the question of the moment of the commencement of an administrative offense case (drafting of the relevant procedural document) is controversial among scholars, in particular, whether this stage is the initial or final stage of the conduct of an administrative investigation in cases of administrative offenses. The Code of Ukraine on Administrative Offenses does not establish the moment when an administrative offense case may be considered commenced.

In administrative tort theory, there is a widespread view that only drawing up a report by an authorised actor indicates the commencement of proceedings on an administrative offense. For example, Yu.P. Bytiak notes that the stage of commencement of an administrative offense case consists in drawing up records by an authorised person, while without records, an administrative offense case cannot be commenced (Bytiak, 2010, p. 222). Interesting is the opinion of M.V. Zavalnyi who emphasises that this approach lacks consideration of the current state of understanding of the administrative tort sphere. This conclusion is prompted by the particularities of the records (as a separate procedural document). The records are a comprehensive document which describes not only the fact of misdemeanour, but also contains information about the offender's identity, a conclusion on the qualification of the act, information about victims and witnesses, explanations of the offender, as well as other information necessary for resolving the case and compensation for material damage (Zavalnyi, 2006).

Undoubtedly, the purpose of the conduct of an administrative investigation in proceedings on administrative offenses is to commence a case, but we should agree with the opinion of D.N. Bakhrakh that the wording "commencing a case on an administrative offense" is not without certain drawbacks, since at the stages of administrative investigation not only the case is commenced, but also an administrative investigation, which consists of a set of procedural actions, such as "detection of the circumstances of the case" or "investigation of the circumstances of the case," is conducted (Bahrah, 1997, p. 29).

Drawing up a procedural document is a phase of the conduct of an administrative investigation, implying "to perform actions aimed at recording and collecting evidence confirming or refuting guilt in committing an administrative offense (misdemeanour), collecting explanations from the participants in the proceedings, appointing an expert examination, clarifying the qualification of the misdemeanour, namely: the presence of elements of an offense (misdemeanour) provided for by the Code of Ukraine on Administrative Offenses, establishing the actual circumstances of the case" (Hnatiuk, 2011, p. 72). In our opinion, it is not quite correct to define the commencement of the conduct of an administrative investigation as the drawing up of records, because then the whole range of procedural actions taken by the authorised actor before its drawing up remains legally unregulated.

Thus, the procedural processing of the investigation results completes the conduct of an administrative investigation, and does not commence it, while the submission of administrative investigation materials to the jurisdiction is the final stage, respectively.

Therefore, we propose to consider "the conduct of an administrative investigation" as the implementation by the bodies vested with administrative and jurisdictional powers of a set of procedural actions to identify and verify the circumstances and facts relevant to the preliminary qualification of an offense committed, and the grounds for commencing

proceedings at the stage of administrative investigation. Consequently, the conduct of an administrative investigation by the National Police is an independent cycle of exercising competence by the authorised police bodies, which has its own specific purpose, tasks and features.

The analysis of the regulatory framework enables to formulate the main tasks of the conduct of an administrative investigation by the National Police as an authorised entity, namely: timely, comprehensive, complete and objective establishment of the circumstances of each case; resolution of the case in strict accordance with the law; prevention of offenses; ensuring public safety and order; protection of human rights and freedoms, as well as the interests of society and the State.

A complete and comprehensive study of the general principles of the conduct of an administrative investigation, in our opinion, requires substantiating the system of principles guiding the officials of the National Police of Ukraine at this stage of proceedings on an administrative offense, since "an important characteristic of all administrative and legal proceedings... is the principles underlying their conduct" (Livar, 2015, p. 48).

In general, the issues of the principles of proceedings on administrative offenses are sufficiently covered in the legal literature. However, it is important to emphasise that some of the principles inherent in proceedings on administrative offenses are not generally applicable to the conduct of an administrative investigation. Consequently, there is a need to distinguish such principles from the general system of principles guiding authorised officials in conducting proceedings on administrative offenses. Moreover, it is important to allow for the specifics of the administrative and procedural status of the National Police of Ukraine, in particular, that they have a significant number of full powers to conduct an administrative investigation in proceedings on administrative offenses.

In our opinion, the system of principles of the conduct of an administrative investigation should be divided into general and special principles. First, we will study the general principles of proceedings on administrative offenses and try to compare them and distinguish from them the general principles of the conduct of an administrative investigation by the National Police with due regard for the stages and procedural features.

According to O.M. Mykolenko, the principles of proceedings on administrative offenses include the principle of competitiveness, the principle of protection, the principle of national language, the principle of publicity, the principle of disposition, etc. (Mikolenko, 2004). According to M.O. Ktitorov, the main principles in administrative offense proceedings are the principles of legality and objective truth, which requires the study of their content and ways of real implementation, especially in the National Police as an authorised entity. The author believes that the main problem in this regard is the formation of a mechanism of proof (sources of evidence, methods of their recording, determination of reliability, etc.) which would ensure the achievement of objective truth in proceedings on administrative offenses and the adoption of an impartial decision on the case on this basis (Ktitorov, 2009).

In general, the principle of legality is a basic principle in the activities of actors of administrative and administrative procedure law. After all, the principle of legality means the requirement of precise and strict adherence to the rules of law. An administrative investigation by the National Police should be conducted exclusively on the basis of strict adherence to the principle of legality. All procedural actions of authorised entities should be carried out exclusively within their competence, in strict accordance with the law. Generally speaking, legality as a principle can be defined through a set of legal requirements directed to an authorised entity. Therefore, the principles of legality and objective truth are inherent not only in proceedings on administrative offenses but are also characteristic of the conduct of an administrative investigation. Therefore, the principles of legality and objective truth are decisive, basic and fundamental for authorised actors, including officials of the National Police, in the course of the conduct of an administrative investigation.

3. Principles of conducting an administrative investigation

In our view, the general principles of conducting an administrative investigation should also include the principle of fairness. Both proceedings on administrative offenses, in general, and the conduct of administrative investigations shall comply with the principles of fairness. "Fairness" should include an assessment and measure of (Dzhuha, 2011, p. 122): obtaining and verifying information, questioning witnesses, evaluating evidence and making decisions. Given the importance of the principle of fairness in the conduct of an administrative investigation, we propose to consider it as fundamental along with the principle of legality and objective truth.

V.P. Yatsenko notes that proceedings on administrative offenses are characterised by the principle of publicity, the implementation of which is associated with certain particularities (Iatsenko, 2015, p. 50). The principle of pub-

licity is often understood as the process carried out using powers, on behalf of the authorities or the state (Iatsenko, 2015, p. 50). (Kolpakov, Kuzmenko, Pastukh, Sushchenko, 2012, p. 399). An administrative investigation in proceedings on administrative offenses is the competence of authorised entities, in particular, the National Police of Ukraine. Officials of the National Police are civil servants, and therefore act on behalf of the State, within their powers and in the manner prescribed by law, and express the position of state institutions, i.e. act publicly. Therefore, the principle of publicity inherent in the conduct of an administrative investigation in proceedings on administrative offenses is implemented in this process.

The principle of official establishment of circumstances in a case, in our opinion, is inherent primarily in administrative proceedings, as provided for in Article 9 of the Code of Administrative Judicial Procedure of Ukraine (Administrative Judicial Code of Ukraine, 2005) and in proceedings on administrative offenses. First of all, this principle obliges courts to take measures to establish all the circumstances of the case, including by identifying and requesting evidence on their own initiative. During the conduct of an administrative investigation, the National Police shall also establish all the circumstances in the case of administrative offenses, as well as identify or request the necessary evidence to resolve procedural issues that arise in the course of the conduct of an administrative investigation.

Consequently, in our view, the principle of publicity (official establishment of the circumstances in the case) in the course of the conduct of an administrative investigation by officials of the National Police of Ukraine is decisive and fundamental.

The issue of correlation between the public and the dispositive in administrative offense proceedings is relevant. After all, disposition as the ability of parties to administrative process to dispose of their rights at their own discretion within the limits provided for by administrative procedure legislation also has its manifestations in proceedings on administrative offenses (Mykolenko, 2012, p. 54).

With regard to the principle of discretion in the conduct of administrative investigations, Article 19 of the Constitution of Ukraine stipulates that the legal order in Ukraine is based on the principles that no one may be forced to do anything that is not provided for by law. State authorities and local self-government bodies and their officials shall act only on the ground, within the scope of powers and in the manner provided for by the Constitution and laws of Ukraine (Constitution of Ukraine, 1996), which means that the powers of public authorities are discretionary, i.e., an official of the National Police, when making a decision, may act with a certain freedom of discretion, within the law, has the opportunity to apply the provisions of law and perform specific actions (an action), among others, each of which is lawful.

Therefore, the principle of publicity is inherent in proceedings on administrative offenses and in the conduct of administrative investigations by officials of the National Police of Ukraine.

There is a perspective that the principle of objective truth is manifested in the requirement to reflect the actual circumstances of the case correctly and fully in the relevant procedural documents. Such requirements should also be based on the philosophical category of cognition, according to which objective reality exists independently of the person and is considered to be true if the true circumstances of the case are adequately reflected in the person's mind (Kolpakov, Kuzmenko, Pastukh, Sushchenko, 2012, p. 399). During the conduct of an administrative investigation, an authorised official, in particular of the National Police, works with information that needs to be investigated and decided on whether such information corresponds to the objective truth. The principle of objectivity is most often realised in the legal qualification of an authorised entity, in particular, an official of the National Police.

According to M.V. Ktitorov, the special principles inherent in both proceedings on administrative offenses and the conduct of an administrative investigation include the principle of efficiency and the principle of simplicity and cost-effectiveness of the proceedings. The principle of efficiency, from his perspective, reflects the principles related to rapid response and timeliness of procedural actions. This is manifested in the establishment of short deadlines for the relevant procedural actions (Ktitorov, 2009, p. 49).

The principle of simplicity and cost-effectiveness of the proceedings implies the simplicity of the procedure for the conduct of an administrative investigation, compared to, for example, criminal proceedings, while the principle of cost-effectiveness is not only about saving budgetary funds in the performance of procedural actions, but also about a rational approach to the number of procedural actions to solve the tasks of the administrative investigation stage, which are determined by the individual costs of their implementation (Ktitorov, 2009, p. 50).

Therefore, these special principles are to a certain extent also determinative, and author-

ised officials, including of the National Police, shall comply with them when exercising their competence at the stage of administrative investigation.

4. Conclusions

As a result, the analysis of the principles of proceedings on administrative offenses enables to form the system of principles for the conduct of an administrative investigation consists of general and special principles. The implementation of these principles is essential for the effective operation of authorised entities, in particular, the National Police, in conducting administrative investigations in cases of administrative offenses.

Thus, as of today, the fundamental principles of the conduct of an administrative investigation by the National Police as an authorised entity cannot be assessed unambiguously as positive or negative. This is due to the fact that, on the one hand, this issue is regulated sufficiently at the legislative level. On the other hand, this regulatory framework has a number of gaps and shortcomings which prevent the police from a full, efficient and effective exercise of their administrative and legal status in the relevant area.

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НАЦІОНАЛЬНА ПОЛІЦІЯ УКРАЇНИ ЯК УПОВНОВАЖЕНИЙ СУБ'ЄКТ ЗДІЙСНЕННЯ АДМІНІСТРАТИВНОГО РОЗСЛІДУВАННЯ

Анотація. ***Мета.*** Метою статті є визначення засад здійснення адміністративного розслідування Національною поліцією України як уповноваженим суб'єктом. ***Результати.*** Здійснення адміністративного розслідування у провадженні по справах про адміністративні правопорушення є компетенцією уповноважених суб'єктів, зокрема органів Національної поліції України. Посадові особи Національної поліції є державними службовцями, а отже, діють від імені Держави, в межах своїх повноважень і у спосіб, передбачений законом, та виражають позицію державних установ, тобто діють публічно. Так, принцип публічності притаманний здійсненню адміністративного розслідування у провадженні по справах про адміністративні правопорушення і реалізовується у цьому процесі. Запропоновано розглядати «здійснення адміністративного розслідування» як реалізацію органами, наділеними адміністративно-юрисдикційними повноваженнями, комплексу процесуальних дій щодо виявлення та перевірки обставин і фактів, що мають значення для попередньої кваліфікації вчиненого правопорушення, та підстав для порушення провадження у справі на стадії адміністративного розслідування. З огляду на зазначене вище здійснення адміністративного розслідування органами Національної поліції є самостійним циклом щодо реалізації уповноваженими суб'єктами поліції своєї компетенції, що має свою специфічну мету, завдання та особливості. ***Висновки.*** Зроблено висновок, що система принципів здійснення адміністративного розслідування складається із загальних та спеціальних принципів. Реалізація цих принципів має суттєве значення для ефективної діяльності уповноважених суб'єктів, зокрема органів Національної поліції, під час здійснення адміністративного розслідування у справах про адміністративні правопорушення. Так, на сьогодні засади здійснення адміністративного розслідування органами Національної поліції як уповноваженим суб'єктом не можна оцінити однозначно з позитивного чи негативного боку. Зазначене пояснюється тим, що на законодавчому рівні вказане питання досить детально регламентовано. А з іншого боку, вказане нормативно-правове забезпечення має низку прогалин та недоліків, які заважають поліції повною мірою, якісно та ефективно реалізовувати свій адміністративно-правовий статус у відповідному напрямі.

Ключові слова: принципи, адміністративне судочинство, адміністративні правопорушення, доказ, повноваження.

The article was submitted 18.07.2022
The article was revised 08.08.2022
The article was accepted 29.08.2022

UDC 342.9
DOI https://doi.org/10.32849/2663-5313/2022.10.06

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Ilchyshyn, Nadiia (2022). Phases of preparatory proceedings as a stage of administrative proceedings. *Entrepreneurship, Economy and Law, 10*, 37–43, doi: https://doi.org/10.32849/2663-5313/2022.10.06

PHASES OF PREPARATORY PROCEEDINGS AS A STAGE OF ADMINISTRATIVE PROCEEDINGS

Abstract. ***Purpose***. The purpose of the article is to define the essence and features of preparatory proceedings as a stage of administrative proceedings, as well as to distinguish judicial procedures at each of its phases. ***Results.*** The article analyses the provisions of the Code of Administrative Procedure of Ukraine which regulate preparatory court procedures by an administrative court at the stage of preparatory proceedings. The author reviews scholars' perspectives on the division of the preparatory proceedings into certain phases, and notes that such division should be specified depending on the form of action proceedings. The author analyses the particularities of preparatory proceedings as a stage of court proceedings which are considered under the rules of general action proceedings. It is noted that in this case the preparatory proceedings will consist of four phases, one of which is optional. The author highlights the issues of consideration of court proceedings under the rules of simplified action proceedings and concludes that on such grounds the preparatory proceedings consist of two phases. The author analyses the particularities of consideration and resolution of an administrative case or a separate procedural issue without summoning the parties to the case. The author emphasises the difficulty of making a court decision without holding a preparatory hearing if both parties have filed a motion to consider the case in their absence. It is substantiated that the preparatory proceedings are divided into certain phases which depend on the form of action proceedings. It is noted that the phases of preparatory proceedings, depending on the content of a particular case, consist of certain preparatory court procedures. It is determined that the preparatory court procedures at the phase of appeal and cassation proceedings closely overlap with the preparatory actions to be performed by a judge at all phases of the preparatory proceedings, but the specificity is that the appeal is against a court decision, and not against the body or official who issued the initial decision. ***Conclusions.*** The author concludes that the main purpose of preparatory court procedures is to ensure that all measures permitted by law aimed at timely, comprehensive, objective and cost-effective consideration of a case are implemented, and an additional purpose is to reconcile the parties before the trial on the merits.

Key words: preparatory proceedings, preparatory court procedures, phases, general action proceedings, simplified action proceedings, written proceedings, appellate proceedings, cassation proceedings.

1. Introduction

The ongoing reform processes in our country cannot exist without certain legislative changes. Such changes should, first and foremost, ensure better protection of the rights and interests of citizens that have been violated or disputed, as well as improve the quality and efficiency of administrative proceedings. Along with making a legitimate and well-reasoned decision, the court should also save resources, both material and procedural. Allowing for the above requirements related to the processes dictated by modern realities will help to strengthen the rule of law in the state.

The relatively new version of the Code of Administrative Procedure of Ukraine (hereinafter – the CAPU) as of December 15, 2017 introduced significant changes regarding such a stage of administrative proceedings as preparatory proceedings.

Scholars of various branches of law have studied preparatory proceedings as a stage of the judicial process, in particular, a significant contribution in this field has been made by Kh.I. Kit, D.V. Rozhenko, O.A. Banchuk, R.O. Kuibida and M.I. Khavroniuk, Yu.Yu. Tsal-Tsalko. However, despite the wide interest of the scientific community, this issue in the context of administrative proceedings is not sufficiently studied.

The purpose of the article is to define the essence and features of preparatory proceed-

ings as a stage of administrative proceedings, as well as to distinguish judicial procedures at each of its phases.

2. Stages of administrative proceedings

Preparatory proceedings are a stage of administrative proceedings that is the basis for the correct, comprehensive and prompt resolution of a case on the merits, and if ignored, may have negative consequences for the entire subsequent judicial process, such as violation of the time limits for consideration of the case or reversal of court decisions. The effectiveness of the court's activity in considering and resolving administrative cases and the possibility of the best fulfilment of justice tasks are largely due to the quality of administrative actions taken at the stage of preparatory proceedings (Keleberda, 2018, p. 66). Thus, in administrative cases, preparatory proceedings are the basis on which further proceedings in the case develop and which largely determine the outcome of the trial.

The stage of preparatory proceedings as a preparatory procedure begins with the commencement of the proceedings and ends with the closure of the preparatory hearing. However, the latter applies to the consideration of cases under the rules of general action proceedings. After that, the judge who has opened the case (this is logical, since he or she has already familiarised himself or herself with the filed statement of claim and has an idea of the materials submitted to it) shall perform a number of procedural actions. The nature of such actions depends to a certain extent on the particularities of the disputed legal relations, namely on their subjective composition and factual circumstances to be established by the court.

The preparatory proceedings shall be conducted within sixty days from the date of commencement of the proceedings, but in exceptional cases this period may be extended for no more than thirty days at the request of one of the parties or on the initiative of the court (Code of Administrative Procedure of Ukraine, 2005). As for the time limit for preparatory proceedings during the consideration of a case under the rules of simplified action proceedings, the legislation in force does not clearly establish it but, relying on the analysis of the provisions specified in Articles 257-263 of the CAPU, it can be concluded that this period may last from 15 to 30 days.

As noted above, the preparatory proceedings have their own phases. In the legal literature, it is customary to divide this stage into three phases: the initial phase begins when the administrative court issues a decision to initiate proceedings in the case; the main phase begins when the decision to hold a preliminary court hearing is made; the final phase is when the court adjudicates on the results of the preparatory proceedings (Kit, 2013, p. 137). We agree that the stage of preparatory proceedings consists of certain phases, however, it should be noted that they depend on the form of the action proceedings, which should be determined at the point of its opening.

According to the new CAPU, administrative proceedings are conducted in the manner of action proceedings in two forms: general (the CAPU, Article 12, part 3) or simplified (the CAPU, Article 12, part 2).

The rules of general action proceedings apply to cases concerning 1) appeals against legal regulations; 2) decisions, actions and inaction of a public authority, if such actions caused material damage exceeding five hundred times the subsistence minimum for able-bodied persons; 3) expropriation of land and other real estate located on it for reasons of public necessity; 4) appeals against a decision of a public authority, on the grounds thereof it may claim the recovery of funds in an amount exceeding five hundred times the subsistence minimum for able-bodied persons; 5) appeals against decisions of the National Commission for Rehabilitation in legal relations arising under the Law of Ukraine "On Rehabilitation of Victims of Repressions of the Communist Totalitarian Regime of 1917-1991"; 6) appeals against individual acts of the National Bank of Ukraine, the Deposit Guarantee Fund, the Ministry of Finance of Ukraine, the National Securities and Stock Market Commission, and decisions of the Cabinet of Ministers of Ukraine, as defined in part one of Article 266-1 of the CAPU (Code of Administrative Procedure of Ukraine 2005). As we can see, these categories of cases can be classified as complex, as they require more time and more procedural steps to be resolved.

With regard to the simplified action proceedings, their purpose is to consider cases of minor complexity and other cases. The list of cases falling into this category is defined in the CAPU, Article 12 part 6, analysing the provisions thereof we can conclude that the features of simplified action proceedings are: 1) completion of the procedural cycle within a certain court instance; 2) reduction of the number of procedural actions or systemic change in the way they are performed; 3) narrowing of the procedural capabilities of the court and participants in the process; 4) limited application to a certain range of cases (Zavalniuk, 2017, p. 15). Therefore, the priority in the consideration of cases of minor complexity is to reduce the time of consideration, which should be alongside compliance with all the principles on which the case consideration process is based. Obviously, this is the reason why certain phases of the prepara-

tory proceedings may be excluded due to their inappropriateness in a particular case.

In our opinion, the first phase of the preparatory proceedings as a preparatory procedure under the rules of general action proceedings is the formation of the case for the preparatory hearing. The main task of this phase is to create organisational and procedural prerequisites for the effective conduct of the preparatory hearing.

At this stage, the judge shall familiarise himself with the case file in detail in order to finally determine the subject matter of the dispute and the nature of the disputed legal relationship and sends copies of the decision to open the proceedings, copies of the statement of claim and the documents attached thereto. At this stage, the defendant has the right to file a response.

Next, it is necessary to establish the existence of controversial issues that may further adversely affect the course of the case and, if possible, ensure their resolution at the first phase of the second stage by establishing the circumstances to be proved. This goal can be achieved by obtaining or requesting evidence from the parties to the dispute.

The next judicial procedure at the phase of forming the case for the preparatory hearing is to determine the composition of the persons who shall participate in the preparatory hearing. Here it is important to determine the composition of the court, decide whether the parties to the case (or their legal representatives) shall be present in person, and ensure that the above-mentioned persons are duly notified of the time and date of the preparatory hearing, which is also decided at the phase of forming the case for the preparatory hearing.

In turn, if the case is considered under the rules of simplified action proceedings, the first phase of the preparatory proceedings stage will be the preparation of the case for trial, as no preparatory hearing is held in cases related to this form of administrative proceedings. Such a conclusion can be made based on the provisions of the CAPU, Article 171, part 9, clause 5, which states that when commencing proceedings in an administrative case, the court shall specify in its decision the date, time and place of the preparatory hearing if the case will be considered under the rules of general action proceedings (Code of Administrative Procedure of Ukraine, 2005). In this case, the main burden of preparatory procedures for the stage of consideration of the case on the merits will fall on the phase of preparation of the case for trial, during which all the tasks of the stage of preparatory proceedings specified in the CAPU, Article 173, part 2, shall be fulfilled. Therefore, we do not agree with the opinion of some scholars who equate the concepts of "preparatory proceedings" and "preparation of the case for trial".

The second phase of the preparatory proceedings, if the case is considered under the rules of general action proceedings, can be a preparatory hearing. Having received all the necessary documents and evidence in the case, at this phase, all the details of the case are clarified, the procedure for clarifying the circumstances is established, and the date, time and place of the substantive hearing are determined. All applications and motions submitted to the court are considered. If necessary, relevant expert examinations are appointed, the term and procedure for settling the dispute with the participation of a judge is set, if it is consented to do so, and other actions are taken to ensure that the case is considered on the merits in a correct and timely manner.

With regard to the decision to involve third parties in the proceedings, the participation of bodies and persons authorised by law to go to court in the interests of other persons, and the involvement of other parties to the proceedings, such decisions may be made both at the first and second phases of the preparatory proceedings.

In general, the list of court procedures at the preparatory hearing phase is quite diverse. The further course of the case and the most important processes of its organisation depend on their quality. Given the wide range of issues that arise during the analysis of the second phase of the preparatory proceedings, that is, the preparatory hearing, we consider they require further research in our next studies.

The third phase of the preparatory proceedings, in our opinion, is the performance of procedural actions that shall be performed before the end of the preparatory proceedings and the commencement of the consideration on the merits. However, the review of a number of court rulings enables to conclude that this phase is optional and should be performed based on the content of a particular case.

3. Particularities of legal effects in preparatory proceedings

Each court procedure shall result in the relevant legal effects, so the issuance of a court decision based on the results of the preparatory proceedings is a mandatory phase of the preparatory proceedings. If the case is considered under the rules of general action proceedings, this phase will be the fourth. In turn, since the CAPU does not provide for a preparatory hearing in the course of resolving disputes under the simplified action proceedings, in this case, the court decision based on the results of the preparatory proceedings is the second

and final phase of the second stage of administrative proceedings.

At this phase, the court shall issue one of the rulings.

First, if there are grounds, the exhaustive list of which is set forth in the CAPU, Article 240, part 1, the court may decide to leave the claim without consideration (Code of Administrative Procedure of Ukraine, 2005). The decision to leave the claim without consideration will have its own procedural effects in the form of the concerned parties' right to re-apply to the court with a claim in the general procedure, provided that the reasons that have been the basis for its adoption are eliminated.

Second, if there are grounds specified in the CAPU, Article 238, part 1, the court may issue a decision to close the proceedings in the case (Code of Administrative Procedure of Ukraine, 2005). In essence, this means that the court is done with the case. The procedural effects of such a decision are significantly different from the effects of leaving a claim without consideration, since after the case is closed, it is impossible to re-apply to the court regarding a dispute about the same subject matter, on the same grounds and by the same parties.

It should be noted that both rulings may be appealed within the time limit established by law.

Third, after all preparatory procedures of the preparatory proceedings stage are completed, in particular, all claims and objections are specified; all issues related to the composition of the parties to the case are clarified; the facts to be established to resolve the dispute are determined; evidence to be used by the parties to substantiate their arguments or objections are determined and deadlines for their submission are set; other actions necessary to prepare the case for trial have been taken (Kivalov, Kharytonov, Kharytonova, 2009, p. 360), the court issues a ruling to close the preparatory proceedings and set the case for trial on the merits. In addition to the prescribed details, this ruling shall specify what preparatory actions have been taken and indicate the date, time and place of the trial.

This ruling is the ground for the immediate sending of summonses to the parties to the case, and notification summonses to the persons involved in the case regarding the performance of procedural actions in which their participation is not required (Articles 124-131 of the CAPU). In turn, the defendant is sent copies of the statement of claim and the documents attached thereto (provided that they were not served during the preparatory hearing).

A court decision in the preparatory hearing in case of withdrawal of a claim, recognition of a claim, or reconciliation of the parties is made in accordance with the procedure established by Articles 189 and 190 of the CAPU (Code of Administrative Procedure of Ukraine, 2005). In general, this issue is quite voluminous and has many grounds for consideration, so we propose to study it in more detail in our further work.

Copies of court decisions based on the results of preparatory proceedings are sent to parties concerned.

It should be noted that at the stage of preparatory proceedings, there are certain particularities in the resolution of a public law dispute in written proceedings.

Written proceedings are consideration and resolution of an administrative case or a separate procedural issue in a court of first instance, court of appeal or cassation without notification and/or summoning of the parties to the case and holding a court hearing on the ground of case materials in cases established by the CAPU (Code of Administrative Procedure of Ukraine, 2005). In this form, an administrative case may be considered provided that the plaintiff, when filing a statement of claim with the court, simultaneously files a motion to consider the case without his/her presence. Such actions are based on the provisions specified in the CAPU, Article 161, Part 5, which states that "if necessary, the claim shall be accompanied by the plaintiff's petition and statements on consideration of the case under the rules of simplified claim proceedings,...etc." (Code of Administrative Procedure of Ukraine, 2005). By "etc." it should be understood that the list of motions that may be filed by the plaintiff in the statement of claim is not exhaustive, and therefore any motion may be filed, including a motion to consider the case in his/her absence. In turn, the defendant may also file a motion for the case to be heard in his or her absence. And then a situation may arise when a public law dispute can be resolved only if the materials available to the court are sufficient to make a lawful and reasonable decision (Keleberda, 2018, p. 67). Although the preparatory proceedings in the written proceedings are based on general provisions that constitute the content of the preparatory proceedings and shall be applied in all cases without exception. Therefore, in our opinion, in this case it is still advisable not to neglect the stage of the preparatory hearing.

Further, we propose to define the particularities of preparatory procedures during appeal and cassation proceedings.

Appellate proceedings are an optional stage of administrative proceedings regulated by the CAPU, which consists of a range of court

procedures, the content of which is related to the review by the administrative court of appeal of a court decision which has not entered into force (Keleberda, 2018, p. 118). After commencement of the appellate proceedings, a court of appeal proceeds to the next phase – the appellate hearing, which in turn consists of two parts: preparation of the case for the appellate hearing and the hearing of the case in opening.

When preparing a case for trial, the reporting judge shall perform a number of preparatory court procedures: 1) to establish the composition of the participants in the court proceedings. If it is established that the decision of the court of first instance may affect the rights and obligations of a person who did not participate in the case, he/she shall involve such person in the case as a third party who does not make independent claims regarding the subject matter of the dispute; 2) to establish the circumstances referred to by the parties to the case as the basis for their claims and objections; 3) to establish which circumstances are admitted and which are denied by the parties to the case; 4) to invite the parties to the case to submit new evidence to which they refer, or requests it at the request of the person who filed the appeal or on its own initiative; 5) to decide on the validity of the reasons for not submitting evidence to the court of first instance; 6) at the request of the parties to the case, to resolve the issue of calling witnesses, appointing an expert examination, court orders for the collection of evidence, involving a specialist, interpreter in the case; to resolve other written requests of the parties to the case; 7) to resolve the issue of the possibility of written proceedings on the materials available in the case in the court of appeal; 8) to resolve other issues necessary for the appeal consideration of the case (Code of Administrative Procedure of Ukraine, 2005). Therefore, the list of preparatory court procedures is not exhaustive and will depend on the specific case. The final result of preparing a case for appeal should be a decision by the panel of judges to assign the case for consideration, having previously carried out additional preparatory actions, if necessary, as well as notifying the parties to the case of the date, time and place of its consideration, if the case is not considered in written proceedings.

In turn, cassation proceedings are the activities of the cassation court regulated by the provisions of the CAPU to verify the legality of court decisions that have entered into force due to the incorrect application of substantive law by the courts of first and/or appellate instances or violation of procedural law (Halunko, Dikhtiievskyi, Kuzmenko, Stetsenko, 2018, pp. 318-322).

Both after the commencement of appellate and cassation proceedings, proper preparation of the case for consideration shall be ensured. However, cassation proceedings, unlike appellate proceedings, consist of three phases: 1) preparation of the case for cassation; 2) preliminary consideration of the case; 3) cassation proceedings of the case in court. We propose to analyse the first two phases in detail.

For example, when preparing a case for cassation, the reporting judge shall perform the following judicial procedures: 1) to determine the composition of the parties to the case; 2) to resolve the written motions filed by the parties to the case; 3) to decide on the possibility of preliminary consideration of the case or written proceedings on the basis of the materials available in the case in the court of cassation; 4) to decide on the suspension of execution of the appealed court decisions; 5) to resolve other issues necessary for the cassation review of the case (Code of Administrative Procedure of Ukraine, 2005). Similar to preparatory court procedures in appellate proceedings, the list is not exhaustive.

After preparatory actions, the reporting judge assigns the case for cassation consideration in a court hearing or in written proceedings based on the materials available in the case. The parties to the case are notified of the date, time and place of the hearing if the case is considered with their notice in accordance with the CAPU (Code of Administrative Procedure of Ukraine, 2005).

The next phase is the preliminary consideration of the case, which shall be conducted within five days after the report is drawn up by the reporting judge without notifying the parties to the case. At this phase, the reporting judge reports to the panel of judges on the circumstances of the case that are necessary for the cassation court to make a judgment. As a result of the preparatory procedures, the cassation court shall make one of the following decisions: 1) on appropriate grounds, to dismiss the cassation appeal and leave the judgment unchanged; 2) if appropriate grounds are present, to cancel the court decision; 3) to set the case for consideration in court, if the cassation proceedings do not provide for consideration of the case in written proceedings (Code of Administrative Procedure of Ukraine, 2005). A case may be scheduled for consideration in court only if at least one judge of the court has reached such a conclusion. The ruling on the appointment of the case for consideration in court shall be signed by the entire court.

As we can see, the above closely overlaps with the preparatory actions to be performed by a judge at all phases of the preparatory

proceedings in the court of first instance, but the specificity of court procedures at the stage of preparing a case for appeal or cassation is that the appeal is against a court decision, and not against the body or official who issued the initial decision.

4. Conclusions

Therefore, the main purpose of the preparatory court procedures to be performed by a court of any instance prior to the stage (stage in case of cassation or appellate proceedings) of consideration of the case on the merits is to ensure that all measures permitted by law aimed at timely, comprehensive, objective and cost-effective consideration of the case are taken. Moreover, an additional purpose can be identified, which is to reconcile the parties before the trial on the merits. In our opinion, this is the essence of the preparatory proceedings.

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ЕТАПИ ПІДГОТОВЧОГО ПРОВАДЖЕННЯ ЯК СТАДІЇ АДМІНІСТРАТИВНОГО СУДОЧИНСТВА

Анотація. ***Мета.*** Метою статті є визначення сутності та ознак підготовчого провадження як стадії адміністративного судочинства, а також виокремлення судових процедур на кожному з її етапів. ***Результати.*** У статті проаналізовано положення Кодексу адміністративного судочинства України, які регламентують виконання підготовчих судових процедур адміністративним судом на стадії підготовчого провадження. Розглянуто позицію науковців щодо розділення на певні етапи стадії підготовчого провадження, при цьому зазначено, що такий поділ необхідно конкретизувати залежно від форми позовного провадження. Проаналізовано особливості підготовчого провадження як стадії судового провадження, яке розглядається за правилами загального позовного провадження. Зазначено, що в такому випадку підготовче провадження складатиметься з чотирьох етапів, один з яких є факультативним. Висвітлено питання розгляду судового провадження за правилами спрощеного позовного провадження та зроблено висновок, що за таких підстав підготовче провадження складається з двох етапів. Проаналізовано особливості розгляду і вирішення адміністративної справи або окремого процесуального питання без виклику учасників справи. Наголошено на складності прийняття судового рішення без проведення підготовчого засідання у разі, якщо обидві сторони подали клопотання про розгляд справи за їхньої відсутності. Обґрунтовано, що підготовче провадження поділяється на певні етапи, які залежать від форми позовного провадження. Зазначено, що етапи підготовчого провадження залежно від змісту конкретної справи складаються з певних підготовчих судових процедур. Визначено, що підготовчі судові процедури на стадії апе-

ляційного та касаційного провадження тісно пересікаються з підготовчими діями, які мають бути виконані суддею на всіх етапах стадії підготовчого провадження, проте особливістю є оскарження рішення суду, а не органу чи посадової особи, яка видала первинне рішення. ***Висновки.*** Зроблено висновок, що основною метою підготовчих судових процедур є забезпечення виконання всіх дозволених законом заходів, спрямованих на своєчасний, всебічний, об'єктивний та економічний розгляд справи, а додатковою метою – примирення сторін до судового розгляду справи по суті.

Ключові слова: підготовче провадження, підготовчі судові процедури, етапи, загальне позовне провадження, спрощене позовне провадження, письмове провадження, апеляційне провадження, касаційне провадження.

The article was submitted 21.07.2022
The article was revised 11.08.2022
The article was accepted 30.08.2022

UDC 342.9
DOI https://doi.org/10.32849/2663-5313/2022.10.07

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Kryvoruchko, Larysa (2022). The concept and role of organisational and legal framework for activities of implementers of international standards in the field of human rights protection. *Entrepreneurship, Economy and Law, 10*, 44–49, doi: https://doi.org/10.32849/2663-5313/2022.10.07

THE CONCEPT AND ROLE OF ORGANISATIONAL AND LEGAL FRAMEWORK FOR ACTIVITIES OF IMPLEMENTERS OF INTERNATIONAL STANDARDS IN HUMAN RIGHTS PROTECTION

Abstract. ***Purpose.*** The purpose of the article is to define the concept and role of the organisational and legal framework for the activities of implementers of international standards in human rights protection. ***Results.*** The article, relying on the analysis of scientific views of scholars and provisions of current legislation, characterises the organisational and legal framework for the activities of implementers of international standards in the field of human rights protection. The author's original definition of this concept is proposed. The author emphasises the importance of the organisational and legal framework for the activities of implementers of international standards in the field of human rights protection. Judicial practice as a source of implementation and adoption of international human rights standards in Ukraine is under focus, because although judicial precedent is not recognised in our country as a source of law, it cannot be denied that it is the results of the work of courts that primarily determine the real level of implementation of these standards in the country, since only courts are authorised to administer justice in Ukraine, and, accordingly, a court decision is an important indicator of whether the goals pursued by the process of implementing international standards are achieved. ***Conclusions.*** Therefore, the organisational and legal framework for the implementation of international standards in the field of human rights protection is a set of principles and rules (provisions), stipulated in international and national legislation, according to which these standards are implemented (enshrined and applied) within the country. Organisational and legal frameworks facilitate the implementation of international human rights standards, due to: the necessary focus and consistency; implementation by competent entities – Ukrainian legislation clearly defines and delimits the powers of public authorities to recognise and formalise international standards, as well as to ensure the practical implementation of their requirements at the national level; implementation that meets national interests and the specifics of the organisation and functioning of law enforcement and human rights mechanisms and institutions; support by means of state influence, which is an important condition for guaranteeing the reality, rather than declarative nature, of the standards under study, although it should be noted here that this is possible only when the state itself is truly interested in implementing the relevant standards, and does not proclaim them only for the sake of declaring its intentions that have no practical value.

Key words: organisational and legal framework, activities, actor, implementation, international standards, human rights protection.

1. Introduction

The Law of Ukraine "On the National Program for the Adaptation of Ukrainian Legislation to the EU acquis" stipulates that the purpose of adapting Ukrainian legislation to the EU acquis is to achieve compliance of the Ukrainian legal system with the acquis communautaire, considering the criteria set by the European Union (EU) for states that intend to join it. The adaptation of Ukrainian legislation is a systematic process that includes several successive stages, each of which should achieve a certain degree of compliance of Ukrainian legislation with the EU acquis. The stages of the Program's implementation are determined allowing for the stages of legislative adaptation. The first stage of the Program is designed for the period until the end of the PCA. The periods of the next stages of its implementation will be determined depending on the results achieved at the pre-

vious stages, the economic, political and social situation in Ukraine, as well as the development of relations between Ukraine and the European Union. Adaptation of Ukrainian legislation to the EU acquis is a priority component of the process of Ukraine's integration into the European Union, which, in turn, is a priority area of Ukraine's foreign policy (Law of Ukraine On the National Program of Adaptation of the Legislation to the EU acquis, 2004).

Some problematic issues related to the implementation of international standards in the field of human rights protection have been considered in scientific works by Yu. Bytiak, O. Bezpalova, I. Holosnichenko, V. Zhyvytskyi, A. Komziuk, O. Mykolenko, O. Solomatina, Kh. Yarmaki and many others. However, despite a considerable number of scientific achievements, scholars have not virtually focused on the issue of the organisational and legal framework for the activities of implementers of international standards in the field of human rights protection.

The purpose of the article is to define the concept and role of the organisational and legal framework for the activities of implementers of international standards in the field of human rights protection.

2. Implementation of international standards in human rights protection

With regards to the introduction of international standards in the state, in particular, in the field of human rights protection, researchers usually focus on its implementation in Ukrainian legislation. The latter can be understood in two aspects, namely: 1) systemic, according to which it is a set of relevant organisational, legal and other means, forms and methods (ways, techniques) through which international human rights standards are implemented at the domestic level; 2) functional, which characterises implementation as targeted activities (work) of competent entities to ensure proper implementation of the standards under study at the domestic level.

The current legislation does not clearly define the conceptual and terminological construct of "organisational and legal principles" or "legal principles", although these terms are often used in the text of various laws, in particular in their titles, for example, the Laws of Ukraine "On organisational and legal principles of combating organised crime", "On basic principles of state supervision (control) in the field of economic activity", "On principles of state regulatory policy in the field of economic activity", etc. In the dictionary, scientific and educational literature, the term "principle" is interpreted as the basis of something, the main thing on which something is grounded; the initial, main position; the basis of the worldview, a rule of behaviour; a way, a method of doing something (Busel, 2005, p. 419). V.V. Nazarov notes that the principles should be understood as the basic starting points of any scientific system, theory of an ideological trend, etc. Considering the principles of criminal proceedings, he interprets them as the main, initial points on which, in turn, more detailed provisions are based. These are the initial regulatory and guiding principles expressed in criminal procedure law, which characterise its content and the laws of social life enshrined in it, and which have been enshrined in the Constitution of Ukraine, the Code of Criminal Procedure and other regulations (Nazarov, Omelianenko, 2008, p. 31).

Therefore, it is worth considering the key sources of the organisational and legal framework for the implementation of international standards in the field of human rights protection, among which the Constitution of Ukraine should be highlighted. With regard to the direct implementation of international human rights standards, the Constitution clearly stipulates that: international treaties in force, ratified by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine; everyone has the right, after exhausting all national legal remedies, to apply for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant (The Constitution of Ukraine, 1996). In other words, in its Basic Law, Ukraine recognises that internationally adopted rules and provisions are important and binding for it as an active participant in international cooperation. Moreover, Article 9, part 2, and Article 18 stipulate that Ukraine is guided primarily by its national interests, and the implementation of standards that do not meet them and are not consistent with the provisions of the Constitution can only take place after the latter has been amended accordingly. In addition, the importance of the Constitution lies in the fact that it defines the powers of the President of Ukraine and other state authorities in terms of international cooperation.

The next group of organisational and legal frameworks for the implementation of international human rights standards is made up of international legal acts, which are second only to the Constitution of Ukraine in terms of their legal force, provided that such an act has been duly ratified in our country. The significance of these documents is primarily due to the fact that they stipulate the scope and content of the obligations assumed by the state by agreeing to or acceding to the relevant international act, which shall be

fulfilled properly, in particular by facilitating an appropriate organisational and legal environment and mechanisms at the national level. In addition, it should be noted that international treaties define general rules and requirements for the application of their provisions. In particular, the Vienna Convention on the Law of Treaties of 1986 (Resolution of the Council of Ministers of the USSR On the Approval of the Vienna Convention on the Law of Treaties, 1986) should be underlined, because it defines the requirements for the conclusion and implementation of international treaties in order to ensure an appropriate level of fairness and respect for the obligations arising from treaties by participants in international cooperation.

3. The role of Ukrainian legislation as the organisational and legal framework for implementing international standards in human rights protection

Next, the laws of Ukraine play an important role in determining the organisational and legal framework for the implementation of international standards in the field of human rights protection. A law is the main type of act issued by the highest authorities. Laws differ from other acts of state power due to their regulatory nature, while bylaws can be both regulatory and non-regulatory (Pashkov, Smirnov, 1982, p. 98). Therefore, laws are one of the main sources in the Ukrainian legal system, and their provisions are intended to develop and ensure the relevant constitutional provisions. They regulate the most important social relations and determine public policy in a particular area of public life, express the state's vision of how the relevant area (sphere) of social relations should function and develop in order to ensure the proclaimed social values and facilitate the proper fulfilment of the state's obligations to its population. As the source of the organisational and legal framework under study, the laws define the substantive and procedural requirements for the participation of Ukraine, represented by its competent authorities and officials, in international cooperation, the range and scope of powers of these entities, the procedure for approval and implementation of relevant international standards, and liability for their violation or improper implementation.

The key legislative sources in this context include such laws as the Law of Ukraine "On International Treaties of Ukraine", which establishes the procedure for concluding, implementing and terminating international treaties of Ukraine in order to properly ensure national interests, implement the goals, objectives and principles of Ukraine's foreign policy enshrined in the Constitution of Ukraine and the legislation of Ukraine (Law of Ukraine On International Treaties of Ukraine, 2004), "On the National Program of Adaptation of Ukrainian Legislation to the EU acquis," which stipulates that the adaptation of Ukrainian legislation to the EU acquis is a priority component of the process of Ukraine's integration into the European Union, which in turn is a priority direction of Ukraine's foreign policy; this is National Program for the Adaptation of Ukrainian Legislation to the EU acquis that defines the mechanism for Ukraine to achieve compliance with the third Copenhagen and Madrid criteria for EU membership. This mechanism includes the adaptation of legislation, the establishment of relevant institutions and other additional measures necessary for effective law making and law application. According to this law, public policy of Ukraine on the adaptation of legislation is formed as an integral part of the legal reform in Ukraine and is aimed at ensuring unified approaches to rulemaking, mandatory consideration of the requirements of the European Union legislation during rulemaking, training of qualified specialists, facilitation of appropriate environment for institutional, scientific and educational, rulemaking, technical and financial support of the process of adaptation of Ukrainian legislation (Law of Ukraine On the National Program of Adaptation of the Legislation to the EU acquis, 2004); "On the Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights, which regulates relations arising from the state's obligation to execute judgments of the European Court of Human Rights in cases against Ukraine, the need to eliminate the causes of Ukraine's violation of the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, the introduction of European human rights standards into Ukrainian judicial and administrative practice, and the creation of preconditions for reducing the number of applications to the European Court of Human Rights (Law of Ukraine on Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights, 2006).

In addition to special laws directly regulating the implementation and ensuring implementation of international human rights standards at the national level, a number of other laws of Ukraine, including codes, regulate these issues to varying degrees, and set forth these standards in the form of relevant principles and provisions binding on all parties to law and legal relations covered by them.

In terms of legal force, the lower level of organisational and legal framework for the implementation of international standards in the field of human rights protection is bylaws.

A by-law is a document, issued by a competent authority or official on the basis of and in accordance with the law to specify and implement legislative requirements, containing rules of law. The subordinate nature of these regulations does not mean that they are less legally binding. They have the necessary legal force, but it does not have the universality and supremacy inherent in laws. The legal force of these acts depends on the status of state bodies, the nature and purpose of these regulations (Vediernikov, Papirna, 2008).

Organisational and legal frameworks of by-laws, despite their lower legal force compared to laws, are extremely important for ensuring the quality implementation of the standards under study, since it is at this level that conceptual provisions, as well as specific procedures and methodologies for assessing and incorporating (introducing, implementing) these standards into Ukrainian legislation and law enforcement practice are usually developed. For example, these are the Resolution of the Cabinet of Ministers of Ukraine "On the Concept of Adaptation of Ukrainian Legislation to the EU acquis", the Order of the Ministry of Economy and European Integration of Ukraine "On Approval of the Methodology for Determining the Criteria for the European Integration Component of State Target Programs," providing for that implementation is the realisation, fulfilment by the state of international legal provisions. In addition, it is important to note that a number of bylaws define the responsibilities of the relevant authorities, including ministries and other executive bodies, to implement the requirements of international standards in their activities.

Judicial practice as a source of implementation and adoption of international human rights standards in Ukraine should be under focus, because although judicial precedent is not recognised in our country as a source of law, undeniably it is the results of the work of courts that primarily determine the real level of implementation of these standards in the country, since only courts are authorised to administer justice in Ukraine, and, accordingly, a court decision is an important indicator of whether the goals pursued by the process of implementing international standards are achieved. It should be noted that Ukraine is traditionally among the five European countries with the most frequent complaints to the ECHR. The number of these applications is measured not in tens or hundreds, but in thousands. For example, at the end of 2018, this judicial institution had more than 7,200 complaints pending against Ukraine (Ukraine is in the top three in the number of complaints against it in the European Court of Human Rights, 2019). This is less than in previous years, but the figure is still impressive. Such a number of complaints is obviously evidence that the Ukrainian judicial system does not adequately protect human rights, freedoms and legitimate interests, and therefore, does not contribute to the real implementation of international standards in this field.

4. Conclusions

Therefore, the organisational and legal framework for the implementation of international standards in human rights protection is a set of principles and rules (provisions), stipulated in international and national legislation, according to which these standards are implemented (enshrined and applied) within the country. Organisational and legal frameworks facilitate the implementation of international human rights standards due to:

- First, the necessary focus and consistency; implementation by competent entities – Ukrainian legislation clearly defines and delimits the powers of public authorities to recognise and formalise international standards, as well as to ensure the practical implementation of their requirements at the national level;
- Second, implementation that meets national interests and the specifics of the organisation and functioning of law enforcement and human rights mechanisms and institutions;
- Third, support by means of state influence, which is an important condition for guaranteeing the reality, rather than declarative nature, of the standards under study, although it should be noted here that this is possible only when the state itself is truly interested in implementing the relevant standards, and does not proclaim them only for the sake of declaring its intentions that have no practical value.

To sum up, in order for international human rights standards to serve as real guarantees, rather than declarative statements, their implementation at the national level shall be ensured by relevant legal regulations and law enforcement practice, primarily by judicial authorities.

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ПОНЯТТЯ ТА РОЛЬ ОРГАНІЗАЦІЙНО-ПРАВОВИХ ЗАСАД ДІЯЛЬНОСТІ СУБ'ЄКТІВ ЗАПРОВАДЖЕННЯ МІЖНАРОДНИХ СТАНДАРТІВ У СФЕРІ ЗАБЕЗПЕЧЕННЯ ЗАХИСТУ ПРАВ ЛЮДИНИ

Анотація. ***Мета.*** Мета статті – визначити поняття та роль організаційно-правових засад діяльності суб'єктів запровадження міжнародних стандартів у сфері забезпечення захисту прав людини. ***Результати.*** У статті, спираючись на аналіз наукових поглядів учених та норм чинного законодавства, надано характеристику організаційно-правовим засадам діяльності суб'єктів запровадження міжнародних стандартів у сфері забезпечення захисту прав людини. Запропоновано авторське визначення цього поняття. Наголошено на важливості організаційно-правових засад діяльності суб'єктів запровадження міжнародних стандартів у сфері забезпечення захисту прав людини. Звернено увагу на судову практику як джерело запровадження та утвердження в Україні міжнародних стандартів захисту прав людини, адже хоча судовий прецедент і не визнається в нашій державі джерелом права, але не можна заперечити, що саме за результатами роботи судів насамперед можна судити про реальний рівень реалізації зазначених стандартів у країні, бо лише суди уповноважені в Україні здійснювати правосуддя, і, відповідно, судове рішення є важливим показником того, чи досягають ті цілі, які переслідує процес впровадження міжнародних стандартів захисту прав людини. ***Висновки.*** Організаційно-правові засади запровадження міжнародних стандартів у сфері забезпечення захисту прав людини являють собою сукупність передбачених у міжнародному та національному законодавстві принципів і правил (норм), згідно з якими відбувається реалізація (закріплення і застосування) зазначених стандартів усередині країни. Завдяки організаційно-правовим засадам процес запровадження міжнародних стандартів захисту прав людини: отримує необхідну цілеспрямованість та послідовність; по-друге, здійснюється компетентними суб'єктами – законодавство України чітко визначає та розмежовує повноваження органів публічної влади щодо

визнання та оформлення міжнародних стандартів, а також забезпечення практичної реалізації їх вимог на національному рівні; здійснюється з урахуванням національних інтересів, а також особливостей організації і функціонування правоохоронних і правозахисних механізмів та інститутів; забезпечується засобами державного впливу, що є важливою умовою гарантування реальності, а не декларативності досліджуваних стандартів, хоча тут слід зауважити, що це можливо лише тоді, коли сама держава по-справжньому зацікавлена у впровадженні відповідних стандартів, а не проголошує їх лише заради декларування своїх намірів, які не мають реальної практичної цінності.

Ключові слова: організаційно-правові засади, діяльність, суб'єкт, запровадження, міжнародні стандарти, захист прав людини.

The article was submitted 21.07.2022
The article was revised 11.08.2022
The article was accepted 30.08.2022

UDC 342.9
DOI https://doi.org/10.32849/2663-5313/2022.10.08

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Kurko, Oleh (2022). Procedural legal personality of parties to competence dispute: theoretical and legal analysis. *Entrepreneurship, Economy and Law, 10*, 50–55, doi: https://doi.org/10.32849/2663-5313/2022.10.08

PROCEDURAL LEGAL PERSONALITY OF PARTIES TO COMPETENCE DISPUTE: THEORETICAL AND LEGAL ANALYSIS

Abstract. ***Purpose.*** The purpose of the article is to analyse the category of "administrative legal personality" to highlight the specific features of the legal status of the parties to a competence dispute. ***Results.*** The article analyses the category of "administrative legal personality" to highlight the specific features of the legal status of the parties to a competence dispute. It is determined that the CAP and the scientific doctrine define the possibility of a person to be a party to an administrative case through the category of "administrative legal personality" which correlates with the term "legal status" as a part to the whole. Legal status is a general concept that combines in its content a certain range of elements, enabling to determine the place and role of a certain actor in the circle of legal relations. In turn, "administrative legal personality" is one of these elements. It is found that Article 43 of the CAP defines the components of the category of "administrative legal personality", but the issue of administrative and procedural tort capacity is neglected. This is despite the fact that, according to general theoretical principles, obligations are meaningless without measures of liability for their improper performance. It has been clarified that a competence dispute relates exclusively to the distribution of competence between authorised actors or persons with delegated functions. Their legal personality should be understood as the existence of a legally enshrined ability to be a party to disputed relations, to perform procedural actions and to be responsible for them. ***Conclusions.*** It is determined that the acquisition of relevant rights and obligations is both primary and secondary. In particular, the primary acquisition is related to the ability to have them on the basis of competence established by law. In turn, secondary acquisition is directly related to the entry into administrative procedural relations. The key point is that the scope of their rights and obligations may be changed when entering into administrative proceedings. It is generalised that the parties to a competence dispute have not only general and special administrative and procedural legal personality, but also targeted legal personality which limits the scope of their rights and obligations by the absence of their own interest in the resolution of an administrative case.

Key words: administrative courts, administrative law dispute, liability, competence dispute, rights and obligations, legal status, legal personality, public law dispute, parties to a competence dispute, authorised actor.

1. Introduction

In general, a competence dispute is a type of administrative law dispute that has arisen in the field of public law functions of public administration and concerns the removal of obstacles to the exercise of competence of its specific representatives. One of its key features is the parties, as the plaintiff in competence disputes is an authorised actor, if he/she believes that another authorised actor, the defendant, has interfered with his/her competence by his/her decision or actions or if such decision or actions are his/her prerogative (Decision of the Dnipropetrovsk District Administrative Court, 2022).

Their ability to participate in administrative proceedings is determined by the concept of administrative legal personality (Cherniakhovych, 2019, p. 186). However, both in the theory of law and in individual legal sciences, there is no consensus on the content of this term (Ditkevych, 2010, p. 132). And according to I. Cherniakhovych, the issues of administrative procedural legal personality are generally insufficiently developed in legal science (Cherniakhovych, 2019, p. 186).

Therefore, the purpose of the article is to analyse the category of "administrative legal personality" with a view to highlighting the spe-

cific features of the legal status of the parties to a competence dispute.

The topic being analysed is related to the works by scholars such as: M. Bevzenko, A. Venediktov, I. Ditkevych, O. Zubrytska, T. Matselyk, A. Pasichnyk, I. Cherniakhovych and others. However, the purpose of this article focuses on a different object of study, and therefore their works are its source base, since no researcher has directly addressed the specifics of the legal status of the parties to a competence dispute through the analysis of their administrative legal personality.

2. Content of procedural legal personality

The Great Encyclopaedic Legal Dictionary defines "legal personality" as the ability of individuals and legal entities to be parties to legal relations in the established manner, i.e. holders of subjective rights and legal obligations. The legal personality of individuals consists of their capacity for rights and ability to act. In some cases, legal personality also includes tort capacity. For legal entities, according to the dictionary, this capacity is manifested in their competence, a set of rights and obligations granted to them to perform their respective functions (Ditkevych, 2010, p. 132).

According to the provisions of the CAP of Ukraine, administrative procedural legal personality consists of administrative procedural capacity for rights and administrative procedural ability to act (Administrative Judicial Code of Ukraine, 2005). Article 43 of the CAP does not mention administrative and procedural tort capacity. However, the analysis of its provisions shows that it does exist, as the court may take measures to prevent abuse of procedural rights, including leaving without consideration or returning a complaint, application, petition (Administrative Judicial Code of Ukraine, 2005).

Following I. Ditkevych (2010, p. 132), in Soviet-era scientific works, scholars predominantly identified the concepts of "capacity for rights", "ability to act ", and "legal personality". For example, A. Venediktov argues that there are no grounds for distinguishing between capacity for rights and ability to act and characterises capacity for rights (ability to act) as the ability to have rights and obligations, the ability to be an independent bearer, actor of these rights and obligations (Venediktov, 1948, p. 86). In addition, the scholar argues that the ability to be a holder of rights and obligations in various branches of legal relations can be defined as its general legal personality; the ability to be a holder of rights and obligations in a particular area of legal relations – as its sectoral legal personality: administrative, civil, labour, etc. (Venediktov, 1955, pp. 17–28).

With regards to the administrative legal personality as a sectoral category, T. Matselyk argues that ontologically, it is the ability of a person to be an actor of administrative law. In other words, the specificity of the category of legal personality as a certain legal form is that it fixes the limits of a person's capacity for rights. In view of this, the scientist understands legal personality in one of its aspects as the relationship between an individual and society regarding their future relations with all third parties – actors of administrative law (Matselyk, 2011; Zubrytska, 2015).

In I. Ditkevych's opinion, administrative procedural legal personality as an element of the regulatory mechanism for administrative procedural legal relations specifies the scope of these legal relations, the relevant branch of legislation and the legal status of actors of administrative procedural activities (Ditkevych, 2011, pp. 5-6). It is an integral and specific element of the regulatory mechanism for administrative procedural legal relations and it ensures the transition of provisions of administrative procedural law to the sphere of administration of justice and realisation of the right to judicial protection (Ditkevych, 2011, p. 5).

According to O. Zubrytska, the main features of this term are as follows: 1) The conditions under which an actor of administrative law may become a participant in administrative legal relations are: the presence of administrative law provisions on the rights and obligations of the actor; the presence of grounds for the emergence, change and termination of administrative legal relations, as well as elements of administrative legal personality; 2) Rights, obligations and liability operate simultaneously and complement each other. It is impossible for a person to have certain rights without having an obligation to fulfil related (interchangeable) rights. The presence of an obligation is conditioned by the inevitability of liability for violation of imperative directions; 3) Administrative legal personality is measured by time, nature and scope, depending on the participants, the scope (role) of participation in a particular public law institution; 4) Administrative legal relations are performed in different areas of public administration, which have their own specifications. Therefore, types and/or models of administrative legal personality can be considered. For example, A. Pasichnyk substantiated the idea of a typological classification of legal personality, noting that administrative legal personality of legal entities under private law is divided into general (characteristic of all legal entities under private law without exception) and additional, which, in turn, is divided into: legal person-

ality of public associations, stock exchanges, commodity exchanges, self-regulatory organisations of professional stock market participants, credit unions, charitable organisations, religious organisations, trade unions and their associations, chambers of commerce and industry, condominium associations, private pension funds and business companies (entrepreneurial). It can be called additional targeted administrative legal personality (Pasichnyk, 2013). It should be emphasised that additional elements of legal personality do not form an independent model composition. On the contrary, they expand the scope of the basic legal personality to the level necessary to satisfy the public interest. Therefore, the author concludes that legal personality is an abstract and defining feature of a particular participant in a particular legal relationship, and its mandatory constituent elements are capacity for rights and ability to act and tort capacity. The correlation between legal personality and legal status should be understood as specific in the general, namely, legal personality is a set of rights, obligations and liability of a particular participant in legal relations. Only with legal personality does an actor of law become a participant in a legal relationship. In addition, legal personality connects the participant with a specific branch of legal relations (Zubrytska, 2015, p. 100).

Therefore, we can summarise that the parties to a public law dispute are its special participants, whose legal status is defined by law, providing for the assignment of administrative and procedural rights, obligations and liability to them, the exercise of which is ensured by the possibility of their use in the context of these disputed procedural relations.

Furthermore, their acquisition of relevant rights and obligations is both primary and secondary. In particular, the primary acquisition is related to the ability to have them on the basis of competence established by law.

3. Particularities of administrative legal personality

Traditionally, the emergence of administrative legal personality of an authorised actor is associated with its state registration or with the adoption by an authorised body of a managerial act establishing such an entity. Moreover, given the legal nature of authorised actors, it can be concluded that there are other legal facts that are associated with the emergence of administrative legal personality in these authorised actors. In other words, the moment of legal capacity also depends on the organisational and legal form, type and direction of activity of the future authorised actor. Depending on the type of authorised actors, the grounds for acquiring administrative legal personality can be classified, for example, into those that arose as a result of the people's will and the oath taken by the relevant authorised actor (Verkhovna Rada of Ukraine, President of Ukraine) or as a result of a decision of the general meeting (judicial self-government bodies) (Bevzenko, 2009, p. 14).

In turn, secondary acquisition is directly related to the entry into administrative procedural relations. The key point is that the scope of their rights and obligations may be changed when entering into administrative proceedings. In other words, the legal personality that arose at the beginning of the process may change several times during the further consideration and resolution of the dispute by the administrative court. For example, the transformation of the content of administrative procedural legal personality is a natural phenomenon in case of replacement of an improper party. In particular, the court of first instance, having established that the administrative claim was filed by the person other than to whom the right of claim belongs, or the person other than one liable under the administrative claim, may, with the consent of the plaintiff, allow the replacement of the original plaintiff or defendant with the proper plaintiff or defendant, if this does not entail a change in the cognisance of the administrative case (art. 52 of the CAP of Ukraine) (Bevzenko, 2009, p. 15). Moreover, this is admissible in case of administrative succession. It should be clarified that this process involves the full or partial transfer (acquisition) of administrative competence of one an authorised actor (public administrator) to another either as a result of the termination of the original entity or as a result of the full or partial termination of its administrative competence (Decision of the Dnipropetrovsk District Administrative Court Regarding the replacement of the defendant in case No. 160/17019, 2021). For example, Resolution of the Cabinet of Ministers of Ukraine No. 893 "Some Issues of Territorial Bodies of the State Tax Service" of 30 September 2020 liquidated the territorial bodies of the State Tax Service as legal entities of public law, according to the list in the Annex. The rights and obligations of the liquidated territorial bodies of the State Tax Service were transferred to the State Tax Service and its territorial bodies within the limits set out in the Regulations on the State Tax Service and its territorial bodies (paragraph 3 of Resolution No. 893). The Order of the State Tax Service of Ukraine of 30 September 2020 No. 529 "On Establishment of Territorial Bodies of the State Tax Service" established territorial bodies as separate subdivisions of the State Tax Service according to the list in the Annex. The pos-

sibility of ensuring the exercise by the newly established territorial bodies of the powers and functions of the territorial bodies being liquidated from 1 January 2021 was provided for by the relevant Order No. 755 of 24 December 2020. In other words, each territorial body of the State Tax Service established as its separate subdivision is the legal successor to the property, rights and obligations of the relevant territorial body of the State Tax Service being liquidated (Order No. 643 "On Approval of Regulations on Territorial Bodies of the State Tax Service" of 12 November 2020). Accordingly, on 1 January 2021, the actual (competent) administrative succession took place, since it was the administrative law provisions that regulated the conditions and procedure for the transfer of competence from the liquidated territorial body of the State Tax Service as a legal entity under public law to the territorial body of the State Tax Service as its separate subdivision (Decision of the Dnipropetrovsk District Administrative Court Regarding the replacement of the defendant in case No. 160/17019, 2021). In this case, the territorial body of the State Tax Service as a legal entity under public law lost the administrative procedural capacity for rights of a body that, according to the law, performs functions, in particular in the field of implementation of the state tax policy (Decision of the Dnipropetrovsk District Administrative Court Regarding the replacement of the defendant in case No. 160/17019, 2021), while the territorial body of the State Tax Service, established as its separate subdivision, de facto received it initially.

However, it should be considered that the administrative procedural legal personality of an authorised actor and its structural units is different (Bevzenko, 2009, p. 16).

It is also worth marking that authorised actors may either personally exercise their administrative procedural rights and obligations or entrust the case to a representative (Administrative Judicial Code of Ukraine, 2005). For example, the CAP of Ukraine, Article 55, part 3, provides for that: "a legal entity, regardless of the procedure for its establishment, an authorised actor that is not a legal entity, shall participate in the case through its director, a member of the executive body, or another person, authorised to act on his/her behalf in accordance with the law, charter, regulations, employment agreement (contract) (self-representation of a legal entity, an authorised actor), or through a representative" (Administrative Judicial Code of Ukraine, 2005). Pursuant to Article 57(1) of the CAP, an attorney or a legal representative may act as a representative in court. Furthermore, the provisions of Article 131-2 of the Constitution of Ukraine stipulate that only an attorney-at-law may represent another person in court (Constitution of Ukraine, 1996). That is, from 1 January 2020, an authorised actor that is not a legal entity shall participate in the case through its manager, a member of the executive body or another person, authorised to act on his/her behalf in accordance with the law, charter, regulations, employment agreement (contract) (self-representation of the authorised actor), or through a representative, such as an attorney or prosecutor (Decision of the Kyiv District Administrative Court On the return of the claim, 2022).

Moreover, it should be noted that the current legislation does not clearly provide for the possibility, grounds and procedure for limiting the procedural legal personality of authorised actors, but the provisions of some legal regulations enable to state with certainty that such restriction is admissible both in pretrial and court proceedings, but only if there are grounds clearly provided for by the rules of administrative or administrative procedural law (Bevzenko, 2009, 16).

4. Conclusions

The study enables to sum up that:

– the CAP of Ukraine and the scientific doctrine define the possibility of a person to be a party to an administrative case through the category of "administrative legal personality" which correlates with the term "legal status" as a part to the whole. Legal status is a general concept that combines in its content a certain range of elements, enabling to determine the place and role of a certain actor in the circle of legal relations. In turn, "administrative legal personality" is one of these elements;

– article 43 of the CAP defines the components of the category of "administrative legal personality", but the issue of administrative and procedural tort capacity is neglected. This is despite the fact that, according to general theoretical principles, obligations are meaningless without measures of liability for their improper performance;

– the legal personality of the parties to a competence dispute should be understood as the existence of a legally enshrined ability to be a party to disputed relations, to perform procedural actions and to be responsible for them;

– the parties to a competence dispute have not only general and special administrative and procedural legal personality, but also targeted legal personality which limits the scope of their rights and obligations by the absence of their own interest in the resolution of an administrative case.

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ПРОЦЕСУАЛЬНА ПРАВОСУБ'ЄКТНІСТЬ СТОРІН КОМПЕТЕНЦІЙНОГО СПОРУ: ТЕОРЕТИКО-ПРАВОВИЙ АНАЛІЗ

Анотація. ***Мета.*** Метою статті є аналіз категорії «адміністративна правосуб'єктність» задля виокремлення особливостей правового статусу сторін компетенційного спору. ***Результати.*** Стаття присвячена аналізу категорії «адміністративна правосуб'єктність» задля виокремлення особливостей правового статусу сторін компетенційного спору. Визначено, що КАС України та наукова доктрина визначають можливість особи бути стороною у адміністративній справі через категорію «адміністративна правосуб'єктність», яка співвідноситься з терміном «правовий статус» як частина

від цілого. Правовий статус є загальним поняттям, що поєднує своїм змістом певне коло елементів, завдяки яким можна визначити місце і роль певного суб'єкта у колі правових зв'язків. Своєю чергою «адміністративна правосуб'єктність» є одним із таких елементів. Виявлено, що у статті 43 КАС України визначено складники категорії «адміністративна правосуб'єктність», однак облишено увагою питання адміністративно-процесуальної деліктоздатності. Це попри те, що за загальними теоретичними основами існування обов'язків є безглуздим без наявності мір відповідальності за їхнє неналежне виконання. Уточнено, що компетенційний спір стосується виключно розподілу компетенції між суб'єктами владних повноважень або особами з делегованими функціями. Під їхньою правосуб'єктністю слід вбачати наявність у них законодавчо закріпленої можливості бути суб'єктом спірних відносин, вчиняти процесуальні дії та нести за них відповідальність. ***Висновки.*** Визначено, що набуття цими суб'єктами відповідних прав та обов'язків є як первинним, так і вторинним. Зокрема, первинне набуття пов'язане зі здатністю їх мати на основі законодавчо закріпленої компетенції. Своєю чергою вторинне набуття пов'язане безпосередньо зі вступом у адміністративно-процесуальні відносини. Принциповим є те, що під час вступу в адміністративний процес обсяг їхніх прав та обов'язків може бути зміненим. Узагальнено, що сторони компетенційного спору мають не тільки загальну та спеціальну адміністративно-процесуальну правосуб'єктність, а й цільову, яка обмежує обсяг їхніх прав та обов'язків відсутністю власного інтересу у вирішенні адміністративної справи.

Ключові слова: адміністративні суди, адміністративно-правовий спір, відповідальність, компетенційний спір, права та обов'язки, правовий статус, правосуб'єктність, публічно-правовий спір, сторони компетенційного спору, суб'єкт владних повноважень.

The article was submitted 18.07.2022
The article was revised 08.08.2022
The article was accepted 29.08.2022

UDC 342.9
DOI https://doi.org/10.32849/2663-5313/2022.10.09

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Tomilina, Irina (2022). Tasks and ways of implementing administrative supervision by the National Police units in the field of authorisation system. *Entrepreneurship, Economy and Law, 10*, 56–61, doi: https://doi.org/10.32849/2663-5313/2022.10.09

TASKS AND WAYS OF IMPLEMENTING ADMINISTRATIVE SUPERVISION BY THE NATIONAL POLICE UNITS IN THE FIELD OF AUTHORISATION SYSTEM

Abstract. ***Purpose.*** The purpose of the article is to determine the tasks and ways of implementing the procedure for administrative supervision by the National Police in the field of the authorisation system as a form of prevention. ***Results***. In order to achieve the goal, the article analyses the scientific approaches and perspectives of scholars on understanding the content of the authorisation system. The article characterises the content of administrative supervision of the National Police as a form of prevention in the field of authorisation system. The author identifies the requirements for prevention in the form of administrative supervision and provides the characteristic features enabling to distinguish administrative supervision by the police in the field of authorisation system from other preventive measures. The authorisation system is one of the main means of ensuring public safety, since in its implementation the authorised executive bodies perform rule-making activities by establishing mandatory regulations with purpose of implementing its requirements; perform law enforcement activities; apply coercive measures provided for by law for offenses committed in the field of the authorisation system, and other activities. Administrative supervision in the field of the authorisation system can only exist if there is continuous control of compliance with the rules of the relevant activity, supported by the possibility of applying enforcement measures to persons who violate the established rules of the authorisation system, otherwise such a preventive measure loses its effectiveness. ***Conclusions.*** In conclusion, the article outlines the tasks and range of measures implemented by the relevant units of the National Police in the course of administrative supervision in the field of the authorisation system. The tasks are realised by the National Police due to a certain range of measures: obtaining complete information about the object of supervision for its initial inspection; full implementation of information and analytical measures on the data obtained; making appropriate competent decisions based on the results of these measures; systematic inspection of facilities in order to identify possible cases of violation of the rules of the authorisation system; taking actions to implement decisions made during supervision to prevent offenses in this field and applying legal liability to offenders.

Key words: National Police, preventive measures, authorisation system, prevention.

1. Introduction

The formation of Ukraine as a state governed by the rule of law, democracy and, undoubtedly, socialism, allowing for the provision of the Constitution of Ukraine that recognises a person, his or her life, honour and dignity as the highest value, requires certain steps to ensure the protection of rights, freedoms and interests guaranteed to people by the State. Therefore, facilitating an enabling environment for the proper protection of these rights and freedoms is one of the main tasks of modern Ukraine. Taking into account the armed aggression of the Russian Federation against the sovereignty of Ukraine, the introduction of the legal regime of martial law on the territory of our country from February 24, 2022, Law of Ukraine "On ensuring the participation of civilians in the defence of Ukraine" No. 2114-IX of March 03, 2022 (Law of Ukraine On ensuring the participation of civilians in the defence of Ukraine, 2022) was adopted, as well as Order of the Ministry of Internal Affairs of Ukraine No. 175 of March 07, 2022, which established the " Procedure for obtaining firearms and ammunition by civilians who participate in repelling and deterring armed

aggression of the Russian Federation and/or other states" (Order of the Ministry of Internal Affairs of Ukraine approving the Procedure for obtaining firearms and ammunition by civilians who participate in repelling and deterring armed aggression of the Russian Federation and/or Other State, 2022).

Based on the provisions of these legal regulations, in order to create conditions and opportunities to protect human life and health, honour and dignity, inviolability and personal security, civilians are granted the right to participate in repelling and deterring the armed aggression of the Russian Federation by obtaining firearms and ammunition.

This situation leads to an increased demand of civilians to exercise their right to obtain firearms and hunting firearms and, accordingly, the authorisation system.

On May 25, 2022, on the initiative of the Minister of Internal Affairs of Ukraine, a nationwide survey on the free possession of firearms was launched in the Diia app, according to which the votes of the participants were distributed as follows: for special needs – 19.43%, for personal protection – 58.75%, against the right to own firearms – 21.82% (Social News, 2022).

Therefore, the process of administrative supervision by the National Police of Ukraine in the field of the authorisation system becomes increasingly relevant in order to avoid cases of non-compliance with the prescribed rules for obtaining permits for firearms and ammunition, storage and handling of firearms and hunting firearms and ammunition, cold steel, explosive materials and substances.

The theoretical basis for the study of tasks and procedures for prevention of the National Police in the field of authorisation system is the works by scholars such as: V.B. Averianov, O.M. Bandurka, D.M. Bakhrakh, Yu.P. Bytiak, V.A. Humeniuk, O.V. Dzhafarova, S.V. Kivalov, A.T. Komziuk, S.O. Kuznichenko, V.P. Petkov, S.O. Shatrava, Yu.S. Shemshuchenko, and others.

The purpose of the article is to determine the tasks and ways of implementing the procedure for administrative supervision by the National Police in the field of the authorisation system as a form of prevention.

2. The concept and essence of administrative supervision by the National Police units in the field of authorisation system

The study of the issue of administrative supervision in the field of authorisation system as a form of prevention of the National Police of Ukraine requires to reveal the concept of the authorisation system in the current legislative acts and to reviews works by administrative law scholars.

According to clause 1 of the Regulation on the Permit System, approved by Resolution of the Cabinet of Ministers of Ukraine No. 576 of October 12, 1992, the authorisation system is a special procedure for the manufacture, acquisition, storage, transportation, accounting and use of specially designated items, materials and substances, as well as the opening and operation of certain enterprises, workshops and laboratories in order to protect the interests of the state and the safety of citizens (Resolution of the Cabinet of Ministers of Ukraine on approval of the Regulation on the permit system, 1992).

O.V. Kharytonov characterises the authorisation system in a broad sense as a certain set of legal relations arising in order to ensure public safety between state executive authorities, local self-government bodies authorised to issue permits on the one hand (permittee), and individuals or legal entities on the other (applicant), the possibility for the latter to perform actions aimed at acquiring certain rights or powers by the applicant in a special procedure, regarding the use of such substances, materials, objects, or engaging in activities that may be dangerous to human life and health, threaten the public interest, with subsequent control and supervision by the permittee of compliance with the established rules, as well as bringing the perpetrators (in presence of the grounds) to the liability established by law (Kharytonov, 2004).

In his study, S.V. Didenko argues that the authorisation system in the field of firearms circulation is a special administrative law institution defined by administrative law provisions, which determines for legal entities a narrow legal "corridor" for issuing permits for the right to acquire, store, carry, transport certain types of firearms, as well as design, construction, opening and operation of facilities where firearms are stored or used, and a clear (permissive) list of possible and necessary variable actions for legal entities (Didenko, 2016).

A.T. Komziuk considers the authorisation system in two aspects. A broad understanding of the authorisation system implies a special procedure for various entities to perform any actions that require a special permit. The authorisation system in the narrow sense applies only to the objects listed in the Regulations on the authorisation system (Bandurka, 2000, p. 194).

The authorisation system is one of the main means of ensuring public safety, since in its implementation the authorised executive bodies perform rule-making activities by establishing mandatory regulations with purpose of implementing its requirements; perform law enforcement activities; apply coercive measures

provided for by law for offenses committed in the field of the authorisation system, and other activities. The author argues that the authorisation system is a specific form of activity of the entire state administration apparatus, and not its separate part or area (Kharytonov, 2004).

One of the elements of the proper functioning of the authorisation system is the activities of entities authorised to control the compliance with the rules of the system established by the state, in our case, it is the administrative supervision of the National Police.

In accordance with the current legislation, the public administration in the field of firearms circulation and use in Ukraine grants permits, carries out licensing, control and supervision, establishes prohibitions, authorises certain actions, and applies coercion. Therefore, the type of legal support in this field is the so-called type of special permit, which provides for the possibility to carry out only those actions that are expressly authorised by law (Didenko, 2016, p. 11).

Therefore, the authorisation system in the field of firearms circulation has a preventive purpose to prevent accidental or intentional use of firearms by unauthorised persons, to prevent encroachments on human life and health, to ensure public order, protection of property rights, public interest of the state and society by regulating the issuance, revocation, re-issuance of various permits and licenses in this field; establishing a list of full powers of public administrators to issue, revoke, re-issue various permits; preventing illegal firearms trafficking; establishing the procedure for handling firearms, including their storage, registration and carrying; regulating the procedure for actions in case of their sudden loss; preventing their unjustified use; preventing encroachments with their use; establishing and applying administrative liability for violation of permitting rules and creating conditions for bringing to criminal responsibility those who have committed criminal offenses in this field (Didenko, 2016).

3. Particularities of administrative supervision by the units of the National Police in the field of the authorisation system

An important element of the prevention of the National Police in the field of the authorisation system is administrative supervision over its proper functioning, namely over the objects of the authorisation system.

Instruction No. 622 of August 21, 1998 stipulates that the police supervise compliance with the rules of the authorisation system by officials of ministries and other central executive authorities, enterprises, institutions, organizations and citizens by inspecting the objects of the authorisation system and approving the conclusion of labour contracts for work, related to the manufacture, acquisition, storage, accounting, protection, transportation and use of specially designated items and materials, by taking measures to prevent and deter violations of the authorisation system rules, as well as bringing the perpetrators of offenses to legal liability in accordance with the procedure established by law (Order of the Ministry of Internal Affairs on the approval of the Instructions on the procedure for the manufacture, acquisition, storage, accounting, transportation and use of firearms, pneumatic, cold and cooled firearms, devices of domestic production for firing cartridges, equipped with rubber or metal projectiles with similar properties of non-lethal action, and cartridges for them, as well as ammunition for firearms, main parts of firearms and explosive materials, 1998).

The legislation introduces a number of basic requirements for preventive measures of the National Police, including administrative supervision in the field of authorisation system, which shall be

– legal, i.e., defined by law;

– necessary, for the proper implementation of the preventive measure;

– proportionate, i.e., the harm caused by the preventive measure does not exceed the benefit to which it is applied;

– effective, i.e., its application ensures the exercise of police powers (Law of Ukraine On the National Police, 2015).

As a preventive measure, administrative supervision in the field of the authorisation system has a special character and importance among the tasks and powers of the National Police. This preventive measure has the features of comprehensive activities of the relevant entity and is part of a separate area of activities of the National Police to prevent offenses and their negative consequences.

The tasks of the authorisation system of internal affairs bodies shall be implemented by the National Police through its structural units: – authorised unit for firearms control of the central police management body (hereinafter referred to as the CPMU); – authorised unit for firearms control and the authorisation system of the General Directorate of National Police in the Autonomous Republic of Crimea and the city of Sevastopol, regions and the city of Kyiv (hereinafter referred to as the GDNP); – territorial (separate) police units in districts, cities, districts in cities (hereinafter referred to as territorial police units) (Order of the Ministry of Internal Affairs on the approval of the Instructions on the procedure for the manufacture, acquisition, storage, accounting, transportation and use of firearms, pneumatic, cold and cooled

firearms, devices of domestic production for firing cartridges, equipped with rubber or metal projectiles with similar properties of non-lethal action, and cartridges for them, as well as ammunition for firearms, main parts of firearms and explosive materials, 1998).

With regard to administrative supervision in the field of the authorisation system, it should be noted that it can only exist if there is continuous control of compliance with the rules of the relevant activity, supported by the possibility of applying enforcement measures to persons who violate the established rules of the authorisation system, otherwise such a preventive measure loses its effectiveness. According to V.A. Humeniuk, the main way to ensure compliance with the rules of the authorisation system is public control, which includes preliminary inspection of facilities before issuing the relevant permits (licenses), subsequent systematic inspections of these facilities, verification and admission of persons to work with objects and substances subject to the authorisation system, subsequent control of their activities, as well as accounting of these facilities. The main methods used by the internal affairs authorities in implementing the authorisation system are persuasion and coercion. With regard to the importance of persuasion in ensuring compliance with the rules of the authorisation system, the focus should be on the analysis of administrative coercion measures (prohibition of certain types of activities, closure of facilities, revocation or suspension of permits (licenses), orders to eliminate violations of certain rules, prohibition of certain individuals to work at facilities, etc.), since their application is associated with restriction of the rights of citizens and legal entities (Humeniuk, 1999).

Given the special nature of administrative supervision of the police in the field of authorising, this area of prevention of the police has specific features that separate it from other powers in law enforcement.

Firstly, the activities of the administrative supervisor are of a preventive (warning) nature, aimed at preventing the commission of offenses rather than eliminating their negative consequences, although such supervision may result in enforcement measures as a result of violations of the rules established by the authorisation system.

Secondly, the activities of the administrative supervisor to verify compliance with the rules of the authorisation system are proactive, but do not require the consent of individuals or legal entities that are parties to relations in the field of the authorisation system (revocation of a license, seizure of an object of the authorisation system, etc.)

Thirdly, the parties to legal relations regarding the implementation of administrative supervision in the field of the authorisation system is regulated at the level of laws and regulations.

Fourth, the existence of a special object of administrative supervision, which, at the level of a regulation, includes items that are withdrawn from civilian circulation fully or in part, which, accordingly, requires the functioning of the authorisation system for the purpose of their legal and safe use and application.

4. Conclusions

Therefore, the main task of such administrative supervision is to identify possible violations, to prevent their consequences and eliminate shortcomings in functioning of the authorisation system, to establish conditions and causes that contribute to possible violations in the field of the authorisation system.

The National Police realises the outlined tasks through a number of measures: - obtaining complete information about the object of supervision for its initial inspection; – full implementation of information and analytical measures on the data obtained; - making appropriate competent decisions based on the results of these measures; – systematic inspection of facilities in order to identify possible cases of violation of the rules of the authorisation system; – taking actions to implement decisions made during supervision to prevent offenses in this field and applying legal liability to offenders.

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ЗАВДАННЯ ТА ШЛЯХИ РЕАЛІЗАЦІЇ АДМІНІСТРАТИВНОГО НАГЛЯДУ ПІДРОЗДІЛАМИ НАЦІОНАЛЬНОЇ ПОЛІЦІЇ У СФЕРІ ДОЗВІЛЬНОЇ СИСТЕМИ

Анотація. ***Мета.*** Мета статті полягає у визначенні завдань та шляхів реалізації процедури здійснення адміністративного нагляду Національною поліцією у сфері дозвільної системи як форми превентивної діяльності. ***Результати.*** У статті з метою досягнення поставленої мети здійснюється аналіз наукових підходів та позицій учених на розуміння змісту дозвільної системи. Характеризується зміст адміністративного нагляду Національної поліції як форми превентивної роботи у сфері дозвільної системи. Визначено вимоги, що висуваються до такої превентивної діяльності, як адміністративний нагляд, наведено характерні ознаки, які дають можливість виділити здійснюваний поліцією у сфері дозвільної системи адміністративний нагляд з-поміж інших превентивних заходів. Дозвільна система є одним з основних засобів забезпечення суспільної безпеки, оскільки у разі її здійснення повноважні органи виконавчої влади реалізують нормотворчу діяльність за допомогою встановлення загальнообов'язкових розпоряджень, спрямованих на втілення в життя її вимог; здійснюють правозастосовну діяльність; застосовують за вчинені у сфері дозвільної системи правопорушення передбачені законом примусові заходи, здійснюють іншу діяльність. Адміністративний нагляд у сфері дозвільної системи може існувати лише за умови безперервного контролю за дотриманням правил відповідної діяльності, підкріпленого можливістю застосування примусових заходів до осіб, які порушують встановлені правила дозвільної системи, інакше такий превентивний захід втрачає свою ефективність. ***Висновки.*** Як висновок, окреслено завдання та коло заходів, які реалізуються відповідними підрозділами Національної поліції в ході адміністративного нагляду у сфері дозвільної системи. Завдання реалізуються Національною поліцією завдяки визначеному

колу заходів: отриманням повної інформації стосовно об'єкта нагляду для його початкової перевірки; детального провадження інформаційно-аналітичних заходів щодо отриманих даних; прийняття за результатами цих заходів відповідних компетентних рішень; систематичного обстеження об'єктів з метою виявлення можливих випадків порушення правил дозвільної системи; провадженням дій щодо реалізації прийнятих у ході нагляду рішень для попередження правопорушень у цій сфері та застосування інституту юридичної відповідальності до правопорушників.

Ключові слова: Національна поліція, превентивні заходи, дозвільна система, превентивна діяльність.

The article was submitted 21.07.2022
The article was revised 11.08.2022
The article was accepted 30.08.2022

UDC 343.4
DOI https://doi.org/10.32849/2663-5313/2022.10.10

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Dobroskok, Andrii (2022). Criteria for vandalism prevalence and trends in modern conditions. *Entrepreneurship, Economy and Law, 10*, 62–69, doi: https://doi.org/10.32849/2663-5313/2022.10.10

CRITERIA FOR VANDALISM PREVALENCE AND TRENDS IN MODERN CONDITIONS

Abstract. ***Purpose.*** The purpose of the article is to study vandalism state and trends in Ukraine based on relevant criteria. ***Results***. The interpretation of the content of vandalism and, as a result, the use of this concept to officially explain acts related to destructive violent behaviour has now significantly expanded and has gone beyond the criminal law definition. A significant part of acts of vandalism due to minor public danger remains without proper attention from law enforcement agencies, as the grounds for their qualification under the relevant articles of the CC of Ukraine are often insufficient, and the CoAO does not contain special rules that would allow for appropriate response measures. In this regard, it seems relevant to study vandalism state and trends in Ukraine based on the relevant criteria. It is established that the status and trends of vandalism in Ukraine are best determined by characterising the quantitative and qualitative indicators of the prevalence of vandalism offences. It is substantiated that the main quantitative indicators of vandalism should be considered: 1) the place of vandalism in the overall structure of crime; 2) the number of vandalism offences in which persons were served with a notice of suspicion; 3) the number of proceedings in cases of vandalism that were sent to court with an indictment; 4) the prevalence of certain types of vandalism. The main qualitative indicators of vandalism are recognised as follows: 1) geography of vandalism; 2) time when an act of vandalism is committed; 3) how an act of vandalism is committed; 4) means and instruments of vandalism; 5) a place where an act of vandalism is committed. ***Conclusions.*** Common places where vandalism is committed are cemeteries, graves, burial sites, places of worship, morgues, various religious buildings and "sacred" places. The vast majority of cases of lucrative and religious vandalism are recorded in such places. For example, valuable items, as well as elements of monuments and fences, are stolen from graves and cemeteries. Moreover, it is here that various rites and ceremonies are performed, and most acts of desecration and abuse are committed. Less common, but no less important for analysis, are places with a special status: nature reserves, memorial complexes, cultural and archaeological heritage sites, etc. The vast majority of acts of environmental vandalism are committed here.

Key words: types of vandalism, desecration of a grave, burial place, crime, crime rate.

1. Introduction

In order to comprehensively depict the current state of vandalism and its main trends in Ukraine, we have analysed the only reports on criminal offenses for the last five years, summarised by the Prosecutor General's Office of Ukraine and posted on its official website (Official website of the Prosecutor General's Office of Ukraine, 2020). The study and comparison of statistics made it possible to formulate a range of useful conclusions and generalisations for practical application.

Criminal offenses that we propose to qualify as vandalism are a relatively small share of the overall crime structure. For example, while in 2014, 1763 such crimes were committed, which amounted to 0.33% of all registered criminal offenses, in 2018, 2193 were committed, i.e. 0.45%. However, as we noted above, official statistics cannot objectively reflect the actual prevalence of vandalism, as a significant number of acts of vandalism are classified under such general articles as theft, hooliganism, destruction and damage to property, etc. and, accordingly, will not be taken into account in our analysis.

The issue of vandalism has been under focus in the works by O. Bandurka, V. Vasylevych, O. Dzhuzha, V. Dziuba, O. Kolb, A. Nebytov, M. Khavroniuk, V. Shakun, and others. Without detracting from the scientific value of the achievements of these scientists, it should be noted that no comprehensive study of vandalism prevention has been conducted in domestic science. For example, today most issues related to determining the motives for

vandalism, the ways and external forms of vandalism, the determinants that cause vandalism, the mechanism of formation of this deviation, measures to prevent it, etc. remain virtually unexplored.

Therefore, the purpose of the article is to study vandalism state and trends in Ukraine based on relevant criteria.

2. **General principles of the prevalence of vandalism in modern conditions**

Despite all the shortcomings, official statistical reporting allows us to identify the most global trends in the protection of public morality:

– against an overall decrease in crime by 8% (from 529,139 crimes in 2014 to 487,133 crimes in 2018), there is a significant increase in the level of vandalism – by almost 20% (from 1763 crimes in 2014 to 2193 in 2018). In the overall crime structure, the share of such crimes increased by 0.12%;

– the largest number of acts of vandalism was recorded in 2018 (2193 crimes), and the smallest – in 2014 (1763 crimes). At the same time, 2053 such crimes were registered in 2015, 1782 crimes in 2016, and 1972 crimes in 2017;

– the most significant increase in the number of crimes was in the following: illegal possession, desecration or destruction of religious shrines (from 3 crimes in 2014 to 5 crimes in 2018); obstruction of a religious rite (from 1 crime in 2014 to 4 crimes in 2018); desecration of a grave, other burial place or the body of the deceased (from 1608 crimes in 2014 to 2030 in 2018); illegal explorations at an archaeological heritage site, destruction, ruining of or damage to cultural heritage sites (from 52 crimes in 2014 to 77 crimes in 2018); destruction, damage or concealment of documents or unique documents of the National Archival Fond (from 0 crimes in 2014 to 3 crimes in 2018); public denial or justification of fascist crimes, propaganda of neo-Nazi ideology, production and/or distribution of materials justifying the crimes of fascists and their supporters (from 1 crime in 2014 to 38 crimes in 2018);

– the number of crimes such as damage to religious buildings or places of worship decreased (from 7 crimes in 2014 to 2 crimes in 2018); intentional destruction or damage to territories under state protection and objects of the nature reserve fund (from 28 crimes in 2014 to 17 crimes in 2018); desecration of state symbols (from 58 crimes in 2014 to 17 crimes in 2018); violence against the population in the area of military operations (from 4 crimes in 2014 to 0 crimes in 2018).

The next criterion to be analysed is *the number of crimes in which individuals have been served with a notice of suspicion*. The importance of this indicator is due to actual reflection of the number of detected crimes, i.e. crimes in which a person has been identified. The basic value we propose to use is the total number of detected crimes and their ratio to the total number of registered crimes. For example, in 2014, this ratio was 37.7%; in 2015, 33.3%; in 2016, 26.9%; in 2017, 37.9%; in 2018, 39.4%. The average figure for the analysed period is 34.7%. With regard to vandalism, the analysis of statistical data reveals different trends:

– compared to other crimes, the share of detected vandalism cases is much higher, averaging 54.2% over the analysed period. This means that every second reported case of vandalism was detected, i.e. the perpetrators were identified;

– the share of detected vandalism cases increased by almost 10%: from 52.2% in 2014 to 61.7% in 2018. The lowest number of vandalism cases was detected in 2016: 773 crimes, which is 43.4% of the total number of registered vandalism cases;

– the high rate of vandalism crimes in which persons were served with notices of suspicion is relative. For example, only two types of vandalism are characterised by a high detection rate that exceeds the average statistical indicator (we recall that it is 34.7% for the analysed period). For example, these are the desecration of a grave, other burial place or the body of the deceased (57.6%) and the desecration of state symbols (36.3%);

– the following types of vandalism have a lower than average detection rate: damage to religious buildings or places of worship – 30%; illegal occupation, desecration or destruction of religious shrines – 17.9%; obstruction of a religious rite – 10.3%; public denial or justification of the crimes of fascism, propaganda of neo–Nazi ideology, production and/or distribution of materials justifying the crimes of fascists and their supporters – 10.1%; intentional destruction or damage to territories under state protection and objects of the nature reserve fund – 7.3%; illegal exploration at an archaeological heritage site, destruction, ruining of or damage to cultural heritage sites – 6.7%. At the same time, three types of vandalism have a zero percent detection rate, meaning that no one has ever been served with a notice of suspicion of committing them during the analysed period. These are the destruction, damage or concealment of documents or unique documents of the National Archival Fond; looting and violence against the population in the area of military operations.

Another criterion for evaluating statistics on vandalism is *the number of proceedings that were sent to court with an indictment*. On aver-

age, the share of such proceedings is 88.1% of the total number of criminal offenses in which persons were served with notices of suspicion, or 30.6% of the total number of recorded criminal offenses. The highest analysed indicator was in 2018 and amounted to 90.3% and 35.6%, respectively; and the lowest 86.7% – in 2016 – and 23.3%, respectively. With regard to vandalism, we can observe different correlations and trends:

– compared to other crimes, the share of vandalism proceedings that were sent to court with an indictment was significantly higher and averaged 90.7% of the total number of criminal offenses in which persons were served with a notice of suspicion of committing vandalism, or 49.1% of the total number of registered vandalism cases in the analysed period. These figures were highest in 2015 (96.3 and 53.8%, respectively) and lowest in 2016 (80.1 and 34.7%, respectively);

– compared to 2014, in 2018, the share of vandalism proceedings that were sent to court with an indictment increased by more than 11% (from 83.9% and 43.8% to 95.6% and 58.9%, respectively);

– the relative nature of statistical data characterising the ratio of the number of vandalism proceedings that were sent to court with an indictment to such indicators as the number of detected vandalism cases and the total number of registered vandalism cases is worthy of attention. For example, only one type of vandalism is characterised by a high rate of referrals to court with an indictment that exceeds the average statistical indicator (we recall that during the analysed period it accounted for 88.1% of the total number of criminal offenses in which persons were served with a notice of suspicion and 30.6% of the total number of recorded criminal offenses). For example, it is the desecration of a grave, other burial place or the body of the deceased: 90.9% and 52.3% respectively. Another type of vandalism has only one of the two indicators slightly higher than the average: it is the deliberate destruction or damage of territories under state protection and objects of the nature reserve fund: 88.9% and 6.5% respectively;

– the following types of vandalism have lower than average statistical indicators: damage to religious buildings or places of worship – 83.3% and 25.0%, respectively; illegal explorations at an archaeological heritage site, destruction, ruining or damage to cultural heritage sites – 86.3% and 5.8%, respectively; illegal possession, desecration or destruction of religious shrines – 80.0% and 14.3% respectively; desecration of state symbols – 77.8% and 28.2% respectively; public denial or justification of the crimes of fascism, propaganda of neo–Nazi ideology, production and/or distribution of materials justifying the crimes of fascists and their supporters – 77.8 and 7.9% respectively; obstruction of religious rites – 50.0 and 5.3% respectively;

– three types of vandalism are characterised by zero rates of referrals to court with indictments. For example, these are destruction, damage or concealment of documents or unique documents of the National Archival Fond; looting; violence against the population in the area of military operations.

In more detail, the quantitative characteristics of vandalism can be assessed by comparing *statistical data that reflect the prevalence* of each of the types of vandalism we have identified, namely:

– the most common type of vandalism is desecration of a grave, other burial place or the body of the deceased (Article 297 of the CC of Ukraine). The share of registered crimes under this article in the overall structure of vandalism is 92.4%. Moreover, against a general decrease in the crime rate in 2014-2018 (by 8%), a significant increase in the number of registered cases of desecration of a grave, other burial place or the body of the deceased can be noted (by 422 crimes, i.e. by 20.7%). The lowest number of crimes under Article 297 of the CC of Ukraine was registered in 2014 – 1608, and the highest in 2018 – 2030. On average, 1 to 4 crimes under Part 4 of Article 297 of the CC of Ukraine were recorded per year, but in 2015, there was an almost 4-fold increase (15 crimes). On average, a person was served with a notice of suspicion of committing this crime in 57.6% of cases. This figure was the lowest in 2016 – 45.9%, and the highest in 2018 – 65.4%. Approximately 52.3% of proceedings of the total number of criminal offenses under Article 297 of the CC of Ukraine were sent to court with an indictment. The lowest figure was in 2016 – 36.8%, and the highest – in 2018 – 62.5%;

– the second most common type of vandalism is the illegal explorations at an archaeological heritage site, destruction, ruining of or damage to cultural heritage sites (Article 298 of the CC of Ukraine). The share of registered crimes under this article in the overall structure of vandalism is 3.4%. Over the past 5 years, the number of registered cases of illegal explorations at an archaeological heritage site, destruction, ruining or damage to cultural heritage sites has increased by 32.5% (25 crimes). The lowest number of crimes under Article 298 of the CC of Ukraine was registered in 2014 – 52, and the highest – in 2017 – 78. The detection rate of these crimes is extremely low. For example, on average, a notice of suspicion was

served to a person in 6.7% of cases. This figure was the lowest in 2016 – 1.5%, and the highest in 2018 – 11.7%. About 5.8% of proceedings of the total number of criminal offenses under Article 298 of the CC of Ukraine were sent to court with an indictment. This figure was the lowest in 2016 – 1.5%, and the highest in 2018 – 11.7%;

– the third most widespread type of vandalism is the desecration of state symbols (Article 338 of the CC of Ukraine). The share of registered crimes under this article in the overall structure of vandalism is 1.3%. Unlike the previous types of vandalism we analysed, over the past 5 years the number of registered cases of desecration of state symbols has decreased by 70.1% (by 41 crimes). The lowest number of crimes under Article 338 of the CC of Ukraine was registered in 2016 – 10, and the highest – in 2014 – 58. The detection rate of these crimes is relatively high. On average, a notice of suspicion was served to a person in 36.3% of cases. This figure was the lowest in 2016 at 19.0%, and the highest in 2015 at 53.8%. Approximately 28.2% of proceedings out of the total number of criminal offenses under Article 338 of the CC of Ukraine were sent to court with an indictment. This figure was the lowest in 2014 – 13.8%, and the highest in 2018 – 47.1%;

– the fourth most widespread type of vandalism is the intentional destruction or damage to territories under state protection and objects of the nature reserve fund (Article 252 of the CC of Ukraine). The share of registered crimes under this article in the overall structure of vandalism is 1.3%. Over the last 5 years, the number of registered cases of intentional destruction or damage to territories under state protection and nature reserve fund objects decreased by 39.3% (by 11 crimes). The lowest number of crimes under Art. 252 of the CC of Ukraine was registered in 2015 – 16, and the highest – in 2016 – 36. Traditionally, the level of solving these crimes is low. For example, on average, a notice of suspicion was served to a person in 7.3% of cases. This figure was the highest in 2014 – 28.6%, while in 2015, 2016 and 2018, no suspicion was served on any of the facts of committing this crime. Approximately 6.5% of proceedings out of the total number of criminal offenses under Article 252 of the CC of Ukraine were sent to court with an indictment. This figure was the highest in 2014 – 28.6%, while from 2015 to 2018, no proceedings under this article were sent to court with an indictment;

– the fifth most widespread type of vandalism is public denial or justification of fascist crimes, propaganda of neo-Nazi ideology, production and/or distribution of materials justifying the crimes of fascists and their supporters (Article 436–1 of the CC of Ukraine). The share of registered crimes under this article in the overall structure of vandalism is 0.9%. Over the past 5 years, the number of registered cases of public denial or justification of fascist crimes, propaganda of neo-Nazi ideology, production and/or distribution of materials justifying the crimes of fascists and their supporters has increased by as much as 37 times (from 1 to 38 crimes). The lowest number of crimes under Article 436-1 of the CC of Ukraine was registered in 2014 – 1, and the highest – in 2018 – 38. The detection rate of these crimes is extremely low. For example, on average, a notice of suspicion was served to a person in 10.1% of cases. This figure was the highest in 2015 – 25.0%, while in 2014 and 2016 no suspicion was served on any fact of committing this crime. Approximately 7.9% of proceedings out of the total number of criminal offenses under Article 436-1 of the CC of Ukraine were sent to court with an indictment. This figure was the highest in 2015 – 25.0%, while in 2014 and 2016 no proceedings under this article were sent to court with an indictment;

– the sixth most widespread type of vandalism is the illegal maintenance, desecration or destruction of religious shrines (Article 179 of the CC of Ukraine). The share of registered crimes under this article in the overall structure of vandalism is 0.3%. Over the past 5 years, the number of registered cases of illegal possession, desecration or destruction of religious shrines has increased by 40.0% (by 2 crimes – from 3 to 5). The lowest number of crimes under Article 179 of the CC of Ukraine was registered in 2014 and 2015 – 3, and the highest – in 2016 – 10. Traditionally, the detection rate of these crimes is low. For example, on average, a notice of suspicion was served to a person in 17.9% of cases. This figure was the highest in 2018 – 40.0%, while in 2015 no suspicion was served on any fact of committing this crime. Approximately 14.3% of proceedings out of the total number of criminal offenses under Article 179 of the CC of Ukraine were sent to court with an indictment. This figure was the highest in 2018 – 40.0%, while in 2015 and 2017 no proceedings under this article were sent to court with an indictment;

– other types of vandalism are the least common, and therefore their commission does not significantly affect official statistical reporting. For example, damage to religious buildings or places of worship accounts for only 0.2% of the total vandalism; obstruction of religious rites – 0.2%; destruction, damage or concealment of documents or unique documents of the National Archival Fond – 0.03%; loot-

ing – 0.01%; violence against the population in the area of military operations – 0.09%. All of them are characterised by a rather low level of detection and referral to court with an indictment.

Therefore, the analysed official statistics enables to determine the prevalence and dynamics of vandalism over the past five years. At the same time, the above data and our conclusions are not enough to provide a holistic picture of modern domestic vandalism. A number of its *qualitative indicators* need to be further disclosed. However, it is impossible to do this on the basis of official statistics review: first, official statistics do not separate vandalism crimes into a separate group; second, it does not record a number of indicators that play a secondary role in the overall crime structure but are quite important for developing measures to counter and prevent vandalism. In this regard, our further research will be based on the data obtained as a result of studying the materials of criminal proceedings on vandalism, on the conclusions drawn by other scholars, experts and specialists, as well as on the results of a sociological survey.

3. Particularities of the places of committing vandalism

The study enables to make some conclusions, which are organised into several independent blocks for ease of perception.

Geography of vandalism. The prevalence and steadily increasing number of criminalised acts of vandalism is observed in all regions without exception. The level of vandalism is somewhat higher in Luhansk and Donetsk regions, as well as in the areas bordering the Autonomous Republic of Crimea, compared to the overall statistical indicators. This is primarily due to a rather high level of aggressive xenophobia and national intolerance in these regions, which is a consequence of the occupation and actual hostilities. In the western regions of Ukraine, the level of vandalism also remains consistently high, due to the active work of various national-democratic and chauvinistic movements. In general, our study did not show any significant geographic differences in the prevalence of vandalism in Ukraine. The only differences are in the direct objects of attack, as well as the emotional and motivational atmosphere of vandalism.

There are certain differences between urban and rural vandalism. For example, in large cities, which are more saturated with public infrastructure, vandalism of the following types prevails: graffiti, petty and malicious hooliganism, destruction and damage to property. Obscene inscriptions, immoral images, smashed payphones, broken windows, damaged public transportation equipment, etc. are all typical of urban vandalism. In small towns and villages, vandalism is more likely to be motivated by lucrative motives, due to the relatively low socio-economic level of life. For example, there are frequent cases of destruction of graves and cemeteries, and theft of various valuable materials from burial sites. In addition, various natural resources, garden and park and architectural ensembles, green spaces, etc. are often targeted for destruction. In other words, public, nationalist, political, and anarcho-nihilistic types of vandalism are more common in cities, while religious, cemetery, lucrative, and environmental vandalism is more common in villages.

Time when an act of vandalism is committed. The results of our study show that acts of vandalism are committed with approximately the same level of intensity throughout the year. At the same time, certain differences in the structure of vandalism depending on the time of year can be identified. For example, acts of lucrative vandalism are most often committed in winter and in the first two months of spring. Some scholars explain this dependence by the fact that in the warm season it is easier to find seasonal work or other one-time income and fresh vegetables, fruits, mushrooms appear, thus partially solving the food problem for low-income people who are most prone to lucrative vandalism (Husak, 2015, p. 144). Public vandalism, on the contrary, is more common in the summertime. This is due to the fact that teenagers, who are mostly prone to it, have a lot of time free from school and controlled leisure. Nationalist and political vandalism becomes more active in the fall, due to the end of the vacation period and the general increase in political and economic activity in the country. The most "favourable" period for environmental vandalism is the second half of spring, summer and the first half of autumn, which is associated with active agricultural work.

In addition to seasonality, the intensity of vandalism depends on the time of day. There is no clear gradation and no clear priority, while it is possible to state a dependence on a certain type of vandalism. For example, lucrative vandalism is mostly committed in the evening and much less often during lunchtime and at night. This is primarily due to the specificities of visiting cemeteries, burial sites and other public places, from the territory of which valuable objects or their parts are most often stolen. Breaking windows, damaging payphones, painting fences and other cases of public vandalism are mostly committed at night, and less frequently during the day and evening. This is due to the specificities of visiting public places, as well as the availability of free time among young people who are prone to this type

of vandalism. Demonstrative cases of political and nationalist vandalism are mostly recorded during the day, during various political rallies and public events, while vandalism by radicalised informal groups, on the contrary, intensifies in the evening and at night, after sports matches, concerts and performances.

How an act of vandalism is committed. A characteristic feature of modern vandalism is how extraordinary it can be committed. Moreover, the choice of how to impact a protected object depends on many factors: the personality of the vandal and the availability of special skills; the specifics of the object of the attack; the place and time of the crime; the expected goal, etc. In total, more than 50 different ways of committing vandalism can be identified. However, according to the results of the criminal proceedings we have studied, there are several of the most popular among them.

First, acts of vandalism can involve inflicting various damages to protected objects. For example, this includes its complete destruction (by breaking, tearing, dissolving, etc.), demolition, dismantling, breakage, removal of structural parts and elements, painting or pouring various substances, pollution, excavation, arson, explosion.

Second, acts of vandalism can involve the misuse of the object. The most popular of these is stealing the object, removing clothing, jewellery or awards from the body, for example for the purpose of further sale. Less frequently, stolen objects are used for other purposes: for rituals, ceremonies, revenge, etc.

Third, acts of vandalism can express a vandal's negative attitude towards someone or something, which is almost as prevalent. The most popular are the following: painting the object, applying obscene inscriptions, indecent images, or offensive symbols to the object, adding additional elements of an immoral or cynical nature to the object, pasting posters and leaflets. Sometimes, vandalism is committed by public ridicule, demonstration of contempt, mockery of the object or events related to it, as well as by gross violation of the order of ceremonies, rituals, rites, etc.

Fourth, acts of vandalism can allow the vandal to satisfy his or her needs due to sexual or other mental disorders. Among them are dismemberment or disfigurement of the body, illegal exhumation, necrophilia, eating of remains, relieving natural needs on or with the object, and other lewd and immoral acts. Since the share of such acts of vandalism in the overall structure of vandalism is insignificant, these methods are extremely rare.

Means and instruments of vandalism. The choice of means and tools used to unlawfully affect protected facilities always depends on the method of committing the crime chosen by the vandal. And since, as we have shown above, among all possible methods of vandalism, the most popular are those that involve inflicting various damages to protected objects, frequently, vandals use destructive tools such as sledgehammers, hammers, knives, saws, drills, chisels and other tools that can cause various mechanical or physical damage to an object. No less popular are various chemicals, including paints, solvents, combustibles, fuel oil, reagents, chemicals, etc. Sometimes domestic animals, including dogs and cattle, are used as tools.

Our analysis of the ways in which vandalism is committed has shown that a significant number of them are caused by the direct activity of the perpetrator and do not involve the use of any special or additional means and tools. For example, a vandal can personally damage a protected object, break, tear, or trample it. Moreover, theft of an object often does not require the use of any tools. Thus, the above gives grounds to assert that the means and instruments of vandalism should be considered as its optional feature.

A place where an act of vandalism is committed. The extraordinary variety of external forms of vandalism, as well as its prevalence, determines the special nature of the places where it is committed.

The results of our research show that most acts of vandalism are committed in public places (train stations, airports, parks, streets, stadiums, entrances, shopping centres, cinemas, educational institutions, sports grounds, public transport, etc.) First, this is due to an important feature of vandal behaviour such as demonstrative nature (vandals usually seek to give their actions as much publicity as possible, and therefore prefer publicly accessible objects); second, the fact that a significant number of objects that are subject to vandalism are integral elements of public places (benches in parks, seats in public transport, windows and walls in entrances, elevator cabins, etc. are subject to destructive impact); third, the fact that the intention to commit acts of vandalism in many cases arises suddenly, for example during a mass event, after drinking alcohol, during joint leisure activities, etc. (such forms of behaviour are typical for public places).

The specific nature of many targets (special historical, artistic, architectural, religious or other value for a significant number of people) causes the prevalence of acts of vandalism in places where such objects are compactly located: in museums, libraries, exhibition halls, and other educational, scientific and cultural institutions.

Common places of committing vandalism are cemeteries, graves, burial sites, places of worship, morgues, various religious buildings and "sacred" places. The vast majority of cases of lucrative and religious vandalism are recorded in such places. For example, valuable items, as well as elements of monuments and fences, are stolen from graves and cemeteries. Moreover, it is here that various rites and ceremonies are performed, and most acts of desecration and abuse are committed. Less common, but no less important for analysis, are places with a special status: nature reserves, memorial complexes, cultural and archaeological heritage sites, etc. The vast majority of acts of environmental vandalism are committed here.

Less common, but no less important for analysis, are places with a special status: nature reserves, memorial complexes, cultural and archaeological heritage sites, etc. The vast majority of acts of environmental vandalism are committed here.

A relatively significant number of acts of vandalism are committed in abandoned, neglected places (at stopped construction sites, in abandoned residential buildings, in the poorest residential neighbourhoods, at previously damaged and mutilated objects). To explain this trend, some scholars use the "broken windows theory", the essence of which is that vandalism is to some extent encouraged by the situation at the scene: the more disorderly and littered the place, the more likely it is to be committed (Latysh, 2016, p. 52; Reynald, Elffers, 2009, p. 27).

4. Conclusions

Above, we have already analysed the criteria enabling to get only a general idea of the state of and trends in vandalism in the current socio-political and economic environment. Moreover, the data on which our study is based are relative, as most of them are the result of our review of the materials of criminal proceedings for vandalism, and not officially recorded statistical indicators. All of this affects the accuracy of our calculations, as well as the objectivity and reliability of our conclusions.

However, it should be noted that there are no other ways to study vandalism today: neither the National Police of Ukraine nor other law enforcement bodies or NGOs currently keep records of vandalism. Scholars and international experts in their few reports on vandalism rely only on official statistics, which do not focus on vandalism. Therefore, they take as a basis different corpus delicti, which, in their subjective opinion, are manifestations of vandalism. Obviously, under such conditions, the results obtained differ significantly, and the conclusions and generalisations based on them do not reflect the real scale and consequences of vandalism, do not allow us to trace their dynamics and make reliable forecasts.

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КРИТЕРІЇ СТАНУ ТА ТЕНДЕНЦІЙ ПОШИРЕННЯ ВАНДАЛІЗМУ В СУЧАСНИХ УМОВАХ

Анотація. ***Мета.*** Метою статті є дослідження стану і тенденцій вандалізму в Україні на основі відповідних критеріїв. ***Результати.*** Тлумачення змісту вандалізму і, як наслідок, вживання цього поняття для офіційного пояснення діянь, пов'язаних із деструктивною насильницькою руйнівною поведінкою, на сьогодні суттєво розширилося та сягнуло за межі кримінально-правового визначення. Значна частина актів вандальної поведінки через незначну суспільну небезпеку залишається без

належної уваги з боку правоохоронних органів, оскільки підстав для їх кваліфікації за відповідними статтями КК України часто не досить, а КУпАП взагалі не містить спеціальних норм, які б дозволяли вжити відповідних заходів реагування. У зв'язку з цим актуальним видається дослідження стану і тенденцій вандалізму в Україні на основі відповідних критеріїв. Встановлено, що стан і тенденції вандалізму в Україні найбільш доцільно визначати через характеристику кількісних і якісних показників поширення злочинів вандальної спрямованості. Обґрунтовано, що основними кількісними показниками вандалізму слід вважати: 1) місце вандалізму в загальній структурі злочинності; 2) кількість злочинів вандальної спрямованості, у яких особам вручено повідомлення про підозру; 3) кількість проваджень у справах про злочини вандальної спрямованості, які були направлені до суду з обвинувальним актом; 4) рівень поширеності окремих видів злочинів вандальної спрямованості. Основними якісними показниками вандалізму визнано такі як: 1) географія вандалізму; 2) час учинення вандалізму; 3) спосіб учинення вандалізму; 4) засоби та знаряддя вчинення вандалізму; 5) місце вчинення вандалізму. ***Висновки.*** Поширеними місцями вчинення вандалізму є кладовища, могили, місця захоронення, культові будинки, приміщення моргів, різноманітні релігійні споруди та «сакральні» місця. У таких місцях фіксують більшість випадків корисливого та релігійного вандалізму. Зокрема, з могил і кладовищ викрадають цінні речі, а також елементи пам'ятників та огорож. Також саме тут проводяться різноманітні обряди та церемонії, вчиняється більшість актів наруги й осквернення. Менш поширеними, але не менш важливими для аналізу, є місця зі спеціальним статусом: заповідники, меморіальні комплекси, об'єкти культурної та археологічної спадщини тощо. Тут вчиняється більшість актів екологічного вандалізму.

Ключові слова: різновиди вандалізму, наруга над могилою, місце поховання, злочин, рівень злочинності.

The article was submitted 20.07.2022
The article was revised 09.08.2022
The article was accepted 30.08.2022

UDC 343.1
DOI https://doi.org/10.32849/2663-5313/2022.10.11

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Denysenko, Hryhorii, Pohoretskyi, Mykola (2022). Ensuring witness immunity as a guarantee of professional secrets in criminal proceedings. *Entrepreneurship, Economy and Law, 10*, 70–82, doi: https://doi.org/10.32849/2663-5313/2022.10.11

ENSURING WITNESS IMMUNITY AS A GUARANTEE OF PROFESSIONAL SECRETS IN CRIMINAL PROCEEDINGS

Abstract. ***Purpose.*** The purpose of the article is to study witness immunity as a guarantee of professional secrets in criminal proceedings. ***Methods.*** In order to achieve the research purpose, the authors use the system of general scientific and specific methods of scientific knowledge used in legal science. The general dialectical method of scientific cognition of real-life phenomena and processes enables to consider witness immunity in criminal proceedings as a guarantee of professional secrets consisting of interrelated elements. The method of system analysis is used to analyse the legal provisions governing witness immunity in criminal procedure in Ukraine, and the systemic and structural method is used to determine how witness immunity extend to individuals, who are endowed with a secret protected by law and may be exempt from the obligation to keep professional secrets. ***Results.*** The article is focused on the legal analysis of witness immunity as a guarantee of professional secrets in criminal proceedings. The general comparative legal characteristics of witness immunity in criminal proceedings being studied enables to clarify the concept, essence and tasks of witness immunity as a guarantee of professional secrets in criminal proceedings. The ratio of witness immunity, in terms of the right not to testify against close relatives and family members, as well as the list of persons who cannot be questioned as witnesses, and the principle of equality before the law and the court implies that witness immunity is defined as one of the additional guarantees of professional secrets which a witness may use in criminal proceedings. ***Conclusions.*** Witness immunity as a guarantee of professional secrecy in criminal proceedings is exercised in criminal proceedings only in respect of a person who has acquired the procedural status of a witness, is necessarily regulated in the criminal procedure legislation, is based on the protection of moral values and is a paired legal category of correlation of rights and obligations within its implementation. The essence of witness immunity as a guarantee of professional secrecy in criminal proceedings should be understood as a system of witness rights that allow a witness to be exempted from testifying in criminal proceedings. The purpose of witness immunity as a guarantee of professional secrecy in criminal proceedings is to respect the rights and freedoms of a witness, to establish guarantees for the protection of his/her rights to inviolability, to strengthen the moral foundations of justice in criminal proceedings, and to establish the basis for procedural savings from perjury. Witness immunity as a guarantee of professional secrecy in criminal proceedings is a special legal technique created specifically for achieving the socially beneficial goals of legal implementation of the procedural status of a witness in criminal proceedings and guarantees of secrecy in criminal proceedings, which establishes a procedure, status, conditions that do not correspond to reality with the purpose of arising or preventing of certain consequences of law application.

Key words: witness immunity in criminal proceedings, guarantee of secrecy, criminal procedure, professional secrecy, professional secret protected by law, interrogation.

1. Introduction

Article 3 of the Constitution of Ukraine proclaims an individual, his life and health, honour and dignity, inviolability and security shall be recognised in Ukraine as the highest social value, as well as defines human rights and freedoms, and guarantees that determine the essence and course of activ-

ities of the State (Constitution of Ukraine, 1996).

This, in turn, shapes the development course for mechanisms for the protection and defence of human rights; moreover Ukraine as a legal state shall guarantee and protect the rights, freedoms and legitimate interests of a person and citizen, which is reflected in sectoral legislation.

The legal system of Ukraine assigns a specific role to the legislation that determines the procedure of criminal proceedings and is related to the protection of the rights, freedoms and legitimate interests of all participants in criminal proceedings by applying due procedure to each participant in criminal proceedings.

One of the participants in criminal proceedings – a witness – is of particular interest in the context of the issue under study.

With the adoption of the Criminal Procedure Code of Ukraine (CPC of Ukraine), the range of witness rights was significantly expanded. These provisions regulate the conditions for the effective involvement of witnesses in criminal proceedings and provide witnesses with discretion in exercising their rights.

One of such manifestations of the discretion in criminal proceedings is witness immunity, which forms the institution of exemption of certain participants in criminal proceedings from the need to testify (Criminal Procedure Code of Ukraine, 2012).

Given that "immunity" in Latin means "exemption from something", it is worth noting that in criminal law this term is interpreted as "the exclusive right to keep secrets despite the provisions of the law", while the official enshrining of its definition in legal regulations is one of the features of a state's democracy.

The analysis and study of witness immunity in criminal proceedings has been under focus in studies by a number of proceduralists and scholars, such as R.V. Barannik, M.Yu. Veselov, M.Y. Vilhushynskyi, S.H. Volkotrub, V.O. Hryniuk, Yu.M. Hroshevyi, O.V. Kaplina, A.F. Koni, V.V. Korol, I.P. Koriakin, E.F. Kutsova, O.P. Kuchynska, T.A. Loskutova, Ye.D. Lukianchykov, S.V. Lukoshkina, V.M. Lushpiienko, V.T. Maliarenko, M.M. Mykheienko, V.V. Moldovan, V.T. Nor, M.A. Pohoretskyi, L.D. Udalova, Yu.V. Tsyhaniuk, M.M. Sheifer, O.H. Shylo, M.Ye. Shumylo, O.H. Yanovska, and others.

However, the topic of witness immunity as a guarantee of secrecy in criminal proceedings is poorly regarded in national criminal procedure science. Available studies only fragmentarily touch upon the problematic issues of witness immunity and do not fully disclose the concept of witness immunity in criminal proceedings as a means of establishing and ensuring guarantees of legislative and reasonable interference with secrets.

This is due to the fact that with the adoption of the CPC of Ukraine in 2012 and the judicial reform, new rules were introduced into the criminal procedure legislation, which necessitates a rethinking of seemingly established legal concepts and categories. That is why the study of witness immunity as a guarantee of secrecy in criminal proceedings is of particular interest.

The purpose of the article is to study witness immunity as a guarantee of professional secrets in criminal proceedings.

In order to achieve the research purpose, the authors use the system of general scientific and special methods of scientific knowledge used in legal science. The general dialectical method of scientific cognition of real-life phenomena and processes enables to consider witness immunity in criminal proceedings as a guarantee of professional secrets consisting of interrelated elements. The method of system analysis is used to analyse the legal provisions governing witness immunity in criminal procedure in Ukraine, and the systemic and structural method is used to determine how witness immunity extend to individuals, who are endowed with a secret protected by law and may be exempt from the obligation to keep professional secrets.

2. Legal framework regulating interrogation of certain categories of persons

The study of witness immunity as a guarantee of professional secrets in criminal proceedings is impossible without clarifying the essence and purpose of witness immunity, for implementation thereof separate grounds and procedure are established (Denysenko, 2018).

We agree with S.Yu. Nikitin that the value of immunities is determined by their purposes. The purpose of procedural immunities as guarantees of secrecy in criminal proceedings is to ensure enhanced protection and create favourable conditions for the exercise of functions by the actors of immunity. The purpose of immunity is its defining feature, that is, the reason for its existence and legislating (Nikitin, 2005).

It should be noted that the implementation of criminal procedure law can be effective and efficient only if the implementers correctly understand not only the content of the provisions, but also their concepts, features, functional purpose in the system of law, and are familiar with the specifics of different types of procedural rules.

In the CPC of Ukraine, Article 65, Part 2, persons who cannot be interrogated as witnesses because they are privy to a secret protected by law are listed, however, only a certain category of persons may be exempted from the obligation

to keep professional secrets (Criminal Procedure Code of Ukraine, 2012).

It is worthwhile to mention that the CPC of Ukraine, Article 65, Part 2, paragraphs 1-5, define the guarantees of such types of secrets:

1) attorney-client privilege
2) notarial secrecy;
3) medical privacy;
4) secrecy of confession.

In order to determine the type, absolute or relative, of the secret protected by law, it is necessary to consider the legal as well as the ethical aspects [236, p. 56]. This approach to the application of witness immunity as a guarantee of professional secrecy in criminal proceedings is determined by the legislator, namely, by granting the right to a person, who has entrusted information that later became an attorney-client privilege, notarial secrecy, medical privacy or secrecy of confession confidential, to release the holders of such a secret from the obligation to keep it indefinitely.

The regulated prohibition on interrogation of certain categories of persons as witnesses in a criminal case is due to the specific nature of the information they possess, the way it is obtained and the way it is kept secret and cannot depend on the will of the person who possesses it (Vetryla, 2016).

The categories of persons who are entitled to legally protected secrets and may be released from the obligation to keep professional secrets are defined in the CPC of Ukraine, Article 65, part 2, clauses 1-5, as follows:

1) the defence counsel, representative of the victim, of the civil plaintiff, of the civil defendant, of the legal entity in respect of whom the proceedings are conducted, legal representative of the victim, of the civil plaintiff in criminal proceedings – on the circumstances that they became aware of in connection with the performance of the functions of a representative or defence counsel;

2) attorneys – on information that constitutes attorney-client privilege;

3) notaries – on information that constitutes notarial secrecy;

4) healthcare professionals and other persons who, in connection with the performance of their professional or official duties, have become aware of an illness, medical examination, examination and its results, intimate and family life of a person – of information constituting medical privacy;

5) clergymen – on information they received during the confession of believers.

As for the first category, these are the defence counsel, representative of the victim, of the civil plaintiff, of the civil defendant, of the legal entity in respect of whom the proceedings are being conducted, and legal representative of the victim, of the civil plaintiffs in criminal proceedings have the right to preserve information about the circumstances that they became aware of in connection with the performance of the functions of a representative or defence counsel.

The grounds for the use of immunity by the persons mentioned in this category in accordance with the CPC of Ukraine, Article 65, part 2, clauses 1-5, are procedural status and information known to them in connection with their professional or factual status.

It should be noted that the defence counsel, representative of the victim, of the civil plaintiff, of the civil defendant are mostly represented by lawyers. Therefore, in the course of exercising their powers within the framework of criminal proceedings, they combine the fact that they cannot be questioned as witnesses about the circumstances they became aware of in connection with the performance of the functions of a representative or defence counsel, as well as information that constitutes attorney-client privilege. Since most scientific studies still investigate witness immunity using the category of a "defence counsel-attorney", we consider it appropriate to study the immunity of a defence counsel as a witness together with the study of the immunity of an attorney.

S.N. Burtsev argues that in criminal proceedings it is impossible to combine the opposite and mutually exclusive functions of testimony and defence to guarantee professional secrecy (Burtsev, 2016, p. 56).

That is, defence counsel immunity is not only about protecting people who perform certain tasks, as people who have "trust in the public functions of a lawyer" and for this reason, entrusting them with knowledge of facts that they would not want to share with any other people (Kruk, 2017, p. 26).

In general, the nature of the legal profession belongs to the group of so-called public trust professions (Kruk, 2017, p. 41).

For example, N.V. Osodoeva argues that any admission of interrogation of a lawyer as a witness about circumstances that he or she learned in connection with the defence undermines the very meaning of defence in criminal proceedings (Osodoeva, 2018, p. 111).

The basis of defence counsel's immunity is the fundamental principle of the general process – the equality of the parties, and that this leads to the application of the rule on the separation of procedural functions of the prosecution and the defence. If the defence counsel is obliged to testify against his/her client, there can be no question of a procedural defence against criminal prosecution (Afanaseva, 2007, p. 12).

Therefore, the defence counsel cannot be interrogated not only about the circumstances of the criminal case in which he/she participates, but also about any other circumstances that became known to him or her in connection with the application for or provision of legal support.

Such prohibitions preserve the relationship of trust between the defence counsel and the client, the lawyer and the person who provided them. The client should be absolutely sure that the attorney does not disclose or use the confidential secrets and other information communicated to his or her detriment (Sheifer, 2005, p. 97).

After all, a defence lawyer, invited by the defendant's choice or appointed by him or her, has the right to talk to him or her in private to clarify all the circumstances he or she considers necessary, and if it were permitted to question the defence counsel as a witness, the defence counsel would be obliged to report what he knows about the case, including what the accused has told him/her.

The very possibility of such interrogation of the defence counsel would cause the accused to distrust him, make the latter behave cautiously when talking to the defence counsel, and thus could prevent the full and correct clarification of facts that could be relevant to the defence of the accused. This would undermine the credibility of the defence, limit and violate the defendant's right to defence.

The law specifies that the prohibition to interrogate a defence counsel as a witness applies not only to cases where certain facts became known to the defence counsel in connection with the performance of his or her duties in the case, in particular, when the defence counsel obtained certain information through a conversation with the accused. Therefore, when the defence counsel becomes aware of a relevant fact before he or she is invited or appointed to defend the accused, he or she may be interrogated as a witness on a general basis, and another person will act as defence counsel (Ryvlina, 1971, p. 107).

The rule prohibiting the interrogation of an attorney, defence counsel of a suspect or accused person as a witness is based on a number of reasons: first, one cannot be a defence counsel and a witness at the same time; second, if it turns out that the defence counsel knows something essential in the case, regardless of his/her function as a defence counsel in this case, he/she should be removed from the defence and interrogated as a witness; third, the defence counsel cannot be interrogated as a witness regarding those circumstances, which he/she became aware of in the course of performing his/her functions (e.g. from a conversation with the accused), even if he/she was dismissed from the defence; fourth, if the defence counsel could be questioned as a witness regarding something he/she he or she had learned from the accused, his or her relatives and other persons who had sought legal support, the credibility of the defence counsel would be seriously undermined; fifth, the accused and his or her relatives who use the assistance of a defence lawyer should be guaranteed the opportunity to freely tell him or her whatever they consider necessary without fear that what they say will not be used to the detriment of the accused; and, sixth, the defence counsel is involved in the case in order to defend the accused, not to incriminate him (the law gives the investigating authorities and the court sufficient powers for this) (Lushpiienko, 2018, p. 45).

It seems that the regulatory mechanism for choosing who cannot be interrogated as a witness, defence counsel, representative of the victim, of the civil plaintiff, of the civil defendant – an attorney is clear and "classic", but several theoretical and practical problems exist.

For example, the provisions of the CPC of Ukraine are subject to detailing in terms of clarifying the list of persons who cannot be interrogated as witnesses about information constituting attorney-client privilege. Thus, part 1 of Article 22 of the Law of Ukraine "On the Bar and Practice of Law" defines attorney-client privilege as any information that has become known to the attorney, to the attorney's assistant, trainee attorney, a person employed by the attorney, about the client, as well as the issues on which the client (a person who was denied the conclusion of the agreement for provision of legal assistance on the grounds provided for by this Law) applied to the attorney, law firm or law office, the content of the attorney's advice, consultations, explanations, documents drawn up by the attorney, information stored on electronic media and other documents and information received by the attorney in the course of the practice of law (Pohoretskyi, 2015, pp. 11-12).

The Rules of Professional Conduct, Article 10, paragraph 5, stipulates that an attorney shall ensure the understanding and observance of the principle of confidentiality by his or her assistants, trainees and other persons employed by the attorney (law firm, law office) (Rules of Professional Conduct, 2017).

Thus, we believe that it is necessary to amend the CPC of Ukraine, Article 65, part 2, clause 2, in a new wording: "2) attorneys, legal assistants, trainees and other persons employed by the attorney (law firm, law office) – on information constituting attorney-client privilege". This was also supported by 60% of respondents.

In addition, the comparison of the texts of the CPC of Ukraine, Article 65, part 2, paragraph 2, and the Law of Ukraine "On the Bar and Practice of Law", Article 22, part 1, reveals a discrepancy in the subject matter of immunity. For example, the CPC of Ukraine, Article 65, part 2, paragraph 2, stipulates that the subject matter is information constituting attorney-client privilege, and the Law of Ukraine "On the Bar and Practice of Law", Article 22, part 1, states that attorney-client privilege is any information, ... and matters, of which the client ... applied to the attorney ..., the content of the attorney's advice, consultations, explanations, documents drawn up by the attorney, information stored on electronic media, and other documents and information received by the attorney in the course of his or her practice of law.

The Rules of Professional Conduct, Article 10, slightly expands the list of what is included in the concept of "attorney-client privilege". It is determined that the principle of confidentiality is not limited in time.

Attorney-client privilege is the fact that a person has applied for legal assistance; any information that has become known to the attorney, law firm, law office, law firm's association, attorney's assistant, trainee or other persons employed by the attorney (law firm, law office), in connection with the provision of professional legal assistance or a person's application for legal assistance; the content of any communication, correspondence and other communications (including the use of communication means) of the attorney, attorney's assistant, trainee with a client or a person who has applied for professional legal assistance; the content of advice, consultations, explanations, documents, data, materials, things, information prepared or collected, received by the attorney, attorney's assistant, trainee or provided by him or her to the client within the framework of professional legal assistance or other types of practice of law (Rules of Professional Conduct, 2017).

Therefore, allowing for the provisions of the Law of Ukraine "On Information," Article 1, Part 1, para. 3, that information is any information and/or data that can be stored on material carriers or displayed electronically (Law of Ukraine On Information, 1992), we believe that when determining the subject of interrogation covered by immunity, it is necessary to use the concept of attorney-client privilege, which is detailed in the Rules of Professional Conduct, Article 10, paragraph 2.

In support of this perspective, it should be noted that violation of the Rules of Professional Conduct is a ground for placing disciplinary liability on an attorney.

Allowing for the CPC of Ukraine, Article 65, Part 3, lawyers-advocate, representatives of victims and civil plaintiffs, defendants in relation to the said confidential information may be released from the obligation to keep professional secrecy by the person who entrusted them with this information to the extent determined by him/her. Such release shall be made in writing and signed by the person who entrusted the said information.

Hence, the right of an attorney to testify in cases where he or she and his or her client are interested in such testimony should be considered.

However, the Law of Ukraine "On the Bar and Practice of Law" establishes cases when a lawyer shall disclose attorney-client privilege, despite the imperative requirement of the CPC of Ukraine, Article 65, Part 2, paragraph 2.

Thus, the Law of Ukraine "On the Bar and Practice of Law," Article 22, part 6, establishes that the submission by an attorney in the prescribed manner and in cases provided for by the Law of Ukraine "On prevention and counteraction to legalisation (laundering) of proceeds from crime, financing of terrorism and financing of proliferation of weapons of mass destruction," reported to the central executive body that implements public policy on prevention and counteraction to legalisation (laundering) of proceeds from crime, financing of terrorism and financing of proliferation of weapons of mass destruction, is not a violation of attorney-client privilege.

The said provision contradicts Article 65, Part 2, paragraph 2, and Article 3 of the CPC of Ukraine, as well as creates a situation where it is necessary to implement Article 9(3) of the CPC of Ukraine, therefore we consider it appropriate to amend, with due regard to the above, the second sentence of part 3 of Article 65 of the CPC of Ukraine adding paragraph 2 as follows: "Submission by the persons referred to in clauses 1-3 of part two of the present article in the prescribed manner and in cases provided for by the Law of Ukraine "On Prevention and counteraction to legalisation (laundering) of proceeds from crime, financing of terrorism and financing of proliferation of weapons of mass destruction", information to the central executive body that implements public policy on prevention and counteraction to legalisation (laundering) of proceeds from crime, financing of terrorism and financing of proliferation of weapons of mass destruction is not a violation of the duty to keep professional secrecy."

There is also an opinion that the defence counsel, despite the prohibition of his interrogation, has the right to testify in the interests of his client, for example, on the fact of falsifica-

tion of case materials by the investigator, at his/her request.

Moreover, we believe that this can relate to cases of ensuring client safety, provoking a crime, etc.

This opinion is confirmed by court practice. For example, from the text of the ruling of the investigating judge of the Kyiv-Sviatoshynskyi District Court of Kyiv Region, it follows: "Attorney A.V. Hrubskyi, acting on behalf of Person_2, filed a motion with the investigating judge of the Kyiv-Sviatoshynskyi District Court of Kyiv Region, arguing that on November 06, 2018 at 16 hrs. 26 minutes, he received a message on Facebook from citizen Person_3, in which the latter insisted on a personal meeting with Person_2 in order to provide important information, that concerned Person_2 personally. Person_2 refused to meet in the city and suggested that Person_3 come to the office at 143a Saksahanskyi Street, Kyiv, where the citizen Person_2 is engaged in public and political activities, namely, he acts as the Head of the Kyiv regional party organisation "Valentyn Nalivaichenko's Movement "Spravedlyvist". At 17 hrs. 09 minutes, Person_2's mobile phone number was called by Person_3 from the number (Number_1).

From a telephone conversation with Person_3, Person_2 learned that an SBU operative had informed him that a statement had been filed on behalf of Person_3, reporting that Person_2 had threatened Person_3 and other citizens with weapons. In a telephone conversation, Person_3 assured Person_2 that he had not made such a statement. After a face-to-face meeting in the presence of a police officer, Person_3 and Person_2 decided to file a criminal complaint.

Because Person_3 believes that his life and health as a public figure are in danger, and Person_2 is the owner of a firearm, in order to avoid possible provocations and slander by an unknown person, who had falsified the statement, they arrived at the Kyiv-Sviatoshynskyi Police Department of the Main Department of the National Police in Kyiv region to initiate interrogation as witnesses in criminal proceedings No. 12018110200006415 of November 06, 2018 on the grounds of an offence under Article 358 of the Criminal Code of Ukraine... This situation prompts the applicant to think about the development of a provocative scenario, carefully worked out by a specialist.

Analysing the circumstances of the crime committed by the unknown, having read the content of the protocols of interrogation of witnesses and the victim, the attorney believes that at the moment there is an unimaginable threat to the lives of citizens Person_2 and Person_3 (Pohoretskyi, 2015). Thus, the attorney reported the information provided to him by his client, but the decision does not contain any information about the permission to disclose such data by the attorney.

Another category of persons, notaries, cannot be interrogated as witnesses about information that constitutes notarial secrecy (the CPC of Ukraine, Article 65, part 2, clause 3). Notaries, like any other persons, are not immune from possible procedural involvement as participants in criminal procedural legal relations. Given the provision that a witness is warned of liability for refusing to testify and for giving deliberately false testimony in order to clarify the subject matter of notarial secrecy, this concept should be studied comprehensively.

According to Article 8 of the Law of Ukraine "On Notaries" (hereinafter – the Law), notarial secrecy is a set of information obtained in the course of a notarial act or an application to a notary by a person concerned, including information about the person, his or her property, personal property and non-property rights and obligations, etc. (Law of Ukraine On Notary, 1993).

The perspective that notarial secrecy is a type of professional secrecy dominates in science.

For example, O.O. Kulinich argues that in case of a private notary, the above information will constitute a professional secret, and in case of the activities of a notary public, automatically such information will have the status of an official secret (Kulinich, 2008, p. 75). In any of these legal regimes, such information should be provided with criminal procedural safeguards.

It is noteworthy that in the CPC of Ukraine, the legislator uses the concept of "information constituting notarial secrecy". This definition does not fully cover the concept of notarial secrecy, which includes not only information about notarial acts, but also, according to Article 8 of the Law, "a set of information, obtained in the course of a notarial act or an application to a notary by a person concerned, including information about the person, his or her property, personal property and non-property rights and obligations," and therefore the CPC of Ukraine needs an updated definition of notarial secrecy.

According to Article 5 of the Law, a notary shall keep confidential the information received in connection with notarial acts. Article 8 of the Law states that a notary may not testify as a witness regarding information that constitutes notarial secrecy, unless required by persons on whose behalf or in respect of whom notarial acts were performed. This is due to the fact that

the notary is only the holder of information constituting notarial secrecy, the authorised owner is the person who applied to the notary to perform the relevant notarial acts (Kostin, 2014, p. 30). First of all, it is in the interests of the latter that the state has introduced a legal regime for the protection, defence and disclosure of notarial secrets. Therefore, a notary may not "voluntarily" disclose the latter on his or her own initiative.

If a notary acts as a witness in criminal proceedings regarding the circumstances of the case, he or she has the immunity provided for in the CPC of Ukraine, Article 65, part 2, clause 3. By type, such immunity refers to special witness immunity (Kohut, 2018). However, in the scientific literature, it is also referred to as alternative immunity. Alternative witness immunity is when a person has the right to refuse to testify as a witness regarding the conduct of his/her professional activities. In this case, the ability to testify depends not so much on the will of the witness as on the will of the client who has asked him or her to testify. The practice of granting notary witnesses with alternative immunity is found in Bulgaria (Article 135 of the Civil Procedure Code), Hungary (paragraph 170 of the Civil Procedure Code), Germany (Article 383 of the Civil Procedure Code), Poland (Article 261 of the Civil Procedure Code) (Serheichuk, 2010).

It is essential to mark that the provisions of Article 8-1 of the Law stipulate that any interference with the activities of a notary, in particular with the aim of preventing him/her from performing his/her duties (the protection of notarial secrecy is a duty, not a right, of a notary – H.D.) or inducing him/her to commit illegal acts, including demanding from him/her, him/her assistant, other workers who are employed by the notary, information constituting notarial secrecy shall be prohibited and shall entail liability in accordance with the law.

It should be noted that the prohibition on interrogating a notary as a witness, as well as an attorney, defence counsel... is not absolute. It is worth noting that in case of interrogation of a notary as a witness in connection with the certification of a multilateral transaction, the provisions of the CPC of Ukraine, Article 65, part 3, apply to each party. That is, if at least one of the parties to the legal act (even for objective reasons, such as residence abroad, death, etc.) has not released the notary in writing from the obligation to keep notarial secrecy, indicating the scope of information that the notary is entitled to disclose and has not personally signed the document, the notary cannot testify as a witness. Undoubtedly, every notary who is interrogated as a witness would like to make sure that the person who released him or her from the obligation to maintain notarial secrecy made such a release in the presence of the notary and leave a copy of the relevant "release". This would be correct and logical based on the provisions of the CPC of Ukraine, Article 65, part 3, but in practice this provision is interpreted ambiguously. Therefore, today it often happens that the investigator, having "explained" under the signature in accordance with Article 65 of the CPC, does not show the notary the document that released him or her from the obligation to keep notarial secrecy. Accordingly, we suggest that in this case, the notary should dictate the following phrase to the investigator: "I cannot testify due to the investigator's failure to comply with the provisions of the CPC of Ukraine, Article 65, part 3," or to write it down in accordance with the CPC of Ukraine, Article 66, part 1, paragraph 7. However, the best option would be to amend the CPC and explicitly provide for the obligation to leave a copy of such "consent" with a notary.

In practice, there are situations when the investigator shows the notary a paper containing a statement addressed to the investigator in which the person releases the notary from the obligation to keep notarial secrecy, indicating the scope of this secrecy, and the person's signature. Such a statement may raise doubts for the notary, as it is unclear whether it is made voluntarily, whether it is signed by the person who released the notary from the obligation to keep notarial secrecy, etc. Undoubtedly, the best option during the interrogation of a notary is to exercise the right to use the legal assistance of a lawyer in accordance with the CPC of Ukraine, Article 66, part 1, paragraph 2.

In the criminal procedure law science, it is proposed that a notary should be released from the obligation to keep notarial secrecy if he or she is notified of suspicion. We support this perspective with the remark that they should be released if they are brought to criminal liability at all. For example, the CPC should provide for a mechanism to protect this data from further dissemination. A similar provision is contained in Part 2 of Article 16 of the Fundamentals of the Russian Federation's Notary Law, according to which a court may release a notary from the obligation to keep secrets if a criminal case is commenced against him or her in connection with a notarial act.

There is an opinion that notaries should be deprived of witness immunity altogether (Yarmak, 2014, p. 135). We believe this is inappropriate, as this would negate the essence of notarial secrecy as envisaged by the legislator. We are convinced that a notary cannot be questioned

about the fact of performing a notarial act, but it is another matter when a notary acts as a witness regarding circumstances that do not contain notarial secrecy.

The shortcoming of the CPC of Ukraine, Article 65, part 2, clause 3, is that it does not mention persons who are entitled by law to perform notarial acts and who are also obliged to keep notarial secrecy in accordance with the Law (consular offices, local government officials, diplomatic missions, etc.). We believe that this provision should be supplemented by stipulating that they also cannot be interrogated as witnesses about information that constitutes notarial secrecy by virtue of Article 8 of the Law. In addition, 75% of respondents supported the idea of granting witness immunity to a notary assistant. Therefore, we believe that the CPC of Ukraine, Article 65, part 2, clause 3, should be reworded as follows: "3) notaries, notary assistants, as well as other persons entitled to perform notarial acts – on information constituting notarial secrecy".

However, not all countries provide witnesses with notary immunity under the secrecy of a notarial act. For example, Article 9 of the Law of the Republic of Belarus "On Notaries and Notarial Activities" expressly enables the competent state authorities to obtain information on notarial acts performed. Notaries are also absent from the list of persons who cannot be interrogated as witnesses in the CPC of Belarus, Article 60, part 2.

The next category of persons is healthcare professionals and other persons who, in connection with the performance of their professional or official duties, have become aware of an illness, medical tests, examination and its results, intimate and family life of a person – information constituting medical privacy.

Medical privacy is based on the Hippocratic Oath and Ukrainian Doctor's Oath. The Hippocratic Oath states, in particular: "Whatever I learn about in the course of my professional activities or outside of them, whatever I see or hear about the actions of human life that should never be disclosed, I will keep silent, considering it a secret." In the Doctor's Oath, approved by the Presidential Decree of 15 June 1992, everyone who takes it swears to "keep medical secrets and not to use them to the detriment of a person".

According to N.Z. Rohatynska, the persons who cannot be interrogated as witnesses about information constituting medical secrecy include: medical and pharmaceutical workers, as well as employees of healthcare institutions and bodies; persons who have become aware of such information in connection with their studies; employees of the police, correctional and labour institutions, correctional and labour, educational and labour institutions; employees of pre-school educational institutions, secondary rehabilitation schools and vocational schools for social rehabilitation, training and rehabilitation centres; persons conducting pre-trial investigations; prosecutors, judges and others. Intentional disclosure of medical secrets by a person who became aware of it in connection with the performance of professional or official duties, if such an act has caused serious consequences, entails criminal liability under Article 145 of the Criminal Code of Ukraine (Rohatynska, 2016, p. 87).

L.D. Udalova believes that it is advisable to clarify the content of the provision (paragraph 4) of part 2 of Article 65 (CPC of Ukraine – H.D.), as the medical privacy is not absolute. Article 40 of the Fundamentals of Legislation of Ukraine on Healthcare stipulates that healthcare professionals and other persons who, in the course of their professional or official duties, become aware of an illness, medical examination, inspection and their results, or an intimate aspect of a citizen's life, have no right to disclose this information, except in cases provided for by law. Thus, in cases clearly defined by law, these persons may disclose the information. Therefore, the CPC of Ukraine, Article 65, part clause 42, should be supplemented with the words "except for cases provided for by legislative acts" after the word "persons" (Udalova, 2013, p. 286).

Moreover, Article 39-1 of the Law of Ukraine "Fundamentals of the Legislation of Ukraine on Healthcare" stipulates that a patient has the right to privacy about his or her health status, the fact of seeking medical care, diagnosis, as well as information obtained during his or her medical examination. It is prohibited to demand and provide information about the patient's diagnosis and treatment methods at the place of work or study (Law of Ukraine Fundamentals of the legislation of Ukraine on health care, 1992). In addition, I.Ya. Foynitsky said: "The duty of medical privacy exists only until the threshold of the courtroom" (Foinytskyi, 1910, p. 245).

3. Particularities of the status of certain categories of persons in criminal proceedings

Another category of persons who cannot be interrogated as witnesses, as they are entitled to legally protected secrets, are clergymen, about information received by them during the confession of believers.

The secret of a confession to a clergyman is one of the types of professional secrets – confidential information entrusted to representatives of certain professions by citizens in order to exercise (protect) their rights and legitimate interests (including the right to freedom

of worldview and religion), which, according to Part 1 of Article 35 of the Constitution of Ukraine, includes the freedom to profess any religion or not to profess any, to freely perform religious cults and rituals, and to conduct religious activities).

In this case, unlike a confession to a psychologist, doctor, or notary, which may not be valid, and if it does, it is solely at the discretion of the confessor, religious confession inevitable, since confession itself is already a procedure of full confession of sins. The sacrament of repentance requires that everyone who repents must first make an examination of conscience. In order to make an examination of conscience, one must first recall all one's sins. In addition, it should be borne in mind that the believer "in order to fulfil the conditions of a good confession" must confess all sins to the priest. Thus, it can be argued that the content of a confession is information entrusted by a citizen to a priest, which is of the most personal (intimate, secret) nature among other types of entrusted information constituting professional secrets.

Symbolising the believer's reconciliation with God, confession takes the form of repentance for one's sins before a priest who forgives sins. Unlike Protestantism, which uses public repentance, Orthodoxy and Catholicism consider confession to be a sacrament. According to Part 5 of Article 3 of the Law of the Ukrainian SSR "On Freedom of Conscience and Religious Organisations" of 23 April 1991, no one has the right to demand from the clergy information obtained during the confession of believers.

As for the keeper of the secret of confession protected by law, O. Prystinskyi notes that both the fact of belonging to a hierarchical level and the fact of belonging to a religious organisation shall be confirmed by relevant official documents. Such documents, in particular, may include the journals of the Holy Synod and a decree (for bishops), as well as a certificate of ordination to the presbyterate and a decree (for priests). The above definition also implies that a clergyman must officially belong to a particular religious organisation (parish, monastery, etc.) whose statute is registered in accordance with the procedure established by law (Prystinskyi, 2011, p. 23).

However, this does not mean that the protection of secrets of confession exempts a clergyman from questioning about information obtained in other ways. Furthermore, it should be considered that not every clergyman is allowed to receive confessions. These persons can only be those who have been ordained and have the right to confess according to church law (bishops, priests, etc.).

At the same time, in the literature review reveals controversial opinions on certain aspects of the impossibility of interrogating priests as witnesses about the information they received during the confession of believers. First, some authors believe that the secret of confession can be disclosed by a priest without releasing the person who entrusted him with such information from the obligation to keep it.

For example, I. Potaichuk notes that if he (a person – H.D.), on the contrary, develops sinful ideas in oneself, and moreover, seeks support in one's ideas from a priest, the latter is obliged to contact law enforcement agencies, because this is not a violation of confession, since it is not a confession in principle. As for the case when a person confesses to a crime that has already been committed, the situation is more complicated. He shall bear both the social punishment imposed on him by a verdict on behalf of the state and the spiritual punishment – the imposition of epithema, the inducement of a person to alleviate his guilt by confessing to law enforcement agencies. It is important that he takes the initiative himself (Potaichuk, Kompaniiets, 2013, p. 11).

On the contrary, I.B. Korol argues that confession is absolutely immune. For example, the author notes that the legal protection of confession by the State does not go beyond the regime of separation of church and state, based on the following considerations. On the one hand, the state in no way violates or interferes with the rite of confession, as it only sanctions the secret already proclaimed by the church. On the other hand, the disclosure of confession can cause significant harm to citizens, as it ultimately violates their constitutional rights to privacy, family life and freedom of thought (Articles 32, 34 of the Constitution of Ukraine). In other words, the disclosure of confession goes beyond the internal activities of the church and therefore requires criminal law protection. Accordingly, the protection of the secret of confession should be guaranteed in the field of criminal justice (Korol, 2008, pp. 197-198).

D.O. Shynharov is an opponent of the disclosure of confession under any circumstances. The author notes that the obligation of a clergyman to keep confession secret is a close intertwining of religious norms, moral norms and legal provisions. To sum up, the secrecy of confession is absolute and, therefore, it is impossible to establish procedural procedures for obtaining permission for its disclosure by the person who confided in it in the event of the death of such a person (Shynharov, 2017, p. 61).

The third approach to disclosing the secret of confession is as follows: A.Ye. Lednev, denying

in general the disclosure of the secret of confession, does not exclude such a possibility and notes that the priest should be held liable for violating the secret of confession under canon law, and the state does not care about this. After all, in the author's opinion, since the church is separated from the state, the issues of confidentiality and immunity of the priest as a witness should be excluded from the provisions of state law and be canonical norms (Lednev, 2006, pp. 105-106).

Another controversial issue is the freedom to profess any religion or none. For example, V. Borodchuk notes that confession is practised in the Orthodox, Greek Catholic and Roman Catholic churches, while there are many other religious denominations in Ukraine. Thus, intentionally or unintentionally, the authors of the draft law protect only some of the existing denominations with this provision and de facto put them in a more privileged position. Although the author refers to the draft Criminal Code of Ukraine, we believe that, developing the idea regarding the secrets of any religion and the freedom of a person to profess any religion, it should be noted that such freedom and secrets are not limited by the protection in the context of the CPC of Ukraine, Article 65, part2, para. 5.

It should be noted that the secrecy of confession is not recognised and protected in all states. If the confession is recognised as a secret, it is protected in criminal proceedings by introducing material requirements for admissibility of evidence, which establish inadmissibility of information that the clergyman has learned from the confession. In addition, confession as a religious rite belongs to the Christian religion, but in some cases, inadmissible evidence is information that has become known to a clergyman of any religion if it became known to him as a result of a confidential conversation with a believer on a spiritual topic (USA). The secret of confession should not be absolute, and both the clergyman and the believer should have the procedural opportunity to break the secret of confession, since such a secret is not legally established.

Given the above and allowing for the constitutional provisions on the freedom to practice any religion (Article 35 of the Constitution of Ukraine), we consider it necessary to amend the CPC of Ukraine, Article 65, Part 2, paragraph 5, as follows: "clergymen (ecclesiastic) – in relation to information that they have learned as a result of a confidential conversation with a believer on a spiritual topic".

In the criminal procedure literature, proposals have been made to expand the circle of persons who are not subject to interrogation as witnesses. Thus, this circle should be supplemented by an interpreter if he or she participated in the conversation between the attorney and his or her client. We consider this opinion to be rational and deserving of support. After all, the current CPC of Ukraine contains provisions on the participation of an interpreter in criminal proceedings for persons who do not speak the state language or do not speak it sufficiently in terms of involving an interpreter in investigative and search actions and court proceedings, during judicial control and the translation of procedural decisions, and the CPC of Ukraine defines the participation of an interpreter in the defence as the right of a person to engage an interpreter. However, given the mandatory participation of a defence counsel in proceedings against persons who do not speak the language of criminal proceedings, we consider it necessary to amend the CPC of Ukraine, Article 65, Part 2, by adding paragraph 2-1) of Part 2 of Article 65 of the CPC of Ukraine as follows: "2-1) an interpreter – with respect to information that he/she became aware of during his/her participation in a confidential conversation between the defence counsel and the suspect, accused, convicted or acquitted person;".

4. Conclusions

Witness immunity as a guarantee of professional secrecy in criminal proceedings is exercised in criminal proceedings only in respect of a person who has acquired the procedural status of a witness, is necessarily regulated in the criminal procedure legislation, is based on the protection of moral values and is a paired legal category of correlation of rights and obligations within its implementation. The essence of witness immunity as a guarantee of professional secrecy in criminal proceedings should be understood as a system of witness rights that allow a witness to be exempted from testifying in criminal proceedings. The purpose of witness immunity as a guarantee of professional secrecy in criminal proceedings is to respect the rights and freedoms of a witness, to establish guarantees for the protection of his/her rights to inviolability, to strengthen the moral foundations of justice in criminal proceedings, and to establish the basis for procedural savings from perjury.

Witness immunity as a guarantee of professional secrecy in criminal proceedings is a special legal technique created specifically for achieving the socially beneficial goals of legal implementation of the procedural status of a witness in criminal proceedings and guarantees of secrecy in criminal proceedings, which establishes a procedure, status, conditions that do not correspond to reality with the purpose

of arising or preventing of certain consequences of law application.

Witness immunity as a guarantee of professional secrecy in criminal proceedings is a legal means by which the legal provisions enshrine the probable assumption that certain categories of persons are endowed with a legally protected professional secret which is presumed to be valid until facts refuting it are proven, or such persons will not be released from the obligation to keep professional secrets in order to protect various interests (of the individual, society and the state).

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ЗАБЕЗПЕЧЕННЯ ІМУНІТЕТУ СВІДКА У КРИМІНАЛЬНОМУ ПРОЦЕСІ ЯК ГАРАНТІЯ ПРОФЕСІЙНИХ ТАЄМНИЦЬ

Анотація. ***Мета.*** Метою статті є дослідження імунітету свідка як гарантії професійних таємниць у кримінальному процесі. ***Методи.*** Для досягнення поставленої мети наукового дослідження використано систему загальнонаукових та спеціальних методів наукового пізнання, які використовуються в юридичній науці. Застосування загального діалектичного методу наукового пізнання реально існуючих явищ і процесів дозволило розглянути імунітет свідка у кримінальному провадженні як гарантію професійних таємниць, що складається із взаємопов'язаних елементів. Метод системного аналізу використовувався в ході аналізу норм права, що регламентують імунітет свідка у кримінальному процесі України та системно-структурний – у разі визначення поширення імунітету свідка на осіб, які наділені охоронюваною законом таємницею та можуть бути звільнені від обов'язку зберігати професійну таємницю. ***Результати.*** Статтю присвячено правовому аналізу імунітету свідка як гарантії професійних таємниць у кримінальному провадженні. За допомогою дослідженої загальної порівняльно-правової характеристики імунітету свідка у кримінальному провадженні було з'ясовано поняття, сутність та завдання імунітету свідка як гарантії професійних

таємниць у кримінальному провадженні. Співвідношення імунітету свідка в частині права не свідчити проти близьких родичів та членів сім'ї, а також переліку осіб, які не можуть бути допитані як свідки, та засади рівності перед законом і судом, полягає в тому, що імунітет свідка визначений як одна із додаткових гарантій професійних таємниць, якою може користуватись свідок під час кримінального провадження. ***Висновки.*** Імунітет свідка як гарантія професійної таємниці у кримінальному процесі реалізується у кримінальному провадженні лише щодо особи, яка набула процесуального статусу свідка, є обов'язково врегульованим у кримінально-процесуальному законодавстві, заснований на охороні моральних цінностей та є парною юридичною категорією кореспондування прав та обов'язків у межах його реалізації. Під сутністю імунітету свідка як гарантії професійної таємниці у кримінальному провадженні необхідно розуміти систему прав свідка, які дають можливість звільнення свідка від давання показань у кримінальному провадженні. Завданням імунітету свідка як гарантії професійної таємниці у кримінальному провадженні є дотримання прав та свобод свідка, встановлення гарантій захисту його прав на недоторканність, зміцнення моральних основ правосуддя у кримінальних провадженнях, а також встановлення основ процесуальної економії від лжесвідчень. Імунітет свідка як гарантія професійної таємниці у кримінальному процесі є особливим засобом юридичної техніки, що створений спеціально для досягнення суспільно корисних цілей правової реалізації процесуального статусу свідка у кримінальному провадженні, гарантій збереження таємниць у кримінальному процесі та який встановлює порядок, стан, умови, що не відповідають дійсності, та спрямований на виникнення або запобігання певних наслідків правозастосування.

Ключові слова: імунітет свідка у кримінальному провадженні, гарантія таємниць, кримінальний процес, професійна таємниця, охоронювана законом таємниця, допит.

The article was submitted 18.07.2022
The article was revised 08.08.2022
The article was accepted 29.08.2022