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DOI <https://doi.org/10.32849/2663-5313/2022.12.01>**Kateryna Chyzhmar,***Doctor of Law, Associate Professor, Chief Researcher at the Department of Scientific-Legal Expertise and Legislative Work, Scientific Institute of Public Law, 2a H. Kirpa street, Kyiv, Ukraine, postal code 03035, k.chyzhmar@gmail.com***ORCID:** orcid.org/0000-0001-8638-7872*Chyzhmar, Kateryna (2022). Particularities of organisational guarantees of notarial activities. Entrepreneurship, Economy and Law, 12, 5–11, doi <https://doi.org/10.32849/2663-5313/2022.12.01>*

PARTICULARITIES OF ORGANISATIONAL GUARANTEES OF NOTARIAL ACTIVITIES

Abstract. Purpose. The purpose of the article is to reveal the particularities of organisational guarantees of notarial activities. **Results.** The article emphasises that the purpose of the Notary Chamber of Ukraine is to unite the efforts of notaries on a professional basis to fulfil the duties assigned to them by the Law of Ukraine "On Notaries" and to ensure their rights, representation of professional interests of notaries in state bodies, local governments, enterprises, institutions and organisations, implementation and application of the fundamental principles of the Latin notary system, as well as the principles of notarial ethics, provisions of the Latin notary, protection of professional interests and social rights of notaries, promotion of professional development of notaries and provision of methodological assistance to them, protection of interests of physical persons and legal entities in case of damage caused to them as a result of illegal actions or negligence of a notary. All notaries who have started their professional activities become members of the organisation by virtue of a direct requirement of the law. Membership begins from the moment of registration of notarial activity and continues until the termination of notarial activity. The principle of compulsory membership excludes the possibility of voluntary withdrawal from the organisation. Termination of notarial activities leads to expulsion from this organisation. The organisation should be able to control the professional activities of notaries and ensure compliance with the professional activities and ethical standards of the notary. Furthermore, it should have the right to apply to the court in case of violation of the legislation in force by a notary. **Conclusions.** The author concludes that control over the legality of a notary's actions is the prerogative of the court. However, when a violation in the performance of notarial acts is established by a court decision that has entered into force, the organisation represented by the regional branch has the right to impose punishment on the notary. In turn, the decision of the organisation may be appealed to the court or to the central office. Furthermore, the organisation should control the admission of persons to the internship: professionalism (legal experience – at least 5 years after obtaining a diploma of higher legal education), personal qualities (decency, responsibility, etc.), understanding of the profession as such. Therefore, the above position should be supported by the legislator and considered when adopting the new edition of the Law of Ukraine "On Notaries".

Key words: notary, notarial acts, economic and financial activities, professional ethics, sanctions.

1. Introduction

As we have already noted, the system of features of notarial activities for the provision of qualified legal support includes features of guaranteeing the receipt of qualified legal support and ensuring the observance of human and civil rights and freedoms during its implementation. These two most important features, combined with the general law enforcement nature of notarial activity, necessitate the theoretical development of the concept of organisational guarantees in the provision of qualified legal support by notaries and their practical implementation in legal reality.

Organisational guarantees *factum notorium* are primarily understood as systematic organi-

sational activities of the state and all its bodies, officials, and public organisations aimed at facilitating an enabling environment for the real exercise of citizens' rights and freedoms. Such guarantees include the existence of a clear system of interconnection between a person and the state. It is manifested in a well-established mechanism for checking citizens' complaints and responding to them quickly, etc. (Zavorotchenko, 2002, p. 43).

2. The regulatory framework for the organisational and legal guarantees of notarial activities

Ukrainian scholars P. Rabinovych and M. Khavroniuk note that organisational and legal guarantees are presented as socio-po-

litical institutions enshrined in legal regulations, which are entrusted with the relevant functions and powers to organise and implement legal support for the implementation, protection and defence of human and civil rights and freedoms (Rabinovych, Khavroniuk, 2004, p. 60). Therefore, researchers understand organisational and legal guarantees as socio-political institutions enshrined in legal regulations. However, we cannot entirely agree with this statement. In particular, the definition of a socio-political institution seems unclear. In addition, the thesis that these institutions are enshrined in legal regulations and are entrusted with relevant functions is quite controversial, since it does not specify who is responsible for these functions (Hrontiuk, 2011, p. 10). We believe that this definition of organisational and legal guarantees needs to be clarified, especially with regard to the role of the state in the process of this guarantee.

V. Pashynskyi considers organisational and legal guarantees as systematic organisational activities of the state and all its bodies, as well as local self-government bodies, their officials, public organisations and political parties, and the media, aimed at ensuring the implementation, protection and defence of rights (Pashynskyi, 2007, p. 171).

We cannot but agree with T. Zavorotchenko's definition, who understands organisational and legal guarantees as a system of bodies and organisations of the state, local self-government, officials, public organisations and political parties, and the media, as well as international human rights organisations in the field of law-making and law enforcement, and their activities aimed at facilitating an enabling environment for the actual enjoyment of their rights, freedoms and fulfilment of duties by actors (Zavorotchenko, 2002, p. 167).

Therefore, in our opinion, the main organisational guarantees should include the procedure for the introduction and termination of the position of a notary, the rules for vesting a notary with powers and termination of the position of a notary, the status of a notary within the notary institution, the principles of organisation and operation of notary self-government bodies, the institution of control over the observance of the law in the provision of qualified legal support by notaries, the place of the notary institution in the system of law enforcement bodies of the state. Moreover, the core of organisational guarantees is the status of a notary, i.e. the totality of his/her rights and duties and position within the notary institution as an actor of notarial activity.

Under the notary law in force, notarial acts in Ukraine are performed by notaries who work

in notary public offices, notary public archives (notaries public) or are engaged in private notarial activities (private notaries) (Article 1 of the Law of Ukraine "On Notaries"). Therefore, the institution of domestic notaries has a complex structure, including two categories of notaries, whose status and legal position have both similarities and differences.

Moreover, it should be noted that the status of a notary as an employee of a notary public's office does not provide him/her with guarantees of independence and impartiality in the performance of professional activities, for example, when representatives of state bodies, institutions and organisations apply to him/her for a notarial act.

As of today, the notary public has no advantage over the free notary, organised on the principles of the Latin notary. The equality of rights and duties of public and private notaries has been supplemented by the legislative consolidation of their competence to perform notarial acts, i.e. notaries engaged in private practice also have the right to conduct inheritance cases.

The world practice proves the futility of the notary's existence as an institution that includes two categories of notaries. The accession of the Ukrainian notary to the International Union of Latin Notaries, which unites notaries of the most developed countries of the continental legal system, not only confirms the compliance of the national notary with the principles of the Latin notary organisation in general, but also imposes on it the obligation to comply with these principles to the fullest extent by switching in the near future to a single organisational basis in the form of a totality of notaries engaged in private practice under their own property liability.

The organisational structure of the notary in the form of a Latin-type notary gives another important advantage over the notary public in guaranteeing constitutional rights and freedoms in the provision of qualified legal support. This is the institution of control over the observance of the legality of notarial activities (Diakovych, 2009, p. 45).

A free Latin notary, being an institution of civil society that protects the rights and legitimate interests of citizens and legal entities, must have an organisational structure that is consistent with its legal nature and purpose. In accordance with the principles of free notaries of the Latin type, a notary shall be a member of a collegial body established on a corporate basis – the Notary Chamber (Novopashyna, 2000, p. 23).

Therefore, special collegial bodies unite persons engaged in notarial activities on a professional basis. In Ukraine, such bodies are

notary chambers: Notary Chamber of Ukraine and Notary Chambers of regions.

It should be noted that the Notary Chamber of Ukraine was established by the decision of the First Constituent Congress of Notaries of Ukraine of 29 March 2013 to implement the Law of Ukraine "On Amendments to the Law of Ukraine "On Notaries" regarding state regulation of notarial activities", adopted by the Verkhovna Rada of Ukraine on 6 September 2012. The Notary Chamber of Ukraine (hereinafter referred to as the NCU) *ex officio* is a non-governmental non-profit professional organisation that unites all notaries of Ukraine on the basis of compulsory membership in accordance with Article 16 of the Law of Ukraine "On Notaries". In its activities, the NPU is guided by the Constitution of Ukraine, the Law of Ukraine "On Notaries", other legal regulations and the NPU Charter, which is a constituent document.

The purpose of the NCU is to unite the efforts of notaries on a professional basis to fulfil the duties assigned to them by the Law of Ukraine "On Notaries" and to ensure their rights, representation of professional interests of notaries in state bodies, local governments, enterprises, institutions and organisations, implementation and application of the fundamental principles of the Latin notary system, as well as the principles of notarial ethics, provisions of the Latin notary, protection of professional interests and social rights of notaries, promotion of professional development of notaries and provision of methodological assistance to them, protection of interests of physical persons and legal entities in case of damage caused to them as a result of illegal actions or negligence of a notary.

On 19 April 2013, the NPU was registered in accordance with the Law of Ukraine "On State Registration of Legal Entities and Individual Entrepreneurs". According to clause 3.2. of the NPU Charter, from the moment of state registration of the NPU, all notaries working in notary public's offices, notary public's archives or carrying out private notarial activities become its members. The notary's consent to become a member of the NPA is not required. Members of the NPU may be persons who have received a certificate of the right to notary practice.

Members of the NPU shall have the right to: participate in the work of the notary self-government bodies in accordance with the procedure provided for by the Charter of the Notary Chamber of Ukraine; elect and be elected to the NPU bodies in accordance with the procedure provided for by the Charter of the Notary Chamber of Ukraine; to participate in the work of any NPU body in an advisory capacity; to apply to

any NPU body with a request for information about its activities and receive information; to protect their professional and social rights; to make proposals for improving the activities of the NPU; to receive methodological, informational and organisational support; to get acquainted with the minutes of the meetings of the NPU Council, minutes of the Congress of Notaries of Ukraine, minutes of the commissions and any working groups established by the NPU Council or the Congress of Notaries of Ukraine, to receive any other information and documents on the activities of the NPU; to hold joint meetings, methodological consultations, other events for the exchange of experience in order to form a unified notarial practice; to appeal against any decisions of the NPU bodies in accordance with the established procedure; to terminate membership in the NPU on the grounds provided for by the Law of Ukraine "On Notaries" and the Charter of the Notary Chamber of Ukraine.

In addition, members of the NPU shall: 1) comply with the requirements of the Law of Ukraine "On Notaries", the Charter of the Notary Chamber of Ukraine, rules of professional ethics and implement decisions of notary self-government bodies; 2) timely pay monthly membership fees to ensure the implementation of notary self-government in the manner and amounts established by the Congress of Notaries of Ukraine; 3) participate in the implementation of the tasks of notary self-government and assist the NPU in its work; 4) perform other duties provided for by the Law of Ukraine "On Notaries" and the Charter of the Notary Chamber of Ukraine.

The notary chamber is not a public association since a necessary feature of a public association is the principle of voluntary membership. Notary chambers, as can be seen from the text of the regulation, are based on mandatory membership of notaries. Therefore, *actis testantibus* in relation to the NPU would be more correctly described as a professional corporate organisation rather than a public association (Kozub, 1996, p. 110). It is also fair to say that the procedure for registration of notary chambers should be changed, since they are not public organisations by their very nature. It should be noted, however, that the procedure for registering a charter does not in any way determine the legal status of the chamber.

The unclear regulatory mechanism for the status of the notary chamber and the application of the law provisions relating to public associations to them also causes a dispute over the mandatory NPU membership.

On the basis of Article 36 of the Constitution of Ukraine and the Law "On Public

Associations", which enshrine the right, not the duty, of citizens to establish public associations, it was suggested that the provision on mandatory membership of notaries engaged in private practice should be recognised as erroneous and removed, as it contradicts Article 36 of the Basic Law of Ukraine, which provides for the right of every citizen to associate. No one may be forced to join or remain a member of any association. Therefore, every notary may voluntarily join his or her professional organisation, but no one has the right to oblige him or her to do so.

There is an opinion that due to the public purpose of notary chambers, the very principle of voluntariness, which is characteristic of membership in other associations created solely on the basis of common interests of citizens, is unacceptable for their organisation. The mandatory membership of notaries engaged in private practice in the notary chamber as a condition for practising this profession violates neither the constitutional principle of equality, nor the constitutional right to freedom of association and free choice of occupation and profession, since the state has the right to establish mandatory conditions for appointment and tenure for all citizens who *in pleno* wish to carry out public activities. This is justified even more when such activities are carried out on behalf of the state, which is exactly what happens when performing notarial acts (Mykulenko, 2012, p. 1097).

The above opinion on the mandatory membership of notaries engaged in private practice in a notary chamber as a condition for practicing the profession of notary follows not only from the recognition of the public nature of notaries but is also determined by studying the practice of establishing and functioning of notary chambers in the member countries of the International Union of Latin Notaries, notaries thereof are mandatory members of notary chambers. No notary shall be entitled to practice notarial law unless he has first joined his chamber, because otherwise all acts performed by him before joining the chamber shall be deemed null and void (Hugo Peres Montero, 1999, p. 56).

According to the President of the Italian National Council of Notaries, membership in a professional board does not mean compulsion to join an association of citizens. It means the exercise of control over the performance of professional duties by the representatives of this profession themselves in the interests of society and the state. In this regard, he points out that notary chambers are not voluntary associations by their nature, because through them notaries are obliged to monitor the professional activities of their colleagues, which is

guaranteed by control by the Ministry of Justice and the judiciary. The President of the National Council of Notaries of Italy considers the opposition of freedom of association to the principle of mandatory membership of notaries in collegial bodies (chambers) to be a far-fetched problem. Rather, the question should be put differently, namely: can a notary carry out his or her activities without control? The answer is obvious: a notary is a kind of control body for the legality of contracts, and by virtue of this, he or she cannot in any way evade the control over his or her activities provided for by law. Such control can only be carried out if the notary is a member of the chamber, which, in turn, acts in strict accordance with the requirements of the law and professional ethics (Bugrej and Tarbagaeva, 2000, p. 68).

Bodies of notary self-government *factum notorium* are the most effective mechanism for exercising control over the legality of qualified legal support by notaries. This is also due to the fact that notary chambers have the authority not only to control notaries for compliance with the requirements of the law. The notary self-government bodies, by virtue of their public purpose, have the right to exercise control over the observance of the lawfulness of actions and decisions taken with respect to notaries and notary self-government bodies. That is, control will be exercised over the state body or official who issued a legal regulation or individual regulation that violates the rights and interests of notaries (Jemma, 1997, p. 23).

The notary self-government body is created precisely to defend the interests of notaries. Notaries working in notary public's offices are deprived of such support. An effective system of control of the free Latin notary provides for the possibility of notaries' control over the activities of the notary self-government body (Polujaktova, 2004, p. 95). Being a member of the notary chamber, a private notary does not merge with it, but retains independence from the collective opinion of the notary self-government body, which is facilitated by rights of a notary as a member of the notary chamber such as the right to receive the necessary information from the Chamber's bodies in accordance with the established procedure; to apply to the Chamber on professional activity and social protection, to take initiatives, make written proposals and recommendations for improving the Chamber's activities; to appeal to the court against decisions of the Chamber's bodies made in violation of the law (Polujaktova, 2004, p. 97).

Moreover, the notary public falls out of the system of mutual control "notary – notary self-government body". Independence

of a notary, an employee of a notary public office, from the judiciary is also unlikely.

Therefore, the law stipulates that associations of notaries represent their interests in state and other bodies, protect the social and professional rights of notaries, carry out methodological and publishing work, may establish special funds and act in accordance with their charters (Article 16). Issues of self-government, delegation of part of the notary's powers to a professional organisation, control, disciplinary sanctions, financial activities in parallel with the Ministry of Justice's control over the maintenance of personnel registers (quotas) and other important issues cannot be implemented if there are several notary associations and membership is optional.

3. Principles of involvement of notaries in performing public functions

That is why it is obvious that the activities of existing professional associations of notaries will not be able to fulfil the tasks assigned to a self-governing professional organisation of notaries by the new version of the Law of Ukraine "On Notaries". Instead, all important issues of notary activities remain governed by the state (Article 2-1). The main purpose of establishing a single self-governing professional organisation of notaries is to involve notaries in performing state functions and to exercise control over their activities on the principles, among which, according to O. Pelekh, the following should be highlighted.

1. The principle of unity. Nowadays we have many public organisations. All organisations have been established to protect the legitimate social rights and professional interests of private notaries, to promote their professional development, etc. However, there are no results in achieving this goal for the reason that the current organisations have no leverage over the authorities, and some notaries are currently not members of any organisation. Therefore, in our opinion, a single professional organisation of notaries in Ukraine should exist (it may well be the existing Notary Chamber of Ukraine).

2. The principle of decentralisation. The structure of this organisation should include regional branches, the Autonomous Republic of Crimea, Kyiv and Sevastopol, which have many functions and levers of influence on the activities of a notary who does not properly perform his/her duties. According to O. Pelekh, the branches unite all notaries registered in these notary districts. The bodies of the branches should be formed as follows: The supreme body is the meeting in which all notaries participate; The council is elected by the meeting, headed by the chairman for a term of, for example, three years; The executive director is hired; The audit

committee and the commission on professional ethics are elected by the meeting (Kvytko, 2009, p. 4).

The Central Office should primarily perform law-making, coordination, methodological and appeal functions without interfering with the work of regional offices and the work of a particular notary. The Central Office unites regional offices, offices in the Autonomous Republic of Crimea, Kyiv and Sevastopol.

Bodies of the central office: The supreme body is the congress, which is attended by elected delegates of branches in equal numbers; The council is elected by the congress with one representative from each organisation, headed by the President, whose term of office should not exceed three years, and for the duration of the President's term of office, his activities as a notary should be suspended due to the fact that he must receive a salary. It would be advisable to provide that the same person cannot be elected President for more than two consecutive terms with at least 10 years of experience as a notary; The audit commission is elected by the congress.

The governing collegial bodies of the organisation should be formed on a regional basis: a candidate is elected from each branch from among notaries by secret ballot.

Meetings and congresses should be held at least once a year with mandatory financial reporting and publication of the results in the official free printed body of the organisation, the council at least once a month.

Such a structure, according to O. Pelekh, will provide each notary with the maximum opportunity to personally participate in the activities of the organisation and there will be no possibility to remove him/her from decision-making (Kvytko, 2009, p. 4).

3. The principle of compulsory membership. All notaries who have started their professional activities become members of the organisation by virtue of a direct requirement of the law. Membership begins from the moment of registration of notarial activity and continues until the termination of notarial activity. The principle of compulsory membership excludes the possibility of voluntary withdrawal from the organisation. Termination of notarial activities leads to expulsion from this organisation.

4. The principle of independence. The professional organisation is independent from the state authorities, first of all from the Ministry of Justice of Ukraine, which should not interfere in the activities of the organisation, their functions should not be duplicated. It is established by law, but its bodies are formed on a democratic, elected basis by notaries themselves. It would be advisable that the Ministry of Justice should

not be able to adopt any regulation in the field of notaries without the approval of the organisation (Kvytko, 2009, p. 4).

5. *The principle of self-financing.* The source of the organisation's maintenance is membership fees of notaries and their own income from educational, publishing and other statutory activities. The amount of contributions should depend on the amount of gross income of a private notary and be determined as a percentage or in another sufficiently transparent way and set at the congress. An organisation can perform entrepreneurial activities to the extent necessary to fulfil its tasks, it can own movable and immovable property that is not subject to taxation (Hrontiuk, 2011).

6. *The principle of full powers.* A professional organisation should have broad powers sufficient to effectively influence the notary system as a whole and an individual notary. These include:

- formation of a unified practice of application of legislation in Ukraine;
- protection of notaries during pre-trial investigation and in court;
- social support to notaries and their family members;
- representation of the notary professional society of Ukraine in relations with state authorities and in international activities;
- participation in legislative work;
- organisation of professional training and internships;
- professional certification of notaries, including the administration of qualification examinations;
- formation of a network of notary offices meeting public needs;
- preservation of the notarial archive of notaries who have terminated their activities;
- consideration of complaints against the actions of a notary on the grounds of violation of ethical rules;
- restriction, suspension or termination of private notarial activities;
- application of incentives and professional penalties to notaries (Kvytko, 2009, p. 5).

7. *The principle of responsibility.* A professional organisation should be responsible for

the quality of the notary's work. Therefore, if a notary causes damage that he or she cannot compensate at the expense of his or her own property, such damage should be compensated by the organisation. In this respect, it will act similarly to an insurance organisation.

8. *The principle of control.* The organisation should be able to control the professional activities of notaries and ensure compliance with the professional activities and ethical standards of the notary. Furthermore, it should have the right to apply to the court in case of violation of the legislation in force by a notary.

The organisation may request from the notary data on notarial acts performed by him/her and other documents related to his/her economic and financial activities. The notary shall provide all information and documents, and, if necessary, personal explanations, including those related to issues of non-compliance with professional ethics. Based on the information received, the organisation has the right to apply to the relevant institutions and to impose sanctions on the notary. Officials of the organisation shall keep the notarial acts, information about which became known in the course of inspections, confidential.

4. Conclusions

Control over the legality of a notary's actions is the prerogative of the court. However, when a violation in the performance of notarial acts is established by a court decision that has entered into force, the organisation represented by the regional branch has the right to impose punishment on the notary. In turn, the decision of the organisation may be appealed to the court or to the central office.

Furthermore, the organisation should control the admission of persons to the internship: professionalism (legal experience – at least 5 years after obtaining a diploma of higher legal education), personal qualities (decency, responsibility, etc.), understanding of the profession as such.

Therefore, we believe that the above position should be supported by the legislator and considered when adopting the new edition of the Law of Ukraine "On Notaries".

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Катерина Чижмарь,

доктор юридичних наук, доцент, головний науковий співробітник відділу науково-правових експертиз та законопроектних робіт, Науково-дослідний інститут публічного права, вулиця Г. Кірпи, 2а, Київ, Україна, індекс 03035, k.chyzhmar@gmail.com

ORCID: orcid.org/0000-0001-8638-7872

ОСОБЛИВОСТІ ОРГАНІЗАЦІЙНИХ ГАРАНТІЙ ДІЯЛЬНОСТІ НОТАРІАТУ

Анотація. Мета. Метою статті є з'ясування особливостей організаційних гарантій діяльності нотаріату. **Результати.** У статті наголошено, що метою діяльності Нотаріальної палати України є об'єднання на професійній основі зусиль нотаріусів для виконання покладених на них Законом України «Про нотаріат» обов'язків і забезпечення їхніх прав, представництво професійних інтересів нотаріусів у державних органах, органах місцевого самоврядування, на підприємствах, в установах і організаціях, втілення та застосування фундаментальних принципів системи нотаріату латинського типу, а також принципів нотаріальної етики, положень латинського нотаріату, захист професійних інтересів та соціальних прав нотаріусів, сприяння підвищенню професійного рівня нотаріусів та надання їм методичної допомоги, захист інтересів фізичних і юридичних осіб у разі заподіяння їм шкоди внаслідок незаконних дій або недбалості нотаріуса. Усі нотаріуси, які розпочали свою професійну діяльність, стають членами організації через пряму вимогу закону. Членство починається з моменту реєстрації нотаріальної діяльності і триває до припинення нотаріальної діяльності. Принцип обов'язкового членства виключає можливість добровільного виходу з організації. Припинення нотаріальної діяльності призводить до виключення з цієї організації. Організація повинна мати можливість контролювати професійну діяльність нотаріусів та етичні норми нотаріату. Також вона повинна мати право звертатись до суду з приводу порушення нотаріусом чинного законодавства. **Висновки.** Зроблено висновок, що контроль за законністю дій нотаріуса – це прерогатива суду. Проте, коли порушення у разі вчинення нотаріальних дій встановлено судовим рішенням, що набрало законної сили, організація в особі обласного відділення має право застосувати до нотаріуса покарання. Своєю чергою рішення організації може бути оскаржене до суду або до центрального офісу. Також організація повинна контролювати допуск осіб до стажування: фаховість (юридичний стаж – не менше 5 років після отримання диплома про вищу юридичну освіту), особисті якості (порядність, відповідальність тощо), розуміння професії як такої. Отже, вищенаведену позицію слід підтримати законодавцю і врахувати у разі прийняття нової редакції Закону України «Про нотаріат».

Ключові слова: нотаріус, нотаріальні дії, господарсько-фінансова діяльність, професійна етика, санкції.

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