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# 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 organisational 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 testantĭbus* 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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## 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 дії нотаріуса – це прерогатива суду. Проте, коли порушення у разі вчинення нотаріальних дій установлено 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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# PARTICULARITIES OF CONCLUDING, AMENDING AND TERMINATING LABOUR CONTRACTS UNDER ATYPICAL FORMS OF HIRED WORKERS' EMPLOYMENT

**Abstract.** ***Purpose.*** The purpose of the article is to reveal the particularities of concluding, amending and terminating employment contracts in the context of atypical forms of hired workers' employment. ***Results.*** Relying on the analysis of scientific views of scholars and provisions of legislation in force, the article reveals the essence, content and particularities of concluding, amending and terminating employment contracts in case of atypical forms of hired workers' employment. The author emphasises that the issue of changing the terms of an employment contract in atypical forms of employment is insufficiently regulated, since it is currently regulated similarly to general categories of employees, which certainly does not correspond to the reality and needs of the relevant forms of employment. It is established that changing the terms and conditions of an employment contract in the context of atypical forms of hired workers' employment is a complex process in nature and content, and its particularities are determined by: the specifics of labour relations arising between employees working remotely, at home or on a flexible schedule; particularities of organisation of the labour process, workplace, etc. ***Conclusions.*** It is concluded that nowadays the procedure for concluding, amending and terminating employment contracts in case of atypical forms of hired workers' employment is somewhat vague and does not allow for the specifics of the employment activities of the category of employees under study. In particular, the issue of changing the terms of an employment contract is insufficiently regulated, since it is currently regulated similarly to general categories of employees, which certainly does not correspond to the reality. Therefore, among the particularities of concluding, amending and terminating employment contracts in atypical forms of hired workers' employment, the following should be highlighted: ambiguity of regulatory mechanism, because, on the one hand, the legislator has regulated the issue of concluding an employment contract in a fairly comprehensive manner, but the amendment and termination of the latter are enshrined in the legislation in force in a rather superficial manner; the terms of an employment contract are changed allowing for the specifics of the organisation of the workplace of the category of employees under study, working hours and rest periods; an employment contract is terminated on the general principles provided for by the Labour Code of Ukraine.

**Key words:** conclusion, change of terms, termination of an employment contract, atypical forms of employment, hired workers.

## 1. Introduction

The specifics of the work of employees who work remotely or from home require a special approach to concluding an employment contract with them. In general, an employment contract is the primary legal form of streamlining the production process, as it determines the place where the employee will work, his or her labour function with the employer, how long the production relationship will last and what are the social benefits for the employee and the employer (Shcherbyna, 2009). The importance of concluding an employment contract is that it allows the parties to labour relations to effectively protect their rights and legitimate interests. Therefore, the present research aims to study the particularities of concluding, amending and terminating employment contracts in the context of atypical forms of hired workers' employment.

Some problematic issues related to the conclusion of an employment contract were consid-

ered in their scientific works by: O.P. Vikhrov, I.O. Vikhrova, T.P. Holopych, M.I. Inshyn, V.V. Marchenko, V. Shyshliuk, V.I. Shcherbyna, and many others. However, it should be noted that currently the literature review reveals insufficient development of the issue of conclusion, amendment and termination of employment contracts in case of atypical forms of hired workers' employment.

That is why the purpose of the article is to reveal the particularities of concluding, amending and terminating employment contracts in case of atypical forms of hired workers' employment.

**2. Particularities of concluding an employment contract**

To begin with, it should be noted that an employment contract is a written agreement concluded in accordance with the procedure established by law between an employee and an employer, the subject matter thereof is, on the one hand, the employee's obligation to perform a specified scope of work, and on the other hand, the employer's obligation to provide conditions for this and pay wages in a timely manner and in full. Therefore, by signing an employment contract: 1) the employee undertakes to: a) properly perform his/her job duties; b) comply with the internal labour regulations and labour discipline; c) comply with the conditions stipulated not only by individual and collective labour agreements, but also by the provisions of the legislation in force; 2) accordingly, the employer assumes the following obligations: a) to pay wages to the employee in a timely manner and in full; b) to comply with the provisions of the legislation in force on labour protection, on social security, etc.; c) to ensure other rights, freedoms and interests of employees guaranteed by the Constitution and applicable law.

An important stage in the conclusion of an employment contract is the determination and discussion of its terms between the parties to the legal relationship. In this context, it is worth mentioning Resolution No. 459 of the Cabinet of Ministers of Ukraine of 20 August 2014 (as amended by Resolution No. 24 of the Cabinet of Ministers of Ukraine of 17 February 2021), which sets out standard forms of employment contracts for home and remote work. According to this legal regulation, the following conditions should be stipulated in the remote work agreement: the employee's position, rights and job responsibilities (type and scope of work); the arrangements of remote work, for example, a task by e-mail or through a program with a deadline for its completion; the procedure and deadlines for completing the task: according to instructions or free choice of tools; the procedure and deadlines for submitting reports on the work performed by employees; the main place of work, part-time or combined work; workplace (if defined), particularities of combining remote work with work at the office workplace; term of the contract: fixed-term or indefinite contract, terms of extension; remuneration terms; working hours, time off (lunch), leave; internal labour regulations, if agreed in the employment contract; frequency and procedure for the employer to provide employees with briefings (training) on occupational safety and fire protection; employee responsibility for ensuring safe and harmless working conditions in the workplace; the employer's responsibility for the equipment safety precautions, if such equipment is transferred to the employee; the amount, procedure and terms of payment of compensation to employees for the use of equipment, software and hardware, information security and other means owned or leased by them. If the employment contract does not specify this, the employer shall provide this, and also pays the costs associated with it (Lysenko, 2021).

When an employee enters into an employment contract, the employer shall inform the employee of the terms of remuneration, the amount, procedure and timing of payment of wages, and the grounds on which deductions may be made in cases provided for by law. Pursuant to the Labour Code, Article 29, parts 1 and 2, when concluding an employment contract for remote work, the employer shall inform the employee against a receipt about the working conditions and familiarise him/her with the collective agreement (Korol, 2021). It is also important to conduct a labour protection briefing. It is conducted by a specialist of the labour protection service or another specialist in accordance with an order (instruction) for the enterprise, who has undergone training and knowledge testing on labour protection issues in accordance with the procedure established by the Model Regulations. The record of the induction briefing is made in the Logbook of the induction briefing on labour protection, which is kept by the labour protection service or the employee responsible for conducting the induction briefing, as well as in the order on hiring an employee. The Induction Logbook is a document for permanent storage (Website of the magazine "Occupational safety and fire safety", 2017).

It should be noted that the working conditions set out in a collective agreement or employer's regulation do not need to be duplicated in each employee's employment contract. In this regard, provided that the procedure for informing employees about their working condi-

tions is complied with in the manner prescribed by law, the employment contract may contain a relevant reference to the collective agreement or employer's regulation without setting out specific remuneration terms and conditions (Korol, 2021).

It is also important to note that when entering into an employment contract for remote work, the employer shall systematically instruct (train) the employee on occupational health and safety and fire safety within the scope of the employee's use of equipment and facilities recommended or provided by the employer. Such instruction (training) may be conducted remotely, using modern information and communication technologies, in particular by video communication. In this case, the fact that the relevant electronic documents are exchanged between the employer and the employee shall be deemed to confirm the instruction (training). When performing remote work, the employer is responsible for the safety and proper technical condition of the equipment and means of production transferred to the employee for remote work (Code of Labor Laws of Ukraine, 1971).

Therefore, the conclusion of an employment contract in the context of atypical forms of hired workers' employment is a crucial stage in the formation and further development of labour relations with the category of employees under study. The development of labour relations, the efficiency of an employee's performance of his/her duties, etc. directly depend on the clarity and content of the terms and conditions in the employment contract. Meanwhile, despite the stability of legal relations and certainty of the employee's labour function as one of the principles governing atypical forms of hired workers' employment, labour relations are dynamic, and therefore they may change under the influence of production necessity, as well as other facts and factors provided for by the applicable legislation of Ukraine.

**3. Grounds for amending an employment contract**

According to M.I. Inshyn, amendment of an employment contract is an important institution of labour law. The stability of labour relations and the effectiveness of the protective function performed by the labour law depend on the perfection of the rules governing the amendment of an employment contract. Therefore, the author concludes that amendment of an employment contract is a stage in the dynamics of labour relations development of transforming the subjective rights and obligations of an employee and an employer, arising from the essential terms of the employment contract previously established by them, which may be in the form of a new employment contract, modification of the previous employment contract that was the basis for the employment relationship between the employee and the employer, or a new arrangement with features different from the previous employment contract and is called a transfer and is the basis for the emergence of a new employment relationship (Inshyn, 2017).

Article 32 of the Labour Code of Ukraine provides for three types of changes to the terms of an employment contract: 1) transfer to another job; 2) transfer to another workplace; 3) change of essential working conditions. Meanwhile, in our opinion, in the context of the topic being studied, it makes no sense to talk about the first two types of changes to the terms of an employment contract. Thus, essential terms and conditions of employment are the necessary and additional terms and conditions of the employment contract that have been agreed upon between the employee and the owner or his/her authorised body in the employment contract, as well as the working conditions established by law, collective agreement, agreement, local regulations on the day of the employment contract conclusion (Marchenko, 2010, p. 210). In the educational and scientific literature, the main features of changes in essential working conditions are as follows: 1) as a rule, they are initiated by the employer; 2) they relate to working conditions that affect the content of the employment contract and the nature of its performance; 3) they may affect the essential terms of the employment contract; 4) they require prior notification of each employee (no later than two months in advance); 5) they require prior consent of the employee (preferably in writing); 6) they may be temporary or permanent; 7) they are executed by amending the employment contract and/or on the basis of an order (instruction) of the employer; 8) in case of disagreement of the employee, they may result in termination of the employment contract (the Labour Code, Article 36, clause 6) (Inshyn, Kostiuk, Melnyka, 2015, p. 257).

Following the Labour Code of Ukraine, due to changes in the organisation of production and labour, it is allowed to change the essential working conditions while continuing to work in the same speciality, qualification or position. An employee shall be notified of changes in essential working conditions, such as systems and amounts of remuneration, benefits, working hours, establishment or cancellation of part-time work, combination of professions, change of grades and job titles, etc., no later than two months in advance. If the same essential working conditions cannot be maintained and the employee does not agree to continue working under the new conditions, the employ-

ment contract is terminated under the Labour Code of Ukraine, Article 36, paragraph 6 (Code of Labor Laws of Ukraine, 1971).

Consequently, what actions should the employer take if he/she decides to change the employee's work mode (transfer to remote work or transfer from remote work to another work mode)? According to Article 32 of the Labour Code, an employee shall be notified of changes in essential working conditions (in particular, remuneration systems and amounts) no later than two months in advance. Therefore, if the employer decides to change the employee's work mode (transfer to remote mode or transfer from remote mode to another work mode), the employer shall notify such employee at least two months in advance (Korol, 2021). In addition, pursuant to the Labour Code, Article 60-2, Part 11, in the event of a threat of an epidemic, pandemic, or the need for employee self-isolation in cases established by law, remote work may be introduced by an order (instruction) of the owner or his/her authorised body without the obligation to conclude a remote work agreement in writing. The employee shall be familiarised with such an order (instruction) within two days from the date of its adoption, but before the introduction of remote work. In this case, the provisions of the Labour Code, Article 32, Part 3, do not apply (Korol, 2021).

Therefore, that changing the terms and conditions of an employment contract in the context of atypical forms of hired workers' employment is a complex process in nature and content, and its particularities are determined by: the specifics of labour relations arising between employees working remotely, at home or on a flexible schedule; particularities of organisation of the labour process, workplace, etc.

Finally, the focus of our research should be on the termination of an employment contract in case of atypical forms of hired workers' employment. Termination of an employment contract is all cases of termination of employment relations and expiration of an employment contract, including its dissolution, due to the will of the parties or a third party who is not a party to it, as well as on the basis of circumstances beyond their control, on the ground, in the manner and under the conditions determined by the labour legislation (Shyshliuk, 2016).

The legislation in force states that an employment contract concluded with employees working remotely or at home is terminated on the grounds and in the manner prescribed by the labour legislation. In particular, pursuant to Article 36 of the Labour Code of Ukraine, the grounds for termination of an employment contract are: 1) agreement of the parties; 2) expiry of the term, unless the employment relationship is actually ongoing and neither party has requested its termination; 3) call-up or enlistment of an employee or an individual employer for military service, or assignment to alternative (non-military) service, except in cases where the employee retains his/her job and position in accordance with the Labour Code, Article 119, part 3, 4) termination of an employment contract at the initiative of the employee (Articles 38, 39), at the initiative of the employer (Articles 40, 41) or at the request of a trade union or other body authorised to represent the labour collective (Article 45); 5) transfer of an employee, with his/her consent, to another enterprise, institution, organisation or transfer to an elected position; 6) refusal of an employee to transfer to another location together with the enterprise, institution, organisation, as well as refusal to continue work due to changes in essential working conditions; etc. (Code of Labor Laws of Ukraine, 1971).

In this context, it should be noted that the terms of notice of termination of the employment contract and the amount of compensation payments in case of early termination of the employment contract at the initiative of the employer are determined in accordance with the labour legislation. Such notices may be reviewed using the electronic means of communication specified in this Agreement. In this case, the fact of exchange of relevant electronic documents between the Employer and the Employee shall be deemed as a confirmation of familiarisation (Order of the Ministry of Economic Development, Trade and Agriculture of Ukraine On approval of standard forms of employment contracts on home and remote work, 2021).

**4. Conclusions**

To sum up, it should be noted that nowadays the procedure for concluding, amending and terminating employment contracts in case of atypical forms of hired workers' employment is somewhat vague and does not allow for the specifics of the employment activities of the category of employees under study.

Thus, the following particularities of concluding, amending and terminating employment contracts in atypical forms of hired workers' employment should be highlighted:

– ambiguity of regulatory mechanism, because, on the one hand, the legislator has regulated the issue of concluding an employment contract in a fairly comprehensive manner, but the amendment and termination of the latter are enshrined in the legislation in force in a rather superficial manner;

– the terms of an employment contract are changed allowing for the specifics

of the organisation of the workplace of the category of employees under study, working hours and rest periods;

– an employment contract is terminated on the general principles provided for by the Labour Code of Ukraine.

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## ОСОБЛИВОСТІ УКЛАДЕННЯ, ЗМІНИ ТА ПРИПИНЕННЯ ТРУДОВИХ ДОГОВОРІВ У РАЗІ НЕТИПОВИХ ФОРМ ЗАЙНЯТОСТІ НАЙМАНИХ ПРАЦІВНИКІВ

**Анотація.** ***Мета.*** Мета статті полягає у розкритті особливостей укладення, зміни та припинення трудових договорів у нетипових формах зайнятості найманих працівників. ***Результати.*** У статті, спираючись на аналіз наукових поглядів учених та норм чинного законодавства, розкрито сутність, зміст та особливості укладення, зміни та припинення трудових договорів у разі нетипових форм зайнятості найманих працівників. Акцентовано увагу на тому, що не досить врегульованим є питання зміни умов трудового договору у разі нетипових форм зайнятості, адже нині воно регулюється аналогічно до загальних категорій працівників, що, безумовно, не відповідає дійсності та потребам відповідних форм зайнятості. З'ясовано, що зміна умов трудового договору у разі нетипових форм зайнятості найманих працівників – це складний за своєю сутністю та змістом процес, його особливості зумовлюються: специфікою трудових правовідносин, які виникають між працівниками, що працюють дистанційно, надомно чи за гнучким графіком; особливостями організації процесу праці, робочого місця тощо. ***Висновки.*** Зроблено висновок, що на сьогодні порядок укладення, зміни та припинення трудових договорів у разі нетипових форм зайнятості

найманих працівників є дещо розмитим та не враховує специфіку здійснення трудової діяльності досліджуваної категорії працівників. Зокрема, не досить врегульованим є питання зміни умов трудового договору, адже нині воно регулюється аналогічно до загальних категорій працівників, що, безумовно, не відповідає дійсності. Тож, серед особливостей укладення, зміни та припинення трудових договорів у разі нетипових форм зайнятості найманих працівників слід виділити такі: неоднозначність правового регулювання, адже, з одного боку, законодавець досить змістовно врегулював питання укладення трудового договору, втім зміна та припинення останнього закріплені у нормах чинного законодавства досить поверхнево; зміна умов трудового договору здійснюється з урахуванням особливостей організації робочого місця досліджуваної категорії працівників, часу роботи та часу відпочинку; припинення трудового договору здійснюється на загальних засадах, які визначені у Кодексі законів про працю України.

**Ключові слова:** укладення, зміна умов, припинення трудового договору, нетипові форми зайнятості, наймані працівники.

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# FORMS OF COMPENSATION FOR DAMAGE CAUSED BY AN EMPLOYEE TO AN EMPLOYER

**Abstract.** ***Purpose.*** The purpose of the article is to establish the scope and characterise the forms of compensation for damage caused by an employee to an employer. ***Results.*** Relying on the analysis of scientific views of scholars and provisions of legislation in force, the article identifies and characterises the key forms of compensation for damage caused by an employee to an employer. The author emphasises that an important task of the legislator and national scholars is to work towards expanding and improving the content of the forms of compensation for damage caused by an employee to an employer. The author establishes that local rulemaking, as a form of compensation for damage caused by an employee, is an activity performed by an authorised entity (an employer or an authorised person) within the framework of legislation in force, which implies the development and adoption of local legal regulations, provisions thereof are aimed at regulating social relations arising in the process of compensation by an employee for damage caused by him/her to the employer. Therefore, the key task of rulemaking is to adopt a special local legal regulation. The content and significance of local rulemaking is to optimally choose a variant of regulatory mechanism, the legislation that would best meet the interests and goals of the organisation (social collective) and its members. To do this, it is necessary to allow for the specifics of the activities of a particular organisation (social collective), favourable objective and subjective conditions for the adoption and application of a local legal regulation, as well as the choice of the optimal legal form for resolving an urgent issue (problem). ***Conclusions.*** It is concluded that the forms are a range of practical actions performed by an employee and an employer within the framework of social relations on compensation for damage caused by an employee. It should be noted that the list of forms of compensation for damage caused by an employee to an employer is not exhaustive, and therefore an important task of the legislator and domestic scholars is to work towards expanding and improving the content of the relevant forms.

**Key words:** forms, compensation for damage, employee, employer, rulemaking.

**1. Introduction**

An important way to protect the employer's legitimate rights, freedoms and interests is to compensate for damage caused by an employee to an employer. In general, it should be noted that during the years of independence of our country, especially over the past 20 years, domestic lawyers have developed a fairly extensive and substantial scientific and theoretical basis on the issues of compensation for damages in labour law. However, some of the conclusions and proposals formulated by the researchers have already lost their relevance, while others require further clarification and refinement.

Certain problematic issues related to compensation for damage caused by an employee to an employer were considered in their scientific works by I.A. Rymar, V.V. Haievyi, O.M. Korotka, Ye.Yu. Podorozhnii, V.D. Chernadchuk, O.Yu. Kostiuchenko, A.A. Abramova, V.V. Yakovlev, P.R. Stavyskyi, N.M. Khutorian, V.S. Venediktov, and many others. However, despite a considerable number of scientific achievements, the legal literature remains insufficiently developed on the issue of forms of compensation for damage caused by an employee to an employer.

As a result, the purpose of the article is to establish the scope and characterise the forms of compensation for damage caused by an employee to an employer.

**2. Legal forms of compensation for damage caused by an employee**

In a general sense, a form is best understood as the external expression of a certain content. The concept of form is actively used in many areas of public life. For example, D.N. Bakhrakh, B.V. Rosinskyi and Yu.N. Starilov in their scientific work concluded that the form of governance is an external expression of the content of gov-

ernance, the limits of specific managerial actions taken directly by state and local governments. According to scholars, a form of management is a certain part of the management activities of a body, its structural units and officials. Each form of management includes certain actions performed by specific actors that reveal in a specific way the content of management activities, the management influence itself (Bakhrakh, Rosinskyi, Starilov, 2007, p. 362).

Therefore, the forms of compensation for damage caused by an employee to an employer are an external expression of practical actions taken by the parties to the relevant legal relationship. In the context of the presented topic, it is advisable to divide the relevant forms into legal and non-legal ones. Thus, according to N.M. Pakhomenko, legal form is, first of all, a comprehensive legal category that mediates various social phenomena that shall be regulated by law, and also serves as a framework within law, streamlines and combines all legal phenomena and law as such. With regards to legal forms, law as a certain social phenomenon is meant that differs from others (politics, religion, morality), which, together with law, are determined by the material conditions of society, its economic conditions and serve as a means of reflection and consolidation. In other words, the concept of "legal form" is a general reflection of the objective relationship between law and the phenomena it affects. The analysis of legislation in force leads to the conclusion that the concepts of "form" and "legal form" are inconsistently used in the regulatory framework (Parkhomenko, 2006, p. 18). V.M. Horshenov and I.B. Shakhova's scientific perspective should be mentioned. Scholars have come to the conclusion that the legal form is a specific organisational form of activity of state bodies, officials and other authorised actors: a) performed in strict compliance with the requirements of the law and other regulations; b) results thereof always entail certain consequences of legal significance or related to their occurrence. The authors emphasise that these two points act in an organic unity and are the main defining properties, and in their totality qualify each organisational form of activity as a legal one (Gorshenev, Shahov, 1987, p. 37).

With regard to the legal forms of compensation for damage caused by an employee, first of all, it is necessary to mention the rulemaking form, which implies local rulemaking of the employer. A.O. Nechyporenko argues that rulemaking is a complex scientific category characterised by the following: the initial stage of the regulatory mechanism, an element of the legal system and legal culture of society, in the course of which needs and interests are transformed into mandatory, formally defined prescriptions and rules; a means of organising social management, but the rulemaking process is itself regulated by law and other social norms; purposeful activity that has a certain longitude and contains internal elements – phases of the process of conception of a legal provision and its entry into force, entailing changes in social life (Nechyporenko, 2015, p. 5).

O.V. Petryshyn proposes a rather substantial list of characteristics of rulemaking, in particular: 1) Rulemaking is a phase of lawmaking; during rulemaking, legal regulations should enshrine the provisions of law which are the result of summarising the most important recurrent social relations, and also a means of displacing harmful social practice; 2) Rulemaking is a legal form of public authority's activity along with law application, interpretation of law, control and supervision, and constituent activities; 3) The result of rulemaking activity is legal regulations, which formally enshrine the provisions of law; 4) Rulemaking is performed by authorised actors – bodies and carriers of public authority; 5) Rulemaking is performed according to a certain procedure regulated by law (Petryshyn, Pohrebniak, Smorodynskyi, 2014).

As noted above, in the context of the issues being studied, local rulemaking is under focus. According to V.I. Prokopenko, the latter is performed directly by the participants to labour relations who make these provisions and can influence their content. This enables employees to know the scope of their rights and duties defined by local provisions, and to adapt as much as possible to realise their interests and meet their needs. The author continues that local rulemaking require two conditions. First, the provisions are local and come into force only if they are adopted in accordance with the procedure previously regulated by centralised control. Secondly, local rulemaking is possible in the presence of a general provision that grants certain actors the right to engage in rulemaking (Prokopenko, 2002). The content and significance of local rulemaking is to optimally choose a variant of regulatory mechanism, the legislation that would best meet the interests and goals of the organisation (social collective) and its members. To do this, it is necessary to allow for the specifics of the activities of a particular organisation (social collective), favourable objective and subjective conditions for the adoption and application of a local legal regulation, as well as the choice of the optimal legal form for resolving an urgent issue (problem) (Formaniuk, 2012).

Therefore, local rulemaking, as a form of compensation for damage caused by an employee, is

an activity performed by an authorised entity (an employer or an authorised person) within the framework of legislation in force, which implies the development and adoption of local legal regulations, provisions thereof are aimed at regulating social relations arising in the process of compensation by an employee for damage caused by him/her to the employer. Therefore, the key task of rulemaking is to adopt a special local legal regulation. According to M.I. Inshyn, local regulations are a type of legal regulations adopted by the employer, as a rule, in a conciliation and contractual manner with the collective of employees (trade union) in order to regulate labour relations in accordance with and within the framework of labour legislation. According to the author, the characteristic features of local regulations are as follows: a) They are adopted in accordance with the Labour Code and other acts of labour legislation of Ukraine; b) They are the result of local rulemaking by the employer and the collective of employees, their authorised bodies (officials); c) They contain local labour law provisions; d) They are usually of a negotiated and contractual nature; e) They cannot worsen the legal status of employees compared to labour law and social partnership acts; e) They serve as a legal basis for concluding labour contracts; f) They have a local scope (apply to the employer and the collective of employees); g) They are usually fixed-term; h) They should be accessible to all employees (posted in prominent places) (Inshyn, Kostiuk, Melnyk, 2016).

Thus, local regulations are regulations issued in accordance with the procedure established by law and aimed at regulating social relations arising in the process of compensation for damage caused by an employee to an employer. According to the Labour Code in force, the key regulations issued by the employer are orders and instructions.

**3. Management regulations**

In general, according to S.F. Denysiuk, an order is a type of managerial act that organises the work of each law enforcement body. Orders can contain individual prescriptions (of one-time – individual orders), as well as provide for rules designed for long-term and repeated use (regulatory orders) (Denysiuk, 2010). M.O. Bosenko identifies the most significant features of an order as follows: a) An order is a legal regulation, i.e. one that is governed by the Constitution of Ukraine and based on the legislation of Ukraine in force; the provisions specified in the text of the order shall not contradict the provisions of the Constitution of Ukraine and other official acts, such as the Laws of Ukraine; b) An order is an authoritative act that is binding on subordinates, i.e. no contradictions are allowed when the addressee executes the order; c) An order is issued by authorised public authorities; such authorities include heads of legislative, executive, judicial authorities, as well as heads of local self-government bodies; d) An order is may be in written, oral or conclusive form; e) It is adopted for the purpose of solving normatively defined tasks and functions of the state authorities of Ukraine; i) An order shall be prepared and issued in accordance with certain rules of legal technique; j) During execution, an order may be enforced by persuasion, state coercion; g) Orders may be issued individually or collectively by specially authorised public authorities; in general, the issuance of orders is characterised by exclusive sole authority, but in the case of a joint act, i.e. when several bodies are involved in the process of issuing an order (Bosenko, 2011, pp. 32-33).

As for the instruction, P.M. Baltadzhi states it is an individual act, a written or oral task of limited duration, which determines the content, place and time of execution, security measures (if any), as well as the list of performers. In order to summarise the understanding of the nature of instruction, this type of regulation is presented as an individual law application act adopted to address operational issues (Baltadzhy, 2008, pp. 134-135).

Therefore, the significance of the rulemaking form of compensation for damage caused by an employee to an employer is that it enables to ensure the normal process of implementation of the relevant legal relations, as well as to facilitate an enabling environment for protecting the rights of the parties to these relations.

The next form that should be mentioned within the framework of the topic being studied is law enforcement. According to Yu.L. Vlasov, law enforcement is a procedural and organisational activity of competent state bodies and officials aimed at resolving specific cases by issuing individual legal prescriptions, i.e., making an authoritative decision in a particular case on the basis of the law. The main social purpose of the application of legal provisions is to facilitate an enabling environment for and ensure the implementation of other forms of applying legal provisions. In many cases, the actual implementation of legal provisions in legal reality, conscious and volitional actions of people depend on the quality and efficiency of the application of legal provisions (Vlasov, 2005, p. 25). The result of law enforcement is the end result of lawful conduct of actors, which is characterised as socially valuable effects of the regulatory mechanism (Makarenko, 2004).

Closely related to the above form is the law application form. In general, following O.F. Skakun, law application is a proce-

dural and organisational activity of competent state bodies and officials, performed in a procedural manner, and implies individualisation of legal provisions in relation to specific actors and specific life cases in the act of applying the law (Skakun, 2000). A.M. Perepeliuk argues that law application as a special form of implementation of law, which finds its expression in the managerial activities performed by state bodies, officials and other specially authorised (competent) persons, the content thereof is to make individually specific decisions on the basis of and in pursuance of legal provisions (Perepeliuk, 2016).

The essential features of law enforcement are as follows: 1) In cases provided for by law, it is a necessary organisational prerequisite for the implementation of legal provisions, as a result of which its social purpose is to organise certain social relations; 2) It is the activity of only state bodies and state-authorised actors, as it shall be of a state power nature 3) It becomes legally significant primarily because the relations that arise, change or terminate as a result of such activities are in the form of mutual legal rights and duties of certain actors; 4) Such relations and ties are established by making individual formal binding decisions (on the basis of legal provisions and in accordance with specific life situations); 5) It shall be only on the basis and in accordance with the procedure provided for by law; 6) It is a process regulated by special provisions and consisting of successive stages; 7) It shall meet certain general requirements that ensure legality, fairness and efficiency; 8) Intellectual and legal results of law application, i.e. relevant decisions, are recorded, manifested externally in the established form – in acts of law application (Kelman, Murashyn, 2006).

**4. Conclusions**

Therefore, in the context of the issues being studied, forms are a range of practical actions performed by an employee and an employer within the framework of social relations on compensation for damage caused by an employee. It should be noted that the list of forms of compensation for damage caused by an employee to an employer is not exhaustive, and therefore an important task of the legislator and domestic scholars is to work towards expanding and improving the content of the relevant forms.

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## ФОРМИ ВІДШКОДУВАННЯ ШКОДИ, ЗАВДАНОЇ ПРАЦІВНИКОМ РОБОТОДАВЦЮ

**Анотація.** ***Мета.*** Мета статті – встановити коло та охарактеризувати форми відшкодування шкоди, завданої працівником роботодавцю. ***Результати.*** У статті, спираючись на аналіз наукових поглядів учених та норм чинного законодавства, виокремлено та охарактеризовано ключові форми відшкодування шкоди, завданої працівником роботодавцю. Акцентовано увагу на тому, що важливим завданням законодавця та вітчизняних науковців є проведення роботи у напрямі розширення та вдосконалення змісту форм відшкодування шкоди, завданої працівником роботодавцю. З'ясовано, що локальна нормотворчість як форма відшкодування шкоди, завданої працівником, являє собою здійснювану в межах чинного законодавства уповноваженим суб'єктом (роботодавцем або уповноваженою ним особою) діяльність, яка полягає у розробці та прийнятті локальних нормативно-правових актів, норми яких спрямовані на регулювання суспільних відносин, що виникають у процесі відшкодування працівником завданої ним шкоди роботодавцю. Тож, ключовим завданням нормотворчості є прийняття спеціального локального нормативно-правового акта. Зміст і значення локальної нормотворчості полягають у тому, щоб в ідеалі вибрати такий варіант правового регулювання, юридичної регламентації, який би найбільш повною мірою відповідав інтересам і цілям діяльності такої організації (соціального колективу) та її (його) членів. Для цього необхідно враховувати специфіку діяльності тієї чи іншої організації (соціального колективу), сприятливі об'єктивні і суб'єктивні умови для прийняття і застосування локального правового акта, а також вибір оптимальної правової форми вирішення нагального питання (проблеми). ***Висновки.*** Зроблено висновок, що форми являють собою сукупність практичних дій, які вчиняються працівником та роботодавцем у рамках реалізації суспільних відносин із відшкодування шкоди, завданої працівником. Варто відзначити, що перелік форм відшкодування шкоди, завданої працівником роботодавцю, не є вичерпним, а тому важливим завданням законодавця та вітчизняних науковців є проведення роботи у напрямі розширення та вдосконалення змісту відповідних форм.

**Ключові слова:** форми, відшкодування шкоди, працівник, роботодавець, нормотворчість.

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# PARTICULARITIES OF FUNCTIONING OF THE MECHANISM FOR CONTROLLING CIVILIAN FIREARMS CIRCULATION IN UKRAINE

**Abstract.** ***Purpose.*** The purpose of the article is to analyse the specifics of the functioning of the mechanism for controlling civilian firearm circulation in Ukraine. ***Results.*** The article studies the particularities of functioning of the mechanism for controlling civilian firearm circulation in Ukraine and formulates a perspective on the role and place of the National Police of Ukraine in this structure, proving that the latter, as a public authority specially authorised to perform such activities, has the widest range of competence. It is proved that the importance of ensuring proper control of civilian firearm circulation in Ukraine is a duty of the State which requires immediate implementation, since in the current situation of repelling russia's armed aggression against Ukraine, it is more important than ever to ensure that all Ukrainian citizens who have such an attempt can exercise the right to self-defence. ***Conclusions.*** The author substantiates the perspective that the mechanism of control of civilian firearm circulation in Ukraine consists of a controlling body and entities being controlled. It is important to underline that in this situation there is only one controlling authority – the National Police of Ukraine, and the entities being controlled are both organisations and individuals who manufacture such weapons or sell them legally and those who directly possess, store and use/apply them. Further research on the functioning of the administrative and legal mechanism for controlling civilian firearm circulation is the need to determine the methods and forms of its functioning.

**Key words:** mechanism, weapon, responsibility, control of circulation, police activity, law enforcement.

## 1. Introduction

Human and civil rights and freedoms determine the orientation of public policy. One of the most important rights in the world is the human right to life and free development of one's personality, which is primarily ensured by safe living conditions and the impossibility of violations of human and civil rights and freedoms by other social actors.

One of the most important rights, in our opinion, is also the right of a person to self-defence by available, legal and effective means and methods, which, in the context of russia's active armed attack on the independence and sovereignty of the Ukrainian state and people, exacerbates a number of processes related to social interaction. For example, the issue of civilian firearm circulation as an effective way to protect one's rights and freedoms in the context of armed aggression, as well as to ensure effective control of this process by specially authorised entities, which is the key to the observance of human and civil rights and freedoms, is being raised to a new level.

The issues of civilian firearms circulation have been repeatedly considered in the works by: V. Averianov, O. Bandurka, Y. Bytiak, A. Hetman, O. Dzhafarova, V. Zarosyl, S. Kivalov, V. Kolpakov, A. Komziuk, A. Korniiets, S. Kuznichenko, R. Myroniuk, V. Petkov, O. Frolov, S. Shatrava, O. Yarmysh, etc.

However, given the situation of the large-scale russian invasion of Ukraine, the significant danger to society and its saturation with illegal firearms, which pose a potential threat to society, the need to regulate the mechanisms for ensuring the right of Ukrainian citizens to self-defence is urgent.

The purpose of the article is to analyse the specifics of the functioning of the mechanism for controlling civilian firearm circulation in Ukraine. This, in turn, necessitates solving the following research tasks: 1. To study the perspectives and opinions of scholars on the concept of control mechanism, control as a legal

phenomenon and the essence of the category "civilian firearm circulation"; 2. To substantiate the specificities of functioning of the mechanism of control of civilian firearm circulation in Ukraine, including through the legal regime of martial law and in the light of the activities of the police as the main controlling entity; 3. To outline the main scientific, theoretical and practical conclusions.

The object of the article is public relations in the field of ensuring public safety and law and order.

The subject matter of the study is the particularities of functioning of the mechanism of control of civilian firearm circulation in Ukraine.

**2. The National Police as a law enforcement body in Ukraine**

The National Police of Ukraine, as one of the important and most active law enforcement bodies, is an important element of the foundation of the architecture of public, community and any other security in the country. Moreover, along with the complexities of the functioning of the relevant structure and the ongoing armed aggression of russia on the territory of Ukraine, an important issue is to organise the system of police activities in such a way that society and its environment take as a basis those standards and rules that cannot be violated.

This, in particular, is closely intertwined with the right of Ukrainian citizens to self-defence, as well as to protect themselves from armed aggression and violations of constitutional rights and freedoms. A wide range of citizens and scholars, as well as practitioners and professional lawyers, believe that a realistic solution in the context of the current situation is to regulate the system of civilian firearm circulation, which, in turn, will require the allocation of additional resources to ensure law and order in this segment of legal relations, in particular due to armed aggression. Thus, the role and place of the National Police in this context is crucial, since it is this state body that is responsible for ensuring control of weapon circulation, and it is logical to assume that this body will have the authority to control civilian firearm circulation.

Scholars emphasise that to date, no single legal regulation has been adopted in Ukraine that would regulate the circulation of weapons, including firearms. The history of formulating legislation on weapons in Ukraine, as well as discussions on their free (conditionally free) circulation, has been going on since Ukraine gained independence. To date, more than 7 draft laws have been prepared at different times, with different titles from the Law "On Weapons" to the Law "On Civilian Weapons and Ammunition," which were rejected at different stages of the legislative process due to the lack of political will to introduce the right to obtain firearms by civilians. Moreover, public opinion on regulating such a right is ambiguous. On 25 May 2022, the government launched an online poll in Diia on the legalisation of firearms by civilians. More than one million 700 users of the app took part in the survey: 62% of participants supported the legalisation of weapons for personal defence; 19% opposed firearm circulation among the civilian population; 18% supported the option "for special needs" (Official site of the "Pryamiy" channel, 2022).

Following O. Ilchenko, one of the main components of the Ministry of Internal Affairs of Ukraine is the National Police of Ukraine. In the course of reforming the law enforcement system of Ukraine, it is necessary to determine the place of the National Police in the system of the Ministry of Internal Affairs of Ukraine, the forms of their interaction and methods of coordination. In this regard, there is an urgent question of introducing new standards in the organisation and management of the National Police (Ilchenko, 2018). Accordingly, it should be noted that the National Police of Ukraine is entrusted with a significant number of responsibilities, including those related to control of weapon circulation. In particular, this issue relates to public safety and law and order, and therefore, it is a law enforcement body that has the broadest powers and rights in this segment.

**3. The regulatory framework for firearm circulation in Ukraine**

The Resolution No. 576 of the Cabinet of Ministers of Ukraine of October 12, 1992 "On Approval of the Regulations on the Permit System" stipulates that control of compliance by officials of ministries, other central bodies of state executive power, enterprises, institutions, organisations, business associations and citizens with the established procedure for the manufacture, acquisition, storage, accounting, transportation and use of items, materials and substances, opening and operation of enterprises, workshops and laboratories subject to the permit system is performed directly by the Ministry of Internal Affairs (Resolution of the Cabinet of Ministers of Ukraine on the approval of the Regulations on the permit system, 1992). The permit 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 (Regulations on

the permit system, Section I, paragraph 1) (Kostiuk, Korzh, Motyl, Sakovskyi, Fedorovska, 2018).

According to Article 22 of the Law of Ukraine "On the National Police", the list of the main powers of the police includes the following:

Control of compliance by individuals and legal entities with special rules and procedures for the storage and use of weapons, special personal protective and active defence equipment, ammunition, explosives and materials, and other items, materials and substances subject to the permit system by the internal affairs bodies;

Reception, storage and destruction of seized, voluntarily handed over or found firearms, gas, cold steel and other weapons, ammunition, explosives and explosive devices, narcotic drugs or psychotropic substances in accordance with the procedure established by law (Law of Ukraine On the National Police, 2015).

These provisions clearly define the role and place of the National Police of Ukraine in the mechanism of control of civilian firearm circulation, since today, among other things, the police control the circulation of award firearms, the number of which is increasing in the context of repelling russia's armed aggression against Ukraine.

For example, the Unified Register of Weapons, initiated by the Ministry of Internal Affairs of Ukraine, has recently been launched. According to I. Klymenko, the main advantages of the Unified Register of Weapons are that citizens will be able to easily obtain information about their registered weapons. In addition, the procedure for obtaining permits will be simplified through the digitalisation of services in the field of weapon circulation. The Unified Register of Weapons also provides for the creation of electronic offices. Therefore, Ukrainians will be able to receive the service from the comfort of their homes, without visiting the National Police, by submitting documents through the Single Citizen's Window https://services.mvs.gov.ua or in a gun shop (Klymenko, 2023).

Therefore, in the mechanism of control of civilian firearm circulation the National Police of Ukraine is the determining entity exercising the powers to ensure its functioning, registering weapons, issuing permits for their purchase, and controlling the process of their storage.

**4. Conclusions**

The article studies the particularities of functioning of the mechanism for controlling civilian firearm circulation in Ukraine and formulates a perspective on the role and place of the National Police of Ukraine in this structure, proving that the latter, as a public authority specially authorised to perform such activities, has the widest range of competence.

It is proved that the importance of ensuring proper control of civilian firearm circulation in Ukraine is a duty of the State which requires immediate implementation, since in the current situation of repelling russia's armed aggression against Ukraine, it is more important than ever to ensure that all Ukrainian citizens who have such an attempt can exercise the right to self-defence.

The author substantiates the perspective that the mechanism of control of civilian firearm circulation in Ukraine consists of a controlling body and entities being controlled. It is important to underline that in this situation there is only one controlling authority – the National Police of Ukraine, and the entities being controlled are both organisations and individuals who manufacture such weapons or sell them legally and those who directly possess, store and use/apply them.

In addition, the author proves that the mechanism of control of civilian firearm circulation has a multi-component structure and is administrative and legal in nature, since it regulates the relations between the State and individual actors of society. It is determined that in addition to the subjects and objects of control, it also contains the rights, obligations, powers and scope of competence of certain participants in these legal relations.

Further research on the functioning of the administrative and legal mechanism for controlling civilian firearm circulation is the need to determine the methods and forms of its functioning.

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## ОСОБЛИВОСТІ ФУНКЦІОНУВАННЯ МЕХАНІЗМУ КОНТРОЛЮ ЗА ОБІГОМ ЦИВІЛЬНОЇ ВОГНЕПАЛЬНОЇ ЗБРОЇ В УКРАЇНІ

**Анотація.** ***Мета.*** Метою статті є аналіз особливостей функціонування механізму контролю за обігом цивільної вогнепальної зброї в Україні. ***Результати.*** У статті досліджено особливості функціонування механізму контролю за обігом цивільної вогнепальної зброї в Україні, сформовано бачення щодо ролі та місця Національної поліції України в указаній конструкції, доведено, що остання як орган державної влади, що спеціально уповноважений на здійснення такої діяльності, має найширше коло компетенції. Доведено, що важливість забезпечення належного контролю за обігом цивільної вогнепальної зброї в Україні є обов'язком держави, що потребує негайного виконання, оскільки у сучасних умовах відбиття збройної агресії росії проти України як ніколи важливо забезпечити можливість реалізації права на самозахист усім громадянам України, що мають таке намагання. ***Висновки.*** Авторкою обґрунтовується позиція, що механізм контролю за обігом цивільної вогнепальної зброї в Україні складається з контролюючого органу та підконтрольних суб'єктів. Важливим є зазначення того, що в цій ситуації контролюючий орган один – Національна поліція України, а поряд із цим підконтрольними є як організації та особи, що виготовляють таку зброю або здійснюють її реалізацію (продаж) у законний спосіб, так і ті, хто безпосередньо нею володіють, зберігають та використовують/застосовують. Додатково обґрунтовано, що механізм контролю за обігом цивільної вогнепальної зброї має багатокомпонентну структуру та за своїм змістом є адміністративно-правовим, оскільки регулює взаємини держави та окремих суб'єктів суспільства. Крім цього, визначається, що, крім суб'єктів і об'єктів контролю, він містить також права, обов'язки, повноваження та межі компетенції в тих чи інших учасників цих правовідносин. Перспектива подальшого дослідження питання функціонування адміністративно-правового механізму контролю за обігом цивільної вогнепальної зброї полягає в необхідності визначення методів і форм його функціонування.

**Ключові слова:** механізм, зброя, відповідальність, контроль за обігом, поліцейська діяльність, правоохорона.

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# PARTICULARITIES OF IMPLEMENTATION OF JUDICIAL PROCEDURES AT THE STAGE OF PROCEEDING COMMENCEMENT IN ADMINISTRATIVE PROCEDURE

**Abstract.** ***Purpose.*** The purpose of the article is to comprehensively study the stages of both administrative proceedings commencement and judicial procedures which are inherent to this particular stage of the administrative procedure, and to develop the author's classification of judicial procedures at this stage. ***Results.*** The article studies and distinguishes the first stage of administrative procedure. The author examines comprehensively the stage of commencing administrative proceedings and judicial procedures inherent in this particular stage of the administrative process. The author has developed original classification of the phases of this stage. The author studies the approaches and judicial procedures inherent in the main theoretical provisions on the commencement of administrative proceedings as a stage of administrative procedure and formulates proposals for improving the relevant regulatory mechanism. The author establishes the particularities of implementation of judicial procedures at the stage of commencing proceedings in an administrative case. The opinions of scholars are analysed to determine that the activity of an administrative court in commencing proceedings in a case is of paramount importance for ensuring the exercise of the right to seek protection in court. The author distinguishes judicial procedures at different stages and emphasises that a judge at each stage decides only those issues which are defined by law. ***Conclusions.*** It is proved that the commencement of administrative proceedings has its own principles, functions and participants, enabling to distinguish it as a separate stage of administrative procedure. The author identifies certain characteristic features of judicial procedures at the stage of proceedings commencement, namely: internal structure, clearly defined in the presence of relevant phases, its own purpose, which determines the nature of procedural actions and specifics of legal means that can be used at this stage – resolving the issue of the possibility (sufficiency of grounds, compliance with requirements, proper jurisdiction) of protection of rights, freedoms and interests of the actors of a certain jurisdiction, rights and interests of legal entities in the field of public law relations in the administrative proceedings, the presence of specific principles defined for this stage, presence of specific functions of administrative proceedings inherent in this stage, in addition to the general functions of administrative proceedings, the procedure for proceedings is defined by regulations, a certain time limit, the so-called terms.

**Key words:** administrative procedure, stages of proceedings commencement, administrative proceedings, judicial procedures.

## 1. Introduction

Currently, when administrative proceedings are in the process of active reform, due to the fact that it is a relatively young legal institution, the role of quality administration of justice in this sector is of great importance. Most of the legal phenomena in modern science should be considered both in terms of holistic concepts and in parts. This enables scholars to better understand the content of their constituent elements, the interconnection and consequences reflected in the final result. Similarly, in the administrative process, the study of the particularities of the implementation of judicial procedures at the stage of commencing administrative proceedings is a topical issue.

Therefore, the stage of commencing proceedings in an administrative case is one of the issues that require priority research. This is primarily due to the fact that the commencement of proceedings in an administrative case is the first stage of administrative procedure, the quality

thereof affects ensuring the right of access to court, which is exercised at this stage and is the focus of many guidelines of the European Court of Human Rights, while the protection of this right is most often the subject matter of appeal to the judiciary.

The importance of determining the particularities of judicial procedures at this stage is also confirmed by the fact that without it, administrative procedural relations do not arise at all, that is, it acts as a filtering mechanism for determining existing violations of the rights and freedoms of the parties to the court proceedings.

Thus, it should be noted that it is the particularities of judicial procedures at this stage that are of primary importance for the further administrative procedure.

In addition, a comprehensive study of judicial procedures at this stage revealed a number of legal conflicts and shortcomings, the elimination of which will improve the quality of this stage of administrative procedure and the quality of administrative proceedings, reducing the number of erroneous and unlawful decisions and violations or restrictions of the right to access to administrative court, and, consequently, the right to effective defence in public law relations.

The topic of stages in administrative procedure in general and the stage of proceeding commencement in particular has been the focus of scientific research by O. Dzhafarova, P. Vovk, I. Kachura, D. Hnap, O. Yarmysh, O. Bandurka, O. Muzychuk, and other scholars. However, in the domestic legal science, theoretical and practical issues of particularities of implementing judicial procedures in administrative procedure are not sufficiently covered, and in the existing scientific works they have been studied fragmentarily or within the framework of broader legal issues, without a comprehensive approach, which, in turn, determines the importance of the chosen area of scientific research.

The purpose of the article is to comprehensively study the stages of both administrative proceeding commencement and judicial procedures which are inherent to this particular stage of the administrative procedure. To develop the author's classification of judicial procedures at this stage. To reveal the approaches and judicial procedures inherent in the main theoretical provisions on the commencement of administrative proceedings as a stage of administrative procedure and formulates proposals for improving the relevant regulatory mechanism.

The methodological basis of the study is modern general and special methods of scientific knowledge. Their application is based on a systematic approach, which enables to study issues in the unity of their social content and legal form. The logical-semantic method enables to deepen the conceptual apparatus of meanings of "judicial procedures" and "stages of commencing proceedings".

The comparative legal method is used to reveal the approaches and judicial procedures inherent in the main theoretical provisions on the commencement of administrative proceedings as a stage of administrative procedure and formulates proposals for improving the relevant regulatory mechanism.

The statistical method and documentary analysis are used to identify the shortcomings in the specifics of the judicial procedures at the stage of commencing proceedings in a case and to formulate proposals for improving the relevant legal regulation.

The need for scientific research has led to the use a number of general theoretical and special scientific methods of scientific knowledge, which, as a result of the awareness of the objective properties of the epistemological interaction between the object and the subject of knowledge, allowing to combine the subjective and objective aspects of knowledge. With the help of the epistemological method, the importance of judicial procedures at this stage is realised, as they are of paramount importance for the further administrative procedure.

The method of generalisation enables to establish the range of knowledge and skills that should be possessed by persons conducting judicial procedures at a high level.

The use of the selected arsenal of scientific research methods (the system of methodological support for this study) enables to ensure the validity, quality, scientific and practical significance of the scientific results obtained. In other words, it is the research methodology that is an effective and necessary tool for finding new knowledge in the process of such research.

**2. Stages of commencing proceedings in administrative procedure**

The arrangement of administrative procedure is doctrinally defined within the procedural stages. To begin with, the review of the current domestic literature and perspectives of scholars reveals the necessary to define the concept and essence of the stages of administrative procedure.

There is no unanimity of opinion in the scientific works of scholars of different legal schools on the issue of distinguishing stages in administrative procedure. The definition of the concept of stages in administrative procedure is largely derived from civil procedure, and most scholars of the old legal school adhered to their definitions and concepts.

One of the first contributions to the definition of dividing the court procedure into stages

was made by I. Benedyk, who notes that a stage is a certain element that describes a changing characteristic of the legal procedure (Benedyk, 1984).

For example, M. Stefan underlines the presence of separate parts or stages in civil proceedings. According to him, the presence of a single goal that unites procedural legal relations and actions are a mandatory feature of the stages.

According to I.A. Kachur, a stage is an element that reflects the characteristic of a legal process or a set of homogeneous procedural actions of participants to procedural legal relations carried out within a certain period to achieve a single specific procedural goal.

Therefore, the perspectives of various scholars enable to conclude that stages are an integral element that outlines the characteristics of the legal procedure or a set of homogeneous procedural actions of participants to procedural legal relations carried out within a time frame to achieve a single specific procedural goal.

In our research, it should be noted that an individual stage of administrative procedure has its own internal structure, which is designed in such a way as to ensure the achievement of the result, and therefore can and should be divided into certain phases.

It is determined that the phases successively replace each other, depending on the specific purposes they fulfil and are united by a single procedural form and compatible tasks. On the basis of the above, conclusions can be drawn regarding the concept of phases.

Phases are relatively independent internal parts of the consideration of a particular administrative case at the relevant stage of the court procedure, aimed at solving its individual tasks. They should be considered not as simple time periods that gradually replace each other (although this formal and logical feature also exists), but as a subsystem of procedural actions and procedural decisions united on the basis of the unity of tasks that are solved with their help, due to the stable recurrence of typical situations (Kachur, 2018, p. 141).

The comprehensive review of the Code of Administrative Procedure of Ukraine (2005) enables to distinguish the following phases of the stage of commencing proceedings in an administrative case:

1) filing of a statement of claim;

2) checking the statement of claim for compliance with the requirements established by law;

3) making a decision on further movement of the claim.

With regard to foreign experience in the use of judicial procedures in legal proceedings in general and administrative one in particular, an important novelty is the use of mediation in resolving legal disputes, indicating that the practice of resolving legal disputes involving a judge as a mediator in foreign countries is actively implemented. The countries in which this institution operates today and has positive indicators are France, Poland, and the United States. In Germany and Italy, on the other hand, the use of mediation in resolving legal disputes, including administrative disputes, is not considered a judicial procedure, but is the prerogative of the private service sector. In Ukraine, important steps have already been taken to introduce the institution of administrative dispute resolution involving a judge. In particular, this is evidenced by the innovations in the administrative procedure legislation that took place at the end of 2017, according to which the rules on the basic principles of administrative dispute resolution involving a judge were introduced into the CAPU. It should be noted that today the institution of dispute resolution involving a judge in Ukraine in administrative procedure is ineffective and almost never used (Horobets, Lytvyn, Starynskyi, Karpushova, Kamenska, 2021).

Next, we will consider each of the judicial procedures separately.

Filing a statement of claim is the exercise of a person's right to go to court to protect violated rights in the field of public law relations and is an integral part of the right to a fair trial. The protection of human and civil rights and freedoms is one of the most important functions of the judiciary of Ukraine, enshrined in the constitution. This reflects the system implying the state judicial policy (state power in general and the judiciary), as well as the single object of protection (Hnap, 2016, pp. 21-23).

Moreover, this is stated in the Constitution of Ukraine as "the highest social value" and is provided for in Article 55 as follows: everyone is guaranteed the right to appeal against decisions, actions or inaction of state authorities, local self-government bodies, officials and employees in court (Code of Administrative Procedure of Ukraine, 2005).

This principle is clearly reflected in Article 5 of the Code of Administrative Procedure of Ukraine: every person has the right to apply to an administrative court in accordance with the procedure established by this Code if he or she believes that his or her rights, freedoms or legitimate interests have been violated by a decision, action or inaction of a public authority and to seek their protection (Code of Administrative Procedure of Ukraine, 2005).

Therefore, the commencement of proceedings can be regarded as the main and decisive

element of the exercise of such right. This is due to the fact that filing a claim in accordance with the procedure established by law does not guarantee the fact of proceeding commencement, although it is necessary for the judicial procedure and has due legal significance.

We argue that filing a lawsuit is an irrefutable fact of the occurrence of administrative and procedural relations between the applicant and the court, but it is not the fact of the beginning of the trial. A claim may or may not be the subject matter of a dispute. The actual exercise of the right to go to court begins with the official registration of the claim in court. In any other case, the filing of a claim should be considered only an intention to go to court, and not the exercise of the right to a fair trial. Therefore, it should be emphasised that *D. Hnap's* statement that the procedure for applying to court includes the preparation of a statement of claim is incorrect.

On the one hand, preparation is essential for the correct drafting of claims, and the plaintiff has the right to receive assistance from the court staff in writing the claim. However, it should be noted that preparation is not yet a filing, but only a prerequisite for the exercise of the right to a fair trial by a person and the person's intention to file a lawsuit.

Furthermore, it should be noted that a public legal dispute may be settled before the filing of a lawsuit. Therefore, a potential defendant, having the opportunity to learn about the intention of another person to take all the necessary preparatory actions to go to court to protect the rights that he or she has violated, may decide to settle the conflict out of court. Thus, the preparation of a lawsuit loses its meaning, and the appeal to the court remains unfulfilled.

It should be noted that the filing of a lawsuit cannot be considered an absolute exercise of a person's right to go to court, since such a right will be fully exercised only after the trial is completed and a decision on the merits is made, and the moment the proceedings are commenced is only the beginning of the exercise of such a right.

**3. Particularities of implementation of judicial procedures at the stage of commencement of proceedings**

It is important to bear in mind that the legislator has clearly established that the commencement of proceedings in a case begins with the filing of a claim with the court The provisions on the prerequisites for such filing are set out in Article 160 of the CAPU "Statement of claim" (Code of Administrative Procedure of Ukraine, 2005), which highlights the essence of the claim and the requirements to be met in its preparation. This position of the legislator is fully justified and correct. Therefore, by commencing proceedings in a case, the court implements provisions of the constitutional right of a person to a fair trial, officially recognising the fact that his or her rights, freedoms or legitimate interests have been violated.

Only in this way can the judiciary question the legality of decisions, actions or omissions of state authorities, local self-government bodies, their officials and employees (Zozulia, Rozhenko, 2013, pp. 87-92).

Moreover, it is important to understand that proceedings may be commenced by an administrative court if the necessary prerequisites for the right to file an administrative claim are met, as well as the procedure for exercising this right is observed (Kivalov, Kharytonov, Kharytonova, 2009).

This concept indicates that the filing of a claim may be the initial phase of commencing proceedings only in presence of administrative ability to act of a person and proper powers of his/her representative.

A person who believes that his or her interests, rights and freedoms in the field of public law relations have been violated, or a public authority for reasons established by the current legislation, can apply to an administrative court. In addition, this right can be exercised if the aforementioned actors have administrative procedural ability to act. For example, the CAPU states that the capacity for rights and duties is administrative procedural legal personality, and the ability of a person to personally exercise his/her administrative procedural rights and duties, including entrusting the case to a representative, in public law relations is administrative procedural ability to act (Code of Administrative Procedure of Ukraine, 2005).

Moreover, it is not enough for a person to have rights and duties to exercise his/her right to a fair trial in an administrative court, as the person shall be of legal age and not be declared incapacitated by the court (Zheltobriukh, 2020, pp. 128-133). Furthermore, a necessary feature of the administrative procedure should be the fact of registration of public authorities in accordance with the manner established by law, since their legal personality arises simultaneously from the moment of their establishment and from the moment of adoption of a regulation on their activities.

We see the second phase of judicial procedures as a set of systematic actions of the authorised actor aimed at ensuring the effectiveness of further consideration of the case on the merits.

This scientific perspective is also confirmed by modern scholars. For example, Kolomoiets

(2009) understands the proceedings commencement as a set of procedural actions to clarify the legal issues of acceptance of an administrative claim by an administrative court for consideration.

D. Hnap, in turn, argues that at the stage of commencing proceedings, it is decided whether conditions necessary for the legislation to relate the very possibility of proceedings in court to consider and resolve a particular administrative case exist (Hnap, 2016).

In addition, V. Hordieiev underlines a set of procedural actions to clarify legal issues on acceptance of an administrative claim by an administrative court for consideration (Hordieiev, 2010).

Having analysed scholars' perspectives, we understand that the activity of an administrative court in commencing proceedings is of great importance for ensuring the exercise of the right to a fair trial.

The court, in its turn, is solely responsible for ensuring judicial procedures for the most detailed analysis of the claim, and therefore the importance of judicial procedures at this stage of the proceedings is significant. From the very moment the judge decides on the progress of the case, legal consequences may arise, which differ depending on the decision made by the judge. An example of such a legal consequence is the occurrence of administrative proceedings, i.e. administrative and procedural legal relations, which is possible in the event of the commencing of proceedings.

If the court decides to refuse to open the case, the proceedings cannot be commenced, and there can be no question of legal relations. However, in the case of an unjustified refusal to commence proceedings, as well as in the case of leaving the claim without motion or returning it, such a legal consequence as an appeal against a court decision may be triggered, since in this case we can speak of a violation of the person's right to access to justice (Pomazanov, 2018, pp. 132-136).

Therefore, in the process of reviewing the claim and other judicial procedures, the judge shall comply with the rules of administrative, substantive and procedural law, and shall ensure a competent, impartial analysis within the time limits established by applicable law.

After receiving a statement of claim for consideration, the judge shall:

1) find out whether the person who has applied to the court has ability to act;

2) check the statement of claim for compliance with the requirements established by the applicable law. The current procedural administrative law establishes a number of requirements for a statement of claim, which are set out in the CAPU, Article 160, para. 5. Furthermore, the law establishes the required list of documents that shall be attached to the statement of claim and that directly relate to the public law dispute and ensure its validity (Code of Administrative Procedure of Ukraine, 2005);

3) check whether the jurisdiction of the dispute is correctly determined. Thus, an administrative court considers cases arising from public law relations;

4) check the time limits for filing a lawsuit. The time limit for filing a claim with an administrative court varies.

Relying on the results of a comprehensive review of the statement of claim, the judge decides on further judicial procedures, such as:

1) to commence proceedings in the case. Such a decision may be made if the judge finds no grounds to refuse to commence the proceedings;

2) to refuse to commence the proceedings if:

the claim cannot be considered according to the rules of procedure of the court to which the statement of claim has been filed;

in the current dispute between the parties, there are final court decisions that have entered into force (a court decision or ruling, a decision to close proceedings in an administrative case);

an individual died or a legal entity that is not a n authorised actor terminated the activities and has filed a claim or is being sued, if in this case the legal relationship cannot imply legal succession;

there is already a dispute between the same parties, on the same subject matter and on the same grounds in the proceedings of this or another court;

3) to leave the claim without motion if the statement of claim is filed without complying with the requirements established by law;

4) to return the statement of claim if:

the plaintiff has failed to remedy the deficiencies of the statement of claim left without motion within the time limit set by the court;

the plaintiff filed an application for its withdrawal prior to the commencement of administrative proceedings;

the claim was filed by a person who does not have administrative procedural ability to act, the claim was not signed or signed by a person who is not entitled to sign it, or by a person whose official position is not specified;

the plaintiff failed to provide evidence of contacting the defendant regarding the pre-trial settlement of the dispute in cases where the law requires pre-trial settlement, or the time limit for pre-trial settlement had not expired at the time the plaintiff filed the claim;

the plaintiff has filed another claim (claims) with the same court against the same defendant (defendants) with the same subject matter and on the same grounds and, at the time of the decision on the commencing of proceedings in the case under consideration, no decision has been made to open or refuse to open proceedings in the case, return the claim or leave the claim without consideration;

violation of the rules for joinder of claims and in other cases provided for by law.

**4. Conclusions**

The review of the stage of commencement of administrative proceedings enables to characterise it as a procedure established by the legislation of Ukraine for the court to carry out legally significant judicial procedures aimed at:

1) acceptance of the statement of claim;

2) verification of the statement of claim for compliance with the requirements established by law, deadlines for filing, identification of deficiencies, establishment of the fact of the plaintiff's administrative ability to act or the proper authority of the representative, the grounds for filing, and the correctness of the jurisdiction of the case;

3) making a decision on further consideration of the case on the merits.

This stage, together with the judicial procedures inherent in it, has a complex internal structure, which is formed by combining legal elements into a single part that is limited by time. The importance of commencing proceedings as a stage of administrative procedure is undeniable, as it is the first phase of exercising the right to a fair trial of a violated or disputed right or legally protected interest of a citizen, as well as protection of rights and interests or exercise of the competence of a state body in cases provided for by law.

Some of characteristic features of judicial procedures at the stage of proceedings commencement are as follows:

1) internal structure, clearly defined in the presence of relevant phases;

2) its own purpose, which determines the nature of procedural actions and specifics of legal means that can be used at this stage – resolving the issue of the possibility (sufficiency of grounds, compliance with requirements, proper jurisdiction) of protection of rights, freedoms and interests of the actors of a certain jurisdiction, rights and interests of legal entities in the field of public law relations in the administrative proceedings;

3) the presence of specific principles defined for this stage;

4) the presence of specific functions of administrative proceedings inherent in this stage, in addition to the general functions of administrative proceedings;

5) the procedure for proceedings is defined by regulations;

6) a certain time limit, the so-called terms.

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# ЩОДО ОСОБЛИВОСТЕЙ РЕАЛІЗАЦІЇ СУДОВИХ ПРОЦЕДУР НА СТАДІЇ ВІДКРИТТЯ ПРОВАДЖЕННЯ У СПРАВІ В АДМІНІСТРАТИВНОМУ СУДОЧИНСТВІ

**Анотація.** ***Мета.*** Метою статті є детальне вивчення стадій відкриття адміністративного провадження та судових процедур, що притаманні саме цьому етапу адміністративного процесу, вироблення власної класифікації судових процедур на цій стадії. ***Результати.*** У статті досліджена та відокремлена перша стадія адміністративного судочинства. Більш детально вивчено стадію відкриття адміністративного провадження та судові процедури, що притаманні саме цьому етапу адміністративного процесу. Вироблено власну класифікацію етапів такої стадії. Розглянуто підходи та судові процедури, що притаманні розкриттю основних теоретичних положень про відкриття провадження в адміністративній справі як стадії адміністративного судочинства та формулюванню пропозицій щодо удосконалення відповідного правового регулювання. Встановлено особливості реалізації судових процедур на стадії відкриття провадження в адміністративній справі. Проаналізовано думку науковців та визначено, що діяльність адміністративного суду з відкриття провадження у справі має колосальне значення для забезпечення втілення права звернення до суду за захистом. Відокремлено судові процедури на різних стадіях та наголошено, що суддя на кожній окремій стадії вирішує лише ті питання, які окреслені законом. ***Висновки.*** Обґрунтовано, що відкриттю провадження в адміністративній справі притаманні власні принципи, функції та учасники, що дозволяє виокремити його в окрему стадію адміністративного судочинства. Визначено окремі характерні ознаки для судових процедур на стадії відкриття провадження, а саме: внутрішня структура, яка чітко визначена у наявності відповідних етапів, власна ціль, яка визначає характер процесуальних дій та специфіку правових засобів, що можуть бути використанні на такій стадії, – вирішення питання про можливість (достатність підстав, відповідність вимогам, належна підсудність) захисту прав, свобод та інтересів суб'єктів визначеної підсудності, прав та інтересів юридичних осіб у сфері публічно-правових відносин у порядку адміністративного судочинства, наявність визначених саме для цієї стадії своїх специфічних принципів, наявність, окрім загальних функцій адміністративного судочинства, що притаманні на цій стадії, ще і специфічних, визначеність порядку судочинства нормативно-правовими актами, певна часова обмеженість, так звані строки.

**Ключові слова:** адміністративний процес, стадії відкриття провадження, адміністративне судочинство, судові процедури.

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# ADMINISTRATIVE AND LEGAL STATUS OF THE NATIONAL SECURITY AND DEFENCE COUNCIL AND THE SECURITY SERVICE OF UKRAINE AS ENTITIES ENSURING NATIONAL SECURITY IN THE CONTEXT OF EUROPEAN INTEGRATION

**Abstract.** ***Purpose.*** The purpose of the article is to reveal the theoretical and practical essence of the concept of "administrative and legal status" in relation to entities ensuring national security of Ukraine in the context of European integration such as the National Security and Defence Council and the Security Service of Ukraine. ***Results***. It is determined that the regulatory framework of the National Security and Defence Council of Ukraine requires optimisation changes. First, it is necessary to clearly identify its role and purpose, that is, to facilitate or to perform specialised management; second, when distinguishing its powers and functions, the warning provisions of EU law regarding the inadmissibility of limiting the scope of human and civil rights (without proper justification) for reasons of national security should be considered. Therefore, the administrative and legal status of the National Security and Defence Council of Ukraine characterises it as an entity ensuring national security in the context of European integration by the following provisions: it is a body of special competence, which, on the one hand, is responsible for information and analytical support for the national security management system of Ukraine, and, on the other hand, for strategic planning and management of its system through coordination and control powers. ***Conclusions***. The author determines that the administrative and legal status of the National Security and Defence Council and the Security Service of Ukraine as entities of special competence in the field of national security in the context of European integration in the substantive aspect characterises the totality of tasks, goals and functions established by legal regulations, the implementation thereof is their direct responsibility and is manifested in the information and analytical field, which in turn is the basis for making managerial decisions (National Security and Defence Council) and implementing law enforcement measures to eliminate threats to state security (Security Service of Ukraine). It is revealed that these entities require to be relieved of uncharacteristic functions and limited in the scope of their powers to meet the purpose of their functioning in the discourse of Ukraine's European future. Furthermore, the National Security and Defence Council should have a more flexible scope of legal capabilities compared to the Security Service of Ukraine, activities thereof should exclude the possibility of discretion. In addition, the issue of adverse legal effects of their activities (establishment of measures of legal liability), including for unlawful decisions and improper performance of functional duties, shall be regulated, since to meet the public interest, they should allow for European standards of the minimum acceptable level of protection of personal rights and values of a person and citizen with the impossibility of their unreasonable restriction.

**Key words:** administrative and legal status, security, European integration, security provision, competence, system of actors.

## 1. Introduction

Each state is endowed with the privileged right to independently resolve national security issues. This means that any threat (if it is real and duly justified as such) can be eliminated in a way that the state's leadership considers appropriate and necessary. Nowadays the global security of the world community is riddled with

acute problems arising from this established dogma because, bypassing the need to prove and justify the existence of a real threat to national security, individual countries are actually undermining the entire global security by abusing this right.

Awareness of this problem and the search for effective legal mechanisms to address it are of both national and international nature. For example, the law of the European Union (hereinafter – the EU) contains a number of caveats regarding the national legislation of its member states in terms of the need to unify the approach to public administration of national security issues (to a greater extent, respect for human and civil rights), and the availability of adequate and effective guarantees in the mechanism for its implementation to prevent abuse of state power functions.

Currently, Ukraine's national security is in the most difficult state since the country's independence, as its external and internal threats have increased and become more complex (Kysloho, Strelbytskoho, 2021). Rebuilding, restoring and renewing of Ukraine are the steps that need to be taken for Ukraine's new European future (Official website of the Cabinet of Ministers of Ukraine, 2022), which must be implemented despite the strong desire of the Russian Federation to prevent a strong, sovereign Ukraine and the victory of democracy and the rule of law in the post-Soviet space (Vahener, 2022). Therefore, cooperation and coordination of global efforts to repel the aggressive efforts of the Russian Federation's leadership is extremely important, as it forms the basis of a renewed democratic world.

It is Ukraine that currently plays an important role in the development of political and economic cooperation on the European continent and in the adjacent areas, ensuring regional stability and security in the face of the Russian Federation's extraordinary military and information aggressive activity (Danylian, 2020). All of this is a merit of actors ensuring the national security of Ukraine, whose activities in crisis situations have been reformatted from the strategic to the tactical level of management, and have proven their effectiveness, as each representative of their system acts as an integral part of a powerful and holistic mechanism for protecting the national identity, dignity and will of the Ukrainian people, its statehood, independence and territorial integrity.

Among these actors, the activity of those with special competence is of importance. In this study, we will try to clarify the theoretical and practical essence of the concept of "administrative and legal status" in relation to the National Security and Defence Council and the Security Service of Ukraine as entities ensuring national security of Ukraine in the context of European integration.

The concept under study as a direct subject of scientific research is characterised by a triple content. This means that one part of it is sufficiently covered and studied by domestic scientists of administrative law (for example, the works of such scientists who have studied the foundations of the theoretical understanding of the concept of "administrative and legal status" on the example of various subjects) (Vyshneva, 2021), another part relates directly to its features of the actors being analysed, and the last part focuses on entities ensuring Ukraine's national security in the context of European integration. In particular, in the latter aspect, there are no scientific developments of domestic scholars.

**2. Administrative and legal status of the National Security and Defence Council**

A review of legal literature and certain legal regulations enables to argue that the legal category of "status" is frequently used, and in quite different interpretations. It makes no sense to go into its terminological features, given the number of scientific works by leading scholars of legal science, including administrative science, devoted directly to this topic. We will only clarify that it is mostly used to denote a specific phenomenon, actor or process in a certain space (Zamryha, 2021); its meaning is in something.

Furthermore, the scientific definition of administrative and legal status is complicated due to its theoretical construct without legislative interpretation, therefore there is a lack of unity of both perspectives on and scientific understanding (Vyshneva, 2021) of this concept, as it is derived from a more general term – legal status. Moreover, it should be considered that the general understanding of this term implies an opinion that the category "legal status" refers to a person, while "legal position" refers to a public authority (Zubko, 2019).

Nevertheless, as a rule, the concept of "administrative and legal status" is revealed through the characteristics of its elements or through the competence (Priakhin, Humin, 2014) of a particular public administrator (Prykhodko, 2020) (for example, V. Averianov defines the administrative and legal status as a set of rights and duties enshrined in the provisions of administrative law, the implementation thereof is ensured by certain guarantees (Averianov, 2004)).

Therefore, the administrative and legal status is a legal concept used only by scientists and expressed exclusively within the framework of administrative and legal science, the conceptual component thereof is formed by adding

to the basis of specific actors' legal status elements of essential understanding (Vyshneva, 2021) of the uniqueness of their activities as representatives of a certain system, which have a specific social orientation of the actions taken in the plane of the administrative vector of legal relations, and this determines the meaning and role of their existence in the system of implementing (Vyshneva, 2021) public functions.

With regard to the administrative and legal status of the entities under study, it should be noted that the term "special competence" in this context refers to the implementation of a set of measures organised and performed by individual entities of the security and defence sector and having a functional impact on the objects of their jurisdiction. It means that legal regulations vest such entities with special functions that cannot be exercised/delegated to other entities. It is clear that, for example, the functions of the parliament cannot be performed or delegated to other entities either, but in this aspect, it is not so much about the exclusivity of functions, but rather about their specificity.

Article 107 of the Constitution stipulates that the National Security and Defence Council (NSDC) is a coordinating body on national security and defence under the President of Ukraine. The President of Ukraine shall be its Head and shall form the personal membership; and the Prime Minister of Ukraine, the Minister of Defence of Ukraine, the Head of the Security Service of Ukraine, the Minister of Internal Affairs of Ukraine, and the Minister of Foreign Affairs of Ukraine shall be *ex officio* members. The Chairman of the Verkhovna Rada of Ukraine may participate in NSDC meetings (Constitution of Ukraine, 1996).

That is, the constitutional provisions indicate that the entity under study has a special administrative and legal status in general, not only in the field under analysis.

It should be noted that of all the actors that make up the national security system of Ukraine, its functions in national security management and status are the most detailed. In fact, the Constitution imposed on the NSDC the honourable role of coordinator in this field, namely, the coordinator is the main link in the management and decision-making system. Regardless of whether coordination is only about efficiently gathering information so that the President can make appropriate decisions based on it, or whether it enables effective management of various structures to address current issues (Bidenko, 2006). For example, in Poland, the National Security Council is an advisory body to the president on internal and external security issues and does not have such broad powers as a similar body in Ukraine. Thus, its function is to study issues and form opinions related to the security of the state, and they include: general guidelines for the security of the state, principles of and trends in foreign policy, areas of development of the Armed Forces, issues related to external security, threats to internal security and resources to counter them (About the National Security Council, 2022).

The fact that the NSDC has a significant scope of powers not only in the field of national security and defence and deals with almost all issues of the country's life is indicated by the provisions of the Law of Ukraine "On the National Security and Defence Council of Ukraine". For example, Article 4 of this Law defines the competence of the NSDC on the basis of its functions (analytical, coordination and control). The powers listed in this article includes quite specific ones, for example, those related to the recognition of a person as having significant economic and political weight in public life (oligarch), as well as the exclusion of a person from the Register of persons having significant economic and political weight in public life (oligarchs) (Law of Ukraine On the National Security and Defence Council of Ukraine, 1998). No other country in the world has such a concept as an "oligarch" at the legislative level and recognises that they can pose a threat to national security and defence given their "significant economic and political weight in public life".

In addition, the list of powers of the NSDC most often includes the power to coordinate and control the activities of executive bodies. This is despite the fact that in most countries similar bodies have advisory functions, as this actually means that interference in the system of executive authorities is permissible. The NSDC is not a part of any branch of government and is only an advisory body to the President of Ukraine (Lipkan, 2009), so the existence of such powers raises a number of questions.

In our opinion, coordination and control over the activities of executive authorities can only be remained for "repulsing armed aggression, organising the protection of the population and ensuring its vital activity, protecting life, health, constitutional rights, freedoms and legitimate interests of citizens, maintaining public order in martial law and state of emergency and in the event of crisis situations that threaten the national security of Ukraine". (Law of Ukraine On the National Security and Defence Council of Ukraine, 1998). Under normal circumstances, this body should perform analytical and advisory functions. Therefore, we believe that part 2 of Article 3 of the Law of Ukraine "On the National Security and Defence Council" should be cancelled.

If such an approach is enshrined in law, it can be stated that the NSDC is a specialised body in the system of national security actors, as it will exercise special powers in exceptional cases. Currently, it is a body that has such powers regardless of the state of affairs in the security environment in the country.

In view of this, K. Tarasenko believes: "The NSDC is a national, integral, systemic, specialised, interdepartmental ("supra-departmental"), comprehensive and collegial state authority of Ukraine" (Tarasenko, 2009).

Therefore, the regulatory framework for the NSDC is imperfect, as the relevant law gives it powers that are too broad in scope. Moreover, the procedures for their implementation are not supported by a mechanism-based approach (in particular, there are no provisions on the responsibility of departments within the Council, no provisions on such important elements of national security management as annual reports, intelligence gathering, responsibility for their actions, etc. (Bidenko, 2006)).

The ineffectiveness of the approach when the NSDC is concerned with everything and nothing can be demonstrated by the example of V. Radchenko's report "On the main results of the work of the National Security and Defence Council of Ukraine and the Council apparatus in 2003" (On the main results of the work of the National Security and Defence Council of Ukraine and the Council apparatus in 2003, 2024). In particular, several paragraphs of this report of the constitutional body reveal measures aimed at reducing accidental alcohol poisoning. The result of the NSDC's work is that "the number of deaths from accidental alcohol poisoning in January-October 2003, compared to the same period last year, decreased by 652 people". This is simply not possible in the report of, for example, the US National Security Council, due to the clear definition of its powers (Bidenko, A. (2006).

Therefore, the above leads to the conclusion that the regulatory framework of the NSDC requires optimisation changes. First, it is necessary to clearly identify its role and purpose, that is, to facilitate or to perform specialised management; second, when distinguishing its powers and functions, the warning provisions of EU law regarding the inadmissibility of limiting the scope of human and civil rights (without proper justification) for reasons of national security should be considered.

Therefore, the administrative and legal status of the NSDC characterises it as an entity ensuring national security in the context of European integration by the following provisions: it is a body of special competence, which, on the one hand, is responsible for information and analytical support for the national security management system of Ukraine, and, on the other hand, for strategic planning and management of its system through coordination and control powers.

In addition, until important issues such as the NSDC's responsibility for its decisions, the procedure for dealing with a crisis, and a clear definition of national security issues and priorities are resolved at the legislative level, it will remain a purely advisory body that helps provide the Head of State with the most complete information on important issues, analyses potential threats and deals with crisis management (Bidenko, A. (2006).

**3. Administrative and legal status of the Security Service of Ukraine**

The next entity of scientific interest in this study is the Security Service of Ukraine (hereinafter – SSU). The activities of this entity, as well as its status, are regulated by the Constitution of Ukraine and other legal regulations. For example, the Law of Ukraine No. 2229-XII "On the Security Service of Ukraine" of March 25, 1992 (On the Security Service of Ukraine Law of Ukraine, 1992) defines it as a special purpose state body with law enforcement functions that ensures state security of Ukraine and is subordinated to the President of Ukraine.

That is, like the National Security and Defence Council of Ukraine, this body is also subordinated to the President of Ukraine. However, this law enforcement body's functions differ from the ones of the National Security and Defence Council of Ukraine (Nadon, 2017). In particular, the SSU is responsible for protecting the state sovereignty, constitutional order, territorial integrity, scientific, technical and defence potential of Ukraine, protecting the legitimate interests of the state and the rights of citizens from intelligence and subversive activities of foreign special services, attacks by individual organisations, groups and individuals, and ensuring the protection of state secrets within the scope of its competence defined by law. The SSU is also tasked with preventing, detecting, suppressing and solving criminal offences against peace and security of mankind, terrorism and other unlawful acts that directly threaten the vital interests of Ukraine (On the Security Service of Ukraine Law of Ukraine, 1992).

Accordingly, the SSU has a special administrative and legal status as a national security entity, as it combines two key areas within its competence – information-analytical and law enforcement – while performing special service tasks.

It is noteworthy that nowhere in the civilised world a special service conducts law enforce-

ment activities; its purpose is to collect information within the competence defined by law (Zakharov, 2017).

That is why European experts have consistently emphasised the need to reform the SSU in their conclusions. The first stage of the SSU reform began in 2008-2009, when the National Security Council adopted the decision "On the concept of reforming the Security Service of Ukraine: Decision of the National Security Council, 2008" (enacted by Presidential Decree No. 249/2008) and the "Comprehensive Targeted Programme for Reforming the Security Service of Ukraine" (Decree of the President of Ukraine On the decision of the National Security and Defence Council of Ukraine dated February 15, 2008 "On the Concept of Reforming the Security Service of Ukraine", 2008). A draft law was registered, but later withdrawn from consideration. In 2015, a new reform was announced. International partners again insisted on it. One of the main conditions was the elimination of special units dealing with economic crimes (Ukrinform website, 2022).

A new phase of SSU reform commenced in 2019 with the development of a new draft law on the Service. The main goal of the reform is to set new priorities and make the SSU more effective. It will provide the special service with effective mechanisms to better respond to the threats faced in the modern world. In particular, to successfully counteract the hybrid warfare of the Russian Federation. The relevant draft law was developed by SSU experts, and the final version was prepared by an expert group of the President's Office. It allowed for key proposals from international partners. On 19 May 2020, the Verkhovna Rada of Ukraine considered the draft law and sent it for a second first reading and revision to the Parliamentary Committee on National Security, Defence and Intelligence (Official website of the Security Service of Ukraine, 2022).

Therefore, the SSU has a special administrative and legal status in the field of national security in the context of European integration, as it is the only state special-purpose body with law enforcement functions with the main purpose to ensure state security.

**4. Conclusions**

To sum up, the administrative and legal status of the NSDC and the SSU as entities of special competence in the field of national security in the context of European integration in the substantive aspect characterises the totality of tasks, goals and functions established by legal regulations, the implementation thereof is their direct responsibility and is manifested in the information and analytical field, which in turn is the basis for making managerial decisions (NSDC) and implementing law enforcement measures to eliminate threats to state security (SSU).

The entities under study require to be relieved of uncharacteristic functions and limited in the scope of their powers to meet the purpose of their functioning in the discourse of Ukraine's European future. Furthermore, the National Security and Defence Council should have a more flexible scope of legal capabilities compared to the Security Service of Ukraine, activities thereof should exclude the possibility of discretion. In addition, the issue of adverse legal effects of their activities (establishment of measures of legal liability), including for unlawful decisions and improper performance of functional duties, shall be regulated, since to meet the public interest, they should allow for European standards of the minimum acceptable level of protection of personal rights and values of a person and citizen with the impossibility of their unreasonable restriction.

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## АДМІНІСТРАТИВНО-ПРАВОВИЙ СТАТУС РАДИ НАЦІОНАЛЬНОЇ БЕЗПЕКИ І ОБОРОНИ ТА СЛУЖБИ БЕЗПЕКИ УКРАЇНИ ЯК СУБ'ЄКТІВ ЗАБЕЗПЕЧЕННЯ НАЦІОНАЛЬНОЇ БЕЗПЕКИ В УМОВАХ ЄВРОІНТЕГРАЦІЇ

**Анотація.** ***Мета.*** Метою статті є з'ясування теоретичної й практичної сутності концепту «адміністративно-правовий статус» щодо таких суб'єктів забезпечення національної безпеки України в умовах євроінтеграції, як Рада національної безпеки і оборони та Служба безпеки України. ***Результати.*** Визначено, що нормативне регулювання діяльності Ради національної безпеки та оборони України вимагає оптимізаційних змін. По-перше, необхідно чітко ідентифікувати її роль та призначення – сприяти чи здійснювати спеціалізоване управління; по-друге, у разі виокремлення її повноважень та функцій слід враховувати застережні положення права ЄС щодо недопустимості обмеження обсягу прав людини та громадянина (без належного на те обґрунтування) з мотивів національної безпеки. Таким чином, адміністративно-правовий статус Ради національної безпеки та оборони України характеризує її як суб'єкта забезпечення національної безпеки в умовах євроінтеграції такими положеннями: є органом спеціальної компетенції, що, з одного боку, відповідальний за інформаційно-аналітичне забезпечення системи управління національною безпекою України, а з іншого – стратегічне планування та управління її системою через координаційні та контрольні повноваження. ***Висновки.*** Визначено, що адміністративно-правовий статус Ради національної безпеки і оборони та Служби безпеки України як суб'єктів спеціальної компетенції у сфері забезпечення національної безпеки в умовах євроінтеграції у змістово-сутнісному аспекті характеризує сукупність встановлених законодавчими актами завдань, цілей та функцій, реалізація яких є їхнім прямим обов'язком, та має вияв у інформаційно-аналітичній площині, яка своєю чергою є підставою для прийняття управлінських рішень (Рада національної безпеки і оборони) та здійснення правоохоронних заходів щодо ліквідації загроз державній безпеці (Служба безпеки України). Виявлено, що для цих суб'єктів характерною є необхідність позбавлення їх невластивих функцій та обмеження обсягу повноважень, що відповідатимуть меті їхнього функціонування у дискурсі європейського майбутнього України. При цьому Рада національної безпеки і оборони повинна мати більш гнучкий обсяг правових можливостей порівняно зі Службою безпеки України, діяльність якої має виключати можливість застосування дискреції. Окрім того, нормативного врегулювання потребує питання виникнення несприятливих правових наслідків від їхньої діяльності (встановлення мір юридичної відповідальності), у тому числі за прийняті ними протиправні рішення та неналежну реалізацію функціональних обов'язків, адже, забезпечуючи публічний інтерес, вони обов'язково мають враховувати європейські стандарти мінімально допустимого рівня захисту особистих прав та цінностей людини і громадянина з неможливістю їхнього безпідставного обмеження.

**Ключові слова:** адміністративно-правовий статус, безпека, євроінтеграція, забезпечення безпеки, компетенція, система суб'єктів.

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# THE CONCEPT OF "ARTIFICIAL INTELLIGENCE" FROM PHILOSOPHICAL AND LEGAL PERSPECTIVE

**Abstract.** ***Purpose.*** The purpose of the article is to study the origin of the concept of "artificial intelligence" and to compare it with the concept of "human intelligence" in the philosophical aspect. ***Results.*** The article reveals topical issues of understanding the concept of "artificial intelligence" from a philosophical perspective, researches the origin of this concept and its identification with the concept of "human intelligence". The active implementation and use of artificial intelligence in recent years in various areas of human activities, as well as the ambiguity of the interpretation of the concept of artificial intelligence, leads to a distorted and ambiguous understanding of artificial intelligence. Therefore, the article reviews publications in this area, in order to conducting an independent search for answers to the questions from a philosophical perspective. To this end, the author examines comprehensively the concept of human intelligence and consciousness as a socio-cognitive system capable of making non-standard decisions in complex, unplanned situations that a person faces on a daily basis. The study focuses on the problematic aspects of consolidating the definition of artificial intelligence, reviews the draft Strategy for the Development of Artificial Intelligence in Ukraine for 2020-2030, which states that the primary task in creating artificial intelligence is to create an intelligent system that forms artificial consciousness as a model of the functional apparatus of human consciousness. ***Conclusions.*** It is concluded that nowadays even an ordinary citizen can hardly be surprised by the concept of "artificial intelligence". However, scientists have been debating the existence of artificial intelligence for decades. During this time, programmes have been created to establish the dimension of artificial intelligence, i.e. the ability of a "machine" to think, feel, emote, cognise, understand and do all of this simultaneously, i.e. processes that occur in human activities. A complex task that has not been finally solved by scientists in various fields for several decades. The article presents an original interpretation of "artificial intelligence", relying on the literature review on this topic in recent years, enabling to draw specific conclusions.

**Key words:** intelligence, artificial intelligence, human intelligence, human consciousness, artificial consciousness, intelligent system.

**1. Introduction**

The research on an understanding of artificial intelligence requires to turn to the philosophical dimension of "human intelligence" and "personal consciousness" to highlight the genesis of the concept under consideration, since scientists are still studying the concepts of human intelligence and personal consciousness. These questions have been raised by people since the dawn of philosophy, and scientists are still trying to establish an understanding of these concepts and give a definition. The search for an answer to the definition of human consciousness has been going on for millennia and is inextricably linked to the philosophy of knowledge of existence.

The issue of revealing the concept of artificial intelligence in the philosophical aspect was considered in the studies by: A.V. Kasianenko, V.V. Fedotov, I.V. Hryhorenko, C. Jung, N.K. Tymofiieva, O.B. Stoliarenko, O.I. Stebelska, O.Ya. Moroz, etc. However, despite the studies conducted, there is currently no clear definition of the concept of "artificial intelligence" and the nature of its origin, which gives rise to further research in this area.

The purpose of the article is to study the origin of the concept of "artificial intelligence" and to compare it with the concept of "human intelligence" in the philosophical aspect.

**2. Philosophical approaches to the concept of intelligence**

The first definition of artificial intelligence was given back in 1956 by John McCarthy, an American computer scientist and researcher

of thinking. However, it should be noted that before the final introduction of the term "artificial intelligence", there were introductions to the intelligence of the first electronic computers. The question arises: can computers think like humans? A significant contribution was made by the English mathematician Alan Turing, who was the first to introduce a test of the ability of a computer to think like a human being. This test went down in the history of the development of "artificial intelligence" under the name of the author of the Turing test. However, the materials on his research were only theoretical and incomplete. From that moment on, scientists from various fields, namely mathematics, computer science, logic, philosophy, cryptography, etc. have been studying the issue.

The twentieth and twenty-first centuries have gone down in history as a period of rapid technological development. The development has been particularly rapid in recent years thanks to IT technologies. Technology has become pervasive in all areas of human activity. Today, it is difficult to imagine our lives without technological tools; looking back, generations of people wonder how they could have done without the things we are used to today. It is hard to find people who do not use IT technologies, it is rather beyond normal behaviour, which was not the case even 10 years ago. In the Asia-Pacific region and in the United States of America, IT technologies were introduced much earlier than in Ukraine. After the active implementation of the technological process, the question of the definition of artificial intelligence arises, both in philosophical and legal terms. In recent years, Ukraine has also been actively implementing the technological process. Of course, the development of technology affects the usual order of life, such as professional, domestic, leisure, educational spheres and others.

However, artificial intelligence originated much earlier. Historically, questions related to thinking processes were first studied in philosophy. The principles of rational thinking were formulated by Aristotle (384 - 322 BC). In the 16th century, René Descartes first published the results of his discussion of the differences between mind and matter. Thus, philosophy formulated the most important provisions governing the rational part of thinking, but their formalisation required fundamental research in another science – mathematics. For several centuries, these studies were conducted in parallel, mutually enriching both sciences. Artificial intelligence has been most influenced by the development of such branches of mathematics as logic, calculus, and probability (Kasianenko and Fedotov, 2022). It is impossible to understand the concept of artificial intelligence without considering human intelligence.

Thus, intelligence (from the Latin *intellectus* – understanding, mind, cognition) is a relatively stable structure of an individual's mental abilities. Usually, intelligence is defined by the level of development, which is considered in connection with such cognitive processes as perception, memory, imagination, etc. The interpretation of intelligence as general mental abilities is used in the form of behavioural characteristics of an individual related to understanding and predicting events, performance, and successful adaptation to new life tasks (Dziuba, Zhukovskyi, Zhelezniak, 2014).

In the Middle Ages, idealistic and materialistic philosophers associated the concept of human intelligence with natural, innate mental abilities. Over time, intelligence has been viewed from the perspective of psychology. In the twentieth century, intelligence was viewed from a medical perspective and in the context of human brain research. Such comprehensive research has allowed scientists to come closer to solving the long-standing problem of understanding intelligence. Only to approach, because there are many definitions of human intelligence today, none of which can be rejected in the course of our work. In the end, this may affect the roots of the concept of "artificial intelligence" and clarify its nature of origin and close connection with human intelligence.

According to I.V. Hryhorenko, "intelligence can be defined as a personality's ability that determines the overall success of a person's adaptation to new environments. Intelligence is becoming one of the most essential and necessary properties of a person in the modern knowledge society, which is actively being formed in the globalising world. We see further prospects in a comprehensive analysis of the philosophical aspect of intellectual behaviour in modern society" (Hryhorenko, 2013). Therefore, the basis of human intelligence can be characterised as "flexibility" and adaptation to modern environments, independent choice of an algorithm of activities considering objective circumstances based on the individuality of each person.

Alongside the concept of "human intelligence" we can find the concept of "consciousness" of a person or personality. There is a need to understand whether these concepts are identical. For example: "human consciousness is a fundamental social and cognitive system of a person, which is a product of the brain and is capable of perceiving and recognising information, creating, forming and systematising knowledge, learning, making independent motivated decisions depending on the tasks and existing circumstances, allowing

for the laws and rules of society. A qualitative assessment of the results of a person's conscious activities correlates with the level of his or her intelligence IQ (Intelligence Quotient), which is a quantitative characteristic of intelligence. Therefore, the primary task in creating artificial intelligence is to create an intelligent system that forms artificial consciousness as a model of the functional apparatus of human consciousness" (Shevchenko, 2022). Thus, intelligence is an integral part of human consciousness, i.e. intelligence is a narrower concept than consciousness. In addition, the author argues that intelligence can be calculated and has quantitative characteristics, while consciousness includes many other factors that are more difficult to calculate (program) than of intelligence. Therefore, moving on to the definition of artificial intelligence, it is better to use the concept of "artificial intelligence" rather than the concept of "artificial consciousness". Obviously, the concept of "artificial consciousness" is unattainable today, due to the absence of precise definition of consciousness and the calculation of all the factors that need to be considered.

According to O. B. Stoliarenko, the concept of a human being means that it is a being that combines two directions of development: biological and social (a person is a carrier of consciousness, which is a social product). As an individual, a person develops in ontogeny, and as a personality, he or she goes through his or her life path, during which the individual is socialised. Therefore, *a human being* is a biosocial being with consciousness and the ability to act. Combining these three levels into a single whole makes an integral characteristic of a person - his or her individuality. *Individuality* is a combination of psychological characteristics of a person that make him or her unique and different from other people. Individuality is manifested in a person's abilities, dominant needs, character traits, sense of self-esteem, worldview, system of knowledge, skills, and level of intellectual, creative processes, individual style of activities and behaviour, type of temperament, characteristics of emotional and volitional spheres, etc. (Stoliarenko, 2012). We can see that one of the factors in the formation of a personality as a socially developed person is the development of intelligence. However, the presence of intelligence alone is not enough, all factors together are important, including the socialisation of a person in the course of life and the development of intelligence. Various theories of personality development suggest that other personality factors influence the development of a person's intelligence.

In M. Y. Varii's opinion, human *consciousness* has the following layers: 1 - initial level of consciousness; 2 - low level of consciousness; 3 - medium level of consciousness; 4 - high level of consciousness; 5 - perfect level of consciousness. The highest (in ascending order) is the superconscious level of the human psyche, which contains mental phenomena, acts and states that have arisen as a result of interaction with the Universe, as well as the psi-programmes of such interaction. This level has the following layers: 1 - intuitive; 2 - segmental; 3 - comprehensive. However, the psyche of each individual person functions as a single integral complex, in which the unconscious, subconscious, conscious and superconscious affect all subsystems (Varii, 2011).

For example, Freud presented the mental life of the individual as a constant arena of struggle between the irreconcilable forces of the conscious and unconscious, reason and instincts, which compete for control over behaviour. This concept of mental life is called *psychodynamic*. Instead, in the theory of A. Adler's theory does not contain any postulates about hidden immense forces and structures of mental life. According to Adler, the main force that determines human behaviour and life is not innate drives, not innate archetypes, but the sense of community with others (Stoliarenko, 2012).

The level of intelligence is different for each person and has its own characteristics. Therefore, it is generally accepted to divide them into: mental abilities/ intelligence quotient (IQ); emotional quotient (EQ); positive quotient (PQ); adaptive quotient (AQ); social quotient (SQ); learning quotient (LQ); spiritual quotient (SQ); love quotient (LQ); linguistic (verbal) quotient; logical and mathematical quotient; musical quotient; bodily and kinaesthetic quotient; spatial quotient; interpersonal (communicative) quotient; intrapersonal quotient; naturalistic quotient; existential quotient. Of course, this is not a complete list of types of intelligence, but even this list gives an idea of the complex system of human mental abilities.

Therefore, the psychophysiology of the concept of "intelligence", which is naturally inherent in humans, as the main component of human mental capacity (the biological in humans) is closely related to other dimensions that touch on the "social" in humans. The issue under consideration will provide some answers to the definition of "artificial intelligence". When considering the concepts of "human intelligence" and "artificial intelligence", it is impossible to ignore cognitive psychology, active scientific research and origins thereof date back to the mid-twentieth century. The development of artificial intelligence has contributed to the improvement of postulates that revealed

the problems of processing and storing information in memory, as well as language learning.

**3. Comparing artificial intelligence with human intelligence**

All the studies conducted on the nature of artificial intelligence are related to the comparison with human intelligence. For example, in order to create artificial intelligence, it is necessary to identify the properties of natural intelligence and develop a way to model it. There are many definitions of artificial intelligence in the literature, but there is no precise definition of this science yet. Intelligence is the ability to understand the world around us and solve various problems. We use the term "mind" as a synonym, which expresses the ability to think, i.e. analyse and draw conclusions. One of the concepts of artificial intelligence is the formalisation of problems and tasks that are similar to human actions. Different authors model natural intelligence in different ways. For example, artificial intelligence is defined as the ability of a digital computer to respond to information coming to its input devices in much the same way as a human being would react under the same information conditions. This approach is based on the principle of self-organisation of the model and is called heuristic. In this paper, human intelligence is considered as an intuitive system. That is, intuition is understood as the process of optimal decision-making in relation to the external environment (Tymofiieva, 2022).

Furthermore, O. Stebelska raises the issue of creating artificial intelligence, based on previous research: "In Penrose's theorem, this problem sounded sharp and categorical: "No matter how powerful a device with the architecture of a finite machine (computer, in the modern sense) is, human thinking has some capabilities that are not available to such a device". It should be noted that the main problems of implementing artificial moral machines is not so much in the technical as in the philosophical and methodological plane Modern futurists also constantly predict an impressive future, but so far scientists have not been able to create a machine equivalent to a human in terms of its capabilities. This is due to many reasons discussed above. But the main problems lie in the philosophical and methodological plane. First of all, it is unclear how to create a smart machine. In addition, research in the field of artificial intelligence has one common drawback: scientists try to model and prescribe something that they themselves cannot unambiguously and clearly explain: consciousness, morality, imagination, creativity, emotions and feelings, freedom, etc. Human consciousness is such a complex, ambiguous, multifaceted phenomenon that it is currently not amenable to technologicalisation. Even the term "intelligence" itself has no clear definition. However, the aforementioned obstacles in the creation of intelligent machines have a positive side: the more we try to create artificial intelligence, the more we deepen our understanding of our own nature" (Stebelska, Fedoriv, 2019).

Having gone through the path of artificial intelligence research from the initiation of the idea to its implementation and active use in recent decades, it was only in 2020 that the Concept for the Development of Artificial Intelligence in Ukraine was approved, which consolidated the concept of artificial intelligence as an organised set of information technologies that can be used to perform complex tasks using a system of scientific research methods and information processing algorithms, received or independently created in the course of work, as well as create and use their own knowledge bases, decision-making models, algorithms for working with information and determine ways to achieve the tasks set (Decree of the Cabinet of Ministers of Ukraine On the approval of the Concept of the development of artificial intelligence in Ukraine, 2020).

**4. Conclusions**

Therefore, having considered different points of view, we can state that the issue of development and formation of artificial intelligence has been considered by scientists from different perspectives. For example, in terms of the existence of artificial intelligence, which is actively used to solve problems in the field of production, agriculture, services, education, IT, and others, as programmed tasks to facilitate their implementation, or the possibility of bringing artificial intelligence closer to human intelligence in terms of the ability to make independent decisions, awareness of threats, danger, the ability to make intuitive or emotional decisions, and other manifestations of human consciousness, and not just pragmatic actions that do not go beyond the plan or programme. Moreover, with regard to the programme, it should be noted that the creation of artificial intelligence is due to human mental abilities, especially in relation to the development of artificial intelligence and developments in this area in recent years. An interesting issue of considering artificial intelligence arises not only from a practical perspective, but also from the philosophical understanding and nature of the origin of such a name, which is still closer to human intelligence, that is, the ability of a machine to make independent "volitional" decisions with the help of artificial intelligence. With regard to the qualitative characteristics of artificial intelligence, it should be noted that

artificial intelligence has long gone beyond human mental abilities. For example, a primitive calculator from the last century is likely to be better than an average citizen in the correct solution of multiplication with three-digit digits, in a few seconds. However, a person is capable of making non-standard (unplanned) decisions, can act on an intuitive level, sometimes in the absence of logic and consistency, and such a decision will be correct in a particular situation. In recent years, machines have been equipped with such programmes that can independently choose the path to achieve their goal, but still cannot go beyond the programme. Such a programme involves several situations in which the machine needs to choose a path and make the only right decision in accordance with the objective situation. The most important thing to remember is that all artificial intelligence is created thanks to the mental abilities of humans and is, of course, aimed at serving humanity.

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## ПОНЯТТЯ «ШТУЧНИЙ ІНТЕЛЕКТ» У ФІЛОСОФСЬКО-ПРАВОВОМУ РОЗУМІННІ

**Анотація.** ***Мета.*** Метою статті є проведення дослідження щодо витоку походження поняття «штучний інтелект», проведення співставлення із поняттям «інтелект людини» у філософському аспекті. ***Результати.*** У статті розглянуті актуальні питання розуміння поняття «штучний інтелект» з філософської точки зору, здійснений шлях пошуку витоку цього поняття та ототожнення його з поняттям «інтелект людини». Активне впровадження та використання штучного інтелекту останніми роками в різних сферах діяльності людини, неоднозначність інтерпретації поняття штучного інтелекту призводить до викривленого та неоднозначного трактування штучного інтелекту. Тому стаття присвячена огляду публікацій за вказаним напрямом з метою проведення самостійного пошуку відповідей на поставлені запитання з філософської точки зору. З цією метою детально розглянуто поняття інтелекту та свідомості людини як соціально-когнітивної системи, яка здатна на прийняття нестандартних рішень у складних незапланованих ситуаціях, з якими людина стикається щоденно. В дослідженні було звернено увагу на проблемні моменти закріплення визна-

чення штучного інтелекту, розглянуто проєкт Стратегії розвитку штучного інтелекту в Україні на 2020–2030 роки, де зазначається, що першочерговим завданням у створенні штучного інтелекту є створення інтелектуальної системи, що формує штучну свідомість як модель функціонального апарату свідомості людини. ***Висновки.*** Зроблено висновок, що сьогодні навряд чи можна здивувати визначенням «штучний інтелект» навіть пересічного громадянина. Однак учені вже десятиріччями ведуть запеклі суперечки з приводу існування штучного інтелекту. За цей час створені програми для встановлення виміру штучного інтелекту, тобто здатності «машини» на роздуми, відчуття, емоції, пізнання, розуміння і це все одночасно, тобто такі процеси, які відбуваються у діяльності людини. Складне завдання не може бути остаточно розв'язане вченими різних галузей уже декілька десятиліть щодо розуміння «штучний інтелект», у статті дано власне бачення на основі оглянутих публікацій з цієї тематики за останні роки, що дало змогу зробити конкретні висновки.

**Ключові слова:** інтелект, штучний інтелект, інтелект людини, свідомість людини, штучна свідомість, інтелектуальна система.

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# ADMISSIBILITY OF EVIDENCE OBTAINED DURING COVERT INVESTIGATIVE (SEARCH) ACTIONS OUTSIDE THE SCOPE OF PRE-TRIAL INVESTIGATION IN CRIMINAL PROCEEDINGS

**Abstract.** ***Purpose.*** The purpose of the article is to study the correlation between the subject matter of proving and the purpose of covert investigative (search) actions, and their importance for verifying evidence for admissibility, and to formulate the legal position on the assessment of evidence obtained outside the scope of pre-trial investigation in criminal proceedings. ***Results.*** Ensuring the rule of law, legality, the right to liberty and security of person, secrecy of communication and non-interference with private life during covert investigative (search) actions in criminal proceedings should be considered not only as general principles of criminal proceedings, but also as rights and freedoms guaranteed by the Constitution of Ukraine and the European Convention on Human Rights. The right to respect for private and family life guaranteed by Article 8 of the European Convention stipulates that public authorities shall not interfere with the exercise of this right, except such interference is in accordance with the law and is necessary. The correct determination of the subject matter and the scope of proving in a particular criminal proceeding, and the comparison of the purpose of covert measures with the circumstances to be proved, is one of the main prerequisites for ensuring guarantees of rights and freedoms in the sphere of private and family life. The study of the subject matter of proving, determination of its scope, in addition to the circumstances of the act, entails the study of the content of actions of each person who have participated in the commission of a criminal offence. ***Conclusions.*** The author concludes that the implementation of the principles of the rule of law, legality, respect for human dignity, ensuring the right to liberty and personal integrity, secrecy of communication and non-interference with private life, requires that when verifying evidence for its admissibility, not only the scope of rights and powers of actors, who make decisions on permission to covert investigative (search) actions and conduct these actions in the context of holding a certain position, of involving in a group of investigators or prosecutors shall be considered are conducted, but also the performance of such actions within the scope of the pre-trial investigation in terms of legal facts and parties.

**Key words:** covert investigative (search) actions, criminal procedure, subject matter of proving, guarantees of rights and freedoms, privacy.

## 1. Introduction

The ongoing reform of the criminal procedure legislation, the introduction of such a new institution as covert investigative (search) actions (further – CI(S)A) and significant changes to the organisation and conduct of these actions in connection with the introduction of martial law require a rethinking of approaches to ensuring guarantees of human rights and freedoms, improving the practice of applying covert actions to obtain information, including in the field of judicial control, when considering applications for permission to conduct them, and using the results of CI(S)A in other criminal proceedings. The legality and validity of conducting CI(S)A, as well as the observance of human rights and freedoms during their conduct, largely depends on the correct definition of the subject matter of proving, which in its essence limits the scope of interference by the prosecution with a person's private life by determining the circumstances to be proved. Evaluation of evidence obtained in the course of conducting CI(S)A outside the scope of the subject matter of proving in criminal proceedings results not only in

the inadmissibility of such evidence, but also in grounds for recognising the actions (activities) of operational units, investigators and prosecutors as committed in excess of authority and contrary to the established procedure.

The issues of proving in criminal proceedings, organisation and conduct of covert investigative (search) actions have been under focus in the works by: V.D. Arseniev, Yu.M. Hroshevyi, O.V. Kaplina, V.T. Nor, O.Ye. Omelchenko, M.A. Pohoretskyi, D.B. Serhieieva, V.I. Farynnyk, I.V. Tsiupryk, and many others. However, insufficient attention has been paid to the issues of correlation between the purpose of a particular covert action and the subject matter of proving in criminal proceedings, assessment of such evidence for its admissibility, as well as assessment of such actions performed by the prosecution as committed outside the scope of their authority.

The purpose of the article is to study the correlation between the subject matter of proving and the purpose of CI(S)A, and their importance for verifying evidence for admissibility, and to formulate the legal position on the assessment of evidence obtained outside the scope of pre-trial investigation in criminal proceedings.

**2. The circumstances and subject matter of proving in criminal proceedings**

The purpose of proving in criminal proceedings is to obtain knowledge as close as possible to objective reality (Omelchuk, Fedorenko, 2020).

The subject matter of proving is usually understood as the range of circumstances enshrined in law that are subject to establishment or refutation in each criminal proceeding.

Circumstances to be proved in criminal proceedings are defined in Article 91 of the Criminal Procedure Code of Ukraine (2001) and include:

1) the event of the criminal offence (when, where, how a criminal offence has been committed and under what circumstances of the criminal offence);

2) the degree of guilt of the accused in committing a criminal offence, form of guilt, motive and purpose of the criminal offence;

3) the type and amount of damage caused by the criminal offence, as well as the amount of procedural costs;

4) circumstances which aggravate, mitigate the committed criminal offense, characterise the personality of the accused, toughen or mitigate punishment, preclude criminal liability or shall be grounds for terminating the criminal proceedings

5) circumstances that shall be grounds for relief from criminal liability or punishment;

6) circumstances that confirm that cash, valuables and other property subject to special confiscation have been gained as a result of commission of a criminal offence and/or are proceeds from such property or that they were designed (used) to induce a person to commit a criminal offence, finance and/or provide logistical support to a criminal offence or reward its commission, or are a target of a criminal offence related inter alia to their illicit trafficking or are selected, made, adapted or used as means or instruments of criminal offence;

7) circumstances that are grounds for application of criminal law measures to legal entities.

The subject matter of proving is correlated with the totality of circumstances to be proved. Previously, there was an opinion among proceduralists that the subject matter of proving was limited to establishing only information indicating the fact of a criminal offence and the person(s) who committed it (Volobuiev, 2011). However, the list of circumstances to be proved set out in Article 91 of the CPC of Ukraine indicates that the subject matter of proving in criminal proceedings is not limited to information, that characterise a socially dangerous act and the person who committed it, there are a number of others, in particular: the amount of procedural costs; circumstances that characterise the person, exclude criminal liability of the act or are grounds for terminating the proceedings, etc.

Sometimes the subject matter of proving is correlated with the scope of proving.

According to M.M. Mykheenko, the scope of proving is a totality of evidence (evidence and its sources) that will ensure reliable, consistent establishment of all circumstances that are the subject matter of proving, correct resolution of the case and taking measures to prevent crimes (Mykheenko, 1984). Therefore, there is an opinion: "...if the subject matter of proving can be viewed as the horizontal limits of investigation of circumstances, then the scope of proving determines the depth of investigation of these circumstances", and "The scope of proving is determined by the totality of evidence necessary to recognise the circumstances that are the subject matter of proving as sufficiently established" (Karneeva, 1962).

These perspectives reveal that "the subject matter of proving", "the scope of proving", "circumstances to be proved" are usually considered in terms of sufficiency for: serving a person with a notice of suspicion, making certain other procedural decisions, and rendering a court decision. That is, as a necessary, sufficient minimum for making a certain procedural decision.

This is primarily due to the tasks of criminal proceedings set out in Article 2 of the CPC of Ukraine as follows: protection of a person, society and the state from criminal offences,

protection of rights, freedoms and legitimate interests of participants in criminal proceedings, as well as ensuring prompt, full and impartial investigation and trial, so that everyone who has committed a criminal offence is brought to justice to the fullest extent of his or her responsibility, no one who is innocent is accused or convicted, no one is subjected to unreasonable procedural coercion and due process is applied to everyone involved in criminal proceedings.

The formulation of the tasks of criminal proceedings in this way indicates that the rights of an individual, society and the state to protection from criminal encroachments, the rights and legitimate interests of participants in criminal proceedings, and the application of due process to each participant in criminal proceedings are decisive. However, the rights and freedoms of a person who is not a victim of criminal proceedings, suspect, accused, defendant or other participant, but who is subject to covert investigative (search) actions during the pre-trial investigation that significantly restrict his or her rights and freedoms, are not allowed for.

The protection of the rights of such people is beyond the scope of criminal proceedings, which to some extent contradicts the provisions of Article 3 of the Constitution of Ukraine, which guarantees: "A person, his/her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the content and direction of the state's activities. The state is accountable to the individual for its activities. The promotion and protection of human rights and freedoms is the primary duty of the state," as well as Article 8 of the European Convention, which recognises "necessary" as one of the conditions for public authorities to interfere with private and family life.

Therefore, based on the provisions of Article 3 of the Constitution of Ukraine, Part 2 of Article 8 of the European Convention, the general principles of organising and conducting CI(S)A, defined in Chapter 21 of the CPC of Ukraine, the subject matter of proving in criminal proceedings, its scope should be determined not only in terms of their sufficiency to prove the guilt of a person, but also be limited to the circumstances of the criminal offence under investigation, the person in respect of whom it is being investigated.

This aspect is related to the fact that, on the one hand, unlike operational and investigative activities, the conduct of CI(S)A is not limited to the person being checked for involvement in a crime, but may concern an indefinite number of persons, including witnesses, victims and other participants, and, on the other hand, the absence of prohibitions and clear boundaries of the subject matter of the pre-trial investigation allows the prosecution to conduct these measures to establish circumstances that are not the target of investigation in the criminal proceedings under which they are conducted.

For example, during the pre-trial investigation of a criminal proceeding on the sale of drugs, the investigator found that an employee of a penitentiary institution agreed to transfer a drug to a convicted person for a financial reward. However, after the investigator received information about the fact of acceptance of the offer of unlawful benefit, no criminal offence under Article 368 of the Criminal Code of Ukraine was registered. Instead, despite the fact that the target of the pre-trial investigation was only an act related to drug trafficking, the investigator commenced CI(S)A on the fact of accepting an offer of unlawful benefit, namely, noting, instructing and handing over money and other items to the person in order to verify the information about the receipt of drugs by the person in respect of whom CI(S)A are conducted for transfer to the convict and the unlawful benefit for committing these actions.

**3. Investigation of the subject matter of proving in court proceedings**

The court of cassation during the review of court decisions in this part concluded that at the time of the above actions, which are components of CI(S)A, that is control over the commission of the offence, the criminal proceedings under Article 368 of the Criminal Code had not been registered, respectively, CI(S)A were conducted contrary to the provisions of Article 214 of the CPC, before the registration of criminal proceedings and was carried out without proper procedural grounds (Resolution of the Supreme Court No. 346/553/15-k, 2022).

Relying on the analysis of this court decision, we can conclude that despite the fact that these CI(S)A were conducted with formal compliance with the requirements set out in Chapter 21 of the CPC of Ukraine: in criminal proceedings on a grave crime; in case when information about the criminal offence and the person that committed it cannot be obtained in any other way, based on a decision made by an authorised person, its results are recognised as inadmissible evidence, since the prosecution went beyond the scope of the pre-trial investigation in criminal proceedings when obtaining permission and conducting CI(S)A.

Furthermore, the study of the subject matter of proving, determination of its scope, in addition to the circumstances of the act, entails the study of the content of actions of each person who have participated in the commission of a criminal offence. However, the procedure

for obtaining and recording evidence in relation to special actors for whom some particularities are defined in the legislation (attorneys, judges, law enforcement officers, MPs) has differences. For example, the CPC of Ukraine, Article 247, part 2, provides that consideration of applications for permission to conduct covert investigative (search) actions against judges, court and law enforcement officers and/or in the premises of judicial and law enforcement bodies, which is referred to the powers of the investigating judge in accordance with the provisions of this chapter, may be performed by an investigating judge of the relevant court of appeal outside the territorial jurisdiction of the pre-trial investigation body conducting the pre-trial investigation.

In other words, if the subject matter of the pre-trial investigation is the actions of judges, court officials and law enforcement officers, or such actions take place on the premises of judicial and law enforcement bodies, the investigating judge authorised to consider the application for permission to conduct CI(S)A may be an investigating judge of another court that is most geographically close to the court. In such a case, when assessing the grounds for granting permission to conduct CI(S)A in relation to a special actor (premises), establishing the correspondence between the subject matter of the pre-trial investigation and the activities subject to control during covert actions is also crucial for assessing admissibility of evidence obtained.

For example, when assessing the results of CI(S)A for admissibility, the panel of judges of the Third Judicial Chamber of the CCU of the Supreme Court (Resolution of the Supreme Court, 2021) underlines that during criminal proceedings on charges of Person 1 under Part 1 of Article 366, Part 3 of Article 368 of the Criminal Code of Ukraine, the prosecution unreasonably identified the suspect (accused) as a special actor – a law enforcement officer. Therefore, having incorrectly determined that the crime under investigation was committed by a law enforcement officer, the prosecution appealed to an investigating judge of the Court of Appeal outside the territorial jurisdiction. As a result, the court stated that since the accused was not a law enforcement officer, the investigating judge of the Court of Appeal outside the territorial jurisdiction did not have the procedural rights to grant permission to interfere with the private life of a person, and evidence obtained during these actions was inadmissible.

**4. Conclusions**

The implementation of the principles of the rule of law, legality, respect for human dignity, ensuring the right to liberty and personal integrity, secrecy of communication and non-interference with private life, requires that when verifying evidence for its admissibility, not only the scope of rights and powers of actors, who make decisions on permission to CI(S)A and conduct these actions in the context of holding a certain position, of involving in a group of investigators or prosecutors shall be considered are conducted, but also the performance of such actions within the scope of the pre-trial investigation in terms of legal facts and parties.

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# ДОПУСТИМІСТЬ ДОКАЗІВ, ОДЕРЖАНИХ ПІД ЧАС ПРОВЕДЕННЯ НЕГЛАСНИХ СЛІДЧИХ (РОЗШУКОВИХ) ДІЙ ПОЗА МЕЖАМИ ПРЕДМЕТА ДОКАЗУВАННЯ У КРИМІНАЛЬНОМУ ПРОВАДЖЕННІ

**Анотація.** ***Мета.*** Метою роботи є дослідження співвідношення предмета доказування та мети проведення негласних слідчих (розшукових) дій, їх значення для перевірки доказів на предмет допустимості, формулювання правової позиції щодо оцінки доказів, одержаних поза предметом досудового розслідування у кримінальному провадженні. ***Результати.*** Забезпечення верховенства права, законності, права на свободу та особисту недоторканість особи, таємниці спілкування та невтручання у приватне життя під час проведення негласних слідчих (розшукових) дій у кримінальному провадженні слід розглядати не лише як загальні засади кримінального судочинства, а й як права і свободи, гарантовані Конституцією України, Європейською Конвенцією з прав людини. Гарантоване ст. 8 Європейської Конвенції право на повагу до приватного і сімейного життя передбачає, що органи державної влади не можуть втручатись у здійснення цього права, за винятком випадків, коли втручання здійснюється згідно із законом і є необхідним. Правильність визначення предмета та меж доказування у конкретному кримінальному провадженні, співставлення мети проведення негласних заходів з обставинами, що підлягають доказуванню, є однією з головних передумов забезпечення гарантій прав і свобод у сфері приватного та сімейного життя людини. Дослідження предмета доказування, визначення його меж, крім обставин вчинення діяння, зумовлює дослідження змісту дій кожної особи, яка брала участь у вчиненні кримінального правопорушення. ***Висновки.*** Зроблено висновок, що реалізація принципів верховенства права, законності, поваги до людської гідності, забезпечення права на свободу й особисту недоторканість, таємниці спілкування та невтручання у приватне життя передбачає обов'язок під час перевірки доказів на предмет їх допустимості враховувати не лише обсяг прав та повноважень суб'єктів, якими ухвалюються рішення про дозвіл на проведення негласних слідчих (розшукових) дій та проводяться зазначені заходи в контексті перебування на певній посаді, включення до складу групи слідчих чи прокурорів, а й щодо вчинення таких дій у межах предмета досудового розслідування за фактичним та суб'єктним складом.

**Ключові слова:** негласні слідчі (розшукові) дії, кримінальний процес, предмет доказування, гарантії прав і свобод, таємниця приватного життя.

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# GUARANTEES OF ATTORNEY-CLIENT PRIVILEGE IN ENSURING HUMAN RIGHTS DURING INVESTIGATIVE (SEARCH) AND COVERT INVESTIGATIVE (SEARCH) ACTIONS BY THE SECURITY SERVICE OF UKRAINE

**Abstract.** ***Purpose.*** The purpose of the article is a comprehensive theoretical study of the guarantees of attorney-client privilege in ensuring human rights during investigative (search) and covert investigative (search) actions by the Security Service of Ukraine. ***Results.*** The article reveals the essence of the guarantees of attorney-client privilege in ensuring human rights during investigative (search) and covert investigative (search) actions by investigators of the Security Service of Ukraine. Scientific sources are reviewed in accordance with the chosen topic. It is emphasised that if it is necessary to conduct a search, the investigator, with the consent of the prosecutor, or the prosecutor shall file a relevant motion with the investigating judge that shall contain information on 1) the name of the criminal proceedings and its registration number; 2) a brief summary of the circumstances of the criminal offence in connection with the investigation of which the motion is filed; 3) legal classification of the criminal offence, indicating the article (part of the article) of the law of Ukraine on criminal liability; 4) the grounds for the search; 5) the person's dwelling or other property or part of the person's dwelling or other property where the search is planned; 6) the person who owns the dwelling or other property and the person in actual possession of it; 7) things, documents or persons to be found out. ***Conclusions.*** It is concluded that the guarantees of holders of attorney-client privilege during certain investigative (search) and covert investigative (search) actions by the SSU investigators include: inadmissibility of interrogation of the holders of the attorney-client privilege as witnesses; prohibition of inspection of things and documents, including those on electronic media containing information relating to the attorney-client privilege; exercise of departmental and judicial control, as well as prosecutorial supervision over the non-interference of pre-trial investigation bodies in the activities of defence counsel, as well as information and things constituting the attorney-client privilege; determination of the jurisdiction of the appellate court to exercise judicial control over the observance of the guarantees of attorney-client privilege during the pre-trial investigation; inadmissibility of rulings by the investigating judge or court on temporary access to things and documents, containing the attorney-client privilege; mandatory involvement of representatives of the bar self-government bodies in any procedural actions against the attorney; inadmissibility of evidence obtained in violation of the guarantees of the attorney-client privilege.

**Key words:** guarantees of attorney-client privilege, investigative (search) actions, covert investigative (search) actions, investigator of the Security Service of Ukraine, criminal procedure.

## 1. Introduction

The Constitution of Ukraine grants every citizen the right to professional legal support. Its proper implementation is one of the key guarantees of observance of the rights and freedoms of citizens, promotes the rule

of law and the establishment of the legal state. One of the key elements of effective legal support is the attorney-client privilege.

Failure to comply with it negates the adversarial nature of the judicial process, impedes the effective implementation of investigative (search) and covert investigative (search) actions by SSU investigators, and turns a lawyer into an ordinary consultant, depriving a person who has sought legal support of the opportunity to effectively defend his or her rights and interests.

The following issues should be under focus: requirements for witnesses involved in the search of the attorney's home or office, the soundness of such investigative operations; the provision of additional guarantees in meeting the requirements of the legislation against money laundering. Only after these issues are resolved the establishment of an effective and human rights-oriented institution of the Bar in Ukraine is possible (Kucherena, 2003).

The issues of legal and regulatory framework for guarantees of attorney-client privilege in ensuring human rights during investigative (search) and covert investigative (search) actions by the Security Service of Ukraine have been studied by T.V. Varfolomeeva, Yu.M. Hroshevyi, M.A. Pohoretskyi, O.V. Kaplina, S.M. Lohinova, O.H. Yanovska, and others. However, the dynamic changes in the current regulatory framework make the issue under study relevant and require further scientific developments in this field.

The purpose of the article is a comprehensive theoretical study of the guarantees of attorney-client privilege in ensuring human rights during investigative (search) and covert investigative (search) actions by the Security Service of Ukraine.

**2. Regulatory framework for the institution of attorney-client privilege**

One of the important guarantees of the attorney-client privilege in the course of investigative (search) actions by the SSU investigators is the prohibition of interrogation of an attorney, his or her assistant, trainee, or a person employed by the attorney, law firm, law office, as well as a person in respect of whom the right to practice law has been terminated or suspended, in relation to information that is an attorney-client privilege (Law of Ukraine "On the Bar and Practice of Law," Article 23, part 1, clause 2).

Currently, frequently SBU investigators summon for questioning attorneys (defence counsels), their assistants, trainees, persons employed by the attorney, law firm, or law office, and attempt to obtain information from them that constitutes an attorney-client privilege (Vilchyk, 2015).

This is because there is an imperfection in the provisions of the criminal procedure legislation in force, as the CPC of Ukraine, Article 65, part 2, provides for the list of those who cannot be interrogated as a witness:

1) A defence counsel, representative of the victim, civil plaintiff, civil defendant, legal entity in respect of which the proceedings are being conducted, legal representative of the victim, civil plaintiff in criminal proceedings – on 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 an attorney-client privilege (Criminal Procedure Code of Ukraine, 2012).

According to the Rules of Professional Conduct, Article 10, part 3, disclosure of information constituting the attorney-client privilege is prohibited under any circumstances, including unlawful attempts by the inquiry, investigation and court authorities to interrogate the attorney about the circumstances constituting the attorney-client privilege.

Following the CPC of Ukraine, Article 224, part 8, a person has the right not to answer questions about the circumstances that are directly prohibited by law (confession, medical confidentiality, professional secrecy of a defence counsel, secrecy of a conference room, etc.) or which may give rise to suspicion, accusation of committing a criminal offence by him/her, his/her close relatives or family members, as well as in relation to officials performing covert investigative (search) actions and persons who confidentially cooperate with pre-trial investigation authorities. In addition, the Criminal Procedure Code of Ukraine, Article 47, part 3, provides for that a defence counsel, without the consent of the suspect or accused, has no right to disclose information that he or she has become aware of in connection with participation in criminal proceedings and constitutes an attorney-client privilege or other legally protected secret (Criminal Procedure Code of Ukraine, 2012).

Therefore, certain inconsistencies exist between the provisions of the Law of Ukraine "On the Bar and Practice of Law," Article 23, part 1, clause 2, and the CPC of Ukraine, Article 65, part 2, clauses 1, 2, and the Rules of Professional Conduct, Article 10, part 3, accordingly this leads to the impossibility of ensuring effective mechanisms for the implementation of criminal procedural guarantees of the attorney-client privilege during interrogation as investigative (search) action.

It should be noted that the investigator and the prosecutor have the right to interro-

gate the attorney and other persons who are obliged to keep the attorney-client privilege as witnesses only if the person who entrusted the relevant information has released these persons from the obligation to keep the privilege (Law of Ukraine "On the Bar and Practice of Law," Article 23, part 1, clause 2). According to the Law of Ukraine "On the Bar and Practice of Law," Article 22, part 2, and the Rules of Professional Conduct, Article 10, part 4, information or documents may lose the status of attorney-client privilege upon a written request of the client (Law of Ukraine On the Bar and Practice of Law, 2012).

The next guarantee of the attorney-client privilege during investigative (search) actions is the prohibition of inspection, disclosure, demand or seizure of documents related to the practice of law (Law of Ukraine "On the Bar and Practice of Law," Article 23, part 1, clause 4). According to the CPC of Ukraine, Article 46, part 6, documents related to the performance of defence counsel's duties are not subject to inspection, seizure or disclosure by the investigator, prosecutor, investigating judge or court without his or her consent.

Thus, the regulatory framework for the institution of attorney-client privilege during the inspection is deficient, which in turn leads to access of investigators and employees of operational units to things and documents containing information constituting an attorney-client privilege (Law of Ukraine On the Bar and Practice of Law, 2012).

According to the Law of Ukraine "On the Bar and Practice of Law," Article 23, part 1, clause 3, investigative actions against an attorney, which may be carried out only with the permission of the court, are performed on the ground of a court decision made at the request of the Prosecutor General of Ukraine, his or her deputies, the prosecutor of the Autonomous Republic of Crimea, the region, the cities of Kyiv and Sevastopol. According to T.V. Varfolomeieva, the introduction of this provision will help stop "...the vicious practice of conducting searches in attorneys' offices and attorneys' homes..." (Varfolomeieva, 2012).

**3. Criminal procedure guarantees of an attorney-client privilege during investigative (search) actions**

With regards to the issue of search, it should be noted that a search is a type of investigative (search) action conducted on the basis of a ruling of an investigating judge (CPC of Ukraine, Article 234, part 2). According to the CPC of Ukraine, Article 234, part 2, if it is necessary to conduct a search, the investigator, with the consent of the prosecutor, or the prosecutor shall file a relevant motion with the investigating judge that shall contain information on 1) the name of the criminal proceedings and its registration number; 2) a brief summary of the circumstances of the criminal offence in connection with the investigation of which the motion is filed; 3) legal classification of the criminal offence, indicating the article (part of the article) of the law of Ukraine on criminal liability; 4) the grounds for the search; 5) the person's dwelling or other property or part of the person's dwelling or other property where the search is planned; 6) the person who owns the dwelling or other property and the person in actual possession of it; 7) things, documents or persons to be found out. (Law of Ukraine On the Bar and Practice of Law, 2012).

Investigating judges should pay special attention to documents and things that may be searched. After all, in accordance with the Law "On the Bar and Practice of Law," Article 23, part 2, in case of a search or inspection of the attorney's home or other property, premises where he or she carries out the practice of law, temporary access to the attorney's belongings and documents, the investigating judge or court in its decision shall specify the list of things and documents that are planned to be found, discovered or seized during the investigative action or application of measures to ensure criminal proceedings.

When studying the problematic issues of implementation of criminal procedure guarantees of an attorney-client privilege during investigative (search) actions by the SSU investigators, it should be noted that the greatest threat to the principle of confidentiality of the attorney's activity in pre-trial investigation is the conduct of covert investigative (search) actions by the SSU investigators, which are related to interference with private communication of the attorney (Pohoretskyi, Pohoretskyi, 2016).

For example, pursuant to Article 267 of the CPC of Ukraine, a ruling of the investigating judge is a ground for an action such as an inspection of publicly inaccessible places, housing or other property of a person. According to the CPC of Ukraine, Article 267, part 1, clause 5, the purpose of such an action may be to install technical means of audio and video control of a person.

However, such control is a type of interference with private communication. However, as we have already noted, it is prohibited to interfere with private communication between an attorney (defence counsel) and his/her client.

In this context, we advocate the opinion of S.L. Savytska that it is not possible to enter the premises where the attorney carries out his/

her practice of law, his/her home or other property in order to install technical means of audio and video control of a person (Savytska, 2013). In addition, the Law of Ukraine "On the Bar and Practice of Law," Article 23, part 1, clause 4, states that it is prohibited to inspect and seize documents related to the practice of law. Therefore, such entry is not allowed for the purpose of detecting and recording these documents, making copies of them. In other cases, provided for by the CPC of Ukraine, Article 267, part 1, the entry into the premises where the attorney carries out his or her practice of law, his or her home or other property is prohibited. Covert entry and examination may be carried out in order to: detect and record traces of a grave or exceptionally grave crime, things relevant to the pre-trial investigation; make copies or samples of these things; detect and seize samples for examination; identify wanted persons.

**4. Conclusions**

To sum up, we can conclude that the criminal guarantees of attorney-client privilege in pre-trial investigation in the course of certain investigative (search) and covert investigative (search) actions by investigators include: inadmissibility of interrogation of the holders of the attorney-client privilege as witnesses; prohibition of inspection of things and documents, including those on electronic media containing information relating to the attorney-client privilege; exercise of departmental and judicial control, as well as prosecutorial supervision over the non-interference of pre-trial investigation bodies in the activities of defence counsel, as well as information and things constituting the attorney-client privilege; determination of the jurisdiction of the appellate court to exercise judicial control over the observance of the guarantees of attorney-client privilege during the pre-trial investigation; inadmissibility of rulings by the investigating judge or court on temporary access to things and documents, containing the attorney-client privilege; mandatory involvement of representatives of the bar self-government bodies in any procedural actions against the attorney; inadmissibility of evidence obtained in violation of the guarantees of the attorney-client privilege.

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# ГАРАНТІЇ АДВОКАТСЬКОЇ ТАЄМНИЦІ В ЗАБЕЗПЕЧЕННІ ПРАВ ЛЮДИНИ ПІД ЧАС ПРОВЕДЕННЯ СЛІДЧИХ (РОЗШУКОВИХ) ТА НЕГЛАСНИХ СЛІДЧИХ (РОЗШУКОВИХ) ДІЙ СЛУЖБОЮ БЕЗПЕКИ УКРАЇНИ

**Анотація.** ***Мета.*** Метою статті є всебічне теоретичне дослідження гарантій адвокатської таємниці в забезпеченні прав людини під час проведення слідчих (розшукових) та негласних слідчих (розшукових) дій Службою безпеки України. ***Результати.*** У статті розкрито сутність гарантій адвокатської таємниці в забезпеченні прав людини під час проведення слідчих (розшукових) та негласних слідчих (розшукових) дій слідчими Служби безпеки України. Зроблено аналіз наукових джерел відповідно до вибраного тематичного напряму. Наголошено, що у разі необхідності провести обшук слідчий за погодженням з прокурором або прокурор звертається до слідчого судді з відповідним клопотанням, яке повинно містити відомості про: 1) найменування кримінального провадження та його реєстраційний номер; 2) короткий виклад обставин кримінального правопорушення, у зв'язку з розслідуванням якого подається клопотання; 3) правову кваліфікацію кримінального правопорушення із зазначенням статті (частини статті) закону України про кримінальну відповідальність; 4) підстави для обшуку; 5) житло чи інше володіння особи або частину житла чи іншого володіння особи, де планується проведення обшуку; 6) особу, якій належить житло чи інше володіння, та особу, у фактичному володінні якої воно перебуває; 7) речі, документи або осіб, що планується відшукати. ***Висновки.*** Зроблено висновки, що серед гарантій адвокатської таємниці під час проведення окремих слідчих (розшукових) та негласних слідчих (розшукових) дій слідчими СБУ є: недопустимість проведення допиту суб'єктів збереження адвокатської таємниці як свідків; заборона проведення огляду речей та документів, у тому числі на електронних носіях, що містять відомості, які стосуються адвокатської таємниці; здійснення відомчого та судового контролю, а також прокурорського нагляду за невтручанням органів досудового розслідування в діяльність захисника, а також щодо відомостей та речей, що становлять адвокатську таємницю; визначення юрисдикцією апеляційної судової інстанції здійснення судового контролю за дотриманням гарантій адвокатської таємниці під час досудового розслідування; недопустимість постановлення слідчим суддею, судом ухвал щодо проведення тимчасового доступу до речей і документів, що містять адвокатську таємницю; обов'язковість залучення представників органів адвокатського самоврядування під час проведення будь-яких процесуальних дій щодо адвоката; визнання недопустимими доказів, отриманих із порушенням гарантій адвокатської таємниці.

**Ключові слова:** гарантії адвокатської таємниці, слідчі (розшукові) дії, негласні слідчі (розшукові) дії, слідчий Служби безпеки України, кримінальний процес.

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# SOME ASPECTS OF ACTIVITIES OF THE HEAD OF A PRE-TRIAL INVESTIGATION BODY DURING COVERT INVESTIGATION

**Abstract.** ***Purpose.*** The purpose of the article is to study the problematic issues of exercising the full powers of the head of a pre-trial investigation body during covert investigative (search) actions and, allowing for the practice of pre-trial investigation bodies, to propose ways to resolve them. ***Results.*** The author emphasises that today the issues of conducting covert investigative (search) actions with respect to victims (or persons against whom a crime is being prepared) with their consent are particularly relevant. This practice is not only an effective means of collecting evidence, but also contributes to the timely suppression of unlawful acts and ensures the safety of persons involved in criminal proceedings. There are many reasons why covert investigative (search) actions have not yet become an effective remedy against crime. Meanwhile, the main ones are related to legislative gaps, vividly illustrated by the practice of applying Article 273 of the Criminal Procedure Code of Ukraine that regulates the manufacture and use of identified (marked) and bogus (imitation) means for specific covert investigative (search) actions. The author identifies the need to impose on the head of the pre-trial investigation body the duty to approve the investigator's decision to terminate further covert investigative (search) action, if this is no longer necessary, and subsequently inform the investigating judge who authorised the covert investigative (search) action of the decision to terminate this investigative action. The head of the pre-trial investigation body and prosecutor (as authorised decision-makers on the use of pre-identified (marked) or bogus (imitation) means) should entrust operational units to manufacture pre-identified (marked) or bogus (imitation) means, which in turn should record in separate investigative reports the fact of identification and delivery of the relevant means to the person. ***Conclusions.*** It is concluded that despite the positive experience of implementing the provisions of the Criminal Procedure Code of Ukraine, some issues of the regulatory framework for the full powers of the head of a pre-trial investigation body have not been fully resolved and require the development of legislative provisions with due regard to the need to ensure rights and freedoms and increase the efficiency of criminal proceedings.

**Key words:** head of a pre-trial investigation body, covert investigative (search) actions, operational or controlled procurement, controlled supply.

## 1. Introduction

The head of a pre-trial investigation body is one of the main participants in criminal procedural relations on the part of the prosecution. The criminal procedure law entrusts the head of the pre-trial investigation body with resolving fundamental issues of ensuring the proper level of legality, timeliness and efficiency of the procedural activities of investigators, for the implementation thereof he or she is vested with the relevant full powers.

Despite the fact that the procedural figure of the head of the pre-trial investigation body is of significance in the science of criminal procedure and law application, there are still numerous problems that complicate or reduce the effectiveness of the procedural activities of this participant in pre-trial proceedings. In addition, it should be considered that the presence of the head of a pre-trial investigation body as an independent participant in criminal procedural legal relations in criminal proceedings has led to heated academic debate. In the modern science of criminal procedure, the full powers of this participant, their content, scope, functions and other issues are almost the central focus of research.

Improving the procedural and organisational forms of exercising full powers by

the head of a pre-trial investigation body has been under the focus in the studies by many domestic and foreign procedural scholars (V.P. Ashytko, E.I. Voronin, Yu.V. Derishev, V.V. Kalnytskyi, P.I. Miniukov, M.A. Pogoretskyi, V.A. Sementsov, O.Yu. Tatarov, L.D. Udalova, V.I. Farynnyk, M.M. Cherniakov, H.P. Khimicheva), who have contributed to making reasonable proposals for improving the national criminal justice system. However, some issues, in particular in the course of covert investigative (search) actions, still remain unresolved.

The purpose of the article is to study the problematic issues of exercising the full powers of the head of a pre-trial investigation body during covert investigative (search) actions and, allowing for the practice of pre-trial investigation bodies, to propose ways to resolve them.

**2. Role of the head of the pre-trial investigation body during covert investigation**

The analysis of practice reveals that during the pre-trial investigation, situations often arise when, in order to prevent the commission of a grave crime or crime of special gravity or to stop it, it becomes necessary to immediately remove information from transport telecommunication networks, examine a publicly inaccessible place, dwelling or other property of a person, conduct audio and video monitoring of the place, etc. We fully advocate the perspective of those scholars who propose to formulate the relevant provisions of the CPC of Ukraine in this way as to clearly regulate the possibility of conducting any covert investigative (search) action before the ruling of the investigating judge is issued (Bahrii, M.V. (2015, p. 88; Kerevych, Klymchuk, 2015, pp. 243–244; Luk'ianchykov, 2015, pp. 5–6).

A comprehensive analysis of the provisions of Chapter 21 of the CPC of Ukraine gives grounds to assert that the possibility of conducting a covert investigative (search) action before the ruling of the investigating judge is issued is provided only for the observation of a person, thing or place and for establishing the location of a radio electronic device.

According to the CPC of Ukraine, Article 250, part 1, the legislator emphasises that covert investigative (search) actions may be conducted before the ruling of the investigating judge is issued only in cases provided for by this Code. However, the possibility of using the provisions of Article 250 of the CPC of Ukraine is only mentioned in Articles 268 and 269. Therefore, O.I. Poliukhovych's perspective seems to be well-reasoned, because under the current regulatory framework, the application of the provisions of Article 250 of the CPC of Ukraine for the immediate commencement of all other covert investigative (search) actions (except for establishing the location of an electronic device and surveillance of a person, thing or place) is unlawful. Therefore, evidence obtained in this manner should be declared inadmissible (Poliukhovych, 2017, pp. 106–113).

Moreover, with the purpose of preventing possible violations of the criminal procedure law, when an investigator decides to conduct covert investigative (search) actions, including in exceptional urgent cases as defined in Article 250 of the CPC of Ukraine: observation of a place or thing, and in urgent cases – of a person (Article 269 of the CPC of Ukraine); obtaining data from electronic information systems or a part thereof, access to which is not restricted by its owner, holder or keeper or is not related to overcoming the logical protection system (part 2 of Article 264 of the CPC of Ukraine); establishing the location of a radio electronic device (Article 268 of the CPC of Ukraine), we consider it a correct practice to approve such decisions by the head of the pre-trial investigation body.

In addition, according to the Instruction on the organisation of covert investigative (search) actions and the use of their results in criminal proceedings, depending on the crime under investigation and the status of the person in respect of whom the covert investigative (search) action is being conducted, and other factors, the head of the pre-trial investigation body is authorised to approve the investigator's instruction to conduct a covert investigative (search) action to the head of another law enforcement body, including one under jurisdiction thereof the site of the criminal offence is not located, justifying such necessity.

Nevertheless, the relevant powers are provided only at the regulatory level. However, considering the positive practice, they should be reflected in the provisions of the CPC of Ukraine, and therefore it is proposed to supplement the CPC of Ukraine, Article 246, part 6, with the following provision: "In order to ensure the effectiveness of the pre-trial investigation, the investigator conducting the pre-trial investigation of a criminal offence may entrust, with the consent of the head of the pre-trial investigation body, the authorised operational units of another law enforcement body, including one under jurisdiction thereof the site of the criminal offence is not located, to conduct covert investigative (search) actions, justifying such necessity"

It should be noted that today the issues of conducting covert investigative (search) actions with respect to victims (or persons against whom a crime is being prepared) with their consent are particularly relevant. This

practice is not only an effective means of collecting evidence, but also contributes to the timely suppression of unlawful acts and ensures the safety of persons involved in criminal proceedings.

For example, visual surveillance of a person who is being threatened with murder, forced to fulfil or fail to fulfil civil law duties, or extorted money, allows to detain the perpetrators at the time of the attempted crime and prevent it from being committed; visual surveillance of the place allows to record the actions of the perpetrators of the attempted robbery, theft, etc; visual surveillance of a thing allows to prevent the illegal seizure of a motor vehicle, to obtain evidence of an attempt to commit this criminal offence by a particular person or group of persons. Similarly, locating a radio electronic device belonging to the victim (or a person against whose life, health or property, according to information entered in the URPI, a crime is being prepared) greatly simplifies the organisation of visual surveillance. Monitoring a person's mobile and/or landline phone enables to identify the communication devices used by the perpetrators and determine their current location, obtain the necessary materials for conducting a phonoscopic examination, as well as information important for making and justifying the necessary procedural decisions.

Unfortunately, the provisions of the CPC of Ukraine do not allow such covert investigative (search) actions to be carried out without a ruling of the investigating judge, even if the victim consents and initiates them. Social relations ensuring the security of persons involved in criminal proceedings should be regulated not by a special law, but by a separate chapter of the CPC of Ukraine.

In our opinion, Article 246 of the CPC of Ukraine should provide that covert investigative (search) actions under Articles 260-264, 267-270 of the CPC of Ukraine in respect of a person and property in his/her possession may be conducted with his/her consent on the basis of the decision of the investigator approved by the head of the pre-trial investigation body or the prosecutor. Moreover, the factual data obtained as a result of these actions may be used as evidence in criminal proceedings on the grounds and in the manner prescribed by the CPC of Ukraine.

According to D. Serhieieva, more than 85% of the world grave crimes or crimes of special gravity are solved due to covert investigative means, and the results of most covert means are recognised as judicial evidence by the courts of Western countries (Serhieieva, 2016, p. 487). However, an analysis of the practice of using the institution of covert investigative (search) actions shows that only 7% of their results are recognised as evidence by domestic courts.

There are many reasons why covert investigative (search) actions have not yet become an effective remedy against crime. Meanwhile, the main ones are related to legislative gaps, vividly illustrated by the practice of applying Article 273 of the Criminal Procedure Code of Ukraine that regulates the manufacture and use of identified (marked) and bogus (imitation) means for specific covert investigative (search) actions.

Some scholars propose to use in the context of Article 273 of the CPC a much wider list of means, such as, in addition to the already listed, means of disguise (material tools for changing the appearance of participants in covert investigative (search) actions, their devices, equipment, premises and transport), means of cover-up (written and oral disinformation (including documents) with respect to the participants in covert investigative (search) actions, their devices, equipment, premises and transport, etc.

This provision does not provide a clear definition of the procedure for the production, creation of identified (marked) or bogus (imitation) means for conducting specific covert investigative (search) actions, recording, which in practice gives rise to ambiguous interpretation of this provision and contradictory decisions by the courts in such cases.

The Instruction on the procedure for conducting controlled supply, controlled and operational procurement of goods, items, things, services, documents, means and substances, including those prohibited for circulation, from individuals and legal entities, regardless of ownership specifies that during a controlled supply, controlled and operational procurement, the use of pre-identified (marked) and bogus (imitation) means shall be recorded in the proper manner (Order of the Ministry of Internal Affairs, the Security Service of Ukraine and the Ministry of Finance of Ukraine on the approval of the Instructions on the procedure for the controlled supply, controlled and operational procurement of goods, objects, things, services, documents, means and substances, including those prohibited for circulation, from individuals and legal entities regardless from forms of ownership, 2017).

In general, identification (marking) of means (things, documents, substances) is a measure related to the covert addition or application of specially manufactured means, including chemical and technical means, to objects or substances in order to track the movement of marked objects and substances, their traces and to clarify other circumstances relevant to the performance of operative-search activities.

In addition, the production and use of bogus (imitation) means should be defined as a set of measures that consists in the production, storage and use of things and documents with full or partial change of basic data about a person and fictitious attributes of the documentary registration of an enterprise or organisation, separate premises, vehicle and a story about their purpose and activities in order to ensure non-disclosure of the actual information about the persons conducting or involved in the conduct.

In practice, there are different perspectives on these things, even in criminal proceedings that have been subject to review by the Supreme Court of Ukraine and the Supreme Court.

For example, while the CPC of Ukraine, Article 273, part 2, stipulates that the manufacture and production of bogus (imitation) means shall be documented in a relevant manner, in compliance with the requirements of Articles 104, 106, 252 of the CPC, this provision does not mention the procedure for documenting identified (marked) means at all. Moreover, the mechanism of transferring bogus (imitation) means (things, documents, etc. or marked material objects) to a person for use in a specific covert investigative (search) action is not regulated.

For example, in one case, the actions of the prosecution, which were formalised in single records on the course and results of a covert investigative (search) action, such as control over the commission of a crime as the process of identifying funds and their delivery to a person for further transfer to a person (case No. 727/6661/15-k), were recognised as justified and lawful. In other cases, the process of identification of banknotes by the prosecution was carried out by separate records of inspection and separate records of handing over to the person for further transfer to the person (cases No. 127/23772/16-k and No. 715/1591/17-k).

In our opinion, it is the head of the pre-trial investigation body and the prosecutor (as authorised decision-makers on the use of pre-identified (marked) or bogus (imitation) means) should instruct operational units to manufacture pre-identified (marked) or bogus (imitation) means, which in turn should record in separate investigative reports the fact of identification and delivery of the relevant means to the person.

In addition, the full powers of the head of the pre-trial investigation body (defined in Article 39 of the CPC of Ukraine) should be supplemented by the right to entrust operational units to manufacture and use identified (marked) or bogus (imitation) means.

**3. Problematic issues of the regulatory framework for the activities of the head of the pre-trial investigation body during covert investigation**

As practice reveals, the issue of initiating the question of the need to conduct a covert investigative (search) action such as control over the commission of a crime before the prosecutor remains problematic (Article 271 of the CPC of Ukraine).

We advocate O. Tatarov's perspective that situations are common when the investigator orally or in writing (providing a certificate with appropriate justification) proves to the prosecutor that he needs to make a decision to control the commission of a crime. However, this does not contribute to saving procedural time and ensuring the fulfilment of the tasks of criminal proceedings, as it creates additional obstacles to urgent actions in terms of operational or controlled procurement, controlled supply, special investigative experiment, and simulation of the crime scene. These forms of control over the commission of a crime do not involve interference with private communication or other restrictions on the constitutional rights and freedoms of a person, and therefore should be carried out by analogy with the performance of a special task to uncover the criminal activities of an organised group or criminal organisation (Tatarov, 2016, pp.72–73). In this regard, the scholar's perspective regarding the decision to control the commission of a crime by analogy with Article 272 of the CPC of Ukraine, i.e. on the basis of the investigator's resolution with the consent of the head of the pre-trial investigation body or the prosecutor's resolution, is quite correct.

Moreover, inconsistencies and some shortcomings in the procedure for completing covert investigative (search) actions do not contribute to ensuring constitutional guarantees of rights and freedoms. For example, the CPC of Ukraine, Article 249, part 5, stipulates that it is the prosecutor's duty to decide to terminate further covert investigative (search) actions if they are no longer necessary. However, by mentioning only this duty of the prosecutor in the provisions of the CPC, the legislator has not fully protected the rights of persons subject to covert investigative (search) actions (Kyrpa, 2013, p. 218).

In this case, there is no control (including judicial control) over the implementation of such actions in the course of covert investigative (search) action. In particular, there are no guarantees of termination of further interference with a person's private communication after the result of a covert investigative (search) action has been achieved, but the investigating judge's ruling has not expired.

The Ministry of Internal Affairs took some measures to unify the practice of early termination of covert investigative (search) actions and agreed with the Prosecutor General's Office (Letter No. 04/2/1-2665 outgoing No. 13 of 27 December 2013) the perspective that early termination is the completion of covert investigative (search) actions by the decision of the prosecutor before the expiry of the investigating judge's decision in the presence of circumstances that prevent the achievement of the purpose of the investigation. Moreover, an intrusion with inspection of the object, during which the purpose is achieved (Article 267 of the CPC), establishment of the location of a radio electronic device and its seizure (Article 268 of the CPC), detention of a person subject to audio or video surveillance (Article 260 of the CPC), confinement of a suspect in relation to whom information was taken from transport communication channels (Article 263 of the CPC), surveillance of a person (Article 269 of the CPC) do not require a separate the prosecutor's decision on early termination of a covert investigative (search) action due to the achievement of the purpose of the action.

In our opinion, it would be correct to impose on the head of the pre-trial investigation body the duty to approve the investigator's decision to terminate further covert investigative (search) action, if this is no longer necessary, and subsequently inform the investigating judge who authorised the covert investigative (search) action of the decision to terminate this investigative action.

The novelty proposed will regulate the practice of completing covert investigative (search) actions and will optimise the activities related to early termination of covert investigative (search) actions, in case of its termination before the expiry of the investigating judge's ruling due to the achievement of the purpose of the investigation, for example, establishing the location of a mobile terminal, searching for a person who evaded the investigation, recording the fact of obtaining an unlawful benefit with the detention of a person, etc.

**4. Conclusions**

Therefore, despite the positive experience of implementing the provisions of the CPC of Ukraine, some issues of the regulatory framework for the full powers of the head of a pre-trial investigation body have not been fully resolved and require the development of legislative provisions with due regard to the need to ensure rights and freedoms and increase the efficiency of criminal proceedings.

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## ОКРЕМІ АСПЕКТИ ДІЯЛЬНОСТІ КЕРІВНИКА ОРГАНУ ДОСУДОВОГО РОЗСЛІДУВАННЯ ПІД ЧАС НЕГЛАСНОГО РОЗСЛІДУВАННЯ

**Анотація.** ***Мета.*** Метою статті є дослідження проблемних питань реалізації повноважень керівника органу досудового розслідування під час проведення негласних слідчих (розшукових) дій та з урахуванням практики діяльності органів досудового розслідування запропонування шляхів їх вирішення. ***Результати.*** Наголошено, що на сьогодні особливо актуальними є питання проведення стосовно потерпілих (або осіб, щодо яких готують учинення злочину) за їх згодою негласних слідчих (розшукових) дій. Така практика є не лише ефективним засобом збирання доказів, а і сприяє своєчасному припиненню протиправних дій, забезпеченню безпеки осіб, які беруть участь у кримінальному судочинстві. Причин того, що негласні слідчі (розшукові) дії ще не стали дієвим засобом у протидії злочинності, можна назвати багато. Водночас основні з них пов'язані з прогалинами законодавства, яскравим прикладом чого є практика застосування ст. 273 Кримінального процесуального кодексу України, яка регламентує виготовлення і використання ідентифікованих (помічених) та несправжніх (імітаційних) засобів для проведення конкретних негласних слідчих (розшукових) дій. Визначена необхідність покласти на керівника органу досудового розслідування обов'язок погоджувати рішення слідчого про припинення подальшого проведення негласної слідчої (розшукової) дії, якщо в цьому відпала необхідність, та у подальшому повідомляти слідчому судді, який надав дозвіл на проведення негласної слідчої (розшукової) дії, про прийняте рішення припинити таку слідчу дію. Керівник органу досудового розслідування та прокурор (як суб'єкти, уповноважені на прийняття рішення про використання заздалегідь ідентифікованих (помічених) або несправжніх (імітаційних) засобів) повинні доручати оперативним підрозділам виготовлення заздалегідь ідентифікованих (помічених) або несправжніх (імітаційних) засобів, які своєю чергою мають фіксувати в окремих протоколах слідчих дій факт ідентифікації та вручення особі відповідних засобів. ***Висновки.*** Зроблено висновок, що, незважаючи на позитивний досвід реалізації норм Кримінального процесуального кодексу України, окремі питання правової регламентації повноважень керівника органу досудового розслідування є не до кінця вирішеними і потребують розроблення законодавчих норм з урахуванням необхідності забезпечення прав і свобод та підвищення ефективності кримінального провадження.

**Ключові слова:** керівник органу досудового розслідування, негласні слідчі (розшукові) дії, оперативна чи контрольована закупка, контрольована поставка.

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# PROBLEMS OF DETERMINING TIME LIMITS FOR APPLICATION OF SOME MEASURES TO ENSURE CRIMINAL PROCEEDINGS AND WAYS TO SOLVE THEM

**Abstract.** ***Purpose.*** The purpose of the article is to identify the measures to ensure criminal proceedings both by the time limit and by the manner of establishing such a term. ***Results.*** In the article, it is emphasised that the procedure for terminating the property attachment in case of closure of criminal proceedings by the investigator (which we consider to be measures with an unspecified time limit) is also indeterminate. Such cases are common, in particular, in proceedings in which a decision is made to seize property "without a suspect", allowing for the provisions of Articles 98 and 170 of the CPC (when the property of any individual or legal entity is seized if there are sufficient grounds to believe that the property is not the property of a suspect), that it is a material object that was an instrument of a criminal offence, retained its traces or contains other information that can be used as evidence of a fact or circumstances established in criminal proceedings, including an item that was the target of criminal offences, money, valuables and other things acquired criminally or obtained by a legal entity as a result of a criminal offence). ***Conclusions***. The analysis of the practice of applying measures to ensure criminal proceedings reveals some problems in determining the time limit of some of them. It is determined that measures to ensure criminal proceedings differ both in the time limit and in the manner of establishing such time limit. In practice, they can be considered in three categories: measures which last for a clearly defined time and which may be extended (provisional restriction on the use of a special right, removal from office, preventive measures, permission to apprehend for the purpose of compelled appearance); measures that last for a clearly defined time and cannot be extended (detention of a person, provisional access to things and documents, provisional property attachment); measures that do not have a defined time limit (personal obligation, personal guarantee, bail, imposition of a monetary penalty, property attachment, lawful detention; summons; property attachment included in the list for which permission to search is expressly granted in the search warrant and not related to items seized from circulation by law). Shortcomings of the regulatory mechanism for time limits are revealed in the application of: measures with a clearly defined time limit and those which cannot be extended and measures the time limit thereof is not defined. The author suggests ways to eliminate the shortcomings arising from the lack of definition or unclear definition of the time limits of these measures.

**Key words**: criminal proceedings, provisional measures, terms of application, problems of definition, ways of solution.

## 1. Introduction

Measures to ensure criminal proceedings are a new institute of criminal procedure law (as compared to the previously applicable legislation of Ukraine), the five-year experience of application thereof has proved its usefulness and expediency. The regulatory model of the institution of measures to ensure criminal proceedings is

the result of the implementation of European standards of human rights in the field of criminal proceedings, convergence of their procedural form in democratic countries, the development of legislation thereof is determined by making human rights and the rule of law fundamental. However, law application shows that many problems arise with regard to measures to ensure criminal proceedings due to a number of both objective and subjective factors. Every legal state seeks to ensure that the conditions for applying measures restricting human rights are clearly defined by law. After all, the application of such measures entails a restriction of constitutional rights and freedoms, so in each case it is necessary to carefully consider the time limit of this restriction. However, the institution of measures to ensure criminal proceedings is not clearly regulated in this part. Many of the regulatory shortcomings are related to gaps, conflicts and contradictions in some legal provisions governing the application of measures to ensure criminal proceedings, in particular, with regard to the time limit for their implementation. This makes it relevant to formulate scientifically sound proposals aimed at improving the current criminal procedure legislation in this part.

A number of scholars have considered the particularities of setting and observing time limits in the context of other components of the mechanism for applying measures to ensure criminal proceedings. V. M. Tertyshnyk argues that the time limits belong to the system of guarantees of human rights, as well as the entire criminal procedure - in this term, according to the scientist, any institution of criminal procedure law, any procedural document is a procedural guarantee of establishing the truth, proper investigation and resolution of criminal proceedings (Tertyshnyk, 1999, p. 13). Yu. M. Hroshevyi, V. Ya. Tatsii, A.R. Tumaniants refer to the terms as general rules of applying measures to ensure criminal proceedings, in the context of the provision on the indication of the time limit in the ruling on the application of these measures (Hroshevyi, Tatsii, Tumaniants, 2013, p. 370). The issue of observance of time limits when applying measures to ensure criminal proceedings is partially under focus in the works by O.M. Humin (2013, pp. 226-231), O.M. Bondarenko (2014, pp. 98-100), O.M. Mykolenko (2014, pp. 81-84), S.M. Smokov (2012, pp. 628-632), O.H. Shylo (2011) and others. However, this issue has not been studied in a comprehensive manner and is of interest for scientific research.

The purpose of the article is to identify the measures to ensure criminal proceedings both by the time limit and by the method of establishing such a term.

**2. Particularities of application of measures to ensure criminal proceedings**

The analysis of the practice of applying measures to ensure criminal proceedings reveals some problems in determining the time limit of some of them.

In particular, there are shortcomings in the regulatory framework for time limits when applying provisional access to things and documents (which we refer to as measures that cannot be extended). For example, in accordance with Articles 159 and 163 of the CPC, when granting permission for provisional access to things and documents, the investigating judge may grant permission for their attachment (removal). The CPC, Article 164, part 1, paragraph 7, only specifies the validity period of the ruling, which may not exceed one month from the date of its issuance. However, the legislator does not regulate the validity period of the ruling in respect of the actually seized property, which, accordingly, causes difficulties in application. Moreover, the property seized during provisional access is not considered to be temporarily seized property and, accordingly, is not subject to the procedural status of such property and the procedure for terminating provisional attachment (Article 169 of the CPC). That is why it would be correct to assume that the validity period of the ruling on provisional access to things and documents includes the time during which the investigator or prosecutor shall "dispose" of the property: return it to the owner or apply to the court for attachment (Articles 169, 171 of the CPC). Furthermore, according to Letter of the High Specialised Court of Ukraine No. 223-558/0/4-13 of 5 April 2013 "On some issues of judicial control by the investigating judge of the Court of First Instance over observance of rights, freedoms and interests of persons in the course of application of measures to ensure criminal proceedings", the expiry of the ruling on application of measures to ensure criminal proceedings indicates termination of such measures and restoration of rights and freedoms of the person in respect of whom they were applied or whose interests were concerned. However, practice reveals ambiguity in the application of these provisions. In our opinion, this issue should be resolved at the legislative level: by granting such property the status of temporarily seized after the expiry of the court ruling with the following relevant procedural effects. Thus, provisional access to things and documents should be attributed to measures with a clearly defined time limit (up to 30 days from the date of the ruling). In this regard, it is proposed to supplement Article 165 of the CPC with a new part as follows: "Things and documents seized

pursuant to the decision of the investigating judge or court, after the expiry of such decision, are considered temporarily seized property".

Moreover, the procedure for terminating the property attachment in case of closure of criminal proceedings by the investigator (which we consider to be measures with an unspecified time limit) is also uncertain. Such cases are common, in particular, in proceedings in which a decision is made to seize property "without a suspect", allowing for the provisions of Articles 98 and 170 of the CPC (when the property of any individual or legal entity is seized if there are sufficient grounds to believe that the property is not the property of a suspect), that it is a material object that was an instrument of a criminal offence, retained its traces or contains other information that can be used as evidence of a fact or circumstances established in criminal proceedings, including an item that was the target of criminal offences, money, valuables and other things acquired criminally or obtained by a legal entity as a result of a criminal offence). The CPC Code does not clearly define the procedure for cancelling the attachment of such property. That is why, in presence of grounds for closing the criminal proceedings, during the pre-trial investigation in the course thereof the property attachment has been applied, the decision to close the criminal proceedings shall be made by the prosecutor simultaneously with the revocation of property attachment (CPC, Article 174, part 3). In this regard, in our opinion, it is necessary to supplement the CPC, Article 284, part 4, subparagraph 2, with a provision according to which the investigator shall make a resolution to close the criminal proceedings if no person was notified of suspicion and/or property was not seized in these criminal proceedings. In addition, the CPC, Article 174, part 3, should stipulate that the revocation of the property attachment, if it is not subject to special confiscation, is the prosecutor's duty (and not his right, as it is now) in case he issues a resolution to close criminal proceedings.

**3. Application of personal commitment, personal guarantee and bail as measures to ensure criminal proceedings**

The issue of the time limit of such non-isolation measures as personal commitment, personal guarantee and bail (which we refer to as measures with an indefinite time limit) is also ambiguous. Unlike house arrest and detention (which we refer to as measures with a clearly defined time limit), the CPC does not specify the time limits and maximum (cumulative) periods for the application of these measures. In practice, these preventive measures are applied simultaneously with the obligations under Article 194 of the CPC. Moreover, such obligations may be imposed on the suspect or accused for a period not exceeding two months. If necessary, this period may be extended at the request of the prosecutor, and upon expiry of the period, including the extended period for which the suspect or accused was subject to the relevant obligations, the ruling to apply a preventive measure in this part ceases to be valid and the obligations are revoked. However, the CPC does not regulate whether in this case the preventive measure applied together with the obligations is terminated. This issue has not been resolved in the theoretical plane either. It becomes especially relevant when bail is applied, because after the termination of this measure of restraint, the bail that has not been turned into state revenue is returned to the suspect, accused, or pledgor. This forces investigators and prosecutors to continue applying procedural obligations to the suspect without filing a motion to extend the term of a non-isolation preventive measure (personal commitment, personal guarantee or bail). In our opinion, procedural obligations cannot be applied to a suspect separately from a non-isolation preventive measure (personal commitment, personal guarantee or bail). After all, compliance with these obligations is the main component of ensuring criminal proceedings by applying an appropriate preventive measure. Without such obligations, the measure itself is nothing more than a procedural "deception" or fiction and does not guarantee any prevention of the risks that gave rise to its application. Procedural obligations and preventive measures are inextricably linked elements of the same system. It is in these obligations that the essence of the measure is expressed. Moreover, the regulatory wording of these non-isolation measures contained in the CPC proves this: "personal obligation means an obligation to fulfil the duties assigned", "personal guarantee means a written undertaking that the person is vouched for the fulfilment of duties", "bail means a deposit to ensure the fulfilment of duties under the condition of the funds being returned". The termination of a preventive measure automatically entails the termination of procedural obligations imposed on the suspect. In this regard, the practice of the prosecution filing motions to impose procedural obligations under Article 194 of the CPC on the suspect without applying a preventive measure should be recognised as unreasonable.

The procedure for termination of measures to ensure criminal proceedings remains problematic: the CPC does not clearly specify whether it is necessary to issue a resolution (ruling) to terminate the application of a meas-

ure to ensure criminal proceedings or whether it is automatically cancelled upon expiry of its validity. In our opinion, the practice of issuing a ruling on the termination of a preventive measure contradicts the provisions of the CPC and its concept in general. Indeed, in accordance with Article 110 of the CPC, all decisions of the investigator and prosecutor shall be issued in the form of resolutions. Moreover, the decision to apply measures to ensure criminal proceedings (except for summons, provisional property attachment, detention of a person, preliminary property attachment) is made by the investigating judge or court. Therefore, an investigator or prosecutor is not entitled to issue a resolution to terminate a decision made by another party to criminal proceedings (except for the revocation of the property attachment by the prosecutor). In addition, in cases where measures to ensure criminal proceedings were applied on the basis of a decision of an investigator, prosecutor, authorised official, as well as with the consent of the prosecutor - the head of the Main Department (Office) of the SSU or the head of the territorial body of the NPU, the Director of the NABU (or his/her deputy), in case of loss of expediency of applying such a measure, should decide to terminate it, and in case of unreasonableness or illegality - to revoke it. This applies, in particular, to the provisional property attachment, detention of a person, preventive detention of a person, and preliminary property attachment. Such a decision shall be in the form of a relevant resolution.

In addition, it should be considered that, at the request of the prosecutor, the investigating judge may extend, in accordance with the term of the pre-trial investigation, the application of measures to ensure criminal proceedings, including removal from office, provisional restriction of the use of a special right and preventive measures. The latter can be extended within the pre-trial investigation for up to six months in criminal proceedings for minor or medium gravity crimes; up to 12 months for grave and especially grave crimes (except for house arrest, as according to the CPC, Article 181, part 6, the total period of keeping a person under house arrest during the pre-trial investigation may not exceed six months). In this regard, the situation is uncertain in cases where the maximum term of house arrest has expired and it is necessary to extend it beyond 6 months. Therefore, we make proposal to amend Article 181 of the CPC to determine that the total period of keeping a person under house arrest during the pre-trial investigation may not exceed six months in criminal proceedings for minor or medium gravity crimes and twelve months in criminal proceedings for grave crimes or crimes of special gravity.

**4. Conclusions**

Therefore, measures to ensure criminal proceedings differ both in the time limit and in the manner of establishing such time limit. In practice, they can be considered in three categories: measures which last for a clearly defined time and which may be extended (provisional restriction on the use of a special right, removal from office, preventive measures, permission to apprehend for the purpose of compelled appearance); measures that last for a clearly defined time and cannot be extended (detention of a person, provisional access to things and documents, provisional property attachment); measures that do not have a defined time limit (personal obligation, personal guarantee, bail, imposition of a monetary penalty, property attachment, lawful detention; summons; property attachment included in the list for which permission to search is expressly granted in the search warrant and not related to items seized from circulation by law). Shortcomings of the regulatory mechanism for time limits are revealed in the application of: measures with a clearly defined time limit and those which cannot be extended and measures the time limit thereof is not defined.

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# ПРОБЛЕМИ ВИЗНАЧЕННЯ СТРОКІВ ЗАСТОСУВАННЯ ОКРЕМИХ ЗАХОДІВ ЗАБЕЗПЕЧЕННЯ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ ТА ШЛЯХИ ЇХ ВИРІШЕННЯ

**Анотація.** ***Мета.*** Мета статті – виокремити заходи забезпечення кримінального провадження як за строком дії, так і за способом встановлення такого строку. ***Результати.*** У статті наголошено, що невизначеним є порядок припинення дії арешту майна у разі закриття кримінального провадження саме слідчим (що відноситься нами до заходів, строк дії яких не визначено). Такі випадки є поширеними, зокрема у провадженнях, в яких прийнято рішення про арешт майна «без підозрюваного» з урахуванням положень ст.ст. 98, 170 КПК (коли арешт накладено на майно будь-якої фізичної або юридичної особи за наявності достатніх підстав вважати, що воно є матеріальним об'єктом, яке було знаряддям вчинення кримінального правопорушення, зберегло на собі його сліди або містить інші відомості, які можуть бути використані як доказ факту чи обставин, що встановлюються під час кримінального провадження, в тому числі предметом, що було об'єктом кримінально-протиправних дій, грішми, цінностями та іншими речами, набутими кримінально-протиправним шляхом або отриманими юридичною особою внаслідок вчинення кримінального правопорушення). ***Висновки.*** Аналіз практики застосування заходів забезпечення кримінального провадження свідчить про виникнення певних проблем під час визначення строку дії деяких із них. Визначено, що заходи забезпечення кримінального провадження відрізняються як за строком дії, так і за способом встановлення такого строку. Практично їх можна розглядати у трьох категоріях: заходи, що тривають протягом чітко визначеного періоду часу і строк дії яких може бути продовжений (тимчасове обмеження у користуванні спеціальним правом, відсторонення від посади, запобіжні заходи, дозвіл на затримання з метою приводу); заходи, що тривають протягом чітко визначеного періоду часу і строк дії яких не може бути продовжений (затримання особи, тимчасовий доступ до речей і документів, тимчасове вилучення майна); заходи, строк дії яких не визначено (особисте зобов'язання, особиста порука, застава, накладення грошового стягнення, арешт майна, законне затримання; виклик; вилучення майна, яке входить до переліку, щодо якого прямо надано дозвіл на відшукання в ухвалі про дозвіл на проведення обшуку, та не належать до предметів, які вилучені законом з обігу). Недоліки регулювання строків відзначені під час застосування: заходів, що тривають протягом чітко визначеного періоду часу і строк дії яких не може бути продовжений, та заходів, строк дії яких не визначено. Запропоновано шляхи усунення недоліків, які виникають внаслідок відсутності визначення або нечіткого визначення строків зазначених заходів.

**Ключові слова**: кримінальне провадження, заходи забезпечення, строки застосування, проблеми визначення, шляхи вирішення.

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# НОТАТКИ