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REGULATORY AND LEGAL FRAMEWORK FOR THE CONTENT OF ADMINISTRATIVE LIABILITY OF A NOTARY: ISSUES OF THE DAY

Abstract. ***Purpose.*** The purpose of the article is to determine the specific features of the regulatory and legal framework for the content of administrative liability of a notary. ***Results.*** Administrative offences are punishable even if they have not caused any material damage. Therefore, it is quite obvious that "administrative liability" has a completely different purpose and mission. This definition only confirms and demonstrates the absence of a regulatory position of Ukrainian lawmakers on this issue. Instead, administrative law scholars have developed a number of features inherent in "administrative liability" and by which it can be distinguished from other types of "legal liability". To some extent, this compensates for gaps in legislation and reduces some of its imperfections. ***Conclusions.*** In the course of the research, the following conclusions are made. First, the particularities of the main national legal regulation regarding the regulation of "administrative liability" do not allow the use of a formalised method of documentary analysis to determine the scope of "administrative liability" of notaries. The same flaw is found in the relevant law (Law of Ukraine "On Notaries") and other specialised regulations in this field of activities (in particular, the "Code of Professional Ethics for Notaries of Ukraine"). Second, the current national administrative legislation in general has a number of shortcomings that are not conducive to both the analysis of "administrative liability of notaries" and good law application practice in general. As of today, the shortcomings of the national legal and regulatory framework for this issue are: the lack of a clear legislative definition of the term "administrative liability"; the actual blocking of further development of regulating some types of "administrative liability" (in particular, in relation to legal entities) due to the substantive features of the term "administrative offence"; insufficient (non-exhaustive) codification of legal regulations, including those of different levels of legal force, on the issues of regulating "administrative liability", which has been inherent in the current CUAO for the entire period of its existence. Third, despite a large number of scientific developments relating to the specific features of "administrative liability", law application practice is characterised by difficulties in differentiating "administrative liability" from other types of "legal liability".

Key words: legal and regulatory framework, liability, administrative liability, notarial activities, notary.

1. Introduction

To begin our study, we should acknowledge the fact that the concept of " liability" is complex and multidimensional. This leads to a large number of perspectives on this phenomenon, as well as the existence of various classifications of " liability". For example, Shevchenko Prize winner V. Morenets emphasised this fact during an open meeting at the Kyiv Mohyla Business School. Both the status of the educational institution and the business orientation of the event itself indicate an extremely wide range of applications of the concept of "liability" to denote the relevant social phenomenon in society. However, the speaker focused on the so-called "external liability", which is "the response of society to our actions. ... All legal codes, courts of all jurisdictions are the sphere of external liability" (Morenets, 2017), according to the scholar.

For example, the Free Encyclopedia emphasises that in a broad general sense, "responsibility" is not a legal term, but primarily a sociological term that expresses a person's conscious attitude to the requirements of social necessity, duties, social tasks, norms and values. Responsibility means an awareness of the essence and significance of activities, their consequences for society and social development, and the actions of a person in terms of the interests of society or a certain group" (Wikipedia (the free encyclopedia), 2020). This interpretation, in our opinion, quite clearly shows the characteristics of "responsibility" as one of the signs of internal personality traits.

The professional literature now also contains references to approaches similar to the division of "responsibility" into internal and external. The latter are used, in particular, to analyse the "legal liability" of various actors (which, in turn, include notaries). For example, M. Veselov and L. Ladina argue that: "legal liability of a notary as a structural element of ... legal status consists not only in the application of appropriate coercive measures to a notary for an offence already committed (retrospective aspect), but also in the awareness of his/her responsibility for the proper performance of duties (prospective aspect)" (Ladina, Veselov, 2021).

Of course, one can debate the effectiveness of this approach in the field of legal sciences. However, all the above suggests that "responsibility" is not only an individual's internal attitude to his or her actions and decisions, but also external "feedback" from reality that should help the individual to understand the existing norms, requirements and rules. In this case, the formation of external mechanisms of influence (primarily formalised by the state) seems to be necessary and extremely important.

The problem of the concept and features of administrative liability is not new in administrative tort law. The following scholars have studied it: V. Averianov, V. Bevzenko, Y. Bytiak, V. Harashchuk, O. Dzhafarova, O. Drozd, E. Hetman, I. Holosnichenko, P. Dikhtievskyi, R. Kaliuzhnyi, L. Kovalenko, I. Koliushko, T. Kolomoiets, V. Kolpakov, A. Komziuk, S. Kuznichenko, O. Kuzmenko, V. Kuibida, E. Kurinnyi, D. Lukianets, P. Liutikov, O. Mykolenko, V. Moroz, Y. Onishchyk, S. Petkov, H. Pysapenko, D. Pryimachenko, V. Razvadovskyi, O. Riabchenko, A. Selivanov, S. Stetsenko, V. Tymoshchuk, A. Shkolyk, I. Shopina, and others.

Considerable attention to the study of legal liability of a notary in Ukraine has been paid by the following scholars: O. Vysiekantsev, I. Haievskyi, N. Denysiak, L. Ladina, O. Nelin, O. Popovchenko, I. Sviatetska, S. Khimchenko and others. Not to underestimate the importance of the scientific contribution of each scholar to the study of the problems of legal liability of a notary, we note that some issues have not yet received their proper thorough study.

2. Specificities of forming the content of an administrative offence

At present, the legislation in force, given the importance of the phenomenon of "liability", enshrines its content in a number of terms. For example, national regulations define: Tort liability; Disciplinary liability; Material liability, etc. A search of the national regulatory framework reveals more than two dozen terms containing the word "liability" (Verkhovna Rada Ukrainy – Ofitsiinyi webportal of the parliament of Ukrainy, 2020).

Moreover, the legislation reveals the meaning of the term "liability" as an independent category. According to the Agreement "On Cooperation on the Civil Global Navigation Satellite System (GNSS) between the European Community, its Member States and Ukraine", ratified by Law No. 553-V (553-16) of January 10, 2007, this term "means the legal accountability of a person or legal entity to *compensate for damage caused* to another person or legal entity in accordance with specific legal principles and rules" (On cooperation regarding the civil global navigation satellite system (GNSS) between the European Community, its member states and Ukraine, 2005).

It should be noted that the focus on "compensation" is atypical for administrative law. After all administrative offences are punishable even if they have not caused any material damage. Therefore, it is quite obvious that "administrative liability" has a completely different purpose and mission. This definition only confirms and demonstrates the absence of a regulatory position of Ukrainian lawmakers on this issue. Instead, administrative law scholars have developed a number of features inherent in "administrative liability" and by which it can be distinguished from other types of "legal liability". To some extent, this compensates for gaps in legislation and reduces some of its imperfections.

In 2013, Yu. Harust emphasised: "It should be noted that an attempt to give the concept of 'administrative liability' an official definition was made in the Draft Code of Ukraine on Administrative Offences of 2004. According to its Article 8, administrative liability is a means of protection and defence of public relations used by the state as administrative coercion and consists in applying administrative penalties and measures of influence established by this Code to the committer of an administrative offence. However, this document remained a Draft, and the definition of "administrative liability" is still absent in the legislation of Ukraine" (Harust, 2013).

Currently, various scientific definitions of the concept of "administrative liability" are contained in encyclopaedias, professional dictionaries, textbooks and research materials. For example, the Great Ukrainian Encyclopaedia (GUE) defines administrative liability as: "a type of legal liability that occurs as a result of administrative offences committed by persons" (Banchuk, 2021). However, scientific research is by no means complete. Despite the large number of definitions, many modern professional and educational materials empha-

sise the fact that: "the concept of administrative liability, its content and scope still remain one of the most controversial issues of Ukrainian administrative and legal science" (Multimedia training manual "Administrative responsibility", 2015). Moreover, "the constant discussions on this issue are primarily due to the rather widespread practice ... (of using this concept) in legal and law enforcement activities, (and) secondly, to the uncertainty on the part of the legislator ... (of the content of the relevant term)" (Drofych, 2022), as we have already described in some detail above.

In addition, the quoted remark on law application practice is reliable evidence of the existence of relevant, duly enshrined national legal provisions in the state. Therefore, despite the absence of the term "administrative liability" in the legislation, it is possible to identify the main legal instrument that regulates its content and scope. Such instrument is undoubtedly the Code of Ukraine on Administrative Offences (CUAO).

Currently, the CUAO contains about 330 articles (some provisions have been excluded from the original content of this instrument, while others have been added, resulting in the formation of new articles of the Code). Due to the volume of the document, its card is divided into two parts with identifiers 80731-X and 80732-X. On the basis of the information contained in the first card alone, it can be noted that the Code: has led to the adoption of 4 laws; currently refers to 100 other legal documents; national legislation refers to CUAO provisions 2,244 times (Verkhovna Rada Ukrainy – Ofitsiinyi webportal of the parliament of Ukrainy, 2020). Therefore, even without analysing the second card of this legal instrument, there is every reason to assert that this codified act is undoubtedly a very powerful and important one in the field of administrative law.

However, it should be emphasised that the current Code was adopted by the Verkhovna Rada of the Ukrainian Soviet Socialist Republic on 07 December 1984. In other words, it is definitely a legacy of the Soviet system with specific inherent flaws. This explains why it has been repeatedly edited and amended. Of course, since the adoption of the Code, the attitude of legal experts to the issue of "administrative liability" has gradually changed, transformed and improved. As a result, the CUAO has now undergone more than half a thousand changes and revisions.

A purely mechanistic study of the content of the CUAO reveals that notaries and notarial acts are directly mentioned 6 times. Of these, only 1 time is a notary mentioned to be subject to "administrative liability". Namely, in Article 163-9 "Illegal use of insider information". By the way, this article was added to the Code of Administrative Offences only in 2008 (by Law No. 801-VI of December 25, 2008), and the note to this article, which mentions the notary, was introduced by Law No. 3306-VI of April 22, 2011. The latest amendments to Article 163-9 were introduced by Law No. 738-IX of June 19, 2020, that is, only about three years ago.

Despite the above information, it is quite clear that the scope of "administrative liability" of notaries is primarily related to their professional activities and cannot be limited to the above article of the CUAO. Therefore, other articles of the Code can and should be applied to notaries, including in connection with the performance of their professional duties.

Therefore, the most obvious and logical solution to this problem (defining the scope of administrative liability of a notary) is to consistently study all (about three hundred) articles of the Code in order to identify those that may apply to notaries. However, we have good reason to believe that such a utilitarian approach is not only inconvenient but, unfortunately, will not provide one hundred per cent complete and reliable results.

The explanation for this statement is based on the content of Article 2 of the Code of Ukraine on Administrative Offences. This article is entitled "Legislation of Ukraine on Administrative Offences". In particular, it states that: "The legislation of Ukraine on administrative offences consists of this Code *and other laws of Ukraine. The laws of Ukraine on administrative offences shall be directly applicable until they are incorporated into this Code in accordance with the established procedure"* (Code of Ukraine on Administrative Offenses, 1984).

Therefore, despite all the power of the CUAO, this Code does not contain all the necessary information, and the list of its provisions on the definition of "administrative liability" is not exhaustive. And the same situation (with the "direct application" of provisions not included in the Code) has been observed from the very beginning of the publication of the CUAO.

In our opinion, this state of affairs does not indicate insufficient legislative elaboration, but rather demonstrates certain dynamics of administrative and legal issues and approaches to their solution. As an example of the transformation of "administrative liability", we can cite certain facts of regulating the application of "administrative liability" to legal entities.

The issue of "administrative liability of legal entities" was considered, for example: in 2008, in the textbook edited by T. Kolomoi-

ets "Administrative Law of Ukraine", clarifying that "in addition to the CUAO, proceedings on administrative offences are regulated by ... other regulations, usually by-laws, which regulate the issue of bringing legal entities to liability" (Kolomoiets, 2008); this problem was also analysed in 2017 in the scientific article by M. Kravets "Administrative Liability of Legal Entities" (Kravets, 2017); and in 2023, under the general editorship of S. Petkov, the publication *Administrative liability of legal entities. Legislation. Judicial practice* (Petkov, 2023); at the time of the study, the relevant materials were also posted on the reference and information platform of legal consultations of the Free Legal Aid system "WikiLegalAid", in particular, the source states that "the committer of administrative offences may be an individual who has reached the age of 16, and a legal entity regardless of its form of ownership" (WikiLegalAid website, 2020). However, in the CUAO itself, "administrative liability of a legal entity" is still not properly defined.

In the context of the above, it should be emphasised that Article 9 of the CUAO, revealing the essence of the concept of "administrative offence", suggests interpreting the latter as a guilty act or omission characterised by intentionality or negligence. Moreover, in Articles 10 and 11, the Code consistently describes the features of intent and recklessness. In defining these concepts, the legislation operates with categories such as: awareness; foresight of consequences; and recklessness. Nevertheless, all of these qualities are inherent exclusively to a person as a carrier of consciousness and cannot in any way be inherent in a legal entity in general. The term "legal entity" is defined by the Civil Code of Ukraine According to it: "a legal entity is an organisation established and registered in the manner prescribed by law..., (which) is endowed with civil legal passive and active legal capacity..." (Civil Code of Ukraine, 2003). Therefore, a legal entity a-priory does not have independent consciousness. And only its worker, official, or other person involved in its creation and functioning can be aware of something. Consequently, the very definition of the concept of "administrative offense" creates certain obstacles to the regulatory frame for "administrative liability of legal entities."

Moreover, the Law of Ukraine No. 596-VIII of 14 July 2015 added a number of articles to the CUAO. Among them, for example, Article 14-2, which provided for "administrative liability" not only of an individual but also of a legal entity for traffic violations that were recorded automatically. When creating this legal provision, the legislator obviously relied not on the current definition of an "administrative offense," but on the legal entity's passive and active legal capacity. The aforementioned legislative provision existed unchanged until December 21, 2017, when the Law of Ukraine No. 2262-VIII imposed liability under Article 14-2 of the Code of Administrative Offences on the head of a legal entity instead of the legal entity. In this regard, we would like to emphasise that probably any manager who has a private car fleet of at least a dozen cars understands that the previous version of the legislative provision was more favourable and, probably, fairer.

The above example demonstrates that the provisions of the Code of Administrative Offences depend on both the dynamics of law-making and the degree of development of scientific views in the field of law. In addition, Article 15 of the Code of Administrative Offences provides for "Liability of servicemen and other persons subject to disciplinary statutes for committing administrative offences". In addition, the Code of Ukraine on Administrative Offences itself uses other (besides the above) options for solving the problems of regulating "administrative liability". For example, Article 15 of the Code of Administrative Offences provides for "Liability of servicemen and other persons subject to disciplinary statutes for committing administrative offences". This article defines the cases and range of persons for whom "administrative liability" is replaced by disciplinary liability.

Therefore, the CUAO itself transforms administrative liability and transfers it to other legal regulations. This raises the problem of separating "administrative liability" from "disciplinary liability". The same issue (but on different grounds) was mentioned by O. Lytvyn back in 2010. In his research, the scholar noted: "the current legislation theoretically allows for the possibility of disciplinary and administrative penalties to be imposed on a civil servant for virtually the same offence. However, this state of affairs contradicts the general principle of fairness of legal liability and the impossibility of double penalties for the same offence" (Lytvyn, 2010).

In our opinion, it is worth summarising the above with I. Komarnytska's observations made in 2018 on the prospects for the development of the institution of "administrative liability". The scientist noted that: "today, the legislation in the field of administrative liability is characterised by unsystematic nature, even in the presence of a codified act. ... The current sources of administrative provisions are located outside the Code of Ukraine on Administrative Offences, which does not contribute to

the improvement of its practical application" (Komarnytska, 2018). Despite the fact that about half a decade has passed since this statement, we believe that it still applies to the current situation with the issue of "administrative liability".

Therefore, for a comprehensive study of the specific features of "administrative liability" of notaries, we have to turn to the legal regulations that have more sectoral focus on regulating the legal status and activities of the notary than the CUAO. Undoubtedly, the Law of Ukraine "On Notaries", issued at the end of 1993, is the main relevant piece of legislation.

3. Liability of notaries in the legislation of Ukraine

The issues of notaries' "liability" are particularly related to the following articles of the Law: Article 8 "Notarial Secrecy"; Article 21 "Liability of a Public Notary"; Article 27 "Liability of a Private Notary"; Article 28 "Insurance of Civil Liability of a Private Notary"; Article 29-1 "Grounds for Suspension of Notarial Activities of a Private Notary"; Article 30 "Grounds for Termination of Notarial Activities of a Private Notary"; Article 51 "Measures to be Taken by a Notary or an Official Performing Notarial Acts in the Event of Detection of a Violation of the Law".

The titles of the listed articles of the Law do not all relate to the notary's "liability". For example, Article 51 merely specifies the actions that a notary must take if he or she discovers a violation of the law in the course of his or her professional activities. It does not mention the " liability" to which the notary will be subjected. As for the other articles, we will look at their content further below. However, it should already be noted that none of them mentions "administrative liability" specifically. For the most part, they address the issue of compensation for damages caused by the notary's actions. Therefore, it is actually a different type of "legal liability".

Therefore, it can be argued that the current Law of Ukraine "On Notaries" also does not provide sufficiently complete information to identify the specific features of "administrative liability" of a notary. Furthermore, while continuing to search for regulations with relevant information, we should also pay attention to documents that are available, for example, on the relevant sections of the official web portal of the Ministry of Justice of Ukraine or the official website of the Notary Chamber of Ukraine (the NCU is an organisation that exercises professional self-government in the field of notary). The latter resource presents, for example, an internal regulatory document developed in the notary system, such as the Code of Rules of Professional Ethics for Notaries of Ukraine (the Code or the Code of Ethics).

"The Code of Ethics was approved on April 20, 2018 by the Meeting of Notaries of Ukraine (the Meeting of Notaries of Ukraine is a body of the NCU). Section V of this document defines "liability" for violations of this Code. In particular, the same section sets out the classification of relevant violations. This classification provides that; "violations may be minor, serious or particularly serious. ... The classification of violations as minor, serious or particularly serious is carried out by the NCU Council" (The Code of Professional Ethics of Notaries of Ukraine, approved by the Congress of Notaries of Ukraine, 2018).

It should be noted that the national classification is in line with international practices and recommendations in the field of notary activities. Moreover, the document under consideration is certainly important and useful. However, the types of violations of the rules of professional ethics by notaries listed in the Code of Ethics (as well as their classification) relate to different types of liability (criminal, disciplinary, etc.). Therefore, the analysed document (as well as the previously considered specialised law regulating the activities of notaries) does not solve the problem of differentiating the "administrative liability" of notaries, since it does not separately differentiate this type of "liability".

4. Conclusions

In conclusion, we should state the following. First, the particularities of the main national legal regulation regarding the regulation of "administrative liability" do not allow the use of a formalised method of documentary analysis to determine the scope of "administrative liability" of notaries. The same flaw is found in the relevant law (Law of Ukraine "On Notaries") and other specialised regulations in this field of activities (in particular, the "Code of Professional Ethics for Notaries of Ukraine"). Second, the current national administrative legislation in general has a number of shortcomings that are not conducive to both the analysis of "administrative liability of notaries" and good law application practice in general. As of today, the shortcomings of the national legal and regulatory framework for this issue are: the lack of a clear legislative definition of the term "administrative liability"; the actual blocking of further development of regulating some types of "administrative liability" (in particular, in relation to legal entities) due to the substantive features of the term "administrative offence"; insufficient (non-exhaustive) codification of legal regulations, including those of differ-

ent levels of legal force, on the issues of regulating "administrative liability", which has been inherent in the current CUAO for the entire period of its existence. Third, despite a large number of scientific developments relating to the specific features of "administrative liability" (namely, the definition of a detailed list of *features* of this type of "liability"; a meaningful scientific characterisation of *sanctions and methods of ensuring legality* used to enforce "administrative liability"; a large number of proposals for the introduction of *definitions* of the term "administrative liability"; *other characteristics*), law application practice is characterised by difficulties in differentiating "administrative liability" from other types of "legal liability".

Given these features, further scientific research should focus on an important characteristic of "administrative liability" such as the "grounds" for its application. Due to its construction by combining and streamlining the various elements which determine the occurrence of "administrative liability", this scientific category looks the most promising for further study of the phenomenon of "administrative liability of notaries".

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НОРМАТИВНО-ПРАВОВЕ ЗАКРІПЛЕННЯ ЗМІСТУ АДМІНІСТРАТИВНОЇ ВІДПОВІДАЛЬНОСТІ НОТАРІУСУ: ПИТАННЯ СЬОГОДЕННЯ

Анотація. ***Мета.*** Метою статті є визначення особливостей нормативно-правове закріплення змісту адміністративної відповідальності нотаріусу. ***Результати.*** Адміністративні правопорушення караються навіть якщо вони не завдали жодної матеріальної шкоди. Отже, цілком очевидно, що «адміністративна відповідальність» має зовсім іншу мету та призначення. А наведене визначення лише підтверджує та демонструє відсутність нормативно закріпленої позиції законотворців України щодо означеної проблеми. Натомість науковцями-адміністративістами вироблена ціла низка ознак, притаманних са́ме «адміністративній відповідальності» та за допомогою яких її можна відрізнити від інших видів «юридичної відповідальності». До певної міри це компенсує пробіли в законодавстві та зменшує деяку його недосконаліть. ***Висновки.*** В межах наукової праці зроблено наступні висновки. По-перше, особливості головного національного нормативно правового акту з врегулювання проблематики «адміністративної відповідальності» не дозволяють використати формалізований метод аналізу документації для окреслення кола «адміністративної відповідальності» нотаріусів. Такою самою вадою відрізняються: й відповідний профільний закон (Закон України «Про нотаріат») і інші спеціалізовані нормативні акти в цій сфері діяльності (зокрема «Кодекс правил професійної етики нотаріусів України»). По-друге, на сьогодні чинному національному адміністративному законодавству в цілому притаманна низка вад, які не сприяють як аналізу «адміністративної відповідальності нотаріусів», так і належній практиці правозастосування в цілому. Наразі до слабких сторін національного нормативно-правового врегулювання означеної проблеми варто віднести: відсутність чіткого законодавчого визначення терміну «адміністративна відповідальність»; фактичне блокування подальшого розвитку унормування деяких різновидів «адміністративної відповідальності» (зокрема в відношенні юридичних осіб), спричинене змістовними особливостями терміну «адміністративне правопорушення»; недостатня (невичерпна) кодифікація нормативно-правових актів законодавства, в тому числі різного рівня юридичної сили, що стосуються питань врегулювання «адміністративної відповідальності», яка притаманна чинному КУпАП протягом всього часу його існування. По-третє, не дивлячись на численну кількість наукових напрацювань, які стосуються особливостей «адміністративної відповідальності», правозастосовній практиці притаманне ускладнення із диференціюванням «адміністративної відповідальності» від інших видів «юридичної відповідальності».

Ключові слова: нормативно-правове закріплення, відповідальність, адміністративна відповідальність, нотаріальні діяльність, нотаріус.