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CONTENTS

THE EFFECTIVENESS OF THE LEGAL REGULATION, OF LOCAL SELF-GOVERNMENT

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Abstract

The article deals with theoretical and legal analysis of the concept of legal regulation of social relations, its mechanism and effectiveness, which streamline the functioning of local self-government as a form of organization of local self-government power, carried out by residents of territorial communities.

Established that in its origin, local self-government in all legal systems of the world has a double nature, combining both social and state fundamentals. The choice of a model of local self-government in those states where it was poorly developed or not at all depends on the form of the political regime and the state will of the leadership, and it's further functioning on the types, directions, types and effectiveness of legal regulation.

Under the mechanism of legal regulation local self-government should be understood as the system of all the identified legal means with the assistance of which the organization of social relations is carried out. Its effectiveness is a prerequisite for the effective legal regulation of local self-government.

Keywords*: legal regulation, mechanism, social relations, local self-government, means, effectiveness of legal regulation.*

Introduction

The overwhelming majority of modern countries of the world have a unique local (municipal) self-government, which is considered to be an important component of their national legal systems, the main institutions of which in their formation had a long historical path. However, sometimes the age-old traditions, local self-government has a natural trait for evolutionary or revolutionary modifications that take place under the influence of objective factors and subjective reasons. The level of development of local self-government in the 21st century states characterizes not only the degree of their democratic system, but also determines their potential for sustainable economic growth. Further legal regulation of local self-government in the legal aspect depends, first of all, on a clear doctrinal theoretical and legal definition of the components of the identified socio-legal phenomenon, which continues to require modern and in-depth research.

Paper objective

The purpose of this publication is theoretical and legal analysis of the effectiveness of the mechanism of legal regulation of local self-government as a social phenomenon,

taking into account existing scientific developments and practices of modern domestic municipal authorities. The achievement of this goal requires, first of all, the evaluation of the theoretical and legal terms and the characteristics of the elements of legal regulation in the field of local self-government, the detailed analysis of which will provide their research at a more modern theoretical level.

In the philosophical aspect, the category of efficiency is understood as the ability of the current cause to make a certain effect. In general, the term "efficiency" (Latin "effectus") in Latin means - execution or action. In short, in the simplified sense of efficiency, it is an indicator of the implementation of a certain work with the least cost of effort. The term "efficiency" is used in many fields of natural sciences and social sciences, including jurisprudence. In legal literature, there is a perception that the cause of effectiveness is the social value, which cannot yet fully guarantee a high degree of efficiency; for this purpose, certain conditions are needed (adequacy of legal regulation for different types of interests, the perfection of legislation and law-enforcement activity, the level of the legal culture of society and the individual, the state of law, etc.) [1, p.212]. Definition of theoretical concepts is a basic component of jurisprudence. We believe that the basis of the theoretical phrase "effectiveness of the mechanism of legal regulation of local self-government" is precisely the term "regulation" borrowed from the legal terminology of Latin from the word "regula", which has the root of "regulation" - the norm, rule, and is interpreted as, which determines the direction, directs the development of something-nothing, brings order, systematicity. Legal regulation (lat. "Juris liculata"), or regulation by means of law, regulation on the basis of law, etc. in jurisprudence has several definitions that are more or less similar to each other.

Thus, the widespread assertion that the regulatory power of the law to social relations constructs a model of obligatory or permissible conduct for various subjects of these relations, which finds expression in providing one of the subjects of social relations certain rights and imposing on other certain responsibilities, linking them with the same mutual rights and responsibilities. Thus, legal regulation, which is conditioned by objective and subjective factors, is the right to social relations through the use of certain legal means [2, p.278]. In scientific circles there is a view that legal regulation can be characterized as implemented through legal means the process of streamlining social relations in order to provide a certain set of social interests that require legal guarantee [3, p.209]. There is a different view that legal regulation should be seen - the form of legal power influence on social relations, which is carried out by the state with the help of all legal means for the purpose of their ordering, consolidation and maintenance [4, p.543]. It is also necessary to listen to the fact that legal regulation is a certain process due to objective and subjective factors, such as: the level of maturity and stability of social relations, the level of social structure of society, the state of economic development of society, the general level of legal culture of the population and others, which envisages the ordering, legal consolidation and protection of public relations through the application of legal means [5, p. 298]. We also agree with the statement that the legal regulation of social relations is carried out not only by the state but also by civil society through the whole set of legal means of streamlining social relations, their consolidation, protection and development. At the same time, legal means of legal regulation are legal norms, legal relationships, acts of implementation and application of law. And legal regulation as the main legal process is the unity of three interrelated

legal processes: lawmaking, the implementation of law, the application of law [6, p.254]. That is, it can be said that legal regulation is a complex, by definition, and multifaceted legal phenomenon, which is an element of the national legal system.

Legal regulation is carried out in certain spheres of social relations - economic, political, socio-cultural, etc., that is, in the spheres of social space, which are covered by law. One of the main socio-political spheres of legal regulation is the kingdom of local (municipal) self-government. In the modern general terms, the concept of "self-government" characterizes the degree of participation of social community in relations with management, the degree of realization of its interests and the isolation of the management system from these interests [7, p.22]. Scientists in their works argue that local self-government is a specific social phenomenon, which is closely connected with state power, but differs from the latter by a number of features: firstly, local self-government is a special form of public power, which has a fundamentally different character than state. - this is a power sub-law, which acts within the limits and in the manner prescribed by law; secondly, local government has a special object of management, its sphere of competence is limited by issues related to satisfaction of everyday needs of the population, etc.: - thirdly, local self-government is a public authority of a territorial community, it has a locally-spatial character , is carried out in the interests of a territorial community and functions only within the limits of separate administrative-territorial units [8, p.62]. We believe that, first of all, local self-government needs to be described as a special type of social governance.

In scientific works, the concept of "local self-government" was introduced in the middle of the 19th century by a German lawyer Rudolf Gneist. Over time, several scientific theories (concepts) of the origin of local self-government have been formed that interpret the essence of this legal institute in different ways, especially its relations with the state (the theory of a free community, economic theory, public theory, state theory, etc.) [9, p. 16]. It should be noted that in its origin, local self-government in all legal systems of the world has a double nature, combining both social and state fundamentals. In general, most scholars are convinced that each state, depending on the specific features of its legal system, forms its peculiar form of local self-government.

At the present stage of the development of municipal law, the concept of "local self-government" has several interpretations that do not contradict each other, but only characterize various aspects of existence, the individual aspects of one phenomenon [10, p.11]. This way N.V. Kaminska while conducting theoretical and legal analysis argues that local self-government generally needs to understand the organizational form of realization of the people of the local authorities, which is intended to provide an independent (under its responsibility) decision by citizens living within the administrative-territorial unit, issues of local importance, based on interests of the population, historical and local traditions [11, p.11]. According to the concept of V.V. Popko, local self-government - is the initiative activity of the population, self-organization of citizens at the place of residence, which becomes the form of realization of public authority, is the right of the territorial community to independently solve the issues of local importance and ensure the realization of their own interests [9, p. 70]. When conducting a comparative legal analysis of legislation and scientific concepts regarding the local self-government of modern countries of the world, it is obvious that in the legal science of each of them developed its original definition of this social institution.

The theory of local self-government, which is formed on the basis of domestic and foreign utilitarian experience and scientific developments, identifies separate models (types, systems) of local self-government for forming the concepts of its further development. We join those modern scholars who distinguish five main systems of local self-government: Anglo-Saxon, Continental, Scandinavian, Iberian and «Soviet» [12, p.119]. We also need to agree with V.V. Naconechny, it is obvious that the "Soviet" system has largely departed from history and represents not so much practical, as academic interest [13, p.6]. Local government systems of most post-Soviet republics can be attributed to the continental model, which usually have their own national peculiarities.

The choice of a model of local self-government in those states where it was poorly developed or not developed at all depends on the form of the political regime and the state will of the leadership, and its further functioning on the types, directions, effectiveness of legal regulation. And all kinds of legal regulation should be divided into two basic units - normative and individual, which, first of all, are connected with each other by a common object, and secondly, they differ in the volume of social relations which are subject to legal regulation [14, p.105]. Summarizing the previous researches of scientists, T.I. Tarakonich emphasizes that normative regulation defines the rules of behavior in general, through a certain system of means, mechanisms, extends to an indefinite number of cases and has a high level of normative generalizations. And individual is a means of implementing normative regulation, by way of its concretization to certain life circumstances; has a one-time, subjective character; aimed at solving a particular situation or concerning the relevant subject. [15, p.30]. With this statement one cannot agree, because such a definition directly concerns the legal regulation of local self-government, which is carried out by the legal norms enshrined in normative acts which include: 1) international legal acts (declarations, charter, conventions, recommendations, resolutions, etc.) relating to local self-government and ratified by the supreme legislative authorities of the states; 2) state normative-legal acts (constitutions, laws and regulations) on local self-government; 3) normative acts of local self-government bodies, in particular statutes of territorial communities, regulations of local and regional self-government bodies, standard rules of development of territories, plans for socio-economic development, decision on the adoption of budgets of administrative and territorial units, etc. In a separate subgroup, scientists highlight the decisions of local or regional referendums, special regulatory agreements (target contracts, inter-industry agreements or other agreements), concluded by specially authorized entities, regulations of the relevant councils, rules, regulations, etc. [9, p.141].

Being acquainted with theoretical scientific developments and normative acts, we believe that the conceptual definition of the legal regulation of local self-government may be the following - it is a well-organized process of influence on social relations in the field of local self-government that are carried out by the state and civil society through legal norms and permits, binding and prohibited methods for the implementation of local self-governing bodies within the framework of the legislation of independent regulation and governance are essential to the public affairs, under their personal responsibility, in the interests of all local residents of the territorial communities.

In the process of streamlining public relations in the sphere of local self-government, there are various obstacles that can reduce the effectiveness of legal regulation. According to domestic scientists, depending on the presence or absence of relevant

factors in the management process, barriers are divided into those that are expressed in the presence of competing with the control of moments, as well as expressed in the absence of the necessary for effective control of the moments. The first should include offenses - it directly competes with legal regulation. To others - such moments, the lack of which also becomes an obstacle. In other words, the obstacle is not only what prevents (that is available), but also what is missing. It is precisely the mechanism of legal regulation that is a system of legal means that allows the most consistent and legal fight with offenses, since separate legal instruments cannot fully ensure this [16, p.514]. The mechanism of legal regulation in legal literature is considered on the basis of the activity approach. In general, the term "mechanism" in various fields of modern science has several interpretations, but in jurisprudence, it is most often used in the sense: 1) the internal structure, system of this phenomenon; 2) a set of states and processes from which this phenomenon is formed. With the help of the mechanism of legal regulation, the necessity of the implementation of legal regulation in society, the order of the phenomena of legal reality, their unity, interconnection and interaction are ensured, the process of transformation of legal prescriptions into the real behavior of the subjects of law [17, p.163].

Concerning the complex notion of "mechanism of legal regulation" in the theory of state and law, it has several definitions, which in their content are largely similar. So, O.F. Skakun characterizes the mechanism of legal regulation as a process of converting the normativity of law into the ordering of social relations, carried out by the subjects of legal regulation with the help of a system of legal means, methods and forms with the satisfaction of public and private interests of participants in social relations, ensuring law and order in law becomes "Existing", that is, the rules of law are transformed into lawful conduct and other legal activities of subjects of law [6, p.269]. Y.V. Krivitsky is convinced that under the mechanism of legal regulation it is necessary to understand - the system of legal means by which the stability of social relations is ensured by the most optimal combination of individual, public and state interests of members of society in order to create conditions for the progressive development of each individual [18, p.79].

A brief definition to their joint work give N.M. Krestovskaya and L.G. Matveyev, who believe that the mechanism of legal regulation - is functioning as a single system of legal means, through which the legal regulation of social relations is carried out. T.I. Tarahonich, having analyzed the opinions of various scholars regarding the interpretation of the notion of the mechanism of legal regulation, emphasizes that this legal category does not have a common understanding of its content, but also based on the fact that it is the totality (system) of legal means, methods and forms by which it is provided the regulation of social relations, the satisfaction of the interests of subjects of law, the establishment of law and order in society, the resolution of conflicts, the achievement of social compromise in the legal sphere [19, p.15]. It is generally recognized that the elements of the mechanism of legal regulation are: the rule of law, as a mandatory rule of conduct; legal relations that arise on the basis of law; legal facts with which the rules of law relate to the emergence, modification or termination of subjective legal rights and obligations. And the main methods (means) of the mechanism of legal regulation in the theory of law include permissions, prohibitions and obligations. One can confidently say that in the sphere of local self-government the prevailing type of legal

regulation prevails. Summarizing the above said, we can afford the wording of the fact that the of legal regulation of local self-government is a system of all determined legal means, with the assistance of which is streamlined social relations in the field of local self-government in the direction it desires.

The perfection of legal instruments used in legal regulation, their compliance with its goals and objectives, the nature of public relations subject to legal regulation, as well as the degree of actual implementation of these intentions reflected in the effectiveness of legal regulation [3, p.223]. The effectiveness of the legal regulation mechanism is a prerequisite for effective legal regulation.

The definition of efficiency is of particular importance in the legal concept complex "effectiveness of the legal regulation mechanism". According to P.M. Rabinovich, criterion for assessing the effectiveness of legal regulation is the ratio of the purpose of legal regulation and the real results of legal regulation [21, p.159]. A number of scholars are convinced that the effectiveness of legal regulation is its ability to lead to the highest possible positive outcomes at the expense of reasonable, reasonable and expedient costs and constraints, which is determined by two indicators: on the one hand, efficiency is calculated as the ratio between the actual and planned results of legal regulation; on the other - as the ratio of the achieved result of regulation to the costs incurred and the reported efforts [22, p. 96]. According to O.M. Melnik, the effectiveness of the legal regulation of social relations in modern conditions is a kind of "productivity of labor" of the social value of legal incentives and limitations, the coefficient of their usefulness, and conditions of effectiveness are the following circumstances, which: 1) contribute to optimal realization of the value of law, which allows better satisfying interests subjects of law; 2) assist subjects in achieving this value, its use [22, p.165]. We agree with the statement that the effectiveness of the mechanism of legal regulation is a measure of achieving the expected result of legal regulation, or the relationship between the established goal of legal regulation of social relations and real results (the purpose of the result). The fact that the effectiveness of the mechanism of legal regulation means the optimal measure of the purposeful influence of the right to social relations, that is, achieving the goal - obtaining the intended and desirable for the creator of the legal norms of the results of their implementation [6, p.271]. The general effectiveness of legal regulation is ensured by: the effectiveness of the legal act itself; the effectiveness of procedural and procedural mechanisms for the application of a legal act; the effectiveness of the implementation and implementation of the legal act [23, p.12]. The same definition also fits into the characteristics of the effectiveness of the legal regulation mechanism.

The effectiveness of the legal regulation of local self-government should be enhanced by, first of all, an improved legislative definition: the territorial basis of local self-government through the introduction of a self-governing administrative unit - a territorial community; the status of territorial communities of settlements, which are under the jurisdiction of local self-government bodies of other administrative-territorial units; circles of issues related to the exclusive powers of territorial communities, the order of their internal organization, the order of creation and reorganization of territorial communities, the creation of united territorial communities, their associations and agglomerations; various forms of direct democracy, changes in the status and order of formation of municipal bodies; the procedure for delegation of authority to local self-government

bodies and state authorities, forms for monitoring the implementation of delegated powers, as well as the responsibility of executive authorities and bodies of local self-government, their officials for non-fulfillment or improper performance of delegated powers, etc. In addition to the above-mentioned legal measures, we also support the following statements by scholars that the further development of local self-government and its transformation, in accordance with the requirements of time, depends to a large extent on personnel professionally and philosophically prepared for creative professional work in the community or bodies of local self-government [24].

Effective local government is possible only under conditions of high civil activity, since it is citizens who solve the problems facing them, creating for these public associations and other non-profit, non-profit organizations [25, p.122]. T.S. Smirnov divided the forms of citizens' right to participate in local self-government into individual, universal and collective [10, p.202]. This is primarily: participation in local referendums, elections, general meetings of citizens at their place of residence; service in local self-government bodies; appeals in court of decisions, actions or inactivity of local self-government bodies, their officials; the right to send individual and collective written appeals or to personally address the bodies of local self-government, their officials; compensation at the expense of local self-government of material and moral damage caused by illegal decisions, actions or inactivity of local self-government bodies, their officials in the exercise of their powers; participation in public examination, etc.

Legal protection of local self-government is the basis of the effectiveness of legal regulation. Thus, in the Universal Declaration of Local Self-Government adopted at the XXVII International Congress on September 26, 1985 in Rio de Janeiro (Article 11), "Local authorities should be empowered to use legal means to protect their autonomy within the limits of the laws establishing their functions and protect their interests "[26, p.69]. This provision was fixed in the following international and state (national) regulations in almost the four countries of the world.

Conclusion

Summing up the above we come to the main conclusion that the effectiveness of the mechanism of legal regulation in the field of local self-government is its purposeful ability to direct and direct the activities of local self-governing bodies (municipalities) of all levels to the desired positive results with the help of law and the whole set of legal measures, methods and types. The increase of the effectiveness of legal regulation of local self-government can be achieved first of all by streamlining the existing and adoption of new international and national normative acts on the basis of the latest theoretical and legal developments in the process of rapprochement and communication of scientific achievements of different countries of the world.

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COMPLIANCE: TERM, DEFINITION AND OBJECTIVES WITH SPECIAL REFERENCE TO GERMAN AND EUROPEAN LAW

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Abstract

The subject of this article is the concept of compliance, which has gained more and more importance in jurisprudence and jurisdiction and for business corporations over recent years. Its origin, relevance and intention is explained in the German and European legal systems and illustrated with examples from these jurisdictions. After the establishment of compliance as an Anglo-Saxon legal term, this term also spread to continental Europe. As a legal definition is lacking, in Germany at least, the scope and content of compliance is not clearly defined, so that in particular there are certain demarcation problems in internal corporate rules in the field of compliance. The abstract definition of the term must follow the intention of compliance. Liability and damage should be largely avoided, or reduced to a minimum, if they do occur. This should be ensured in a first step by legitimate behavior by corporate bodies and employees and in a second step through a prevention-oriented compliance organization headed by a compliance officer. Liability risks have increased significantly for companies in antitrust law since the relevant authorities, the Federal Cartel Office of Germany and the European Commission, have intensified prosecution and the fines imposed have been so high that they affect the performance of a company. This, and sanctions against the responsible corporate bodies and employees, partly in the form of criminal liabilities, has put compliance efforts in the center of the activities of companies.

Keywords*: Compliance, Self-Commitment, Control System, Acting Part, Organizational Part, Internal Regulations, External Regulations, Scope of Compliance, Responsibility, Lawful Behavior, Damage, Liability, Sanctions, Antitrust Law, European Commission, European Court of Justice*

1. Development of the Term

Compliance was used in the legal terminology in the 1960's in the US as a result of competition law violations in the "Electrical Cases". As a result of the cartelization of the American electrical industry illegal market sharing and price fixing occurred. The following public discussion made US companies aware that antitrust violations could be avoided through preventive action [1, p.65].

This development was reflected in the topics and number of articles which were published in the US competition and antitrust law journals. The term "compliance" was used in the titles of those articles and had become an integral part of the legal literature that dealt with questions about the legal advice to companies in the field of antitrust compliance, antitrust compliance programs, and various methods to promote lawful action by employees, the drafting of practice manuals, and proposals for compliance programs [2].

At the same time, at the time of the Cold War, US industry had developed concepts to comply with US export control laws [3], which regulated exports to Eastern Bloc countries. The aim of these so-called "compliance programs" was compliance with

legal export requirements through the proper processing of administrative forms. [4, p.73]

In the late 1980s and early 1990s, the word "compliance" as a legal term spread to the banking and financial industry, triggered by infringements and claims for compensation in the areas of insider trading, corruption and money laundering.[5, p.73] It was recognized that through a self-commitment to comply with laws [6] and create an effective control system, both of which were included in the meaning of the term "compliance", exemption from liability and punishment, or at least a reduction or mitigation of sanctions, could be obtained.[7] Organizational units, which have been named compliance units, evolved in the early 1990s, first in those banks which engaged in the security services business as a core business.[8]

2. Definition of the Term

As the historical development illustrates, the term "compliance" is an import from Anglo-Saxon legal terminology [9], and means "observance, accordance, obedience, and rule are following».

The content and scope of compliance in Germany is not precisely and uniformly defined in the legal debate, especially since a legal definition is lacking. However, there is consensus in regards to the dual structure [10] of compliance, which can be divided into acting and organizational parts [11].

2.1. Acting Part

In terms of the action element, compliance is compliance with external and internal corporate regulations and the prevention of violations of these regulations, in other words lawful conduct. The terms compliance and consistency, as well as preventing and avoidance of infringements are used interchangeably in the literature. [12]

2.1.1. Material Scope of Application

In question is the material scope of application for the acting party in terms of both regulations outside the company and internal corporate rules.

It is beyond dispute that compliance includes the observance of all legal rules which apply to a company [13], regardless of whether they serve the interests of the company or have the protection of third parties.[14, p.33] In the legal literature specific terms such as "legal provisions" [15, p.2], "legal orders and bans" [16] and "legal requirements" [17] are mentioned in the area of compliance, but they are neither systematically nor substantially defined in regards to the term "legal rules" and are consequently used as conceptual alternatives.

Furthermore, in the legal literature the material scope of application of the acting part is broadened to external regulations, some of which are concrete, and others of which are vague. Regulatory rules, such as those of the Banking and Financial Regulatory Authority, court decisions, administrative acts and contractual obligations are considered to be in the scope of external regulations.[18] However, compliance is very closely linked with the duty to comply with any applicable rule and to observe any relevant requirement, without making any specifications. [19, p.2]

The opinion that ethical and moral principles, derived from socio-political and socio-cultural standards, would also be within the material scope of application, if compliance is understood within the company as a supra-legal topic, is discussed. In the discussion it is pointed out that in practice compliance is not primarily used to comply with non-legislative standards. [20]

Furthermore, according to prevailing opinion [21] the internal corporate regulations of a company are within the material scope of application of compliance, in particular corporate policies. [22]

Comparable to the opinion on external regulations, the view of internal regulations in the legal literature expands the material scope of application for internal regulations beyond internal corporate policies. Specifically, the acting part is extended to company charters, articles of associations, procedural rules, by-laws, business directives, and codes of conduct, job descriptions, and work instructions.[23] The legal assessment that employment and service contracts [24, p.1] are internal regulations and therefore are within the material scope of application cannot be accepted, because these contracts may not be unilaterally designed and declared effective by the company, as the legal nature of contracts requires the consent of at least two parties for a mutually binding legal transaction.

It is left open in the discussion whether internal rules derived from the relevant and applicable laws may also include voluntary commitments by a company which go beyond the legally required frame. [25]

2.1.2. Personal Scope of Application

The company itself, its corporate bodies and every single employee, are responsible for compliance with external and internal regulations, and in particular legal requirements and internal company policies. [26]

2.2. Organizational Part

In addition to the acting part, the organizational part is the second essential component of compliance, as this ensures lawful behavior. The organizational part comprises all organizational measures [27], which are required to [28] ensure pre-emptively compliance with external and internal regulations that are applicable to the company and its activities.

Here there is no difference between corporations, LLC [29] and public companies [30], as in both organizational frameworks the rule must be to prevent violations of the law. The extent of organizational measures is determined by the complexity of the corporate structure, the cross-border legal forms and the various business areas of the company. [31]

2.3. Competence and Scope

Compliance is the responsibility of the management of the company [32, p.839], for the LLC [33, p.25] the managing director and for the joint stock company [34] the board of directors, which in practice regularly delegate this task to a Compliance Officer, sometimes a member of the company's management, or relevant departments [35]. The German Corporate Governance Code states in para. 4.1.3 that the board of directors of public companies has the responsibility to ensure compliance with the law and the guidelines issued by the board. [36]

Compliance is a company-wide requirement, which includes the entire company [37] and focuses on critical business aspects, such as essential legal and economic areas [38] of the company. A reduction in the scope [39] of specific compliance fields, such as competition law and anti-corruption law is inadmissible because full compliance with all relevant legislation relating to the company must be ensured.

2.4. Summary

In legal terminology compliance consequently means that the company itself, and its corporate bodies and employees, comply with external and internal regulations, in particular legal requirements and internal company policies, by using organizational measures which are the responsibility of the company's management and involve the entire enterprise.

3. Objectives of Compliance

Compliance aims to ensure correct conduct by corporate organs and employees, and to prevent or minimize liability and indemnities for the company, its corporate bodies and employees. [40]

3.1. Lawful conduct by the institutions and staff

From the definition of compliance it is self-evident that lawful behavior by the corporate bodies and employees in their respective positions in the company is an objective. Any action by individuals in the legal sphere outside the company, when they are not acting as a legal representative of a company, is not included, for example in purely private legal relations, because employees generally carry no responsibility to align their private lives with the interests of their employers [41]. Accordingly, compliance includes only acts by corporate bodies and employees which are performed in the name of the company and may be attributed to it.

Successful compliance firstly requires the commitment of the acting individuals to lawful behavior [42]. This requires knowledge of the applicable regulations, and clarity about their applicability.

In recent years, companies have been increasingly exposed to regulatory rules that have led to new complexities in industry-specific and general areas of law. [43] In particular, Antitrust Law [44], Capital Markets [45], Insurance and Banking Law [46], Environmental Law [47], Data Protection Law [48], Insolvency law [49], and Accounting Law [50] are affected.

Furthermore, foreign jurisdictions cannot be ignored, since they are applicable to international corporations with foreign subsidiaries and / or to the parent company, as well as worldwide operating companies. Especially in the highly globalized economy, there is a worldwide interconnection between manufacturers, suppliers, and distributors that forces them to comply with the legal requirements of different countries and international organizations [51].

The provisions of the US Sarbanes-Oxley Act of 2002, have a direct impact on European companies whose shares are traded on a US stock exchange or for other reasons have to report to the US Securities and Exchange Commission [52], because this act requires the implementation of compliance policies [53].

However, the risk of misconduct increases because of an increasing number of national and international regulations. Lawful conduct must be enabled by internal

regulations, which have to be issued with reliable and clear behavioral instructions. [54] The explanation and instruction of one single abstractly formulated legal norm is not sufficient. The challenge for companies is to comply with all applicable national requirements and, when a cross-border implication exists, to know the respective foreign and international legal requirements and to comply with those. Effective application requires from the company the internal organizational implementation of regulations [55], such as policies, by-laws, business directives, codes of conduct, etc.

Consequently, compliance ensures legal clarity for corporate bodies and employees by summarizing external regulations in internal regulations which can be more easily understood, as external regulations, which are extensive, complex, and often confusing, and therefore need legal expertise [56], have to be applied by the company to ensure legal certainty [57] for the acting persons.

Therefore, Siemens describes, in its Business Conduct Guidelines, in the light of the difficulty of antitrust assessments because of different applicable regulations for each country and case, as well as special antitrust requirements for major corporations, certain generally binding procedural obligations that may lead to a violation of antitrust laws and are therefore prohibited for their employees. [58]

3.2. Liability Prevention and Damage Reduction

The second intention of compliance is to avoid liability claims by third parties and other legal and financial disadvantages that may arise from public sanctions. Damage prevention is the main aim [59]. In the case of infringement, compliance intends to minimize the damage in terms of civil, public and criminal consequences for the company, its corporate bodies and employees [60].

3.2.1. Liability Prevention

Compliance shall prevent risks which cause liability for the company. Antitrust Law, Capital Market Law, Tax Law, Criminal Law, to name a few, define liability situations which lead to liability consequences for the company, its corporate bodies, and employees if they commit certain infringements [61].

Civil and criminal liabilities have to be distinguished. The first can affect the company and its bodies and employees directly, while the latter exclusively applies to natural persons.

On the other hand, each legal field defines different liability requirements that serve the respective purpose and regulation, and sanction very specific behaviors in certain economic sectors. [62] Finally, the national and international liability consequences still have to be accepted. Fines under the Competition Law of the European Union can only be imposed on companies, while the German Antitrust Law allows for the imposition of fines on both companies and the acting person [63, p.99].

In recent years, the awareness of liability risks has increased at companies, since the state prosecution activities have been strengthened in Germany and within the entire European Union. The liability amount, only in relation to fines and disgorgements, has now reached dimensions that can be relevant for the business result. [64] In individual cases, fines of up to 660 million Euros were imposed by the Federal Cartel Office of Germany. The European Commission even imposed a fine of 1.4 billion Euros for the cartel members in the "Autoglas-Case"[65]. In its judgment on 06.12.2014, the ECJ confirmed [66] the European Commission's decision of 13.5.2009, in which it stated that the American microprocessor manufacturer Intel had taken advantage of its

dominant position in the market in breach of Art. 102 TFEU [67] and sentenced Intel to a fine of 1.06 billion Euros, the highest ever for a single cartel member. [68]

The complexity and amount of liability in relation to third parties can clearly be shown in the Antitrust Law that has become the focus of the compliance efforts of companies. Antitrust violations can lead to fines against companies, but also to sanctions against the responsible bodies and employees, either as administrative fines or as criminal penalties, e.g. in the case of subsidy fraud. Furthermore, companies are exposed to damage compensation claims from third parties affected by their cartel agreements and authorities may ban further orders. [69, p.99]

If there is a breach of the cartel prohibition under § 1 GWB [70], or the prohibition of abuse of a dominant position within the market under § 19 GWB, or the prohibition of impediment and discrimination according to § 20 GWB, the Cartel Office can impose fines of up to one million Euro against the acting persons and the company according to § 81 para. 4 sentence 1 GWB. In addition, the company can be fined according to § 81 para. 4 GWB an amount of up to 10% of its total turnover or of the turnover of the whole company group in the last financial year preceding the imposition of the fine.

If the business activities also affect other states, the law of these countries applies. For the member countries of the EU [71] the EU Antitrust Law applies if an activity has an impact on several member countries. By the 7th Amendment of the GWB 2005, the German and European Antitrust Law have been aligned with the exception of the intergovernmental clause. The content of § 1 GWB is now identical to the content of Art. 101 para. 1 TFEU, and § 19 GWB is identical to Art. 102 TFEU. Apart from the restriction that the EU Antitrust Law allows fines only against companies, the framework of liability is the same. [72]

In order to promote the political intention of Private Enforcement, meaning the enforcement of damage claims against cartel members by affected customers, the conditions for facilitating the enforcement of a claim have been created in the 7th Amendment to the GWB. [73, p.113] In case of a breach of the GWB or of Art. 101 TFEU or 102 TFEU or any decree of the cartel authority, the cartel member faces, in accordance with § 33 para. 1 GWB, a claim for abatement or removal, and, in the case of re-offending, a claim for injunctive relief. According to § 33 para. 3, GWB, claim for damage compensation may be made against cartel members if the infringement was committed intentionally or negligently.

§ 33 para. 4 GWB makes the enforcement of claims by the injured party easier, because the German courts are bound by the final decisions of the cartel authority, the European Commission or by the competition authority or court acting as such in an EU Member State. Generally administrative fines become legally binding on companies who have previously cooperated in the investigation. [74, p.117]

Since it is more and more frequently assumed that management has a corporate duty to file claims for damage compensation, the willingness of affected companies to enforce verdicts against cartel members is rising. [75, p.31]

Furthermore, the violation of the prohibition of cartels can lead to the legal effect of reverse transaction of the contractual relationship according to § 1 GWB in conjunctt-ion with § 134 BGB [76]. The same legal consequence occurs, according to Art. 102 TFEU in conjunction with § 134 BGB, if there is an impact on other Member States of the EU. According to § 139 BGB, nullity would comprise the entire agreement, including

the subsequent contracts, if they could not have been concluded without the cartel agreement.

Finally, the criminal consequences have to be taken in consideration. According to § 298 StGB [77], unlawful agreements in tender processes are considered as subsidy fraud crimes, if they aim to cause the operator to accept a particular offer.

3.2.2. Prevention of Administrative Sanctioning

In the context of liability and damage prevention, compliance aims to prevent administrative sanctions. This applies to companies whose businesses depend on obtaining permission from authorities or participating in public tenders [78]. In the case of a failure to abide by the law and show trustworthiness on the part of the members of the management, proven by legally binding convictions or fines usually registered in the Central Trade Register of the company, companies can be excluded from the tender bidding process or authorization in this regard can be refused. For example, § 97 para. 4 sentence 1 StGB focuses on the reliability of the bidder to estimate the current and future legality of the company [79]. If appropriate measures are taken to prevent violations that have already occurred from reoccurring in the future, authorities may waive exclusions from the bidding process. [80] Compliance measures and the required activities to detect the violations are considered appropriate measures for self-rectification and for the establishment of future law-abiding and preventive measures through internal controls and sanctioning consequences. [81]

3.2.3. Damage Reduction

Even when it comes to liability causing violations, it is questionable whether a compliance system is regarded by the authorities as sanction reducing and limiting of the external liability of the company. This would mean that damage reduction could be achieved by compliance, for example, when determining the fines. [82]

In the US in 1991 the Organizational Sentencing Guidelines, which ensure mitigation of the penalties to be imposed if the concerned company can prove that it has established a compliance system as required by the guidelines, came into force. [83]

In the EU, the European Commission does not take antitrust compliance systems into account when determining fines. The European Commission has clearly changed its previous opinion. Until the 90's, compliance systems which were established in companies before the antitrust infringement was committed, as well as subsequently introduced programs, were considered as a mitigating factor, depending on the individual assessment of the case. [84]

In current practice, the implementation of compliance systems is endorsed, but nevertheless the European Commission assesses the committed infringement, irrespective of them. Consequently, corporate measures for a preventive avoidance of antitrust violations have neither a positive nor a negative effect on the attribution of liability and the amount of the fine. [85]

The EGC [86] approved the new administrative practice with the argument that the European Commission is not obliged in a particular case to consider an implemented compliance program to be a mitigating circumstance, although it was considered in the past as such. [87] The ECJ also follows the decision of the European Commission and the EGC on the legal relevance of compliance programs for administrative fines. A legal error cannot be identified in the decision of the EGC, nor can a compliance system change an unlawful act. There is no mitigating circumstance which should be taken into account when determining a fine. [88]

As a result, the European Commission, in its administrative practice, reduced the fining provisions of European Antitrust Law to the character of repression and deterrence. A preventive control intention is not reflected in the fines imposed. This administrative practice may be explained by the European Antitrust Procedural Law, which is a law of corporate sanctions that only sanctions companies and not individuals, since only companies are assumed to cause infringements and to be the addressees of the fines. From this legal dogma no exculpating arguments, such as compliance systems, can be derived for executive managers [89].

The administrative practice in the German Antitrust Law is similar to that of the European Law, although the basis for the determination of liability and fines is different.

Like the European Commission, the German Federal Cartel Office has also adopted guidelines on the setting of fines, according to § 81 para. 7 GWB, which do not consider compliance programs when determining the amount of fines [90], but endorses them after the infringement as a mitigating circumstance. [91] So far, the implementation of compliance programs was not considered by the German Federal Cartel Office as fine-reducing in its decision-making practice, especially not as a positive effort after the infringement. The introduction of compliance systems is apparently deemed by the German Federal Cartel Office to be irrelevant. [92]

3.2.4. Loss of Reputation

Finally, compliance aims in the case of a violation of law that is public and is attributed to a company, to prevent the loss of corporate reputation [93]. Specifically, this means to secure the trust of stakeholders, such as shareholders, customers, suppliers, other business partners, the capital markets and creditors [94]. Otherwise, declines in sales and earnings will occur because business partners and customers may freeze or terminate their business relations to avoid being related to the unlawful behavior. Existing contracts are often suspended and the acquisition of new orders is more difficult. The motivation of employees suffers from the loss of reputation [95]. Therefore, loss of reputation is usually also a financial loss [96].

In addition, major corporations in particular have to implement labor law-related measures within the company to avoid a possible loss of reputation which is not caused by violation of law, but is based on behavior that is no longer in accordance with the policies applicable to the company [97]. The intention behind those policies is that compliance should not only avoid disadvantages from violations of law, but also at the same time contribute to so-called value-based corporate leadership. [98, p.71]

Often, under the heading of Corporate Social Responsibility a morally, economically and environmentally sustainable business philosophy is defined. Within the organization of the company this self-commitment is implemented by policies, usually intended to be enacted as legally binding policies, which are often called an Ethics Policy or Code of Conduct and are partly integrated into the compliance policy. Through this ethical commitment companies seek a positive public image. [99]

The German Post AG for example in its Code of Conduct under the heading "Living Responsibility" summarizes its principles of corporate responsibility. The striving for the global dissemination of environmental and social standards is explicitly named as a corporate goals and employee engagement is considered an important factor for its success. [100]

These corporate objectives and tasks, defined in the Code of Conduct, are, however, only binding instructions for the employees if they represent the concretization of general labor law obligations, which may reasonably be expected from each employee after balancing the various interests of employer and employee. This is usually not the case if the Code of Conduct cannot be derived from legal principles or other existing corporate interests, as it will already lack the direct accessory obligation that could have been concretized in the Code of Conduct [101]. The content of the Code of Conduct is beyond the contractual labor law accessory obligations, because for its legal effectiveness an agreement between the parties is required, meaning the consent of the employee [102, p.9]. The required approval of internal regulations by each employee to reach a legally binding effect contradicts the legal nature of compliance, which includes only internal regulations that can be determined unilaterally and declared effective by the company.

Compliance can encompass internal regulations, which may be based on any final legal requirement, but are necessary to prevent infringement. Companies that are subject to inspection by regulatory authorities, such as publicly listed companies and securities service companies, have to ensure that certain requirements are met for employee transactions. As an example, vesting periods for security trading of their own company by managers are not provided by law, but to prevent violations of insider trading law such periods have been included in the compliance policies of publicly listed companies [103, p.837].

Compliance therefore means to comply with the applicable laws, as well as those internal regulations and instructions derived from the applicable laws, usually designed as corporate policies.[104] To include internal regulations under the legal term Compliance [105, p.3f], they must concretize the applicable laws of the company.

3.3. Protection by Compliance

Primarily compliance protects the company itself from unlawful behavior by corporate bodies and employees, as well as from legal and financial disadvantages caused by liability claims. [106]

The protection of corporate bodies and employees derives indirectly from the protection of the company, since compliance binds them to lawful behavior, although it is not the aim of compliance to protect them from legal and financial disadvantages. Consequently, corporate bodies and employees are also protected by compliance from damage claims, as well as from criminal and finable actions. [107]

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ANTI-DUMPING REGULATIONS UNDER THE WORLD TRADE ORGANISATION

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Abstract

The Article explores anti-dumping regulations set forth by the Agreement on Implementation of Article VI of GATT 1994 commonly known as the Anti-Dumping Agreement, which is an integral part of the Annex 1A to the Agreement Establishing the World Trade Organization. The Article touches upon the background of the Anti-Dumping Agreement and examines regulations imposed thereby on the anti-dumping practices of the WTO member-states on such matters as the conduct of the anti-dumping investigation, determination of dumping and injury to the domestic industry, procedure of application of anti-dumping duties, relationship between the domestic legislation and WTO regulations on anti-dumping, judicial review requirements, conditions of imposition of the anti-dumping duties and duration of anti-dumping measures.

Keywords*: anti-dumping, injury, domestic industry, WTO, GATT, margin of dumping, like product, imports*

Possibility for utilisation of anti-dumping duties pursant to international regulations was initially provided for under Article VI of the General Agreement on Tariffs and Trade (the "GATT"). However, the provisions of Article VI were to certain extent loose and imprecise. These provisions had general character and were lacking concretness. This was creating difficulties in interpretation and application of the said regulations, which required further concretization thereof. The first document elaborating on GATT Article VI was the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade" which has unofficially been known as the "Anti-dumping Code" appeared as an outcome of the Kennedy Round of negotiations within the GATT framwork in 1967. This Agreement was revisited in the Tokio Round of negotiations resulted in reinforcement of its provisions. However, only 26 GATT contracting parties (member-states) acceeded to the document and the provisions of the Anti-dumping Code did not introduce the regulation capable of maintaining acceptable for the GATT Contracting Parties legal regime on matters relating to dumping [1, p.433-450; 23, p.27-44; 24, p.27-52]. In light of general dissatisfaction rooted in incompleteness of regulation and fragmentariness of the Agreement due to the non-accession of all the GATT Contracting Parties, it has been replaced by the Agreement on Implementation of Article VI of GATT 1994, commonly known as the Anti-Dumping Agreement, which provides further elaboration on the basic principles of regulation of the WTO member-states' anti-dumping practices set forth in Article VI itself. The Anti-Dumping Agreement constituting an integral part of the Annex 1A to the Agreement Establishing the World Trade Organization became an instrument mandatory for all the WTO member-states and established detailed regulation on such matters as the conduct of the anti-dumping investigation, determination of dumping, procedure of application of anti-dumping duties [2, p.203-204].

Both GATT and the Anti-Dumping Agreement formally recognise the possibility of application of anti-dumping measures by a WTO member-state (subjects of public (international) law) against economic actors (subjects of private law) having nationality of another WTO member-state [3, p.239-297; 27, p.149-175]. According to Cappeau and Jyillard this is due to the international public law nature of the WTO documents and is so drafted in order not to create any obligation arising out of the public international law for the subjects of the domestic law within the domestic legal systems [10, p.204].

Under the GATT Article VI dumping is existent when a product generating in one member state is introduced into the commerce of another member-state at less than the normal value of the product (GATT-VI:1). However, a WTO member-state may apply anti-dumping measures only when such product been sold at dumping prices [4, p.45-54; 11, p. 289-295; 14, p.563-575; 7, p.41-64; 41, p.115-119; 42, p.1-37] causes or threatens material injury to an established industry in the territory of a member-state or materially retards the establishment of a domestic industry [5, p.5-31]. The anti-dumping duty may not exceed the margin of dumping defined as a difference between the normal value/price of the product and its price under normal trading conditions either (i) in the exporting country's commerce or (ii) export price to a third country or (iii) a constructed export price, which in its turn is defined as (a) the cost of production plus (b) reasonable selling cost and profit (GATT – Article VI:2). Such additional duty to be levied on product been traded at price levels below the normal ones is the only remedy avaialable to a WTO member-state, meaning that such WTO member is prohibited to apply another protective measure whatsoever (such as, for example, an import quota) when it determines (by way of a proper investigation as described below) that sales of the product in question in its territory is carried out at dumping prices and that this causes an injury. Besides, GATT prohibits application of the anti-dumping and counterveiling duties at the same time on the same product, i.e. a WTO member is allowed to apply only one of these two measures (GATT – Article VI:5).

Margin of Dumping. One of the main conditions for the application of an anti-dumping duty is the determination of the difference between the the normal value/price and dumping price. Such difference is determined by way of comparison of the price at which the product has been introduced into the commerce in the importing country and sales prices of the like product in the country of production or in a third country. The following criteria may be used for the determiation of the normal price: (1) the price applicable, in the ordinary course of trade, for the like product in the country of production (GATT – Article VI:1; ADA -2.1); this criterion is applied under the condition that in case where such price is below level of the weighted average per unit costs (Sum of the fixes and variable costs of production, sales, overhead and general expenses (ADA-2.2)), it may be treated as the price not applied in the ordinary course of trade (some additional conditions are applicable to the determination of the normal price by these means under ADA- 2.2.1 and 2.2.2), (2) the highest comparable export price applied in any third country in the ordinary course of trade, (3) per unit cost of production (with the allowance for reasonable selling cost and profit), although there are additional requirements in respect of the calculation of costs and information to be used for these purposes (ADA- 2.2.1 and 2.2.2), (4) in case no export price is established or the export price is regarded unreliable (because of association or an arrangement between the seller and buyer directly or indirectly), the price of resale to an arms length buyer following the importation (ADA – 2.3), or (5) a reasonable basis as the executive autho-

rity entitled under the local legislation to carry out an anti-dumping investigation may determine (ADA – 2.3) if the resale price cannot be established, and (6) where a product is sold via/from an intermediate country or are merely transshipped through such country, the price in the country of origin or in such intermediate country (ADA – 2.5).

Dumping margin shall be established either by way of comparison of the normal value with the average price of all the comparable export sales or price of each separate export sale.

The comparison of the export prices and normal value shall be carried out on the basis of similar sale conditions at the same time, e.g. on the basis of *ex-works* sales. The comparison shall take account of sales terms and conditions, level and rates of taxes, sale volumes, volumes per compared sales, physical conditions of the merchandise, differences in the costs incurred at times of exportation and importation and other pertaining factors and shall be based on currency exchange rate prevailing as at the date of sale [6].

Application of anti-dumping measures is not allowed where the margin of dumping does not exceed the *de minimis* dumping margin rate or where the volume of dumped imports, actual or potential, or the injury, is considered to be (determined as) negligible. In both cases an anti-dumping investigation shall be promptly terminated (ADA – 5.8). The margin of dumping is at *de minimis* level if this margin is less than 2 % of the export price. The volume of dumped imports is regarded to be negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing WTO member-state, provided, however, that the countries individually accounting for less than 3 per cent of the imports of the like product in the such importing WTO member-state collectively account for less than 7 per cent (inclusive) of imports of the like product in that member-state.

In case where dumped imports of the lke products enter the domestic market of the importing member-state from two or more countries and it is established that a dumping margin in each case is more than *de minmis* rate and the volumes of imports in each case are adove the negligable levels, the effects of the such imports may be assessed cumulatively, provided that competition conditions between the imported products on one hand and between the imported and locally produced products on the other hand provides sufficient grounds for such cumulative evaluation.

Like product. Anti-dumping measures may be applied on like products only. Under the ADA, the like product is either an identical product [7, p.73-91], i.e a product which is alike in all respects to the product under consideration or where there is no such product to compare with, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration (ADA- 2.6). It is to be noted that by way of limitation of possibility of application of the anti-dumping duties to the like products only as described above, the ADA excludes the possibility of applications of the anti-dumping measures to other competing or substituable products [2, p.205]

*Material Injury***.** Dumping may only be actionable if it causes material injury to a domestic industry or threatens to cause material injury to a domestic industry [8, p. 91-107] or cause material retardation of the establishment of such an industry (GATT – VI:1). The determination of injury shall be proved by positive evidence and based on examination, on one hand, of the volume of the dumped imports and the increase of in

such volumes and the effect of the increase in such volumes on prices in the domestic market for like products and, on the other hand, the consequent impact of these imports on domestic producers of such products (ADA – 3.1 – 3.4).

An illustrative list of the relevant economic factors and indices having a bearing on the state of the industry includes, but is not limited to (i) actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity, (ii) factors affecting domestic prices, (iii) the magnitude of the margin of dumping, (iv) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments (ADA – 3.4). However, determination on application of anti-dumping duties requires a comprehensive assessment of all relevant factors and indices, given that under the ADA, neither one nor several of these factors brought together may constitute a basis for the determination. Establishment of the the significant rate of increase in volumes of dumped imports either in absolute terms or relative to production or consumption in the importing member-state is a material condition for the determination of injury. Significant reduction of prices by the local producers or significant depressing or suppressing effect on domestic prices may also be assessed as the factors demonstrating the existence of a threat of material injury [9, p.403-413].

There must be a casual link established between the dumped imports and the injury caused or threatened, i.e. a significant injury shall arise as a direct result of the dumped imports. A casual link shall be established by an investigating authority based on all the relevant evidence. All other known factors that may have bearing on the state of the local industry and cause an injury shall be taken into consideration, but without attribution of such injuries caused by these other factors to the dumped imports. Factors not attributable to the alleged dumpig include (without limitation) such factors as the volumes and prices of the imported products not sold in the domestic market at dumping prices, contraction in demand or changes in the patterns of consumption, competition between the foreign and domestic producers, technology advances and level of productivity of the domestic industry.

Domestic Industry. The "domestic industry" is defined as all the local producers of the like products or those local producers whose cumulative output constitutes a major part of the total domestic production of the like products concerned (ADA -4.1). The producers who are related to the exporters or importers or themselves are importers of the allegedly dumped products may be disregarded for the purposes of assessment of the domestic industry, provided, however, that there are sufficient grounds to suspect that the relationship concerned would act as an incentive for such related producers not to support actions of non-related producers. The parties are considered to be related when a party directly or indirectly controlled by the other party or both of them are directly or indirectly controlled by a third party or a third party is directly or indirectly controlled by the parties. One shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

Domestic Legislation. Anti-dimping is just one of the possible safeguards of which utilisation is allowed under the GATT (22) subject to certain conditions and like all other remedies against unfair trade practices, anti-dumping measures may be applied only where there is possibility for their application [10, p.148-160]. Existence of such possibility depends greatly on the regulatory framework, i.e. establishment of dumping and application of anti-dumping measures would be impossible if there is no relevant

domestic legislation and procedures governing anti-dumping investigation in place [43, p.19-32]. In countries where there are no requlations on the issue, the relevant requlation would be required to be enacted with introduction of the relevant amendments in the existing legislation [11, p.137-144].

However, the ADA, taking into account the practice of the utilisation of anti-dumping proscedures in a capacity of a non-tariff barrier and aiming at the prevention of such use of anti-dumping measures in the future, provides for the harmonisation of domestic anti-dumping regulations and establishes uniform requirements and standards for the organisation and conduct of the anti-dumping investigation mandatory for all the WTO member-states [12, p.297-327]. The WTO member-states shall comply with general rules relating to the initiation and conduct of the anti-dumping investigation and judicial review of the findings and application of the anti-dumping duties.

Initiation of the anti-dumping investigation. An anti-dumping investigation may only be initiated upon a written application by or on behalf of the domestic industry to the relevant authority (ADA – 5.1, 5.2). Filing an application does not constitute on and out of itself a basis for the initiation of an investigation. In case where the application appears to be short of the information/evidence specified in Art. 5.2 of the ADA, a relevant state authority shall be obliged to reject the initiation of an investigation. In addition, the investigation authority shall be obliged to establish whether or not the application filed is supported by domestic producers of the like product representing the "domestic industry" as described above. Only in case where it is determined that an application is duly supported, an investigation may start (ADA – 5.4). In the territory of certain WTO member-states employees of domestic producers of the like product or representatives of those employees (e.g. trade unions) may make or support an application for an anti-dumping investigation. Existence of such right for interested groups is entirely a matter of the domestic law. The application is considered to have been made "by or on behalf of the domestic industry" if it is supported by domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry. When a required support is determined on the basis of sufficient evidence a decision may be given on start of an investigation. Such decision shall be publicly announced.

Anti-dumping procedure. The Investigation shall be conducted in strict compliance with the ADA provisions. Provisional measures such as a provisional duty or a security in the form of cash deposit or bond equal to the amount of the provisionally estimated anti-dumping duty may be applied prior to the completion of the investigation. Such measures may not be greater than the provisionally estimated margin of dumping and may not be applied until the expiry of 60 days from the date of initiation of the investigation (ADA – 5.7).

The investigation shall be completed not later than a year as a rule and in any case may not last more than 18 months (ADA – 5.10). The investigation shall be conducted on contention basis (ADA – 6.2) and parties shall be provided equal unhindered opportunities to present their cases and all the relevant evidence (ADA – 6.1). Users and consumers of the product concerned (businesses or consumer organizations) shall be

entitled to participate in the investigation [For more detailed discussion see: 38, p.111-140] and to provide information/evidence relevant to the dumping, injury and causality (ADA – 6.12). Confidential information may not be disclosed, however, a party presented confidential information may be requested and in this case, will be required to present a non-confidential summary of such confidential information (ADA – 6.5). Information presented by the parties may be verified, if necessary and subject to agreement of the persons concerned, in the territories of other member-states, unless such member-state objects to the investigation following due notification of the member-state conducting the investigation (ADA – 6.7, Annex 1). The investigation authority shall inform all interested parties, before arriving at final decision on application of anti-dumping measures, of the essential findings which will form the basis for the final decision. Such disclosure shall be made in such time so that the parties have sufficient time to defend their cases (ADA – 6.9).

The ADA provides for the possibility of termination of the investigation if the exporter of the products at dumped prices undertakes to revise the prices so that the injurious effect of the dumping is eliminated (ADA – 8). Such undertaking may be accepted by authorities if they find it satisfactory in all material respects from the perspectives of the purposes (i.e. elimination of the injurious effects of dumping or prevent threat of such effect) of the investigation and may be offered and accepted only following a preliminary determination of dumping and injury attributable to it. However, authorities may require the exporter to provide information on the compliance with the undertaking from time to time and shall be in a position to verify such information.

Retroactivity. When an anti-dumping measure is applied it, generally, shall not have retospective effect, i.e. as a general rule, the anti-dumping duties are applied after the final decision on application of the anti-dumping measures has been delivered and entered into force. However, under Art. 10.2 of the ADA, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied following the final determination of injury. In case of determination of a threat of injury, anti-dumping duties may retroactively be levied only for the period of time specified above, if it is determined that the dumping would, in the absence of the provisional measures, lead to a determination of injury (ADA – 10.2). Anti-dumping duties may be levied retroactively for the period of time not exceeding 90 days prior to the date of application of provisional measures and in any case only up to the date of initiation of the investigation (ADA - 10.8) if it is determined that (i) there was a history of dumping, which caused injury; or (ii) the importer was, or should have been, aware that the exporter practises dumping which would cause injury; or (iii) the injury is caused by a relatively large volume of dumped imports within a short period of time which, given the timing and the volume, is capable to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied.

Duration of a Measure. Application of an anti-dumping duty shall cease immediately when there is no necessity to offset dumping that causes injury. This shall be established by subsequent review to be initiated either by authorities or an interested party, provided that any review may start upon lapse of a reasonable period of time since the imposition of the definitive anti-dumping measure. Any interested party requesting a review with the aim of lifting an anti-dumping duty shall submit sufficiant information substantiating its request. The term of an anti-dumping duty is limited to

five years from its imposition or from the date of the most recent review (ADA – 11.3), if not terminated prior to the expiry due to a review as described above, unless authorities determine, in a review to be held (either on initiative of authorities or the domestic industry) and completed before the expiry, that the termination of the duty would likely cause continuation or recurrence of dumping/injury. There is no limit on the number of the reviews meaning that an anti-dumping measure may be kept in force intact or as may be changed (increased or decreased) pursuant to reviews for indefinite period of time by way of multiple renewals, if substantiated. Same rules are applicable to the price undertakings.

*Judicial Review***.** There are two ways in which review of the anti-dumping determinations may be sought. Subjects of domestic legal systems (natural and legal persons) may refer to the local judicial bodies and the WTO members may refer to the DSB. It is one of the most significant requirements of the ADA that the application of the anti-dumping measures be susceptible of an independent judicial review [13, p.97-130]. Local legislation shall provide for procedural rules allowing a quick judicial review of the final determinations on application of anti-dumping measures and price-undertaking [14, p.329-342]. A WTO member-state shall have a legislation in place providing for a procedure of prompt review of administrative actions relating to final determinations and reviews of determinations by an independent judicial, arbitral or administrative tribunal (ADA – 13).

At the same time, in case any WTO member believe that benefit accruing to it under the Anti-Dumping Agreement is impaired or nullified or that the achieving of any goal expected under the ADA is being impeded by one or more other member-states, it may request consultations with such member(s) (ADA – 17.3). If a decision is given by the investigation body on definitive anti-dumping duties and such member is of the opinion that the consultations requested as described above failed, it may refer to the Dispute Settlement Body ("DSB") (ADA – 17.4). Application by the member shall indicate how a benefit accruing to it has been nullified or impaired. Possibility to refer to the DSB prior to the delivery of the final determination exists where a provisional measure having a significant impact is applied which, in the opinion of the affected member, had been taken contrary to the provisions ADA (Article 7.1). Possibility to refer to the DSB is not subject to the exhaustion of local remedies, i.e. delivery of the final determination or of a provisional measure having a significant impact suffice for the referral of a case to the DSB. The DSB shall, in such case, establish a panel to examine the matter [15, p.109-181].

If the procedures applied by the investigation body complied with the above mentioned requirements of the ADA, i.e. the establishment of the dumping and the determination of the anti-dumping duty was proper and in accordance with the ADA and the evaluation was unbiased and objective, the panel may not be overturn either a determination of an investigation body or decision of an independent tribunal, even where the panel reaches a different conclusion (ADA – 17.6(ы)). In other words, the DSB shall not be entitled to overturn the anti-dumping measure, if it has been applied by authorities in an unbiased and objective manner. Carreau and Juillard, however, denote that this approach may be considered as reasonable as long as the independent judicial control over the measures applied by the executive authorities is concerned (10, p.209). The fact, however, that the ADA refers not only to the independent judiciary, but to the decisions of government authorities in general, warrants a conclusion on

impossibility for the DSB to overturn decisions of the investigation (executive) bodies as well, if they were unbiased and objective.

In addition, the ADA, admits the possibility of different permissible interpretations of one and the same provision and establishes a presumption of priority of the permissible interpretation chosen by authorities. According to this presumption, provisions of ADA shall be interpreted by the DSB in accordance with the customary rules of interpretation of public international law and in case other interpretations are possible, the panel shall find the authorities' measure to be in conformity with the Agreement even where it has been based on the rules of interpretation accepted in the country but which are in conformity with the interpretation permissble under the rules of public international law [16, p.893-916]. Although not directly referred to in the ADA, permissible rules/means of interpretation shall be understood [9, p.340-345] to be those specified (or implied even if not specified) [9, p.305-306] in 1969 Vienna Convention on the Law of Treaties (Art. 31, 32).

Based on the above, it is apparent that a decision by authorities (be it a decision by an executive or juditial body) may be disputed by the DSB only where:

(1) the determination of dumping and of the anti-dumping measure was wrong and such determination has been accompanied by the breach of the requirements of the ADA;

(2) the determination was not unbiased and objective;

(3) judicial supervision is not by an independent tribunal and a relevant court decision has not been delivered by a court which may be recognised as an independent one;

(4) interpretation by authjorities was not in conformity with the rules of interpretation customarily accepted under international law [4, p.277-310].

In conclusion, it is to be stated that under the ADA, any WTO member-state shall undertake necessary measures to bring its laws, regulations and administrative procedures in conformity with the ADA (Article 18.4). By way of this requirement the ADA establishes supremacy of the internatinal law over the domestic law [2, p.203-204].

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CYBERCRIME AND ITS CHARACTERISTICS

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Abstract

The process of globalization, including the globalization of information technologies offers great prospects to make a real impact on an individual and society. One of the negative outcomes of the development of information technologies is its preconditioning the formation and development of a new type of criminality consisting of crimes occurring in the field of high technologies. In this process computers and computer networks are exposed to criminals' aggression. Also, they act as a method or means of committing crimes. The problem of cybercrime has started to acquire vitality in the period of information society.

Keywords*: cybercrime, computer, computer system, internet, information.*

In the current period computers and telecommunication systems involve all the spheres of human and state activities. Meanwhile, the global internet network is the fastest-developing sphere of telecommunication technologies. Today not only individuals, but entire states can turn into the victims of cybercrime, as the security of thousands of internet users depend on several criminals. The criminality in cyberspace grows in proportion to the number of users. For instance, one can refer to such a fact: the site (Internet Complain Centre) formed to register the victims of cyber criminality was appealed by over million people in 2007. The growing professionalism of cyber criminality and the constant improvement of information technologies generate new risks for the users of global information networks. The problem of the use of science and technology for criminal purposes is associated with one of the most urgent directions of the integrative processes. This direction constitutes the creation of the global internet network which connects millions of computers located in the most varying regions of the world. The internet offers very vast prospects for the acquisition of information and its exchange, and develops at a very high speed. In the 90s of the last century it was considered that within approximately 10-15 years the internet would embrace 1 billion computers. However, the prognoses failed. In the given period the internet already covered over 1.5 billion computers. As it is obvious, this number constituted one fourth of the world population [11]. The fast development of computer networks and their intervention into different spheres of human activities preconditioned new types of criminality. And the areas of activities intervened by computer networks depended on the appropriate time. As, in the 1960s computer networks were mainly used in military and scientific enterprises. The main risk was associated with the loss of the confidential data and unauthorized access to these data. In the 1970s already commercial criminality came to the forefront in the field of computer technologies. Such criminality can include the breakage of bank computer networks, industrial detectives, etc. In the 1980s the breakage of the software and their illegal dissemination began to spread widely. In the 1990s the appearance and

development of the internet network preconditioned the emergence of new serious problems. For instance, intervention in confidential private data, dissemination of child pornography, activities of the groups of extremist virtual networks and other similar problems can be cited [2]. In the further stage there appeared more dangerous problems sufficiently difficult to prevent. Since, the expression "infected computers" has seriously established itself in the lexicon. "Attacks" were launched against such computers whose users remained unaware. Moreover, the integration of telecommunication networks and their convergence, the presence of mobile access to the internet, etc. have enabled the use of information technologies for dangerous or criminal purposes. It should be noted that most of the crimes committed in global computer networks are characterized by a number of features which can be generalized as follows,

- Crimes can be committed quite secretly which is due to the characteristics of information space (the developed mechanisms of confidentiality, the complex nature of infrastructure, etc.)
- the objects and subjects of cybercrime can be located in the most diverse regions of the world;
- the special training of criminals, the intellectual character of criminal activity;
- the frequent renewal of methods of committing crimes, their complexity and diversity;
- the committing crimes in automated regime simultaneously in several sites and the possibility of the weaker resources of numerous individual computers turning into stronger tools of committing a crime;
- the multi-episodic nature of criminal activities;
- the victims' unawareness about their exposure to the impact of the crime;
- the committing a crime from a distance while the criminals and victims do not have any physical contacts;
- the impossibility of preventing crimes through traditional methods [4, p.109]

It should be taken into consideration that the notion "cybercrime" is most often used in parallel with the notion "computer crime". They are even applied almost as synonyms. Indeed, these notions are very close to each other. However, their usage as synonyms is not correct. It is considered that the notion "cybercrime" is broader than "computer crime". Thus, it more accurately expresses the nature of crimes committed in the information space. As, the monolingual Oxford Dictionary defines the word "cyber" as a component of a complex word. It is ascribed to information technologies, internet networks, and virtual realities [10]. Practically, Cambridge Dictionary also expresses the identical definition. As, the prefix "cyber" incorporates the usage of computers, and especially of the internet. Nevertheless, Cambridge Dictionary introduces the word "cybercrime" into the circulation [9]. Thus, cybercrime implies the crimes committed by using computers, also information technologies and global networks. Yet, computer crime implies the crimes targeted against computers or computer data. The global information space, the information mega-pace is non-material. At present with the development of information technologies, the very notion "computer" gradually grows to be vague. As, today practically all mobile phones have an access to the internet. Besides, through the development of 3G and 4G networks, the possibilities of mobile connection to the internet have considerably expanded and their quality has increased. Telecommunication infrastructures are being adapted to the exchange of the data in huge amount in a more comfortable form [3, p.18]. It is not hard to forecast that the

users of internet and mobile communication will benefit from wider potentials in near future. It is observed that the boundaries of the notions "cybercrime" and "computer crime" are distinguished at the level of international legislation as well. Since, in 2001 the Council of Europe adopted the Convention on Cybercrime. This Convention used the very notion "cybercrime". Cybercrime is a crime committed in cyberspace. From this point of view, in order to realize the essence of cybercrime more profoundly, one should elucidate the essence of the notion "cyberspace" itself. Cyberspace is a physical and non-physical space consisting of the following components:

- Computers, computer systems;
- Networks and their software;
- Computer data, content data and the action of the data;
- Users.

As the guidebook on cybercrime was developed in the frames of the UNO, when defining the goals of the criminal legislation in the appropriate field an official approach is referred to. Cybercrime is the sum of computer systems, computer networks, also the crimes committed in cyberspace through the other means allowing an access to cyberspace. This crime is relevantly committed against the computer systems, computer networks and computer data. This approach or definition is appropriate to the UN experts' instructions. Since, according to the UN experts, cybercrime involves any crime committed through the computer systems or networks in the frames of computer systems and networks against the computer systems and networks [5]. Hence one can come to such a conclusion that any crime committed in electronic environment belongs to cybercrime. Such kind of approach is ascribed to all crimes committed in the field of information and communication. In information-communication field information, information resources, information technology act both as the objects of the crimes as well as tools of committing crimes [8, p.187].

As for the issue of consistency between "cybercrime" and "computer crime" along with the above-mentioned, it should be taken into account that the UN specialists have formed a definite attitude. The notion "cybercrime" covers all kinds of crimes committed in the field of information technologies. It can involve both the crimes committed with the help of computers as well as the crimes committed against the computer's subject matter, computer networks and the information restored in them. Computer crime implies not only the illegal interventions targeted against the safe activities of computers and computer networks but also against the information produced by them [6, p.29]. So, one can conclude that computer crime is a variety of cybercrime.

Types of Cybercrime

To realize the nature of cybercrime more accurately, one should also have ideas about its types. Types of cybercrime are defined depending on the object, subject of aggression and means of committing it. Since, depending on the object of aggression, the following types of cybercrime can be distinguished: [1, p.37]

- Commercial computer crimes;
- Crimes targeted against the individual rights and integrity of individual sphere;
- Computer crimes targeted at social and state interests.

Depending on the nature of the use of computers or computer systems, three types of cybercrime can be distinguished:

- Cases when computers act as the subject matter of the crimes (possession of the data, unauthorized access to them, elimination of the files or damaging the devices);
- Cases when computers act as the tools of crimes;
- Cases when computers act as the intellectual means.

The most extensive method is defining the distinction among the crimes committed against computers through computers and computer networks. It should be noted that this classification is being used by the UNO. In reference to it, cybercrime is viewed in its broad and narrow meanings. The Convention of the Council of Europe on Cybercrime divides it into four groups (later the number of the groups was raised to five by adopting additional protocols) [7]:

The first group is defined as "computer crime" and expressed as crimes committed against confidentiality, the confidentiality and availability of electronic data and computer system, and mainly the following types of crime are ascribed to it:

- Illegal access to computer systems or its parts;
- Illegally obtaining the data not intended for the public;
- Illegal damaging, erasing, change of electronic data;
- hindering the activities of computer systems through damaging, erasing and changing the electronic data.

The crimes committed during the use of computer systems are ascribed to the second type. The crimes committed through inputting, changing, eliminating the electronic data are more precisely ascribed to such kind of crimes by the Convention. In accordance with the Convention, the fraudulence in cyberspace is the deprivation of other persons of their assets through changing, eliminating or possessing the software.

The third group includes the crimes committed in connection with the content (the content of the data). This implies child pornography. The Convention expresses the urgency of persecution of actions associated with the dissemination of child pornography. So, the crimes included in this group are associated with the content of the data placed in computer networks. Almost in all states the cybercrime associated with child pornography is punished most severely. In such crimes the persons not physically in contact with a child, but participating in the production of the pornography are also charged. The production of such pornographic materials requires the sexual exploitation of children which is of serious criminal nature.

The fourth group includes the crimes associated with the violation of copy rights and related rights. The Convention does not distinguish the types of such crimes. The national legislation of states envisages that taking actions related to such violations of rights is expressed.

The fifth group includes the crimes associated with the aggression against social security. This category includes cyber terrorism and the usage of cyberspace with aims of terror. It should be noted that the globalization of information processes has preconditioned the appearance of cyber terrorism as a new type of terrorism. Cyber terrorism can be ascribed to the technological type of terrorism. Unlike the classic terrorism, this type of terrorism makes use of the latest achievements of science and technology in the fields of computer and information technologies, radio-electronics, gene engineering.

Conclusion

Thus, it should be pointed out that cybercrime belongs to the most dangerous category of criminality of the modern period. One of the basic features characterizing cybercrime is its extent of danger grows in accordance with the development of computer and information technologies, as well as radio-electronic devices. Another dangerous feature is that there is no factor of borders for cybercrime. The subjects and objects of the crime may be located at the most varied points of the world. From this point of view, it is very hard to analyze the cybercrime or its varieties in the frames of a country or countries.

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Vitali Kuznetsov. **Current Dimension of Criminal and Legal Protection of Cultural Heritage Objects: Comparative and Legal Studies. International Law and Integration Problems, 2018, №3 (55), pp.41-58**

CURRENT DIMENSION OF CRIMINAL AND LEGAL PROTECTION OF CULTURAL HERITAGE OBJECTS: COMPARATIVE AND LEGAL STUDIES

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Abstract

The peculiarities of criminal law protection of the destruction or damage of cultural heritage objects under the criminal law of the countries of the former Union of Soviet Socialist Republics (USSR) have been analyzed by means of the comparative legal method in the scientific article. The evidence of criminal threats for the objects of the national cultural heritage increase in conditions of external aggression has been stated. An analysis of the theses of Ukraine and the Russian Federation concerning the criminal law protection of cultural heritage objects has been carried out to establish the theoretical and legal prerequisites for the study's foundations. The objective and subjective features of the corresponding crimes, qualifying attributes, types and sizes of punishments have been analyzed. The fact of dominance of social morality as a generic and species object of destruction or damage of cultural heritage objects has been noted. Some improving regulatory directions of criminal-legal protection of cultural heritage objects under the criminal legislation of Ukraine have been suggested.

Keywords: *criminal liability, crime, object of crime, criminal and legal protection, cultural heritage object, destruction, damage, ruining, historical value, cultural value, public morality, punishment.*

Introduction

The normal development of any society is impossible without studying and considering past historical and cultural traditions, the objective witness of which are works, buildings, etc. The Constitution of Ukraine declares: cultural heritage is protected by law (Part 4 of Article 54); the state ensures the preservation of historical monuments and other objects of cultural value (Part 5 of Article 54); everyone is obliged not to damage the cultural heritage (Article 66).

For a long time there were numerous facts of the barbaric attitude to the monuments of history and culture in the Union of Soviet Socialist Republics (USSR). Why not wonder why, with the proclamation of Soviet power, there was the establishment of a new ideology which, by different means, began the struggle against religion, the so-called "the opium of the people" aimed not only at the moral, psychic, but also physical destruction of both the believers themselves and religious buildings [1, p. 36-40].

Nowadays, in conditions of Russian aggression the level of protection of cultural heritage objects in Ukraine has only worsened. The United Nations Educational, Scientific and Cultural Organization (UNESCO) stated that the situation in Crimea has been worsening since the beginning of its occupation. This is stated in the report of the Director-General of UNESCO, Audrey Azoulay, published on the official website of the Organization [2]. The document also states that there is no possibility for Ukraine to access its objects of cultural heritage, historical and architectural monuments, museums, scientific centers, etc.; moreover, facts of illegal archaeological excavations, export of

cultural property from the territory of the Crimea have been recorded. So the fragments of the Tiritakskyi shaft of 3-4 centuries BC were actually destroyed by the construction of the Kerch Bridge as well as the ancient Artesian fortification was threatened due to the routine work on the extraction of sand. Of particular concern is the future of the "Swallow's Nest" castle, the Khan Palace in Bakhchisarai, the mosque and madrassah of Uzbek Khan, the Genoese fortress in Sudak. As a whole, after the annexation of the Crimea, Ukraine lost more than 15 thousand historical and architectural monuments [3]. The Office of the National Police in the Autonomous Republic of Crimea and Sevastopol opened a criminal proceeding under Part 1 of Article 298 of the Criminal Code of Ukraine on the fact of "illegal destruction, ruining and damage" of the historical monument, the Khan's Palace in Bakhchisarai.

Azerbaijan faced such a problem even earlier. According to the Ministry of Foreign Affairs of Azerbaijan, Armenia, as military occupation policy against Azerbaijan, conducts a systematic policy of vandalism, destruction, theft, appropriation, falsification of material and cultural values and religious monuments in the occupied area. In particular, 738 historical monuments, 28 museums with more than 83500 exhibits, 4 art galleries, 14 memorial complexes and 1891 objects of material and cultural resources were destroyed in the occupied area, including 1107 cultural institutions [4].

Therefore, the issue of criminal protection of cultural heritage objects today is not only a theoretical but also a practical problem of preserving national identity. The comparative and legal study of the legislation of the countries of the former USSR carried out in the article is not only important from a scientific point of view (the relevant criminal law has a common history of origin and transformation), but it is also significant for the legal assessment of certain unlawful actions (they require an analysis of the norms of both domestic legislation, and the norms of aggressor countries that occupied certain area).

One cannot but pay attention to the fact that the only in Ukraine a comprehensive criminal and legal study of the rules on liability for the illegal conduct of search work at the site of the archaeological heritage, destruction, ruining or damage to cultural heritage in domestic science has been carried out for the period of existence in the criminal law [5]. However, the study was based on legislation of 2012 and does not take into account certain social and political changes in Ukraine and other foreign countries. Let's recall some domestic research concerning certain issues of the cultural values protection.

So E. Gaivoronskyi in his study on "Smuggling of Cultural Values: Criminological Characteristics, Determination and Prevention" (2009) concludes that article 298 of the Criminal Code of Ukraine does not extend criminal law to those subjects that "in fact are archeological monuments, but without their legal status, e.g. unknown to the bodies of protection of cultural heritage and not included in the State Register "[6, p.66]. Ultimately, there is a dissertation study entitled "Criminal liability for the destruction, ruining or damage of monuments, cultural heritage objects" by B. Odaynyk in 2010 [7, p. 189, 190]. Within the research B. Odaynyk confined himself to mentioning of certain regulatory acts in the field of the cultural values protection and the imposition of the norms of the criminal legislation of corresponding foreign countries. The analysis of Article 243 of the Criminal Code of the Russian Federation (RF) and Article 346 of the Criminal Code of Belarus is restricted to the indication of separate attributes of the

crime [7, p.169-172]. Undoubtedly, such a comparative study, in our opinion, is not sufficiently complete to identify important proposals for improving domestic legislation. Also, in Ukraine, studies of general manner were conducted: A. Landina "Criminal law protection of morality in Ukraine" (2005), L. Kuchanskaya "The concept and system of crimes against morality in the criminal law of Ukraine" (2007), S. Repetskyi "Public Morality as an Object of Criminal Legal Protection" (2010) devoted to certain aspects of criminal law protection of morality.

As we know, a number of scientific studies (level of master's theses) were conducted on similar issues in the Russian Federation. In particular, one should recall the following scientists: A. Gaidashov «Criminal liability for theft of items that have a special historical, scientific or cultural value» (1997); V. Bratanov «Theft of cultural property: criminal-law and criminological aspects» (2001); T. Sabitov «Protection of Cultural Values: Criminological and Criminological Aspects» (2002); O. Davletshina «Criminal protection of cultural property in the Russian Federation» (2003); Y. Medvedev «Criminal protection of cultural property» (2003); O. Pashutin «Vandalism as a crime against public order» (2003); N. Cheremnov «Criminal liability for vandalism» (2004); I. Afonin «Criminal protection of cultural property» (2005); V. Vershkov «Criminal liability for non-returning to the territory of the Russian Federation of artistic, historical and archaeological heritage items of the peoples of the Russian Federation and foreign countries» (2005); O. Lachina "Criminal protection of nature, history and culture monuments" (2005); M. Makarenko «Criminal liability for vandalism» (2006); S. Fomichov «The Smuggling of Cultural Values» (2006); Y. Millerov "Criminal law protection of morality" (2006); K. Dikanov «Fighting criminal encroachments on cultural values: criminal-law and criminological aspects» (2008); D. Vasylyev «Cultural values smuggling: criminological research» (2008); Y. Kalininska «Criminal liability for the destruction or damage of historical and cultural monuments» (2008); G. Rusanov «Cultural values smuggling: criminal law, criminological and comparative legal research» (2009); O. Martyshev «Criminal liability for the destruction or damage of cultural heritage and cultural property» (2015); I. Khalikov «Criminal liability for violation of the requirements for the preservation or use of cultural heritage objects (historical and cultural monuments) of the peoples of the Russian Federation» (2018). It was L. Klebanov's dissertation "Criminal-legal protection of cultural values" for obtaining a scientific degree of Doctor of Law to be defended as the first one in the Russian Federation in 2012.

In view of the lack of a sufficiently comprehensive and substantive comparative and legal study of this issue, let's consider the modern regulation of the illegal conduct of search works at the site of an archaeological heritage, the destruction, ruining or damage of cultural heritage objects under the criminal law of the countries of the former USSR by means of the comparative and legal method, and express our own vision for improving the domestic law on criminal liability.

It is fair, in our opinion, such an independent norm to suppose criminal liability for the destruction, ruining or damage of cultural heritage objects in most of the abovementioned foreign codes (Article 246 of the Criminal Code of Azerbaijan, Article 344-346 of the Criminal Code of Belarus, Article 264 of the Criminal Code of Armenia, Article 257 of the Criminal Code of Georgia, Article 229 of the Criminal Code of Latvia, Articles 243-243.3 of the Criminal Code of the Russian Federation (hereinafter - the

Russian Federation), Article 166 of the Criminal Code of Turkmenistan, Article 242 of Tajikistan, Article 132 of the Criminal Code of Uzbekistan, Article 203 of the Criminal Code of Kazakhstan, Article 298 of the Criminal Code of Ukraine).

In some Criminal Codes of foreign countries, such norm is either an independent one or a part of another norm on liability for crimes against property (Article 175 of the Criminal Code of Kyrgyzstan (after January 1, 2019, a new Criminal Code comes into force on February 2, 2017, which provides liability for such actions in Article 210), Article 204, 205 of the Criminal Code (CC) of Estonia, Part 2 of Article 187, Part 1, Article 2, Article 188 of the Criminal Code of Lithuania, Article 199^1–199^5 Criminal Code of Moldova).

After amendments to the Criminal Code of the Russian Federation, the Federal Law of July 23, 2013 provided three additional articles: art. 243.1. «Violation of requirements for the preservation or use of objects of cultural heritage (historical and cultural monuments) of the Russian people included in the unified State Register of cultural heritage objects (historical and cultural monuments) of the peoples of the Russian Federation, or discovered cultural heritage objects», Article 243.2. «Illegal search and (or) extraction of archaeological objects from the places of occurrence», Article 243.3. «Evading of an executor of excavation, construction, melioration, economic or other works or archeological field work carried out on the basis of a permit (open letter) from the obligatory transfer of objects found in the performance of such works items of special cultural value or cultural values in large sizes» to the state instead of one norm (revised article 243 "Destruction or damage to cultural heritage objects (historical and cultural monuments) of the Russian Federation, included in the unified State Register of cultural heritage objects (historical and cultural monuments) of the peoples of the Russian Federation, discovered objects of cultural heritage, natural complexes, objects taken under the protection of the state, or cultural values").

This situation is typical for the criminal legislation of Moldova. After the change of April 21, 2016, the Criminal Code of Moldova instead of an article (Article 221 - excluded) provides for five new rules: Article 199^1"Damage or destruction of cultural heritage objects", Article 199^2 «Execution of unauthorized works in locations of archaeological sites or in areas with archaeological potential», Article 199^3 "Hiding or Illegal Storage of Movable Values of the Archaeological Heritage", Article 199^4 "Illegal sale of movable values of archaeological heritage and classified movable cultural values", Article 199^5 "Illegal penetration of metal detectors or other devices of tele detection into archaeological sites and in areas with archaeological potential and their use in these zones".

It is interesting that Article 107 of the Penal Code of Estonia (hereinafter, PC) "Encroachment on Cultural Values" implies responsibility for the destruction, damage or misappropriation of a cultural monument, church or other building or object of religious significance, works of art or science, archives, libraries, museum having cultural value, or scientific collections that are not used for military purposes. The main difference from Articles 204, 205 CC of Estonia is in another generic facility that is relations that arise during wartime (Chapter 4 "Military Offenses"). That is, if an encroachment on cultural values takes place in peacetime, then responsibility for such crimes occurs under Articles 204, 205 of the Penal Code of Estonia, and in wartime according to Article 107 of the Penal Code of Estonia. In view of the aggressive actions

of individual countries, it is extremely urgent to foresee in Ukraine a separate criminal law for such unlawful actions in the occupied by the Russian Federation territories. In our opinion, such an encroachment should be placed in Chapter XX "Crimes against peace, mankind security and international law and order", since the provisions of this section of the Criminal Code of Ukraine protect certain provisions of international humanitarian law (Convention on the Protection of Cultural Property in the Armed Conflict of May 14, 1954 Convention on Measures to Ban and Prevent the Illicit Import, Export and Transfer of Ownership of Cultural Property of November 14, 1970, etc.).

It should be noted that the names of the relevant articles have practically the same meaning "Destruction or damage to history and culture monuments" (except for Articles 199^2 –199^5 of the Criminal Code of Moldova).

The construction of the articles is structurally different. Taking it into account let's, consider the rules that are provided in separate articles. Thus, in separate legislation, the relevant article (-s) have one part (Article 246 of the Criminal Code of Azerbaijan, Article 166 of the Criminal Code of Turkmenistan, Articles 199^3, 199^5 Criminal Code of Moldova, Article 243.1 of the Criminal Code of the Russian Federation), two parts (Articles 243, 243.3 of the Criminal Code, Article 242 of Tajikistan, Articles 344-346 of the Criminal Code of Belarus, Article 229 of the Criminal Code of Latvia, Article 175 of the Criminal Code of Kyrgyzstan, Articles 199^1, 199^2, 199^4 of the Criminal Code of Moldova), three parts (Article 132 of the Criminal Code of Uzbekistan, Article 203 of the Criminal Code of Kazakhstan, Article 243.2 of the Criminal Code of the Russian Federation), four parts (Article 264 of the Criminal Code of Armenia, Article 257 of the Criminal Code of Georgia), five parts (Article 298 of the Criminal Code of Ukraine).

In the Penal Code of the Republic of Estonia and the Criminal Code of Lithuania, responsibility for such an attack is provided by two articles: Article 204, 205 and Part 2 of Article 187 Parts 1, 2 of Article188 respectively. This is due to the definition of various forms of guilt in this corpus delicti. The non-traditional approach was chosen by the Belarusian legislator, who foreseen liability for such an attack in three articles. At the same time Articles 344 and 345 differ mainly in the form of guilt. Another situation with Article 346 of the Criminal Code of Belarus provides punishment for abuse over historical and cultural values. The forms of violation are not determined by the legislator, but he points out that corpus delicti provided for in Article 346 of the Criminal Code of Belarus is available only in the absence of evidence of a crime envisaged in Article 344 of the Criminal Code of Belarus. So a violation may include both destruction and damage, but at the same time such forms of criminal activity is not limited.

It should be recalled that the formation of the law on criminal responsibility of the republics of the former USSR was largely influenced by the normative developments of the Inter-Parliamentary Assembly of the Commonwealth of Independent States (CIS). Thus, in accordance with the resolution of the Inter-Parliamentary Assembly of the CIS countries (adopted at the seventh plenary meeting of the Inter-Parliamentary Assembly of the CIS countries) of February 17, 1996 (No. 7-5), the Model Criminal Code was approved, which was supposed to be a recommendatory legislative act for CIS countries. The Article 238 of this draft CC provides for the responsibility for the destruction or damage of history and culture monuments: Part 1. "Destruction or damage to history and culture monuments, natural complexes or objects taken under the

protection of the state, as well as objects or documents of historical or cultural value that is a crime of moderate gravity (imprisonment no more than 5 years for intentional crime)". Part 2 "The same actions committed with regard to particularly valuable objects or monuments that is a grave crime (imprisonment no more than 12 years for a deliberate crime)".

This article was applied in construction of the relevant criminal and legal prohibitions in Article 298 of the Criminal Code of Ukraine (version of March 18, 2004), Article 243 of the Criminal Code (version before July 23, 2013), Article 242 of the Criminal Code of Tajikistan, Article 264 of the Criminal Code of Armenia, Article 257 of the Criminal Code of Georgia. Although at the same time, the Criminal Code of Armenia and Georgia differentiated the definition of qualifying circumstances of the corresponding crime.

Next, we will investigate the mandatory objective signs of illegal conduct of search works at the site of the archaeological heritage, destruction, ruining or damage of cultural heritage objects under the criminal law of the countries of the former USSR.

The generic object of the crimes stipulated by the relevant articles is the public morality (Article 246 of the Criminal Code of Azerbaijan, Articles 344-346 of the Criminal Code of Belarus, Article 257 of the Criminal Code of Georgia, Articles 243-243.3 of the Criminal Code of the Russian Federation), morality (Article 264 of the Criminal Code of Armenia, Article 242 of Tajikistan, Article 166 of the Criminal Code of Turkmenistan, Article 132 of Uzbekistan, Article 298 of the Criminal Code of Ukraine), property (Article 204, 205 of the Republic of Estonia, Part 2 of Article 187, Parts 1, 2 Article 188 of the Criminal Code of Lithuania, Article 175 of the Criminal Code of Kyrgyzstan, Article 203 of the Criminal Code of Kazakhstan, Articles 199^1–199^5 Criminal Code of Moldova), public order (Article 229 of the Criminal Code of Latvia).

It should be noted that the domination of social morality as a generic and species object of the illegal conduct of search works on the site of archaeological heritage, destruction, ruining or damage to cultural heritage objects is obvious. At the same time, the peculiarity of determining this generic and species object is its combination with other relations: in the field of public order, public health, family relations and the protection of minors (youth). A separate group is the criminal codes that determine the destruction or damage of cultural heritage objects as a type of crime against property. This situation has a quite logical explanation, since objects of cultural heritage are a kind of property. The placement of relevant criminal law in different sections (chapters) does not reduce the criminal and legal protection of relevant subjects. However, it is important not only to establish an adequate degree of social danger of the act, but also to determine correctly the nature of social danger.

On the whole, one can mention the similarity of positions regarding the generic object of illegal conduct of search works on the site of an archaeological heritage, the destruction, ruining or damage of cultural heritage objects, except the criminal laws of Estonia, Lithuania, Kyrgyzstan, Kazakhstan, Latvia, and Moldova. They, as already noted, specified another generic corpus delicti.

Undoubtedly, the investigated crime is objective, since the criminal influence is materially expressed by the historical or cultural heritage of a particular state.

The subject of the offense is the following: the objects of the cultural heritage or their parts, objects of the archaeological heritage, national monuments, movable objects

originating from the objects of the archaeological heritage (the Criminal Code of Ukraine, Moldova); monuments of history, culture, natural complexes or objects taken under the protection of the state (the Criminal Code of Armenia, the Russian Federation, Tajikistan, Uzbekistan, Kazakhstan, Turkmenistan, Kyrgyzstan); objects or documents of historical or cultural value, especially valuable objects or monuments (the Criminal Code of Armenia, the Russian Federation, Tajikistan, Uzbekistan, Kazakhstan); cultural monuments, archival documents, museum objects or museum collections (Penal Code of Estonia); values of considerable scientific, historical or cultural significance (the Criminal Code of Lithuania); monuments of history and culture, taken under the protection of the state (Criminal Code of Azerbaijan); historical and cultural values or material objects possessing distinctive spiritual, artistic and (or) documentary properties and corresponding to one of the criteria for the selection of material objects for the purpose of conferring on them the status of historical and cultural value and especially valuable historical and cultural historical values, or monuments to the defenders of the Motherland (the Criminal Code of Belarus); cultural monuments taken under the protection of the state (Criminal Code of Latvia).

Moreover, there is a predominance of history and culture monuments, taken under the protection of the state among the objects of this crime. Such a subject was foreseen in Part 1 of Article 298 of the Criminal Code of Ukraine in the version of April 5, 2001.

According to Article 1 of the Law of Ukraine "On the Protection of the Cultural Heritage" of June 8, 2000, the object of cultural heritage should be understood as a prominent place, structure (work), complex (ensemble), their parts, movable objects associated with them, as well as territories or water objects (objects underwater cultural and archaeological heritage), other natural, man-made or artificial objects, regardless of their preservation status, which has brought to our time the value of archaeological, aesthetic, ethnological, historical, architectural, artistic, or scientific point of view and maintained its authenticity. Taking into account the abovementioned and comparing the concept of "cultural heritage object" and "archaeological heritage object", the latter term is concluded to be more restrictive in content and the first concept in its entirety encompasses the following. Therefore, in our opinion, it would be more expedient in Article 298 of the Criminal Code of Ukraine to propose the following changes: instead of the phrase "archaeological heritage objects ", replace the words "cultural heritage objects".

It is incorrect, in our opinion, the allocation of an independent subject in Part 2 of Article 298 of the Criminal Code of Ukraine as parts of objects of cultural heritage. First, such an object is not typical for the Criminal Code of foreign countries (except for the Criminal Code of Moldova), and, secondly, it is completely covered by another subject, i.e. the cultural heritage object, provided for in Part 2 of Article 298 of the Criminal Code of Ukraine. Also, there is a discussion in application of the term "monument of national significance" (since the word "monument" in Article 298 of the Criminal Code of Ukraine no longer occurs) in Part 3 of Article 298 of the Criminal Code of Ukraine. Undoubtedly, one of the varieties of objects of cultural heritage are the monuments of national importance, according to Part 1 of Article 18 of the Law of Ukraine "On the Protection of the Cultural Heritage" of June 8, 2000 and Article 10 of the Procedure "The procedure for determining the categories of monuments of the cultural heritage objects

inclusion in the State Register of immovable monuments of Ukraine" approved by the Decree of the Cabinet of Ministers of Ukraine dated December 27, 2001 № 1760. However, the need for additional reference to other sources of law surely complicates the interpretation of the relevant terms when applying the relevant norm. Therefore, in Part 3 of Article 298 of the Criminal Code of Ukraine we propose to use another term "cultural heritage object of national importance".

All these objects of crimes can be classified into the following types depending on the content of the value: 1) historical and cultural values; 2) cultural values; 3) values of considerable scientific, historical or cultural significance; 4) cultural and archaeological heritage objects; 5) historical and cultural monuments or natural complexes.

All these objects can be divided by formal signs into the following types: 1) monuments; 2) complexes; 3) subjects; 4) documents; 5) values; 6) objects; 7) memorials; 8) collections.

The definition of the subject of a crime and the formulation of its types depends on the normative framework that exists in each individual country.

Since Article 298 of the Criminal Code of Ukraine contains the general concept of the subject of a crime that is cultural heritage objects, then it seems not to be logical to use in other articles the names of objects (Article 193 "someone else's property or treasure that has a particular historical, scientific, artistic or cultural value," Part 1 article 201 - "historical and cultural values" of the Criminal Code of Ukraine) other than the stated name. The existence of different definitions of these objects leads to different interpretations of the concepts [8, p.27-29]. Thus, some scholars believe that for qualifying an act as a crime under Article 201 of the Criminal Code of Ukraine, the subject of smuggling must be both of historical and cultural value; others see the corpus delicti even when the subject only had historical value [9, p.112]. For example, E. P. Gayvoronskyi fairly concludes to exclude historical values from the number of smuggled objects, since, as is known, historical values are part of cultural values [6, p. 17-19]. However, we believe that this conclusion is not new to the domestic theory of criminal law and criminology. In particular, O. Protsiuk in his own dissertation study concluded that "the notion of cultural value is more general in relation to the concept of historical value and recommended in qualifying the actions of a person who carries the objects that have cultural value through the customs border of Ukraine to not require their obligatory simultaneous attachment to historical values; it is necessary to proceed from the fact that the requirement of simultaneous combination in one subject of two signs is a purely grammatical mistake " [9, p.112].

O. Davletshina, who analyzed the legislation, defined a similar problem in Russia and pointed out that there are also other "cultural and historical monuments", "objects of a special historical, scientific, artistic or cultural value", "objects of artistic, historical and archaeological heritage of the peoples of the Russian Federation and foreign countries", "cultural heritage", "antiquity" [10, p. 182]. Therefore, the scientist proposed to combine these objects with one concept of "cultural values" [10, p. 183]. Approving in general the position of O. Davletschina we consider her conclusion not complete because its proposal concerned only Articles 164, 188, 190 of the Criminal Code of the Russian Federation. At the same time Article 243 of the Criminal Code of the Russian Federation remained without corresponding changes. More integral is the position of I. Afonin who proposed to unify the notion of the subject of crimes provided by Articles

164, part 2 188, 190, 243 of the Criminal Code and to consolidate it as "cultural values" [11 , p.155].

Therefore, we consider it expedient to provide a more universal name "cultural heritage objects" instead of the names of the specified objects in Article 193 and part 1 of Article 201 of the Criminal Code of Ukraine.

Corpus delicti of "Illegal conducting of search works at the site of the archaeological heritage, destruction, ruining or damage to cultural heritage objects" in the vast majority of criminal laws of the former USSR by construction is material. In addition to the Criminal Code of Belarus, Ukraine, Moldova, the Russian Federation and the PC of Estonia, in which the respective corpus delicti combine both material and formal corpus delicti. Articles 344 and 345 of the Criminal Code of Belarus provide for the material corpus delicti, and Article 346 provides for a formal corpus delicti, since violence over historical and cultural values may not have the corresponding consequences. Article 199^1 of the Criminal Code of Moldova provides for the material corpus delicti, and Articles 199^2 –199^5Code of Moldova stipulate for formal 1992^2–199^5. Articles 243-243.2 the Criminal Code of Russia provides for consequences (destruction or damage), and Article 243.3. the Criminal Code of the Russian Federation provides for the formal corpus delicti (the crime is considered to be completed from the moment of the evasion of the executor of earth, construction, land reclamation, economic or other works or archeological field work, carried out on the basis of permission (open letter) from mandatory transfer to the state and discovered objects of special cultural value or cultural values in large quantities in the course of such works) in accordance with the law of the Russian Federation.

Article 298 of the Criminal Code of Ukraine provides, in fact, two categories of crimes. Part one of Article 298 of the Criminal Code of Ukraine (illegal conduct of archaeological exploration, excavation, other earthworks or underwater works at the site of the archaeological heritage) is, in our opinion, preparation for a crime stipulated in Part 2 of this article (intentional illegal destruction, ruining or damage to cultural heritage objects or their parts). Therefore, such preparation is a formal structure (Part 1 of Article 298 of the Criminal Code of Ukraine), and the completed offense (Part 2 of Article 298 of the Criminal Code of Ukraine) is a material one.

The objective aspect of the material corpus delicti stipulates the following obligatory attributes (the act means destroying, damaging or ruining history and culture monuments; causal link and consequences mean a decrease or total loss of the value of certain historical and cultural monuments etc.).

The objective aspect of the formal material corpus delicti involves the following obligatory attributes (for a formal structure an act means an outrage on historical and cultural values or the illegal conduct of archeological exploration, excavation, other earthworks or underwater works at the site of the archaeological heritage; for the material structure an action means destruction, damage or ruining of history and culture monuments; causation and consequences mean a decrease or total loss of value of certain historical and cultural monuments etc.).

Among the constructive attributes of the objective side of the relevant crimes one should identify the method of committing a crime as a generally dangerous one (Article 205 of the Republic of Estonia).

In some countries the consequences are determined separately from the encroachment itself (destruction, damage, ruining etc.) and are characterized by a certain size: significant damage (Part 1 Article 204, Article 205 of the PC of Estonia) and a large size (Part 1 of Article 245 of the Criminal Code Belarus). It should be noted that for the relevant corpus delicti (including the construction of qualified corpus delicti) it is not typical to determine the value of the damage caused by the crime (in addition to Article 243.1 of the Criminal Code of the Russian Federation, which specifies in the appendix a large amount of money (the cost of repairs to eliminate the damage exceeds five hundred non-taxable minimum incomes of citizens), and on archaeological heritage objects the cost of measures required in accordance with the legislation of the Russian Federation for the preservation of an object of archaeological heritage exceeds five hundred non-taxable minimum incomes of citizens; and Article 243.3 of the Criminal Code defines the large size of cultural values as a cost exceeding one hundred times the income in the Appendix. Therefore, the value of relevant historical and cultural values, as a rule, is determined not in the material equivalence, but is assessed from the degree of its importance for a particular society and state.

The main forms of committing this crime are closely linked and combined: 1) destruction or damage (PC of Estonia, Criminal Code of Tajikistan, Moldova, Azerbaijan, Armenia, Georgia, Belarus, Kazakhstan); 2) outrage (Criminal Code of Belarus); 3) illegal conduct of archaeological exploration, excavation, other earthworks or underwater works (the Criminal Code of Ukraine); 4) destruction, ruining or damage (the Criminal Code of Ukraine); 5) destruction, ruining or damage (CC of Turkmenistan, Uzbekistan); 6) destruction or damage (CC of Lithuania); 7) ruining or destruction (Criminal Code of Kyrgyzstan); 8) the execution of unauthorized excavations or the search for treasures in places of archaeological sites or in areas with archaeological potential; concealing or illegal storing of the movable archaeological heritage values; the execution of construction works, as well as the execution of other earthworks in places of archaeological sites or in areas with archaeological potential without a release certificate from archaeological potential; illegal sale of movable values of archaeological heritage and classified movable cultural property; illegal penetration of metal detectors or other tele detection devices into archaeological sites and in areas with archaeological potential and their use in these areas (CC of Moldova); 9) destruction, ruining or outrage (Criminal Code of Latvia); 10) violation of the preservation or use requirements of cultural heritage objects; illegal search and (or) extraction of archaeological objects from the places of deposit; evasion of the executor of earth, construction, melioration, economic or other works or archeological field work carried out on the basis of permission (open letter), from the obligatory transfer to the state of objects discovered during the conduct of such works (the Criminal Code of the Russian Federation).

The analysis of the abovementioned forms shows the obvious dominance of some of them: destruction (provided in the Criminal Code of 13 countries) or damage (11). The following is destruction (provided in the Criminal Code of 5 countries), damage (2) etc. In our opinion, such a position of foreign legislators is connected with the fact that destruction or damage is the typical forms of committing such an offense. In this case, destruction and damage is one of the options for the destruction or damage of such values, or supplement these forms, defining independent content. Such a conclusion is

suggested already from the logical analysis of the relevant articles and the content of their dispositions. Therefore, we offer to retain two forms of committing a crime: "destruction or damage" in Part 2 of Article 298 of the Criminal Code of Ukraine.

The philological analysis of the disposition of the relevant criminal law allows us to conclude that in some countries the Criminal Code (Armenia, Georgia, Belarus, Kazakhstan, the Russian Federation, Estonia, and Tajikistan) allow the commission of this crime due to inaction. This is evidenced by the use of the term "act" which in its content covers both action and inactivity. In our opinion, such use of the term is possible, since the crime may also be committed due to inaction.

The construction of Part 5 of Article 298 of the Criminal Code of Ukraine makes it possible to conclude that an official cannot commit the crime because of the inactivity of provided for Parts 2, 3 Article 298 of the Criminal Code of Ukraine. However, such cases are likely to be in a real life.

Thus, a situation characterized as inactivity is a situation in which an official does not carry out the necessary supervision or repair of the house (monuments - an object of cultural heritage) with mercenary motives, so that the gradual destruction of this object has made it possible in the future to build a skyscraper in this city.

This situation requires a detailed study as we cannot give a proper legal assessment at first. Possible inactivity of an official using the official position which entails the corresponding consequences (stipulated in Part 2 of Article 298 of the Criminal Code of Ukraine), requires qualification under Article 364 of the Criminal Code of Ukraine. That is, the general rule is applied, since the special rule (Part 5 of Article 298 of the Criminal Code of Ukraine) does not cover such a case (inaction). In the theory of criminal law, it is considered acceptable that abuse of power or official position can be committed both through action and inaction. Therefore, cases of abuse regulated in the norms of the Criminal Code should editorially foresee the possibility of committing it both through action and inactivity. For this purpose, the traditional formula: the word "act" encompassing such cases must be used. It is of great concern that Part 2 of Article 364 of the Criminal Code of Ukraine editorially provides for "act" as a form of abuse. Such inconsistency of the legislator needs some correlation. We offer Part 5 of Article 298 of the Criminal Code of Ukraine in the following version: "Acts provided ....".

The next stage of our study should be subjective signs of illegal conduct of search work at the site of the archaeological heritage, destruction, ruining or damage to cultural heritage objects.

A person who has reached the age of 14 (the Criminal Codes of Georgia, Kazakhstan, Latvia, Lithuania, the Republic of Estonia) or 16 years old (other republics' Criminal Codes) is deemed to be the subject of unlawful conducting of search works on an object of an archaeological heritage, destruction, ruining or damage of cultural heritage objects. At the same time, the possibility of committing a crime by a legal entity is stipulated in two republics (Part 2 of Article 204 of the Constitution of Estonia, Articles 199^1–199^4 of the Criminal Code of Moldova), and in Ukraine and Moldova a special entity is defined as an official (Article 5 Article 298 of the Criminal Code of Ukraine, paragraph "b", Part 2 of the 199^4 Criminal Code of Moldova, paragraph "b" part 3 of Article 243.2., paragraph "a" Part 2 of Article 243.3 of the Criminal Code of the Russian Federation).

The analysis of the characteristics of the subject testifies to the presence of identical features in domestic and foreign criminal law. The main difference lies in determining the minimum age of prosecution for conducting searches at the site of an archaeological heritage, destruction, ruining or damage to cultural heritage objects.

The subjective aspect of the relevant crimes involves, as a rule, intentional (direct intent) form of guilt (Parts 1, 2, 4 of Article 264 of the Criminal Code of Armenia, Article 298 of the Criminal Code of Ukraine, Article 204 of the PC of Estonia, Article 166 of the Criminal Code of Turkmenistan, Article 132 of the Criminal Code of Uzbekistan, Article 187 of the Criminal Code of Lithuania, Article 246 of the Criminal Code of Azerbaijan, Articles 344, 346 of the Criminal Code of Belarus, Part 1, 2, Article 257 of the Criminal Code of Georgia, Article 175 of the Criminal Code of Kyrgyzstan, Article 203 Criminal Code of Kazakhstan, Articles 199^1 –199^5 Criminal Code of Moldova).

The criminal law of Ukraine, unlike the laws of other countries of the former USSR, stipulates some additional mandatory signs of the subjective part of the qualified corpus delicti: the purpose of the crime to search for movable objects originating from the objects of the archaeological heritage (Part 4, Article 298 Criminal Code of Ukraine); the motive to assess if a crime has been committed on grounds of social, national, racial or religious hatred (Section 3, Part 2, Article 203 of the Criminal Code of Kazakhstan).

It should also be noted that the possibility of committing such an offense with a negligent form of guilt (Article 345 of the Criminal Code of Belarus, Parts 3, 4 of Article 264 of the Criminal Code of Armenia, Parts 3, 4 of Article 257 of the Criminal Code of Georgia, Article 20 of the PC of Estonia, Article 188 of the Criminal Code of Lithuania, Article 203 of the Criminal Code of Kazakhstan).

In some legislations the form of the fault of the relevant offenses is not clearly defined (Article 243 of the Criminal Code of the Russian Federation, Article 242 of the Criminal Code of Tajikistan, Article 229 of the Criminal Code of Latvia).

However, the possibility of committing such crimes is recognized as intentional forms of guilt [12, p. 375] and with negligence [13, p. 115] in the theory of criminal law of the respective states. For example, the Criminal Code of Kazakhstan in Part 2 and Part 3 of Art. 203 provides for a careless form of blame for consequences in the form (moderate and severe bodily harm and death of a person). A similar provision is stipulated in Article 243.1 of the Criminal Code of the Russian Federation on the violation of the requirements for the preservation or use of cultural heritage objects committed both intentionally and with negligence, and a careless form of guilt should be established to the consequences of the destruction or damage of such values to a great extent.

Discussions also arise about the possibility of committing such an offense with an indirect intention [14, p. 462]. In our opinion, it should be recalled Part 2 of Article 24 of the Criminal Code of the Russian Federation and Part 2 of Art. 27 of the Criminal Code of Tajikistan in which an act committed only by negligence is recognized as a crime only when specifically provided for by the relevant article of the Special Part of the Criminal Code of the Russian Federation. We must agree with Russian scholars who believe that "... version of Part 2 of Article 24 of the Criminal Code makes it possible to assert that if in the text of the Article of the Special Part of the Criminal Code there is no form of guilty in the basic corpus delicti or as part of a qualifying consequence, the fault may only be intentional in some corpus delicti or deliberate and careless in other corpus

delicti. This is established in relation to each part of the crime through the interpretation of the criminal law, taking into account the features of the objective side of the crime, included in the number of attributes of the characteristics, the motive and purpose of the act and other circumstances" [13, p. 115]. Given these circumstances and analyzing the signs of the subjective aspect of the destruction or damage to the history and culture monuments, we conclude that this crime, in particular, under the Criminal Code of the Russian Federation, can be committed both with intentional form of guilt, and with negligence. Such a design, although editorially permissible, however, does not adequately address the degree of public danger of a crime committed with the specified forms of guilty. Therefore, the way of other foreign legislators who singled out a responsibility for deliberate and careless acts in certain norms deserves approval. Considering the domestic stereotypes of rulemaking, we consider it acceptable to resolve such a question: to separate responsibility for such acts in separate articles (for example, Article 298 Intentionally illegal conducting of search works on an object of cultural heritage, destruction, ruining or damage of objects of cultural heritage and Article 298-2 Negligent destruction, ruining or damage to cultural heritage objects). It is inappropriate, in our opinion, to exclude such a form of committing illegal searches on the object of cultural heritage by negligence. Because, first, the social danger of such careless actions is minimal; and second, such case is fully encompassed by Article 92 of the Code of Ukraine on Administrative Offenses (CUoAO). Besides, the disposition of Article 92 CUoAO "Violation of Legislation on the Protection of Cultural Heritage" with appropriate dispositions of model 298-2 of the Criminal Code of Ukraine. Since these forms of administrative tort, a violation of the use of cultural heritage monuments, a violation of Historical and Cultural Reserve or the historical and cultural protected area, performing repair, restoration, rehabilitation work on a monument of cultural heritage, diversion monuments of cultural heritage its parts and components can pull careless illegal conduct search operations at the site of the archaeological heritage or destruction, ruining or damage of cultural heritage objects. Therefore, an indication of the existence of an offense in the absence of consequences on destruction or damage to cultural heritage objects should be provided in the disposition of Article 92 CUoAO.

After considering the main corpus delicti of "Destruction or damage to historical and cultural monuments", one should refer to the study of qualifying circumstances which are absent only in the Criminal Code of Azerbaijan, Lithuania, Turkmenistan, and Kazakhstan. The list of qualifying circumstances is the following: the subject of a crime that depends on its value or particular features (national significance monuments (Part 3 of Article 298 of the Criminal Code of Ukraine); especially valuable objects of cultural heritage of the peoples of the Russian Federation, cultural heritage objects (history and culture memorials) of the peoples of the Russian Federation included in the World Heritage List, historical and cultural reserves and museum-reserves or objects of archaeological heritage included in the unified state register of objects of cultural heritage (historical and cultural monuments) of the Russian Federation (Part 2 of Article 243 of the Criminal Code of the Russian Federation); especially valuable objects or monuments (Part 2 of Article 242 of the Criminal Code of Uzbekistan, Parts 2, 4 of Article 264 of the Criminal Code of Armenia, Parts 2, 4 Articles 257 of the Criminal Code of Georgia, Part 2 of Article 344, Part 2 of Article 345, Part 2 of Article 346 of the Criminal Code of Belarus, monuments to the Defenders of the Motherland (Part 2 of

Article 346 of the Criminal Code of Belarus); movable subjects (Part. 4 Article 298 of the Criminal Code of Ukraine); socially dangerous consequences (damage to a considerable extent (Part 2 of Article 175 of the Criminal Code of Kyrgyzstan), significant damage (Article 132 of the Criminal Code of Uzbekistan, Part 4 of Article 264 of the Criminal Code of Armenia, Part 2 of Article 344 of the Criminal Code of Belarus, Paragraph "c" Part 2 of Article 199[4], Criminal Code of Moldova); damage in a particularly large amount (Part 2 of Article 345 of the Criminal Code of Belarus); carelessness causing severe or moderate damage to health (Paragraph 2, Part 2, Article 203 Criminal Code of Kazakhstan); causing negligence of human death (Part 3 of Article 203 of Criminal Code of Kazakhstan); place of commission of a crime (territory of the object of cultural heritage included in the Unified State Register of cultural heritage objects (historical and cultural monuments) of the peoples of the Russian Federation, or the discovered cultural heritage objects (Part 2 of Article 243.2 of the Criminal Code of the Russian Federation); instrument of committing a crime (using special technical means of search and (or) earthmoving machines (Paragraph "a" Part 3 Article 244.2 of the Criminal Code of the of the Russian Federation); the subject of a crime (an official (part 5 of Article 298 of the Criminal Code of Ukraine, Paragraph "b" Part 2 of Article 199[4] of the Criminal Code of Moldova, Paragraph "b" Part 3 of Article 243.2., Paragraph "a" Part 2 Article 243.3 of the Criminal Code of the Russian Federation); legal entity (Part 2 of Article 204 of the PC of the Republic of Estonia); the purpose of the crime in order to search for movable objects originating from the objects of the archaeological heritage (Part 4 of Article 298 of the Criminal Code of Ukraine); the motive of a crime committed from the motives of social, national, racial or religious hatred (Paragraph 3, Part 2, Article 203 of the Criminal Code of Kazakhstan); the method of committing a crime: arson, explosion or other dangerous method (Part 2 of Article 229 of the Criminal Code of Latvia, Paragraph 1 of Part 2 of Article 203 of the Criminal Code of Kazakhstan); type of plurality: repetition (Part 2 of the Article CC of Belarus); form of complicity: group of persons (Part 2 of the Criminal Code of Belarus, Paragraph "a" Part 2 of Article 199[4] of the Criminal Code of Moldova, a group of persons under a preliminary conspiracy or an organized group (Paragraph "в" Part 3 of Article 243.2, Paragraph "б" of Part 2 of Article 243.3 of the Criminal Code of the Russian Federation; a criminal organization (Paragraph "a" Part 2 of Article 199[4] Criminal Code of Moldova).

It should be noted that the relevant features of the subject of the crime are the dominant among the qualifying circumstances. Among the typical characteristics there is not the cost of history and culture monuments, but the value (importance) for a society.

So, the criteria for determining these circumstances are the properties of the subject of the crime, the type of plurality, the form of complicity, the signs of the objective side of the crime (method, consequences), the characteristics of the subject of the crime (the special subject of the crime) and the purpose of committing the crime.

A comparative analysis of qualifying signs of destruction or damage to history and culture monuments, allows pointing out the unusual circumstances of such a crime as a task of cost implications. In our opinion, such criminal act causes significant moral harm to a particular society. These items definitely have some material value, but they are important not by their value. If the cost of such values was originally estimated, then encroachment on such subjects would be a completely different legal assessment

(for example, such a norm should be provided by the Chapter "Crime against property"). It is interesting that the criminal law of those foreign countries (Article 204, 205 of the Republic of Estonia, Part 2 of Article 187, Parts 1, 2 of Article 188 of the Criminal Code of Lithuania, Article 203 of the Criminal Code of Kazakhstan) in which the generic object of these crimes is a property relationship does not contain (except for Part 2 of Article 175 of the Criminal Code of Kyrgyzstan) qualifying circumstances related to the value indicators of damage to history or culture objects.

In our opinion, the definition of such qualifying circumstances as the commission of such crime in order to find movable objects originating from objects of archaeological heritage (Part 4 of Article 298 of the Criminal Code of Ukraine), which has no analogues in the legislation of other countries of the former USSR (except Article 243-243.3 of the Criminal Code of the Russian Federation, Articles 199^1–199^5 of the Criminal Code of Moldova) requires some reflection and possible revision.

The analysis of the sanctions of the relevant criminal law allows the following basic punishments to be distinguished: fine, public works (compulsory work or free labor), correctional works, arrest, restriction of liberty, imprisonment. Additional punishment is the deprivation of the right to occupy certain positions or engage in certain activities (Article 298 of the Criminal Code of Ukraine, Articles 199^1, 199^3, 199^4 of the Criminal Code of Moldova, Part 3 of Article 244.2, Article 243.3 of the Criminal Code of the Russian Federation). It's worth mentioning that such an additional punishment provided in all five parts of Article 298 of the Criminal Code of Ukraine. That is, the application of such a penalty does not have a mandatory condition, such as the commission of such an offense by the official.

According to the degree of severity, criminal law should be placed in accordance with the increase of the punishment:

- Punishment is not connected with deprivation of liberty (Part 1 of Article 199^4 of the Criminal Code of Moldova, Part 1 of Article 132 of the Criminal Code of Uzbekistan);
- punishment in the form of deprivation of liberty for a term up to 2 years (Part 1 of Article 229 of the Criminal Code of Latvia, Article 243.1, 243.2 of the Criminal Code of the Russian Federation, Article 166 of the Criminal Code of Turkmenistan, Article 246 of the Criminal Code of Azerbaijan, Part 1 of Article 264 of the Criminal Code of Armenia, Part 1, Article 175 of the Criminal Code of Kyrgyzstan);
- Punishment in the form of deprivation of liberty for a term up to 3 years (Part 2 of Article 298 of the Criminal Code of Ukraine, Article 243, 243.3 of the Criminal Code of the Russian Federation, Part 1 of Article 242 of the Criminal Code of Tajikistan, Part 1 of Article 344 of the Criminal Code of Belarus);
- Punishment in the form of deprivation of liberty up to 4 years (Part 1 of Article 257 of the Criminal Code of Georgia);
- punishment in the form of deprivation of liberty for a term of up to 5 years (Part 2 of Article 187 of the Criminal Code of Lithuania, Part 1 of Article 204 of the PC of Estonia, Part 2 of Article 175 of the Criminal Code of Kyrgyzstan, Part 2 of Article 229 of the Criminal Code of Latvia);
- Punishment in the form of deprivation of liberty for a term up to 12 years (Part 3 of Article 203 of the Criminal Code of Kazakhstan).

The range of types and sizes of punishment is the following: from a fine in the amount of 750 to 850 standard units with the deprivation of the right to occupy certain positions or engage in certain activities for a term up to 1 year (Part 1 of Article $199^4$of the Criminal Code of Moldova) to imprisonment for a term from 7 to 12 years (Part 3 of Article 203 of the Criminal Code of Kazakhstan).

If we consider the other parts (containing qualifying circumstances) of the relevant articles according to the specified criterion, we can cite the following conditional types of norms for certain sanctions: 1) punishment in the form of deprivation of liberty for a term up to 3 years (Part 2 of Article 132 of the Criminal Code of Uzbekistan, Part 2 Article 199^4 of the Criminal Code of Moldova); punishment in the form of deprivation of liberty for a term up to 5 years (Part 2 of Article 229 of the Criminal Code of Latvia, Part 2 of Article 264 of the Criminal Code of Armenia, Part 2 of Article 175 of the Criminal Code of Kyrgyzstan); punishment in the form of deprivation of liberty for a term up to 6 years (Part 2 of Article 244, Part 3 of Article 244.2, Part 2 of Article 243.3 of the Criminal Code of the Russian Federation); punishment in the form of deprivation of liberty for a term up to 7 years (Part 2 of Article 242 of the Criminal Code of Tajikistan); punishment in the form of deprivation of liberty for a term up to 8 years (Part 5 of Article 298 of the Criminal Code of Ukraine); punishment in the form of deprivation of liberty up to 12 years (Part 2 of Article 344 of the Criminal Code of Belarus, Part 2 of Article 257 of the Criminal Code of Georgia, Part 3 of Article 203 of the Criminal Code of Kazakhstan).

If we compare the size of penalties in sanctions for the abovementioned intentional and careless crimes, it is logical to conclude that punishments are more severe for intentional acts. Moreover, the maximum size of penalties for the corresponding sanctions several times differ (for the PC of Estonia in 5 times; for the Criminal Code of Belarus in 3-4 times; for the Criminal Code of Georgia in 2-4 times; for the Criminal Code of Armenia in 2-2,5 times; for the Criminal Code of Lithuania in 2.5 times). Such different digital indicators depend on the maximum penalties that are defined in the main or qualified corpus delicti.

Conclusion

Based on the abovementioned we can suggest the following conclusions:

1. The Criminal Codes of the former USSR provide for criminal liability for the destruction, ruining or damage of cultural heritage objects.

2. The content of most of the relevant criminal law given the historical traditions of law-making in such countries has common features.

3. The formation of the law on criminal liability of certain republics of the former USSR (Ukraine, Russia, Tajikistan, Armenia, and Georgia) was greatly influenced by the perspective model experience of the Inter-Parliamentary Assembly of the CIS countries.

4. A new modern expanding tendency of the differentiation of criminal responsibility for the destruction, ruining or damage of cultural heritage objects (CC of Moldova, Belarus and the Russian Federation) has been established.

5. The criminal legislation of Ukraine and Azerbaijan in the field of criminal law protection of cultural heritage objects does not take into account modern external threats and has been designed for the peaceful period.

6. In view of the comparative legal analysis, we propose the following changes to the Criminal Code of Ukraine:

- To provide a new Article 438-1 "Illegal conducting of search works, destruction, ruining or damage of cultural heritage objects on the temporarily occupied territories";

- taking into account the legislation of certain foreign countries (the Russian Federation, Moldova), we propose to exclude qualifying circumstances as the commission of the corresponding crime in order to find movable objects originating from archaeological heritage objects (Part 4 of Article 298 of the Criminal Code of Ukraine) and provide the corpus delicti in a new article 298-3 "Intentional illegal destruction, ruining or damage of cultural heritage objects committed for the purpose of searching for moving objects originating from objects of archaeological heritage";

- Part 5 of Article 298 of the Criminal Code of Ukraine to read in the following version: "Acts envisaged ....";

- Part 2 of Art. 298 of the Criminal Code of Ukraine should retain two forms of committing a crime - "destruction or damage";

- exclude an evidence of an independent subject of a crime as a part of an object of cultural heritage from Part 2 of Article 298 of the Criminal Code of Ukraine;

- Article 298 of the Criminal Code of Ukraine must include the following changes: instead of the phrase "the archaeological heritage objects" replace the words "cultural heritage objects";

- an indication of the existence of an offense in the absence of consequences: destruction or damage of cultural heritage objects should be provided in the disposition of Article 92 CUoAO; depending on the form of guilt we propose to separate responsibility for such acts in separate articles of the Criminal Code of Ukraine: Article 298 "Deliberate unlawful conduct of search works at the object of cultural heritage, destruction, ruining or damage to cultural heritage objects" and Article 298-2 "Negligent destruction, ruining or damage to cultural heritage objects";

- Part 3 of Article 298 of the Criminal Code of Ukraine is suggested to use another term "cultural heritage object of national importance";

- Article. 193 and Part 1 of Article 201 of the Criminal Code of Ukraine must state instead of the names of the specified objects ("foreign property or treasure having a special historical, scientific, artistic or cultural value", "historical and cultural values") to provide a more universal title of the object "cultural heritage objects".

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INTERNATIONAL INTELLECTUAL PROPERTY LAW: EVALUATION OF MODERN TENDENCIES

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Abstract

The article is devoted to the current trends in the development of international intellectual property law. The author shows the main challenges of globalization, which define new problems of intellectual property concerning international trade and information society. The main areas of international cooperation under the auspices of World intellectual property organisation and World trade organisation are outlined. The shift from copyright and other intellectual property rights to patent cooperation is underlined. The conclusion is formulated about the mechanisms for the improvement of international patent cooperation. Practical aspects are shown by the example of Eurasian patent organisation.

Keywords: *intellectual property, intellectual property law, copyright, industrial property, patents, international patent cooperation, World intellectual property organisation, World trade organisation, Eurasian patent organisation.*

Introduction

Intellectual property plays a crucial role in successful economic development and is vital for every state in the modern world. National and international intellectual property law are closely interrelated. On the one hand, the development of national law is guided by international standards enshrined in international agreements developed and adopted within the framework of international organizations, primarily WIPO and WTO. On the other hand, international law is aimed at the overcoming of independence and autonomy of national legal systems for the protection of intellectual property rights.

International cooperation in the field of intellectual property has been actively developing since the XIXth century. Significant progress has now been made. However, the relationship between international and national legislation is still determined by the following basic principles. According to the terms of international agreements states are obliged to approximate conditions for granting and enforcement of intellectual property rights and to ensure free access of foreigners to national systems of intellectual property by providing national treatment or most favoured nation treatment.

Intellectual property rights have territorial nature. It means that they are governed by national laws, have no extraterritorial effect and are independent of any such rights existing in other countries. The principle of the territoriality of intellectual property is widely recognized and traditionally regarded as a contradiction in the modern globalized economy, which requires the harmonization or unification of law, regional or global [1].

Thus, international protection of intellectual property is more dependent and relies on sources of international public law (i.e. international treaties) than other relations regulated by private international law [2]. The modern international intellectual property law includes so wide range of specialized sources that the doctrine has special

studies on a holistic view of international intellectual property law as an integral part of the international legal system [3]. We refer to the subject orientation of international intellectual property law, mainly as the prevalence of the two main types of intellectual property: copyright (including related rights) and industrial property. The purpose of this article is to explain the emerging prevalence to patent issues and necessary implementation mechanisms to apply procedural norms relating to formalities.

Sources of international intellectual property law can be classified with the help of different criterions. There are multilateral, bilateral, universal, regional treaties that regulate various issues of intellectual property from the conditions of protection to the formalities necessary to obtain it. First, we turn to universal treaties on any issues of intellectual property in order to reveal the specifics of international policy in relation to intellectual property on a global scale. Following this way, we leave aside the peculiarities introduced into the international legal regulation of intellectual property by the cooperation of countries united by a particular goal. For example, neighbouring countries or countries of the same region can participate in economic integration, which requires solving determined intellectual property problems (regional principle of exhaustion, creation of uniform systems for the protection of industrial property objects, for example, The EU Trade Mark System, etc.). Hence, evaluation of modern tendencies in the development of universal intellectual property treaties can outline the legal foundations of the nowadays global dimension of intellectual property.

Stages and the current state of the international intellectual property law

The process of the development of the international intellectual property law can be divided into several stages depending on changes in goals and methods of international protection of intellectual property rights. In the history of intellectual property P. Drahos distinguishes territorial, international, and global and post-TRIPS stages [4].

The territorial stage is counted from the establishment of the national intellectual property right. It can be counted from the end of the XVth century. At this stage, the principle of territoriality of intellectual property acted without any exceptions due to special international law mechanisms. These mechanisms appeared as mutual recognition of free access to national intellectual property systems fixed by norms of international treaties. The international period was launched with the conclusion of bilateral treaties. By the time of the conclusion of the Paris Convention for the protection of industrial property of March 20, 1883 (Paris Convention), about 70 bilateral treaties in the field of industrial property (mainly on trademarks between European countries) had been concluded. The main cause of the genesis of the international intellectual property law was the need to remove barriers to the international trade in goods embodying intellectual property objects (work, trademarks and inventions). First international exhibitions and fairs like the Great Exhibition of 1851 showed that bilateral treaties are ineffective in the conditions of international trade that had already acquired a multinational character, especially when foreigners refused to participate in the International Exhibition of Inventions in Vienna in 1873 because of insufficient protection of their ideas against piracy [5]. At the time of the development of international cooperation at the universal level, the need for elimination of negative consequences of the principle of the territoriality of intellectual property became apparent.

Paris Convention, Berne Convention for the Protection of Literary and Artistic Works. of September 9, 1886 (Berne Convention), Madrid Agreement Concerning the International Registration of Marks of April 14, 1891 (Madrid Agreement) and other, so called "basic conventions" adopted at the end of the XIXth century laid down the foundations for the international protection of intellectual property: standards for the approximation of laws of the participating states; national treatment, convention priority right; international procedures for industrial property objects (as international trade mark registration). For over a century, international law has been developed in order to stipulate the conditions of protection of intellectual property objects and to increase the range of intellectual property objects and rights regulated by international law. A lot of new international treaties were concluded. Many of them caused the appearance of protection in the participating states. It concerns Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, of October 26, 1961, UPOV Convention for the Protection of New Varieties of Plants, of December 2, 1961, Washington Treaty on Intellectual Property in Respect of Integrated Circuits, of May 26, 1989. The intellectual property law of the majority of the countries, namely developed countries, began to develop in the field of related rights, selection achievements, and topologies of integrated circuit due to the relevant international agreements. The main feature of the international period of the development of the intellectual property law was a pronounced tendency to increase the level of protection of intellectual property rights. The conclusion of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1994 summed up this trend. Developing and least developed WTO Member States adopted high standards of protection and enforcement of intellectual property rights fixed in TRIPS as conditions of a bargain in the course of multilateral trade negotiations.

As a matter of fact, TRIPS was the last universal international treaty that was adopted based on the vision of the developed countries of the goalsetting's in intellectual property law. High TRIPS standards for copyright and related rights were repeated and clarified in two so called "WIPO Internet-Treaties" (WIPO Copyright Treaty and the WIPO Performances and Phonogram Treaty, both of 1996). However, the intention of developed countries to continue the trend towards higher standards of protection and enforcement of intellectual property rights was strongly opposed.

The global period in the development of intellectual property law, triggered by TRIPS, is characterized by the fact that the absolute majority of countries have become involved in international cooperation on intellectual property issues and have assumed obligations under the basic conventions. At the same time, the globalization of the world has the following consequences: significant dependence of national economies on innovations and technologies; aspiration of developing countries to increase their share in international trade in goods embodying intellectual property objects; informational interconnection of the world based on rapidly developing information and communications technologies (ICT). So, it does not allow unconditional support of right holders by giving them new powers to restrict the access of others to the results of intellectual activity and other intellectual property objects. After the conclusion of TRIPS, a new trend in the development of international intellectual property law is becoming obvious. It assumes not higher standards of intellectual property protection and enforcement, but an optimal balance of interests of all stakeholders: right holders, authors, users, innovators, states, etc.

Changes of the geopolitical factors influencing the development of international intellectual property law in the post-TRIPS stage

The impact of intellectual property on the interests of national economy has always been a determining factor for the development of international cooperation in this field. But, prior to TRIPS, the relationship between intellectual property and the national economy was understood as a necessity to increase standards of protection of intellectual property rights in order to stimulate the creative activities of authors and inventors. In the period after TRIPS, it became clear that intellectual property cannot be considered in one-sidedly way, and intellectual property law should provide the optimal balance for all interested parties. Consequently, each national economy has specific areas of concern in intellectual property. Countries with different indicators of economic development and the degree of participation in R&D have different interests and capabilities in regulating intellectual property. At a certain stage of the implementation of the TRIPS provisions, developing WTO Member States realized that high standards of protection and enforcement of intellectual property rights do not in themselves necessarily lead to economic growth, foreign investment flows and technology transfer.

After the conclusion of TRIPS, first in the framework of the WTO, later in WIPO, a disagreement appeared in understanding the further ways and directions of universal cooperation in the field of intellectual property. The corresponding conflict of interests P.B. Maggs and A.P. Sergeyev described as "an imbalance of interests of countries exporting and importing intellectual property" [6].

The post-TRIPS stage is characterized by two main changes. First, the majority of countries prefer to consider the requirements of TRIPS and other international intellectual property treaties not as minimum, but maximum standards of the protection and enforcement of intellectual property rights. The discussion about the qualification of the TRIPS standards as "a floor or a ceiling" emerged between developped and developing countries even before the end of the implementation of these standards [7, p.60]. The laws of the industrialized countries adhering to the position of "TRIPS is a floor, not a ceiling" (leading Member States of the EU, US, Japan, etc.) exceed the TRIPS requirements and tend to increase the terms of intellectual property rights protection and to toughen the measures of liability for intellectual property rights infringements. Bilateral and regional forms of international cooperation on intellectual property between developed countries follow this tendency. However, at the universal level the corresponding development of intellectual property law does not receive support. This statement can be illustrated by the failure of Anti-Counterfeiting Trade Agreement [8, p.675] and new TRIPS Article 31bis facilitating compulsory licensing in international trade [9].

The so called "TRIPS-plus process", which assumes the adoption of international legal obligations on higher standards of intellectual property protection and enforcement in national laws, cannot be effectively realized at a universal level. In the framework of WIPO and WTO, this process takes the form of a discussion. Nowadays, achieving of results, in particular adoption of new international norms is attributed to bilateral and regional levels, and is mostly connected with the regional economic integration instruments [10, p.222].

The second fundamental change in geopolitical factors influencing the development of international intellectual property law concerns the determination by each

country its special interests in the protection of certain intellectual property objects. At the present stage, the connection between international law and international trade in goods embodying intellectual property objects has become more prominent than ever before. The trade positions of the contracting parties affect the discussion of drafting international norms and trade issues anyway come up in the new international agreements on intellectual property. For example, Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled of June 27, 2013 (Marrakesh Treaty) regulates these issues in Articles 5, 6, 9 [11].

The turn of the international intellectual property law to the solution of a new kind of problems

International intellectual property law currently sets the protection standards, on the basis of which other intellectual property issues can be solved, namely international protection of intellectual property and elimination of negative aspects of intellectual property territoriality. The most acute territoriality is manifested in the field of patent law. Thus, it is not by chance that in recent decades the intensity of international cooperation and development of international law in the field of copyright is much lower than in the field of industrial property.

The unification of the intellectual property procedural rules has advanced significantly. Over the period since TRIPS, landmark events have occurred in all WIPO systems on industrial property, in particular:

- on June 1, 2000, the Patent Law Treaty was concluded;
- on January 1, 2006, the Rules of the Patent Law Treaty entered into force;
- on April 1, 2008, the Model International Forms under the Patent Law Treaty entered into force;
- on October 3, 2001, amendments were made to the Patent Cooperation Treaty (PCT);
- on July 1, 2017, the Administrative Instructions and Rules for the PCT Treaty entered into force;
- on November 12, 2017, changes were made to the Protocol of to the Madrid Agreement (Madrid Protocol);
- on November 1, 2017, the General Rules for the Madrid Agreement and the Madrid Protocol entered into force;
- on 1 April 2018, the Administrative Instructions for the Madrid Agreement and the Madrid Protocol entered into force;
- on May 20, 2015, the Geneva Act of the Lisbon Agreement on the Protection of Appellations of Origin and Geographical Indications was adopted;
- on January 1, 2016, the Rules on the Lisbon Agreement on the Protection of Appellations of Origin and their International Registration came into force in 1958;
- on May 20, 2015, the Rules for the Geneva Act of the Lisbon Agreement on the Protection of Appellations of Origin and Geographical Indications were adopted;
- on October 11, 2017, the General Rules for the Lisbon Agreement and the Geneva Act of the Lisbon Agreement were adopted;
- on January 1, 2010, the Administrative Instructions for Names under the Lisbon Agreement entered into force;

- on July 2, 1999, the Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs was adopted;
- on January 1, 2017, the General Rules for the 1999 Act and the 1960 Act of the Hague Agreement came into force;
- on 1 July 2014, the Administrative Instructions for the Application of the Hague Agreement entered into force.

The results of international cooperation during the abovementioned period in the field of copyright law and legal regulation of related rights include four international treaties: Internet-Treaties, Marrakesh Treaty and Beijing Treaty on Audio-visual Performances of June 24, 2012. It is not a matter of quantitative achievements, but of the depth and range of regulated issues. The agenda of the WIPO Standing Committee on Copyright and Related Rights includes a lot of complicated questions attracting international concern: limitations and exceptions, position of libraries and archives, rights of broadcasting organizations, etc. [12]. Discussion of the rules of protection in this area, as well as intellectual property standards regarding new phenomena as genetic resources, traditional knowledge and folklore, serves the important goal of progressive development of intellectual property law. The Member States of WIPO exchange views, discuss the experience of legal regulation, but adopt national laws based on specific national interests. Apparently, there are not enough grounds for adopting new standards of universal acceptability.

On the one hand, the shift in the subject area of international cooperation on intellectual property issues is caused by the task, which in the present conditions is especially important for developing countries, to rethink the economic value of intellectual property in the context of export-import activity, for example through the evaluation of the domestic intellectual property share in global value chains (GVC) [13]. On the other hand, the transfer of interests from substantive to procedural aspects of intellectual property rights is associated with the increasing role of ICT for the execution of formalities relating to industrial property objects. Recent years are marked by the rapid development of the international patent cooperation on the establishment of advanced patent search software and technologies, the international exchange of patent information and the creation of interactive patent information data bases.

International patent cooperation has always been an important part of the WIPO activity. Law and practice in this area began to develop in the second half of the last century. Structurally, international patent cooperation can be divided into universal (WIPO) and regional (European patent organisation, Eurasian patent organisation, etc.) levels. There are cooperative links between national patent offices on bilateral and multilateral grounds. However, in general, this process has always been coordinated and conducted in a harmonized manner. Currently, the complex interweaving of cooperative links between patent offices at all levels along horizontal and vertical vectors gives very interesting results. Leading positions in this process belong to WIPO, EPO and patent offices of developed countries because they have the most advanced ICT facilities for the collection, processing and examining of the patent information.

The main task of the international patent cooperation is to facilitate the fulfilment of formalities necessary for obtaining protection of industrial property in several jurisdictions. For example, it concerns international application and international search under the PCT Treaty. The International Patent Classification (IPC), established by the Strasbourg Agreement of March 24, 1971, simplifies the work of patent offices with

patent information and harmonizes the used terminology. New forms of international patent cooperation allow getting a more far-reaching effect.

The use of advanced ICT, connection of patent information data bases and other progressive forms of international patent cooperation allow overcoming the contradiction between the global unity of the technical achievement (invention) and the fragmentation of its legal protection by patents in different countries. Expanding the possibilities of a more thorough and objective examination of the claimed invention on novelty and inventive step, taking into account the world level of prior art, creates conditions for improving the quality of granted patents and preventing the patenting of technologies, which are already known, and most importantly, are used in goods in the course of international trade. The convention priority right protects the interests of the person who has the right to file an application. In the modern conditions of the Internet and digital technologies, that provide easy access to patent information, it is unjust to leave the possibility to other persons, observing the formal requirements for a patent application, to patent technologies, that have already entered into prior art.

The challenges of the information society require adjustments to the infrastructure of patent information, which reveals the state of the art. There are several significant contributions to this process from WIPO, EPO and leading national patent offices.

First of all:

- since 2010 yearly updated IPC versions (…2017.01, 2018.01, 2019.01), each new version enters into force on January 1,
- PATENTSCOPE database (72 million patent documents including 3.5 million published international patent applications (PCT applications);
- IPCCAT-neural, that is the WIPO automatic text categorization on the basis of IPC, using technologies of artificial intelligence;
- Cooperative Patent Classification (CPC) developed by EPO and the US patent office (USPTO) as internationally compatible classification system for technical documents used by both offices;
- mutual cooperation in so called process "IP5" of USPTO, Japan Patent Office, State Intellectual Property Office of China, Korean Intellectual Property Office, EPO in order to exchange experience, improve the quality of work and avoid duplication in each other's activities.

EAPO is interested in new developments in the digital modernization of patent information infrastructure and is expanding its participation in the international patent cooperation. Thus, CPC, launched in 2013, attracts attention of EAPO from 2016 and will begin to apply to the newly published Eurasian patent documents on January 1, 2019.

CPC is based on a combination of EPO and USPTO classifications (ECLA and USPC, respectively) into a single system with the structure compatible with IPC. However, CPC has several times more classification headings and contains index codes that allow obtaining additional information about inventions. Thus, it allows getting more detailed search than IPC.

The great achievement of EAPO is the development of the Eurasian Patent Information System (EAPATIS) that allows raising to a higher level search procedures in the databases of the EAPO Member States and in external resources. EAPATIS is built on the widespread use of ICT and allows virtual use of a wide range of information resources by using various types of patent searches. EAPATIS significantly expands

patent cooperation globally. It is connected to the resource created by EPO, Espacenets, which is a free online service for searching patents and patent applications on a very high scale (about 100 million patent publications).

It is very important to create a fair and transparent infrastructure for the international protection of inventions. An ideal study of the real state of the prior art should be at the global level. It is also important that expanding the use of ICT and advanced patent bases in patent work have advantages not only in searching for analogues, but also in solving the problems of automating data processing, eliminating language barriers and improving the quality of translation.

From the point of view of national law and interests of national economy the digital modernisation of patent work serves the instant task of the patent law. Patent protection should be available for inventions, which are truly new technical solutions. The expansion of patent information search opportunities creates advantages for society and persons interested in creation and use of innovations. They receive guides in order to decide which invention they can patent; which achievements they can use freely; what are the priority areas of R&D and modernisation of production capacities.

Conclusion

In the modern conditions of globalization of knowledge and the tough competition on the global market of high-tech goods, the determination of national interests in the intellectual property policy changes directions and forms of international cooperation in the field of intellectual property.

Copyright and related rights, especially in the light of the complex problems caused by the development of the Internet relations (in particular, role of Internet service providers and other intermediaries in the infringements of copyright and related rights, blocking the Internet-resources for illegal content, open licenses), new constructions in the intellectual property law (traditional knowledge, genetic resources, etc.), the development of international registration systems for industrial property objects (trademarks, industrial designs, appellation of origins) are covered in the course of international cooperation. New approaches of legal regulation are developing and new standards are adopting in these fields.

However, the patent issues deserve a special highlighting in the modern international intellectual property law, because they reflect a significantly new signs in its development. We observe a close intertwining of rulemaking and law enforcement practices in order to overcome the territoriality of intellectual property. It is of crucial importance that it takes place in regard of the most vulnerable to the principle of territoriality intellectual property system, i.e. patenting.

Thus, the issues of creating the appropriate conditions for the global resolution of the issues of territoriality come out on top, and it is not due to material or conflict of laws rules. It is done through the creation of conditions for application of procedural norms.

The priority of patent issues for inventions is due to the fact that these intellectual property objects are of paramount importance for the economic, technological and innovative development of the national economy. In the globalized world a patent monopoly cannot be determined by the technical manipulation of information on prior art in various jurisdictions, but must be based on technological advances, that really include an inventive step. The increasing intensity of the development of ICT, including

artificial intelligence systems, which are already being put to practical use in the search for patent information, makes it possible to achieve this goal.

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STRATEGIC PRIORITIES FOR PUBLIC INVESTMENT IN UKRAINIAN ECONOMY IN EUROINTEGRATION CLIMATE: ENSURING COMPETITIVENESS AND SUSTAINABLE DEVELOPMENT

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Abstract

This article covers the competitive ability challenges for the Ukrainian economy in the context of the European integration track. Ukraine's rating position in the Global Competitiveness Report and in the Global Sustainable Development Goals (SDG) process is explained in the first part of the article together with underlying rationale for bolstering the efforts to attract investment. The analysis of actual priorities of investment activity and strategic policy papers compliance with the Sustainable Development Goals and with obligations taken by Ukraine within European integration process is done in the second part of the article. Greater emphasis is put on lack of efficient system of public strategic planning and correspondingly on lack of system of the investment activity handling, including deficiency of the Sustainable Development Goals involvement. The Conclusions provide the following arguments: national economy's sustainable development depends on efficient management of public investment process based on strategic public investment priorities which satisfy an investment demand and investment opportunities of the relevant territories. At the same time, a subordination of a capital budget costs policy to the strategic investment priorities shall ensure the completion of strategic tasks of the development of territories, areas of economic activity and structural modernization of the Ukrainian economy. Further research is recommended to be focused on studying organizational and legal, financial and economic, and institutional mechanisms of defining the public investment strategic priorities.

Keywords: *competitive ability, competitiveness, European integration, sustainable development, Sustainable Development Goals (SDG), investment activity priorities, public policy, strategic planning, investment activity, financial sources for investment, investments.*

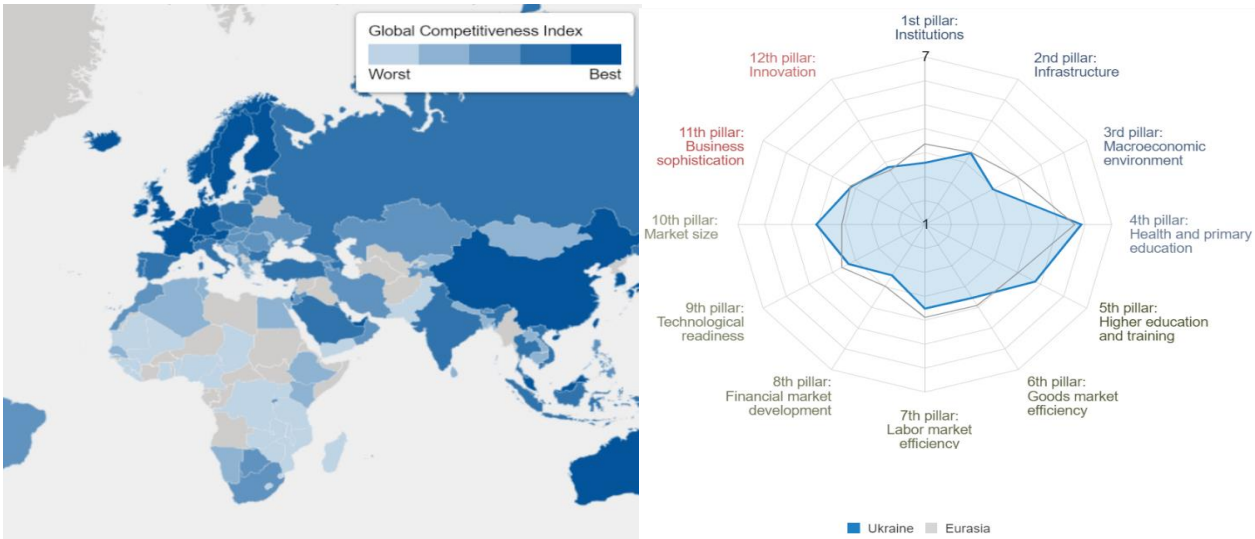
Introduction

To certain extend a country's level of competitive ability should be read as its success barometer and is defined by economic, social and political drivers together with national infrastructure, scientific opportunities, level of education of population that guarantee a steady marketing position for country and its goods both at domestic and international levels.

Ukraine can boast with such global competitive advantages as human resources and natural resources, namely mineral resources.

On the flip side, Ukraine demonstrates mostly low or medium ranks in most global ratings. The Global Competitiveness Report 2017-2018 [1] ranks Ukraine at 81th position from among 137 countries. This year Ukraine worsened its position in 4 out of 12 major pillars, namely the country lost 13 positions in 'Labor market efficiency', 9 positions in 'Innovation', 3 positions in 'Infrastructure' and 2 positions in 'Higher

education and training'. Ukraine is ranked at the lowest levels under some indices, like 'soundness of banks' (ranking 130th position), 'regulation of securities exchanges' (ranking 134th position), 'quality of roads' (ranking 130th position), 'inflation changes' and 'country capacity to retain talent' (ranking 129th position) and 'property rights' (ranking 128th position) (Drawing 1).



Drawing 1. Ukraine in Global Competitiveness Index 2017-2018

According to the components of the Global Competitiveness Index (hereinafter referred to as the GCI), the competitive ability depends on country's ability to create economic and legal environment fostering steady process of added value development and regulating almost all and any areas of social life. With this in mind, taken the nature and scale of this process, it cannot be separated from the Sustainable Development Goals -2030 (SDGs) [2], due to the fact that SDGs set the benchmarks for the countries up to the year 2030. These benchmarks are set for major vectors, namely 'economics', 'environment', 'society', not limited to them, and intend to achieve the global tasks of establishing peace, justice, common institutions and partnership.

Apparently, the country should take the issues of increasing its competitiveness based on sustainable development principles as a top priority; therefore, these issues must be integrated into the public policy analysis loop, starting from the problem identification to the assessment and monitoring of plans and tasks implementation. Implementation of this task requires significant funding for both specific events or measures and administrative process and is to be paid for from national and local budgets, as well as from other sources like private investment, international organizations, international technical assistance, Official Development Assistance (ODA). For this reason and due to fundamental economic problem of limited resources, competitive market realities and global challenges, the way-out should be seen exactly in investment field via ensuring a favorable investment climate and investment attractively of separate sectors or regions.

Baseline content

Investors pursue their own economic interests via making certain arrangements and starting relationships at investment markets. Relevant legislation of Ukraine [3] prohibits public authorities to interfere with investment activity, so in the context of market economy a government first of all applies the indirect influence approach in the capacity of participant of investment processes via state institutions.

Accordingly, in order to increase the country's competitiveness level based on sustainable development principles the public authorities must play an active role in organizing and regulating investment processes and must apply a whole complex of economic, legal and administrative incentives for investment activity of economic entities.

Theoretical development of competitiveness issues has been performed on separate occasions by such economists as A. Smith, M. Porter, A. Cournot, D. Ricardo and other. J.M. Keynes, M. Friedman and T. Veblen have paid great attention to the issues of public management of investment processes and of creating investment environment under crisis development. These authors of correspondingly 'Keynesian', 'monetary' and 'institutional' theories of economic growth have commented among other issues on principles and limits of public interference with investment processes. Prominent national and foreign scientists, such as V. Bodrov, O. Vinnyk, V. Heyets, M. Denysenko, I. Drahan, P. Drooker, S. Zakharin, A. Muzachenko, Y. Kozak, V. Nyzhnyk, A.Peresada, I. Rozputenko, S. Savelko, O. Sokolova, D. Stechenko, N. Tatarenko, L. Balabanov, I. Dolzhansky, S. Sheveliova and others study the following issues: strategic planning challenges, investment resources cumulation and use in national economic system, role of investment resources in social and economic state development, impact of investment on the process of social renewal and ensuring national interests, public regulation and management of investment processes, national competitiveness issues.

Due to significant underachievement of Ukraine in GCI, the necessity to implement a rapid development strategy is obvious.

According to 'Policy of Economic Pragmatism', an analytic research study of the Institute for Social and Economic Research (Ukraine) [4], 'to start catching up with developed economies and succeed with best strategic scenario of a GDP per citizen in the amount of 9 163 USD by 2025, Ukraine must demonstrate more than 7% of economic growth annually'.

According to world practice, it is definitely possible to implement the rapid growth strategy which might bring from 6 to 7 % of annual economic growth and result in the rise of living standards. However, it might be possible only based on structural and innovative model of economic growth, intensive technical and technologic industry modernization [4]. These preconditions are of crucial significance for the progressive intersectoral structural breakthroughs resulting in improvement of both sectoral competitive ability and national economics competitive ability. Eventually, the national economy competitiveness in global economic dimension turns into identifying driver for the national economic security and defines a place of country in global community [5].

The researches consider the establishment of innovative economy to be one of the main drivers influencing competitiveness of Ukraine. In its turn, building an innovative economy requires huge financial resources. Innovative investment requires govern-

mental support and regulation, so that such investment was available for all priority sectors, defined by relevant legislation [5] with proper regard to national interest's protection, prevention of illegal concentration and prevention of total foreign control over separate areas of national economy.

In the context of this issue there exist a range of laws and regulatory acts regulating the performance of investment activity in Ukraine. Still this legislation is highly vulnerable to case-by-case amendment; rules are often mutually contradictive and full of gaps, which cause negative effect on national investment climate.

Nowadays the companies, markets and economies grew more and more global and interrelated. Business and investors get deeper understanding that their prosperity and development abilities depend greatly on prosperous and resilient society. And conversely, these actors evidence the negative aftermath of social inequity, income inequity and environmental damage affecting chains of supplies, capital flows and employees' productivity.

According to the United Nation`s Conference on Trade and Development (UNCTAD) data [6], key sectors concerned with global implementation of SDG demand the investment in the amount of roughly 5 to 7 trillion USD annually. The developing countries themselves show that their expected demand ranges from 3,3 trillion USD to 4,5 trillion USD with annual deficit of funding constituting approximately 2,5 trillion USD.

That means that the least developed countries require the biggest investment, but they most often face difficulties with investment attraction.

In the context of Monterrey Consensus on Financing the Development [7] all state-members face the task of ensuring transparent, steady and predictable investment climate. The UN Addis Ababa Action Agenda and 'Transforming our world: the 2030 Agenda for Sustainable Development' [i] confirmed the commitment of nations to proceed with this activity with utmost effort to better link entrepreneurial activity and investment solutions with SDG.

According to the "Policy of Economic Pragmatism" readings [4], to double its actual GDP by 2025 Ukraine needs to invest additionally 370 billion USD into main capital. This amount can be funded via efficient use of public investment sources. Budget investment effect might be enforced in case of allocation of combined public and private investment in the framework of important projects funded in partnerships.

At the same time, currently the investment process is being in systemic crisis which results in lack of investment into modernization of economics. Ukrainian system of investment activity management is limited to legislative regulation and functions under the influence of spontaneous self-organized market mechanisms. As a result, economic goals of investors along with mechanisms of their achievement happened to be not accorded and oppositely focused bringing to inadequate use of investment resources. The state has lost its control over the capital flow and its social and economic efficiency which resulted in the following: halt of simple reproduction of capital, growth of shadow economics and immense social stratification of population has eventually led to social and economic development destabilization.

Analysis of the innovation activity in 2017 in Ukraine allows to mark that essential weight of general costs in GDP constitutes 0,45%, including at the expense of state budget funds – 0,16%. Along with this, throughout several previous years there were

many significant changes in goods structure of Ukrainian export, in particular the proportion of machinery, equipment, transport vehicles and devices in the structure of Ukrainian export of goods dropped from 16,4% in 2007 and 14,4% in 2013 to 7,2% in 2017. In this way, a significant part of produced in Ukraine goods has no corresponding scientific and technical support, while the proportion of exported mineral resources and primarily processed products is only growing.

At the same time, according to 2016 data, the EC-28 member-states' average GDP share of Research and Development Activity (R&DA) constituted approximately 2,03%. Some countries had more than average share of such costs in their GDP, like Sweden (3,25%), Austria (3,09%), Germany (2,94%), Denmark (2,87%), Finland (2,75%), Belgium (2,49%) and France (2,25%), while other countries had less than average share of such costs in their GDP, like Macedonia, Latvia, Romania, Cyprus and Malta (ranging from 0,43% to 0,61%).

This gives a reason to note a gradual national product competitive ability decrease. Together with this, a change of geographical structure of Ukrainian foreign trade is caused mostly by redirection of major foreign trade relations of Ukrainian business from Russia (and from most ISC states in general) to the European Union and other distant foreign countries.

At the same time, the volume of attracted direct foreign investment (including those from the EC countries) into Ukrainian economics is decreasing.

A simple capital recovery is put on halt in response to actual investment crisis, limited budget funds allocated for development, budget policy dissonance with the strategic development tasks.

This fact is proved by data on fixed assets depreciation. At average in economics this indicator constitutes 58,1%[1]. Simultaneously, the peculiarities of data selection on fixed assets depreciation within 3 previous years should be taken into account, in particular by excluding a value of capital assets of local authorities and self-government bodies from asset estimation. However, even presuming certain artificial overstatement of mentioned indicator readings in comparison with previous years, the mentioned above level of fixed assets depreciation is high and reflects the state of society based on negative value of investment volume. Hence the economy does not ensure a replacement of depreciated production asset by the new ones.

According to the State Statistics Service of Ukraine data a selection of levels of capital asset depreciation was prepared by the economic activity types (Table 1).

[1] A value of land allotments, investment real estate property, animals (other than agricultural) and a value of capital asset of budget funded institutions (main budget funds holders), that shall not be classified under types of economic activity, is included. A value of capital assets of local authorities and self-government bodies is not included.

Condition of fixed assets in 2016, by type economic activity (Code of CTEA-2010)

Table 1.

Type of economic activity	Rate of depreciation, in per cent
Total[1]	**58,1**
Administrative and support service activities	80,2
Industry	69,4
Water supply, sewerage, waste management and remediation	60,5
Public administration and defense, compulsory social security	59,4
Information and communication	55,6
Human health and social work activities	53,4
Professional, scientific and technical activities	51,9
Transportation and storage	50,6
Real estate activities	45,8
Education	42,7
Accommodation and food service activities	41,9
Wholesale and retail trade	39,3
Arts, entertainment and recreation	39,2
Financial and insurance activities	39,1
Agriculture, forestry and fishing	37,3
Construction	36,0

At the same time, the distribution of attracted capital investment volumes by main economic activity areas in January-June, 2018 is as follows: industry – 34,6%, agriculture, forestry and fishing – 13%, construction – 10,9%, Transportation and storage, warehousing and support activities for transportation – 9%, Wholesale and retail trade and repair of motor vehicles and motorcycles – 8,3%, information and telecommunication sector – 6,3%, Public administration and defence, compulsory social security – 4%. This way, an excessive accumulation of investment potential takes place in cost demanding areas which makes a task of economic development more complicated. In addition to that, there is a lack of investment resources in the regions of Ukraine which have only one particular extractive industry or agriculture prevailing in their GRP structure. The lack of investment prevents internal regional opportunities to be revealed, as well as prevents from efficient use of available resources and expanding investment activity frontiers [8].

Absence of systemic national and regional investment policy is illustrated by correlation of actual levels of capital asset depreciation with the following: actual investment priorities by the volumes of capital asset investment funded from all sources, at the expense of state and local budgets, direct foreign investment, and functional classification of reconciled budget special fund expenses (Table 2).

It should also be noted that neither strategy nor program of investment attraction at national scale are applied in Ukraine so far; the mechanisms for defining the strategic public investment priorities are not in use both at national and local levels, hence the analysis on relevant territories and areas investment demands and opportunities is omitted, together with the analysis of incentives for attraction of investment.

It is obvious that the problem of insufficient funding is complemented with inefficient management of public investment process.

Matching of investment activity main directions by the volumes and financial sources with capital assets depreciation levels in relevant areas of economic activity

Table 2

Place	According to the capital investment by type of economic activity for 2017 from all financing sources	According to the capital investment by type of economic activity for 2017 from the state budget	According to the Foreign direct investments for 2017	According to the functional classification of expenditures of the special fund of the consolidated budget (2017)	According to the rate of depreciation of fixed assets (2016)
1	Industry	Public administration and defence, compulsory social security	Industry	Transport	Administrative and support service activities
2	Agriculture, forestry and fishing	Administrative and support service activities	Financial and insurance activities	Education	Industry
3	Construction	Education	Wholesale and retail trade and repair of motor vehicles and motorcycles	Other economic activities	Public administration and defence, compulsory social security
4	Transportation and storage, Warehousing and support activities for transportation	Professional, scientific and technical activities	Real estate activities	Healthcare	Information and communication
5	Wholesale and retail trade and repair of motor vehicles and motorcycles	Human health and social work activities	Professional, scientific and technical activities	Housing and communal services	Human health and social work activities
6	Information and communication	Industry	Information and communication	Public order, security and judicial authorities	Professional, scientific and technical activities
7	Real estate activities	Transportation and storage, Warehousing and support activities for transportation	Administrative and support service activities	Defence	Transportation and storage, Warehousing and support activities for transportation
8	Public administration and defence, compulsory social security	Construction	Transportation and storage, Warehousing and support activities for transportation	Agriculture, forestry and fishing	Real estate activities
9	Financial and insurance activities	Arts, entertainment and recreation	Construction	State functions	Other services
10	Administrative and support service activities	Information and communication	Agriculture, forestry and fishing	Environmental protection	Education
11	Professional, scientific and technical activities	Agriculture, forestry and fishing	Accommodation and food service activities	Social protection and social security	Accommodation and food service activities
12	Human health and social work activities	Wholesale and retail trade and repair of motor vehicles and motorcycles	Arts, entertainment and recreation	Spiritual and physical development	Wholesale and retail trade and repair of motor vehicles and motorcycles
13	Arts, entertainment and recreation	Accommodation and food service activities	Human health and social work activities	Scientific research in the economic spheres	Arts, entertainment and recreation
14	Education	Financial and insurance activities	Education	Information and communication	Financial and insurance activities
15	Accommodation and food service activities	Real estate activities	Public administration and defence, compulsory social security	Industry	Agriculture, forestry and fishing
16	Other services	Other services	Other services	Construction	Construction

As per Tables 1 and 2, a task of structural reconstruction cannot be achieved by simple rise of the volume of financial resources of investment. For example, industry is one of the top priorities both in the context of capital asset investment and direct foreign

investment, though it will remain to rank among leaders by the volume of capital assets depreciation (69,4%).

According to the State Statistics Service of Ukraine, the capital asset investment is largely funded by enterprises and organizations own money (75,4% of total amount of used capital asset investment). A proportion of attracted money (loans and other sources of funding) does not exceed 10% in general structure if capital investment. Although there is a crucial increase or local budgets role in capital investment due to recent decentralization process, together with state budget they still do not significantly participate either in targeting investment into priority areas (as per Table 2), or in fostering and activation of investment attraction from other sources. The latter is confirmed with general trend of increase of enterprises and organizations own funds portion and decrease of attracted and loan funds portion in the previous 7 years.

The US and Finland experience who at different time has achieved highest global ranks of growth competitiveness, witness that the invigoration of public policy of boosting competitive ability of national economics in particular became the crucial driver for this process. To ensure the national economy competitiveness it is necessary to focus both national priorities and major scheduled priorities of the developed countries.

With all this in mind, national foreign economic policy should be highly concentrated on establishing favorable conditions for the investment cooperation with main external partners of Ukraine.

It will be recalled that Ukraine follows the course of European integration. According to the decision of National Security and Defense Council of Ukraine from August 28, 2014 "On urgent measures on the defense of Ukraine and improvement of national defense capability" [9], a strategic partnership with the European Union in the framework of Association Agreement concluded between Ukraine and the European Union, Euratom and their member-states (entered into force in full scale on September 1, 2017, hereinafter referred to as the AA) [10] is one of the national interests priorities. The AA provides for the fundamentals of political, economic and cultural integration based on common values and security enhancement. The AA consists of provisions regulating Deep and Comprehensive Free Trade Area (DCFTA) between Ukraine and the European Union which entered into force on January1, 2016.

The AA parties shall cooperate, inter alia, in the field of competitiveness enhancement. This cooperation shall include but not be limited to the following:

- creation of competitive, transparent and non-discriminatory energy markets grounded on the EC rules and standards via performance of regulatory reforms (Article 338 of the AA);
- coal sector (steam coal, coking coal and lignite) in order to increase its competitiveness, enhance mine safety and occupational safety and reduce its environmental impact, while bearing in mind the regional and social impact (Article 339 of the AA);
- support for reforming and re-organizing its science management system and research institutions (including boosting its capacity for research and technological development), in order to support the development of a competitive economy and knowledge society (Article 375 of the AA);
- management of structural changes (restructuring) and environmental and energy issues, such as energy efficiency and cleaner production (Article 379 of the AA);

- developing a more competitive tourism industry, as a generator of economic growth and empowerment, employment and foreign exchange (Article 399 of the AA);

- Improving the competitiveness of the agricultural sector and the efficiency and transparency of the markets as well as conditions for investment (Article 404 of the AA).

Furthermore, under Article 293 of the AA the parties confirm that trade should promote sustainable development in all its dimensions and they shall strive to facilitate trade in products that contribute to sustainable development, facilitate and promote trade and foreign direct investment in environmental goods, services and technologies, sustainable renewable-energy and energy-efficient products and services, and eco-labelled goods. Each party shall designate and convene a new or existing Advisory Group on sustainable development with the task of advising on sustainable development (Article 299 of the AA). In particular, on September 24, 2018 the Ministry of Economic Development and Trade of Ukraine initiated a contest for choosing independent representative civil society organizations with a view of forming mentioned Advisory Group.

Ukraine has taken the commitments for sustainable development growth via acceding the global process of Sustainable Development Goals (SDG) upon 2030. In conformity with leave no one behind' principle which is fundamental for the sustainable development, at the beginning of Sustainable Development Summit in New York on September 25, 2015 Ukraine approved its SDG approach and ensured consequent elaboration of National Report Sustainable Development Goals: Ukraine [11]. This Report defines national system of SDG composed of 17 goals, 86 national development tasks and 172 indicators for their accomplishment monitoring.

New goals for Ukraine have to ensure the integrated striving for economic growth, social justice and efficient use of natural resources which require deep social and economic transformation in Ukraine together with establishment of new approaches to global partnership opportunities.

Ukraine ranks 39th position in SDG-2017 rating (index reading is 72,7). In particular, Ukraine keeps SDG-1 'End poverty' and SDG-10 'Reduce inequity' in green zone. However, special attention should be paid to the goals within red zone, like SDG-3 "Healthy lives and well-being", SDG-9 "Industry, innovation and infrastructure", SDG-12 "Sustainable consumption and production' and SDG-16 'Peace, justice and strong institutions".

The analysis of other countries rating ranking demonstrates that three Scandinavian countries (Sweden, Denmark and Finland) have received the highest scores for achieving the SDG in 2017, but their integrated score is significantly lower than maximum score possible (which is 100). Each of these countries has at least one SDG in red zone, mainly environmental one. Among G-7 countries only Germany and France entered the top-10 of this rating. This Index ranks the US with 42th position, Russia and China – with 62th and 71th respectively. It should be noted that the poorest countries sit at the bottom of this rating.

Universal nature of the 2030 SDG Agenda has certain inbuilt side effects, namely the activity of prosperous counties affects the ability of other countries to achieve SDG. The range of examples includes contamination of environment, use of global resources, tax harbors, nontransparent financial systems which allow money laundering, corruption, weapon trade.

Therefore all countries ought to ensure that their development strategies are supplemented with the action plans on mitigating mentioned side effects, so that each country would be able to achieve SDGs.

The Agenda recommends that all countries elaborate and introduce national programs built of ambitious goals embracing SDG; all countries should also prepare periodic progress reports.

Each country adopts the SDGs and implements them depending on its realities. At national level the SDGs have the following functions:

- to serve as an instrument for integrating the sustainable development components;
- to serve as guiding principles of the cooperation in the purpose of development;
- to foster national policy elaboration;
- to foster the allocation of national budget funds;
- to serve as an instrument for analysis of national policy efficiency.

According to the research paper "Implementing the 2030 Sustainable Development Goals in Ukraine: analysis of government strategies and public policy"[12], "public strategic policies (PSP) play an important role in forming the nationwide perception by the authorities, business and civil society representatives and individuals of the nearest decade development course of the country, which subsequently allows to lay ground for the predictable sustainable development." That is why it is so important to ensure the assessment, reconsideration and elaboration of national, regional and local strategic public policies based on fundamentals of new 2030 Global Sustainable Development Strategy.

In general, according to preliminary estimates only 60% of SDGs have been approximately integrated into reviewed PSPs. However, this does not guarantee they could be implemented in full scope, because of general weakness of public strategic planning system, management and funding by objectives. These issues cause a gap between plans and programs of various levels and put their implementation at risk.

It should be mentioned that Ukraine lacks many strategic policy papers in a range of extremely important areas, like encouragement of investment, counteracting corruption, income legalization, violence counteracting. This fact can literally torpedo the SDG implementation in mentioned areas. Ukraine has no installed practice of drafting national strategic policy papers for longer than 10 years period. For the instance, the whole period of SDG implementation is covered only by two available strategies – the Energy Strategy and the Transport Strategy, both devised up to 2030.

Together with this, the majority of relevant PSPs are not supported with action plans, and available action plans have no indicators, corresponding terms of implementation and responsible parties. In practice it means, that in absence of any possibility to assess the SDGs implementation progress there are no obligations for politicians and officials to fulfill defined tasks, as nobody is actually liable for the faltered process and therefore nobody can be punished.

At the same time, it is national strategic policy papers and infrastructure plans which ought to favor the long-term investment activity through the establishment of incentives for all investment activity actors corresponding to the principles of sustainable development. Should a risk-return tradeoff in many public interest investment projects be insufficiently attractive for private investors, a big role will be given to

public investment, including indirect investment, joint investment, as well as risks and gains allocation between public partners and private investors via guarantees and other mechanisms.

Thus, the next important stage will be to incorporate SDG into national and local public policies, as well as into state and local budgets, so that the volume of necessary resources could be evaluated within each separate goal.

Simultaneously, while estimating the scope of necessary funding it is important to apply the instruments allowing to minimize resources and use them in the most appropriate way, to support the priority sectors in conformity with international commitments of Ukraine and other obligations, as well as to support the sectors of highest investment capacity from the point of view of rapid economic development and improvement of Ukraine's competitive ability.

Such approach will bring Ukraine closer to international partners and will help to raise ODA from the developed countries and will help to focus private investor and donors on funding the sustainable development projects jointly with national and governments.

To summarize, the AA commitments of Ukraine together with national and regional policy papers which respect National SDGs and are properly funded should be accepted as the milestones for defining the investment priorities. These priorities in their turn will ensure the increase of Ukraine's economic competitiveness based on sustainable development fundamentals. It is important to prevent still-born strategic policy papers by setting the following: strict and clear indicators of progress and achievement of goals, required amount of funding for specific measures, responsible people for goal achievement. Such type of assistance might widen the scope of funding and diversify its sources followed by significant improvement of sustainable development efficient support.

Conclusions and recommendations

The sustainable development-based improvement of national economy competitiveness is one of the prerequisites for letting economic realms out of financial and economic crisis. To achieve this, it is necessary to massively invest into main funds modernization along with saving energy and resources, innovation activity, establishment of new environmentally safe industrial technologies.

On its European integration way Ukraine has undertaken to cooperate, among other fields, in favoring the increase of competitiveness with regard to sustainable development tasks.

The National Report on SDG has formed the nationwide context of movement of Ukraine towards SDG and set tasks for all public authorities and civil society on sustainable development. To ensure SDG successful achievement Ukraine needs not only to perform SDG tasks, but also to change the approaches to strategic planning and state programs implementation.

At the same time, sustainable development planning and choosing of effective mechanisms for its functioning must be done in a comprehensive and systemic manner. Unfortunately, the defined goals and tasks are far from being a basis for public policy planning so far.

Meanwhile, a simple capital recovery is put on halt in response to actual investment crisis, limited budget funds allocated for development, budget policy dissonance with the strategic development tasks. Along with this, there are no effective mechanisms for the definition of strategic priorities of public investment in Ukraine, either at national or local levels. Furthermore, there is a supplementary additional problem to the lack of appropriate funding, namely inefficient management of public investment process.

To satisfy investment demand it is necessary to attract capital and funding from various sources. National and local strategies supported with appropriate funding mechanisms must become the milestones for defining investment priorities, as they can demonstrate opportunities to form partnerships and arrange for the investment portfolio selection.

Ukrainian society has a "homework" to do, namely to put all mentioned above conditions into life, whereas they are main drivers of both AA tasks accomplishment and successful SDG incorporation into national policy of Ukraine, as well as further accomplishment of set tasks in future.

Thus, we have made a conclusion that ensuring competitiveness and sustainable development of national economics in the context of European integration depends on efficient management of public investment process based on strategic priorities of public investment satisfying the investment demands and opportunities of relevant territories.

Therefore, the measures of invigorating the investment attraction are recommended as follows:

1. Define the strategic priorities of public investment in order to ensure an increase of country's competitiveness level based on sustainable development principles, with due regard to investment needs and potential of economic activity areas, and to the investment opportunities of specific territories;
2. Bring the investment incentives into national and local strategic papers regulating industrial, infrastructure and sustainable development. At the same time, relevant strategic papers must lay the basis for proper budget planning and contain action plans, tasks and progress measuring indicators, monitoring indicators and goal achievement and efficiency indicators;
3. It is important to apply the mechanisms of combined financial sourcing to cover priority investment and tasks set for the increase of volumes of attracted investment in defined high priority areas.

With all this in mind, further research shall be done to study the peculiarities of organizational and legal, financial and economic, and institutional mechanisms of defining the public investment strategic priorities; also it is necessary to elaborate a set of recommended measures on improvement of the mechanisms of defining the public investment strategic priorities based on investment opportunities and demands of increasing national economy competitiveness and sustainable development principles.

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Valentina Vasylieva, Alla Zelisko. **The System of Legal Forms of Cooperatives in Ukraine. International Law and Integration Problems, 2018, №3 (55), pp.81-87**

THE SYSTEM OF LEGAL FORMS OF COOPERATIVES IN UKRAINE

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Abstract

The article considers peculiarities of the processes intended to adapt legal regulation of cooperatives in Ukraine to requirements of the European Union. Such peculiarities are formed with allowance for historical and socio-economic preconditions of development of Ukraine's modern legal system. The authors focus on problems of the property autonomy of cooperatives; the feasibility of their full-fledged activities as participants of market relations; the introduction of legal mechanisms capable of increasing the competitiveness of cooperatives under current conditions; the increased security and protection of rights and interests of cooperative members. The article argues that effective entrepreneurial activities of a cooperative do not contradict the social nature of cooperatives, yet rather facilitate its implementation. The arguments in favor of such position are underlain by the principle declared in the practice of law of the European Union – orientation of cooperatives towards affirmation of interests of their members.

Keywords: *a cooperative, a legal entity, production cooperative, consumer cooperative, service cooperative.*

Introduction

In order to outline ways of improving legal regulation of the status of cooperatives in Ukraine, it is essential, in the first place, to analyze in details the current status of its legislative framework, which is of quite chaotic nature. The Civil Code of Ukraine has introduced the new doctrine of division of private law entities into entrepreneurial and non-entrepreneurial societies, specifying that production cooperatives belong to the former, while consumer cooperatives – to the latter. Still, other statutory acts fail to adhere to the indicated novelty, since the Economic Code of Ukraine, the Laws of Ukraine "On Cooperation" and "On Consumer Cooperation" comprise no provisions regarding the affiliation of consumer cooperatives to non-entrepreneurial societies and the special procedure for distributing their incomes.

As a result, *the main aim* of this article is forming of the scientific development of conception of the legal adjusting of cooperative's forms in Ukraine.

Problems of the System of Legal Forms of Cooperatives in Ukraine

The analysis of provisions of the Civil Code of Ukraine affords to argue that the division of societies into entrepreneurial and non-entrepreneurial is to some extent conditional. Indeed, Art. 85 of the Code define non-entrepreneurial societies as those not aimed at gaining profits for the subsequent distribution thereof among participants. At the same time, Art. 86 of the Civil Code of Ukraine enables non-entrepreneurial societies along with their principal activities to perform entrepreneurial activities, unless otherwise established by law, and if these activities comply with the purpose for which they were launched and contribute to its achievement [1]. Therefore, non-entrep-

reneurial societies may profit as a result of their activities, yet the legislation prescribes no mechanism for employing these profits. In view of the aforesaid, the examined doctrine of division of societies seems to a certain degree incomplete.

It is worth mentioning that the similar situation is typical for legislations of most post-socialist states, since provisions of these states' Civil Codes envisage the division of organizations into commercial and non-commercial. Their definitions are identical in meaning to definitions of entrepreneurial and non- entrepreneurial societies in Ukrainian legislation. Foreign civil law specialists have repeatedly emphasized shortcomings of such division.

It should be emphasized that the division of societies into entrepreneurial and non-entrepreneurial assumes particular "conditionality" in what concerns cooperatives, as the latter hold a number of features that preclude them from being seamlessly attributed to the doctrine under consideration.

As previously stated, the Civil Code of Ukraine, similarly to those of most post-socialist states, directly provides for the existence of two organizational and legal forms of cooperatives which are production and consumer cooperatives. Provisions of the Code regulate the legal status solely of production cooperatives by virtue of their affiliation to entrepreneurial legal entities, while regulation of other organizational and legal forms of cooperatives is vested in special statutory acts. In particular, this refers to the special Law of Ukraine "On Cooperation", provisions whereof, unlike the Civil Code of Ukraine, envisage three organizational and legal forms of cooperatives – production, service and consumer cooperatives. However, the concept of the Civil Code of Ukraine and that of the Law of Ukraine "On Cooperation" are fundamentally distinct from each other. The Law of Ukraine "On Cooperation" neglects the possibility of existence of entrepreneurial and non-entrepreneurial cooperatives.

Similarly, Ukraine's legislation develops no unity in relation to organizational and legal forms of cooperatives. The Civil Code of Ukraine prescribes the existence of merely production and consumer cooperatives, whereas the Law of Ukraine "On Cooperation" provides for another type of service cooperatives. Furthermore, it is essential to consider the effect of the special Law of Ukraine "On Agricultural Cooperation" that has defined the status of production cooperatives established by means of association of individuals – agricultural commodity producers, as well as of the Law of Ukraine "On Consumer Cooperation" that regulates the status of consumer societies. Availability of such statutory acts is inherent precisely in Ukrainian legislation and predetermines its particularity.

There has consequently developed the situation, when numerous statutory acts inconsistently regulate the status of cooperatives, since they are based on distinct conceptual approaches. Such legislative alterations are common to most post-Soviet countries, wherein, starting from 1990s, the accumulation of regulations that contain special rules for certain types of cooperatives has been constantly increasing.

The EU legislation develops in the drastically opposite direction, as it primary feature is striving for unification. The Council Regulation of 22 July 2003 on the Statute for a European cooperative society omits the concept of clear division of cooperative societies into entrepreneurial and non-entrepreneurial. Instead, the indicated Regulation emphasizes the specificity of all cooperatives in general, by stipulating the provision according to which cooperatives are primarily groups of persons or legal entities with particular operating principles that distinguish them from other economic agents.

They include the principles of democratic structure and control and the distribution of the net profit on equitable basis. A European cooperative society aims to satisfy its members' needs and/or to develop their economic and/or social activities [2].

Production cooperatives

Most evidently the discrepancy between the Civil Code of Ukraine and the Law of Ukraine "On Cooperation" displays itself by the example of production cooperatives, since provisions of the Code address only the status of production cooperatives. At the same time, production cooperatives subject to norms of the Law of Ukraine "On Cooperation". The indicated statutory acts regulate the status of production cooperatives in different ways. The discrepancy in question is observed, specifically, in different approaches to liability of members of a cooperative under their obligations. Art. 27 of the Law stipulate that members of a cooperative shall be liable for obligations of the cooperative within the limits of their share, unless otherwise provided by the charter of the cooperative or by law. Art. 163.2 of the Civil Code of Ukraine provides that members of a production cooperative shall bear secondary liability for obligations of the cooperative in amounts and according to the procedure established by the charter of the cooperative and by law.

The discussed discrepancies attest to general problems of regulation of social relations in post-socialist states. The point at issue is errors of legal technique. After all, the Civil Code of Ukraine is a general statutory act, while special norms regarding the status of cooperatives are to be established in the Law of Ukraine "On Cooperation". On the subject of production cooperatives, the situation is opposite. The role of general norms is performed by the Law "On Cooperation", since its provisions fail to differentiate the status of separate organizational and legal forms of cooperatives. The role of special norms is performed by relevant provisions of the Civil Code of Ukraine that regulate the status of production cooperatives. In addition, provisions of the Civil Code of Ukraine are primarily applied also due to the fact that it was adopted later than the Law of Ukraine "On Cooperation". The discrepancy between these acts is induced by errors in lawmaking common to all post-socialist states. When adopting a new statutory act, amendments to all related in-force regulatory acts should be introduced systematically. However, in practical terms, such amendments are of highly fragmentary nature.

Production cooperatives are impossible to be identified as a "classic" construction of an entrepreneurial society. What obstructs this are constitutive features inherent in production cooperatives, such as: the dependence of acquiring a portion of profits on personal labor participation and not on the size of a share; the presence of the indivisible fund, which cannot be disposed of by the cooperative, and, in case of its liquidation, is transferred to another cooperative organization. Nevertheless, such special legal features of production cooperatives cannot stand as a reason for recognizing them incapable of efficient entrepreneurial activities. The practice of the European Union confirms such conclusion that will be discussed in the following provisions of the article.

Consumer cooperatives

No less difficult situation exists in what concerns regulation of another organizational and legal form of cooperatives – consumer cooperatives. The Law of Ukraine "On Cooperation" reckons consumer societies among types of a cooperative, and Art. 2

of the Law defines them as a cooperative established by means of association of individuals and/or legal entities in order to organize trade services, to procure agricultural products, raw materials, to manufacture products and to provide other services for the purpose of satisfying consumer needs of its members. Still, its provisions disregard the division of societies into entrepreneurial and non-entrepreneurial as introduced by the Civil Code of Ukraine, and, consequently, regulate activities of consumer societies with general rules that apply to all types of cooperative societies.

The absence of specific features of a consumer society (cooperative) in the Law "On Cooperation" suggests the conclusion that this statutory act only distinguishes consumer societies as a type of cooperatives, while failing to disclose their particularities as a separate organizational and legal form of cooperatives.

The performed analysis of effective statutory acts regulating activities of consumer societies attests that none of them enshrines these activities properly, and it could therefore be argued that Ukrainian legislation in force fails to provide a unified conceptual approach to defining the legal status of consumer societies.

Such situation is common not merely to Ukraine, but similarly to other states, particularly, as evidenced in the Law of the Republic of Belarus "On Consumer Cooperation (Consumer Societies and Their Unions) in the Republic of Belarus" [3], the Law of the Republic of Moldova "On Consumer Cooperation" [4], the Law of the Republic of Kazakhstan "On Consumer Cooperatives" [5].

In the course of examining the legal status of consumer cooperatives, it may be concluded that they fail fully to correspond to the definition of a non-entrepreneurial society as that not aimed at gaining profits for its subsequent distribution among participants. Specifically, Art. 26 of the Law of Ukraine "On Cooperation" entitle members of a cooperative to cooperative payments and payments per share. Cooperative payments is a part of the income distributed upon results of the fiscal year among members of a cooperative in proportion to their participation in economic activities of the cooperative in a manner determined by the decision of the cooperative's highest management organ. Payments per share are payments of a part of the cooperative's income per shares of a member and an associate member of the cooperative. The amount of payments per share is determined by the decision of the general meeting of cooperative members after deducting obligatory financial means for establishment and replenishment of its funds. The total amount of payments per share shall not exceed 20% of the income designated for distribution [6]. With regard to special legislation on certain organizational and legal forms of cooperatives, Art. 6.4 of the Law of Ukraine "On Consumer Cooperation" entitles a member of a consumer society to acquire a part of profits distributed upon results of economic activities among members of the consumer society commensurately with their share contribution [7].

Outlined provisions of legislation in force prove that, despite being affiliated with non-entrepreneurial societies, consumer cooperatives comprise the mechanism of distribution of profits among cooperative members. Nonetheless, such mechanism is peculiar in its nature, since only a limited portion of the income may be distributed among members of a cooperative (no more than 20% of profits designated for distribution), while the other part is allocated to fulfill the primary purpose for which the cooperative was launched.

Service cooperatives

Unlike the Civil Code of Ukraine, the Law of Ukraine "On Cooperation" provides for another organizational and legal form of cooperatives – service cooperatives.

Art. 2 of the Law of Ukraine "On Cooperation" defines a service cooperative as a cooperative established by means of association of individuals and/or legal entities in order to provide services mainly to members of the cooperative, as well as to other persons for the purpose of transacting their economic activities. Service cooperatives provide services to other persons in amounts not exceeding 20% of the total turnover of the cooperative. The Law "On Cooperation" envisages no classification of private law entities into entrepreneurial and non-entrepreneurial, as established by the Civil Code of Ukraine, yet Art. 23 of the Law states that "production cooperatives perform economic activities for the purpose of gaining profit. Other cooperatives provide services to their members without pursuing to gain profit". In fact, the law expressly points to the affiliation of service cooperatives to non-entrepreneurial societies.

However, effective legislation is inconsistent in what relates to solving this matter, since the Civil Code of Ukraine and the Economic Code of Ukraine contain no provisions on the subject of service cooperatives. In addition to the aforementioned codified acts, the legal status of service cooperatives is also governed by the special Law of Ukraine "On Agricultural Cooperation", Art. 1 and Art. 2 whereof envisage that "an agricultural service cooperative – a cooperative, established to provide services primarily to members of the cooperative and other persons for the purpose of transacting their agricultural activities. While providing services to members of the cooperative, service cooperatives are not aimed at gaining profit [8].

The non-entrepreneurial legal status of a service cooperative is also substantiated by the fact that it is established so that to provide services mainly to members of the cooperative, as well as to other persons for the purpose of transacting their economic activities (Art. 2). It is exactly the possibility to provide services to third parties that stands as the main argument against including these cooperatives in the list of non-profit organizations and institutions. Nevertheless, it should be noted that the envisaged possibility to service needs of other persons not related to the cooperative membership cannot eliminate the special nature of these cooperatives due to the following reasons: 1) the provision of services to other persons is substantially restricted to the amount not exceeding 20% of the total turnover of the cooperative; 2) the possibility to perform entrepreneurial activities is authorized by provisions of the Civil Code of Ukraine, in particular, as per Art. 86, such activities are permissible for non-entrepreneurial societies upon condition that they are consistent with the purpose for which these societies were launched. It is apparent that in what concerns service cooperatives in Ukraine, the situation is similar to those involving two previous organizational and legal forms – the lack of a unified, well-grounded legislative approach to their regulation.

Analyzing peculiarities of the status of examined organizational and legal forms of cooperatives reveals that effective legislation of Ukraine (which is common to the post-socialist region in general) regarding cooperatives fails to establish unified approaches to the distribution of their profits (income) among members. Legislations of foreign states comprise somewhat different conceptual approaches to the division of societies into entrepreneurial and non-entrepreneurial.

Let us consider peculiarities of regulating activities of cooperatives by legislation of Germany, insofar as its very provisions were adopted by the Ukrainian legislator. The legal status of cooperatives in Germany is determined by the special Act "On Industrial and Provident Cooperative Societies" of 1889, provisions whereof were later amended by the laws of 9 October 1973 and 16 October 2006 (and 17 July 2017). The specified Act applies discretionary norms in order to address the matter on the possibility to distribute incomes among members of a cooperative. German legislation provides for the right of a cooperative to distribute profits among members, yet, the charter may establish that profits are prohibited from distribution among members and allocated to accumulations envisaged by law. However, the legislation restricts the possibility to enforce such dispositive norm. More particularly, profits are allowed to be distributed among members of a cooperative until the amount of share accumulation of a cooperative member reaches the size of the share. The cooperative cannot use profits to replenish the amount of reduced share accumulation of its members induced due to the need to cover losses. The charter of a cooperative cannot modify the legislative requirement to deduct a portion of profits to special funds of the cooperative [9].

Legislation of the European Union similarly waives the doctrine of division of cooperatives into entrepreneurial and non-entrepreneurial. Given the tendency towards global integration, unique attempts were made to launch supranational organizational and legal forms of legal entities, including cooperatives. This refers to the EU Council Regulation of 22 July 2003 on the Statute for a European Cooperative Society. Art. 66 of the Regulation provides for the possibility to pay a dividend to cooperative members in proportion to their business with the European cooperative society or services they have performed for it. According to Art. 67 of the Regulation, matters related to allocation of profits derived from activities of the cooperative are resolved by the charter of the cooperative (may be carried forward, appropriated to special funds, partially distributed among members of the cooperative) [2].

Based on the aforesaid, it is essential to point to the appropriateness of applying the principle of discretion with regard to the procedure for distributing profits of a cooperative, which enables the charter to address matters related to whether profits of the cooperative are to be distributed among its members, or allocated towards implementing the purpose for which this cooperative was launched.

Emphases in determining peculiarities of the legal nature of cooperative societies should be placed on such constitutive feature of cooperatives as their establishment for the purpose of meeting interests and needs of cooperative members, rather than their entrepreneurial or non-entrepreneurial essence. Such feature conforms to principles of the International Cooperative Alliance, and it is exactly what affords a basis for the concept of legal regulation of peculiarities of the status of cooperatives in legislation of highly developed foreign states [10].

Conclusions

In light of the above-stated, it is reasonable to argue that adaptation of Ukrainian legislation in the field of regulating the legal status of cooperatives to the EU legislation should be directed towards unification of regulatory acts and their increased discretion. Such tendencies in development of Ukraine's legislation will ensure eliminating inconsistency and ambiguity of its norms, and establishing unity in doctrinal approaches with respect to determining the legal status of cooperatives. It is pertinent to emphasize

the need for *further research* in the field of conceptual theoretical approaches that refer to organizational and legal forms of cooperatives, both in terms of harmonizing norms of legislation in force, and from the viewpoint of their transformation following processes of world integration.

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Iryna Lymar. **Efficiency of Judicial Civil Solvency Decisions in Azerbaijan Republic and Ukraine: Processing News And Judicial Control in The Executive Proceedings. International Law and Integration Problems, 2018, №3 (55), pp.88-94**

EFFICIENCY OF JUDICIAL CIVIL SOLVENCY DECISIONS IN AZERBAIJAN REPUBLIC AND UKRAINE: PROCESSING NEWS AND JUDICIAL CONTROL IN THE EXECUTIVE PROCEEDINGS

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Abstract

Taking into account the improvement of the legal regulation of relations in the field of execution of court decisions and the peculiarities of modern models of compulsory execution of European countries, the article investigates the current state of development of executive proceedings in the Republic of Azerbaijan and Ukraine, the main stories of legislation in the field of enforcement of judicial decisions in civil legal proceedings of the above-mentioned countries, the introduction of foreign experience and the adaptation of the procedure for the enforcement of judicial decisions to international standards that are affected on the interaction between judicial authorities and enforcement authorities. Some features of the legal regulation of the control powers of the court and enforcement bodies in the enforcement proceedings of the above-mentioned states, which were chosen for the study are not accidental, since the civil procedural legislation of these countries has undergone significant changes and additions.

Keywords: *enforcement proceeding, execution of court decisions, private performers, enforcement arrangement, stories enforcement, disadvantages enforcement, creditor, debtor, performer.*

Introduction

Timely and effective legal protection of property and non-property rights of participants in enforcement proceedings is one of the most important tasks of civil justice. Proper and timely execution of court decisions is a key criterion for assessing the effectiveness of the organs of justice and affects the authority of the judiciary in the state, the validity of acts it issues, and the confidence of citizens in the court and the government in general.

The form of organization of enforcement proceedings, the powers of enforcement bodies, and the control over enforcement of judgments in the post-Soviet states have certain differences due to the peculiarities of the national legislation and the chosen approaches to improving legislative regulation in line with European experience

The improvement and increase of the role of the court in the enforcement proceedings should be one of the priority directions in the reform of procedural legislation, the ultimate goal of which is to provide a guarantee of legality and timeliness during the enforcement of court decisions.

The purpose and tasks of scientific research are theoretical and legal consideration of issues in the field of executive proceedings, procedural changes in the legislation of the Republic of Azerbaijan and Ukraine in the field of enforcement of judicial decisions in civil judicial proceedings and control powers of the court in the course of execution of decisions, ascertaining their peculiarities, effectiveness of appli-

cation normative legal principles in the sphere of executive proceedings, advantages and disadvantages of functioning of the institute of executive proceedings.

The object of the research is the innovations of the institute for the enforcement of court decisions and the relations that arise during the enforcement proceedings and appeals against acts or omissions of performers in Ukraine and Azerbaijan.

The article of research are scientific looks, normatively-legal acts of Azerbaijan Republic and Ukraine, separate aspects of mechanism of a force implementation of court decisions and their efficiency, short stories of executive production and introduction of them in practical activity.

Implementation of the decision is the final stage of the jurisdiction (human rights) activity, without which the meaning of the court's activity is lost, since it is precisely at this stage that real protection of rights, duties, interests protected by law, confirmed by a court decision. The importance of the institute of executive proceedings is that it is the executive proceeding in the form of enforcement of decisions that actually restores subjective property rights and personal non-property rights of individuals and legal entities through their actual implementation in the manner and procedure specified by the Constitution and laws of Ukraine [1, p.5].

The actual implementation of the decisions not only restores the violated rights of individuals and legal entities, but also contributes to the strengthening of the rule of law and law in society, is a reflection of the quality of the functioning of the entire mechanism of legal regulation of social relations. Judicial control over enforcement proceedings is an effective means of influencing the effectiveness of execution (timely enforcement) of court decisions, but its procedure is not sufficiently regulated, there is no effective mechanism of regulated judicial control procedures for enforcement proceedings. Judicial control over the execution of judicial decisions in civil cases also provides for the possibility of certain procedural steps in the enforcement proceedings only with the permission of the court, when the court authorizes a determination of the possibility of committing a procedural action and the court's duty to consider a complaint against a decision, actions or inactivity of state Executive and other officials of the Executive service and complaints arising out of the relationship in the enforcement of court decisions.

The urgency of the research topic is due to large-scale judicial and legal reforms in the post-Soviet states, which are conducted in different countries in different ways, but taking into account the general historical past have a lot in common in shaping the new legislation on the judicial system, the judicial process and the executive process. The Republic of Azerbaijan and Ukraine are among the states that at the beginning of the 1990s proclaimed their independence and with the adoption of the constitutions laid the foundations for the initiation of judicial and legal reforms that continue to this day, but the effectiveness of their implementation is somewhat different. After gaining state independence, large-scale reforms were carried out in Azerbaijan, national legislation was improved, as a result of which expansion of the powers of the judiciary, increase of their role in society, which led to an increase in the number of appeals to the judicial authorities of the state and enforcement proceedings. Bodies for enforcement of court decisions have been reorganized several times, changing their name, subordination and internal structure. The implemented changes were aimed at ensuring the efficiency and

timeliness of execution of executive documents, strengthening the responsibility for their failure to fulfill and increasing the powers of the enforcement authorities.

In Ukraine, during the last comprehensive constitutional reform in the area of justice and related institutions, the system of enforcement of decisions has also undergone significant changes. In accordance with the Law of Ukraine "On Amendments to the Constitution of Ukraine (in relation to justice)" [2], the Fundamental Law of Ukraine is supplemented by Article 129^1, which defines the obligation to execute a court decision. At the same time, the state ensures execution of the court decision in the manner prescribed by law, and control over execution of a court decision is carried out by a court. According to Art. 18 of the Civil Procedural Code of Ukraine, judicial decisions that have become legally binding are binding on all state authorities, and failure to comply with a court decision is the basis for the liability established by law. The adopted changes are aimed at restoring citizens' confidence in judges and in general, improving the efficiency of enforcement of court decisions. What will undoubtedly contribute to the obligation of the state enshrined at the constitutional level to enforce a court decision and the control function of the court at the stage of enforcement proceedings. The control function of the court at the stage of execution of court decisions should be, first of all, aimed at the actual and timely execution of a court decision, the protection of the rights of participants in enforcement proceedings. As V. I. Bobrik rightly pointed out, the efficiency of justice directly depends on the execution of court decisions. The court's tasks are not limited to the adoption of court decisions, since after the entry into force of a court decision the court has the power to resolve procedural issues related to its execution and judicial control over enforcement proceedings [3, p.40].

Articles 129 of the Constitution of the Republic of Azerbaijan [4] and 15 of the Civil Procedural Code of the Azerbaijan Republic [5] also stipulate the binding nature of court decisions for all state authorities and acknowledges the failure to comply with the above-mentioned lawsuits - disrespect to the court, which entails responsibility which may be criminal including imprisonment up to 3 years old.

The legal and organizational foundations of enforcement proceedings in the Republic of Azerbaijan are governed by the Constitution of the Republic of Azerbaijan [4], the Civil Procedure Code of the Republic of Azerbaijan [5], the Law of Azerbaijan Republic "On the execution of judicial decisions" [6], and the Law of Azerbaijan Republic "On judicial overseers and bailiffs" [7], according to which the Chief Executive Office was established, and the execution of decisions is carried out by the judiciary executors (in some cases, tax authorities, banking and other credit organizations), requirements of which are mandatory for all bodies, officials, legal entities and individuals.

In accordance with the Law of the Azerbaijan Republic "On Judicial Surveys and Bailiffs" No. 782-IG of 28.12.1999, the service of judicial overseers and bailiffs was formed. Article 11 of the said Law stipulates that the control over the correct and timely execution of decisions of courts not connected with deprivation of liberty is carried out by a judge [7].

The system of compulsory execution in the Republic of Azerbaijan consists of the Ministry of Justice of the Azerbaijan Republic and the General Directorate of Bailiffs. Forced execution of court decisions is carried out by city and district departments of bailiffs, who are called executive officials. The control over execution of court decisions

and activities of executive bodies is entrusted to the Ministry of Justice of the Republic of Azerbaijan, which, among other things, conducts measures to assist the enforcement agents in the exercise of their powers.

One of the most important innovations of the latest reform in Ukraine was the introduction of a mixed system of decision-making bodies and the introduction of a private enforcement agency, which required a global reform of the state system of forced execution and the basic principles of the enforcement process. In the majority of European countries, the mixed principle of enforcement has already been introduced, and this is an extremely important step in ensuring the procedural guarantees of access to the court provided for in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, but, given the unstable political and economic situation in our country, innovation needs to be introduced gradually, keeping what has been created.

According to the provisions of the Strategy for the reform of the judiciary, the judiciary and related legal institutes for 2015-2020, reorganization of the system of execution of court decisions and increase of efficiency of executive proceedings in Ukraine provides: 1) the creation of a single mechanism for the functioning of the system of enforcement authorities; 2) the development of the institution of private performers through the gradual creation of a system of self-government, the mechanism of admission to the profession; 3) review of the mechanism for determining remuneration of performers in order to stimulate the growth of the level of real execution of court decisions; 4) reduction of formalization, optimization of stages of executive proceedings and terms of execution of executive actions; 5) achievement of a fair balance of interests between the protection of the rights of collectors and debtors, including through providing executors with practical access to the debtors' assets, while providing guarantees against abuse, introducing effective incentives for the voluntary execution of court decisions, measures of influence on debtors [8].

In June 2017, the Verkhovna Rada of Ukraine adopted two Laws of Ukraine "On Enforcement Proceedings" and "On Bodies and Persons Enforcing Enforcement of Court Decisions and Decisions of Other Bodies" [9, 10], which introduced a number of changes in the system of enforcement of decisions and the procedural principles of the regulation of executive proceedings in Ukraine, the main purpose of which is to eliminate the shortcomings and obstacles that arise in the process of enforcement of court decisions, protection of the rights, freedoms and interests of enforcers in the enforcement proceedings, strengthening of responses range unscrupulous debtors discharge artists of the state executive service. The reform of the enforcement bodies, the introduction of changes and foreign experience in the organization of their work and the procedure of enforcement proceedings also affects the interaction between judicial authorities and enforcement authorities at the final stage of the civil process.

In connection with the above mentioned, V.V. Bontlab correctly noted that the legal regulation of the execution of court decisions requires a new, effective legislation [11, p.6].

Among other changes in the system of civil procedural legislation of Ukraine, which deal with the judicial control over the execution of court decisions in civil cases, include the extension of the range of persons that may be appealed against decisions, actions or omissions of the executives and officials of the bodies of the state executive

service regarding execution of a court decision. From now on, this will be possible not only by the parties but also by other participants and individuals. The Ukrainian court of cassation instance states that the possibility of appealing against acts or omissions of state executives is a guarantee of the rights of individuals and legal entities in the enforcement proceedings, and the consideration of complaints about the decisions, actions or omissions of the executors and officials of the bodies of the state executive service is carried out by the court in the framework of judicial control over execution court decisions [12].

Unlike in Ukraine, in the Republic of Azerbaijan, as far as the author is concerned, in addition to exercising control over executive and judicial authorities in executing judicial decisions, control over the enforcement of court decisions by the head of state is provided, which is provided every six months with information on the actual enforcement of court decisions by enforcement authorities. At the same time, through the mass media, including television and radio broadcasting, the daily work of the enforcement bodies is covered.

In case of evasion from performing a judicial or other act, the executor has the right to take measures to bring the debtor to administrative and criminal liability. For example, Article 313-1 of the Code of the Republic of Azerbaijan on administrative misconduct for failure to comply with the requirements of a bailiff in connection with the execution of decisions of judicial and other bodies data individuals are subject to a fine in the amounts specified in this article [13]. Articles 196 and 306 of the Criminal Code Code of the Republic of Azerbaijan on the deliberate avoidance of payables, in the presence of a court decision that has become legally valid, is punishable by a fine of twice the amount of damages caused, or correctional labor for a term up to 1 year or imprisonment for a term of up to 3 years [14] . The practice of bringing administrative and criminal responsibility for non-enforcement (avoidance) of enforcement in this country is fairly widespread and works well.

One can not fail to take into account the fact that 95% of Azerbaijan's population is made up of Muslims [15], whose faith is a way of life and is rather rigorous about the problem of timely repayment of debt. It also positively affects the increased responsibility of citizens towards debt obligations.

As F. Efendiyev noted, only the last 10 years actual enforcement of cases submitted to enforcement authorities has increased from 70 to 90%, which undoubtedly testifies to the effectiveness of enforcement of judgments [16].

Effectiveness of the implementation of decisions is a reflection of the level of effecttiveness of the mechanism of legal regulation in the country of the institution of enforcement of decisions and the key to the effectiveness of the organization and transparency of the activities of enforcement bodies. Our analysis of the reform of the system of bodies of compulsory execution of two post-Soviet countries in the field of compulsory execution of court decisions testifies to a certain difference in the results achieved.

The state of the efficiency of the executive service in Ukraine is at a very low level, primarily due to existing systemic problems both in legislation and in law enforcement practice, the inextricable interaction of the court and state executives throughout the period of execution of the decision. To date, in Ukraine, according to various estimates, from 2 to 25 percent of court decisions are executed. Ukraine ranks first in the number

of cases pending before the ECTHR due to late execution of decisions of national courts [17, p.14].

An analysis of the existing enforcement system in Ukraine suggests that, despite significant changes, it still does not fully comply with European standards and does not ensure the accessibility of justice. Judicial control declared in the Constitution of Ukraine has not become a mechanism that can guarantee full and timely implementation of decisions. In our opinion, it would be effective, within the framework of reforming the system of enforcement bodies, to at least improve the status of these bodies and increase their powers, increase the responsibility for non-enforcement (avoidance of execution) of court decisions.

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