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## **PROBLEMS OF INCONSISTENCY OF THE PROVISIONS OF UKRAINIAN LEGISLATION ON THE LEGAL STATUS OF THE PUBLIC PROSECUTOR'S OFFICE WITH THE EUROPEAN STANDARDS**

*This article is devoted to the problems of inconsistency of the norms of the Law of Ukraine «On the Public Prosecutor's Office» concerning representation by the public prosecutors the interests of natural persons in the courts of justice as well as the norms of the Economic Procedural Code of Ukraine concerning participation of the public prosecutors in the economic judicial procedure with the provisions of the Constitution of Ukraine and PACE Recommendation 1604 (2003) On the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law.*

**Keywords:** Public Prosecutor's Office, functions of the Public Prosecutor's Office, participation of a public prosecutor in the economic judicial procedure.

Ukraine finds itself in a long-standing position of transition from soviet totalitarian political system with command-administrative economy to democratic political system with free market economy. That determines its position in respective international ratings.

So, in 2017 Index of Economic Freedom Ukraine occupies 166<sup>th</sup> position among 180 countries researched right after Afghanistan, Sudan and Angola and is placed in the lowest fifth category of the countries – the countries with repressed economy [1].

In the Global Competitiveness Index 2017–2018 Ukraine's institutions, including law and law enforcement ones, take 118<sup>th</sup> position among 137 countries researched. Among other things Ukraine in the said Index occupies:

- 81<sup>st</sup> position among 137 countries by burden of government regulation;
- 116<sup>th</sup> position among 137 countries by efficiency of legal framework in settling disputes;
- 119<sup>th</sup> position among 137 countries by intellectual property protection;
- 120<sup>th</sup> position among 137 countries by financial market development;
- 122<sup>nd</sup> position among 137 countries by efficiency of legal framework in challenging regulations;
- 124<sup>th</sup> position among 137 countries by effect of taxation on incentives to work;
- 126<sup>th</sup> position among 137 countries by burden of customs procedures;
- 128<sup>th</sup> position among 137 countries by property rights (protection);
- 129<sup>th</sup> position among 137 countries by effect of taxation on incentives to invest as well as by country capacity to retain talent;
- 134<sup>th</sup> position among 137 countries by regulation of securities exchanges;
- 135<sup>th</sup> position among 137 countries by soundness of banks, and so on [2].

Too long duration of this transition period, in our view, derives from two major factors: in the first place, it is caused by the lack of knowledge and feeling by Ukrainian society, including legislators, legal academics and practitioners, of what democratic political system is and how it is organized, as well as what free market economy is and how it is organized. In the second place (which in fact may be the main reason), it is caused by unwillingness by oligarchs, who de facto control majority of Ukrainian public institutes, to change the post-soviet political and economic environment in Ukraine, which they find comfortable to take advantage of.

The above said factor leads Ukraine again to low positions in respective international ratings such as:

- 124<sup>th</sup> position among 137 countries by effectiveness of anti-monopoly policy;

- 111<sup>th</sup> position among 137 countries by favoritism in decisions of government officials;
- 101<sup>st</sup> position among 137 countries by reliability of police services;
- 129<sup>th</sup> position among 137 countries by protection of minority shareholders' interests;
- 129<sup>th</sup> position among 137 countries researched by judicial independence;
- 130<sup>th</sup> position among 137 countries by business impact of rules on FDI, and so on [2].

In this sort of situation, in our opinion, it is critical for Ukraine to get some sort of guidance from community of developed countries with stable democracy and economy, such as the European Union, as to how to build in Ukraine democratic political system based on the rule of law as well as free market economy. As they say in a proverb: «tell me whom you live with and I will tell you who you are». Realizing that Ukraine has joined to the Council of Europe on the 9<sup>th</sup> of November 1995 becoming the 37 member of organization. While joining the said international organization beyond the statutory obligations, Ukraine freely undertook to fulfil a number of specific commitments in order to improve democracy, human rights and the rule of law in the country; these various obligations and commitments are laid out in Parliamentary Assembly of the Council of Europe (hereinafter PACE) Opinion No. 190 (1995). Among those obligations there is the one that provides that «the role and functions of the Prosecutor's Office will change (particularly with regard to the exercise of a general control of legality), transforming this institution into a body which is in accordance with Council of Europe standards» [3].

The Council of Europe standards with respect to the public prosecutor's office are actually specified in the PACE Recommendation 1604 (2003) On the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law. This Recommendation limits the role of the public prosecutor's office to respective activities exclusively in the sphere of criminal law providing that «the essential role of the public prosecutor in ensuring security and liberty throughout European societies: by safeguarding the rule of law, by protecting against criminal violations of their rights and freedoms, by ensuring respect for the rights and freedoms of those suspected of or charged with the commission of criminal

offences, and by overseeing the proper functioning of the bodies responsible for the investigation and prosecution of offences» [4]. PACE definitely recommends «that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other functions» [4].

«Founded in 1937 as a repressive body of the state, the state prosecutor's office, or Prokuratura, in Soviet times was responsible for overseeing the legality of actions of all state bodies, including the courts. Most of these functions carried over into the legal framework of independent Ukraine, where many of the Prokuratura's functions, in fact, were expanded. Given the lack of accountability connected with its expansive functions of oversight, investigation and prosecution, the Prokuratura has come under widespread criticism for the way these powers were exercised» [5].

On June 2, 2016 the Verhovna Rada adopted the Law of Ukraine No. 1401-VIII «On Amending the Constitution of Ukraine (Concerning Justice)» by which Law Section VII «Public Prosecutor's Office» of the Constitution had been cancelled. Instead the said section of the Constitution was replaced with Art. 131<sup>1</sup>, which article changed significantly the functions of the Public Prosecutor's Office. «Now, for the first time since the collapse of the Soviet Union and Ukraine's independence, amendments to the Constitution significantly change the competences of the state prosecution office. The amendments abolish the wide general supervisory authority of the prosecutor's office and limit its functions to the following:

- 1) organization and leadership of pre-trial investigations;
- 2) support of public prosecution in the courts;
- 3) representation of the state's interest in the courts, according to the law.

While the leading role of procedural supervision envisaged in the amendments is worrisome, overall, the proposed amendments should help decrease the corruption and abuse of powers in criminal cases. They will also hopefully bring Ukrainian legislation and practice with respect to the protection of rights in criminal prosecutions in line with provisions of the Convention on Human Rights and the practice of the European Court on Human Rights» [5].

In this regard the PACE mentioned that «the adoption of the constitutional amendments with regard to the judiciary, which will address many shortcomings with regard to the justice system and

independence of the judiciary, is to be warmly welcomed, especially the abolition of the general oversight functions of the Prosecutor General, which was an accession commitment by Ukraine to the Council of Europe. It is now important that all the necessary implementing legislation is adopted, and, where needed, existing legislation amended, to allow for the prompt implementation of the constitutional amendments» [6].

Among the necessary implementing legislation to be adopted, and, existing legislation to be amended, to «allow for the prompt implementation of the constitutional amendments», we find necessary to draw attention to two critical pieces of Ukrainian legislation to be amended.

In the first place, it is necessary to amend the contradictory provisions of the Law of Ukraine «On the Public Prosecutor's Office» as follows.

The amended Constitution of Ukraine in Art. 131<sup>1</sup> specifies the functions of the Public Prosecutor's Office as follows:

- 1) support of public prosecution in the courts;
- 2) organization and procedural leadership of pre-trial investigations, resolving pursuant to the law other issues during criminal proceedings, overseeing over secret and other investigation and detective activities conducted by law enforcement organs;
- 3) representation of the state's interest in the courts, in exclusive cases and according to the law [7].

The Law of Ukraine «On the Public Prosecutor's Office» in part 3 of Art. 2 provides that «the Public Prosecutor's Office may not be vested with other functions which are not envisaged in the Constitution of Ukraine». In the meantime, the said Law in part 1 of Art. 2, contrary to its own provision of part 3 of Art. 2, vests the Public Prosecutor's Office with the functions which are not envisaged in the Constitution of Ukraine. Particularly, contrary to paragraph 3 of the first part of Art. 131<sup>1</sup> of the Constitution of Ukraine, which provides that the Public Prosecutor's Office may perform the function of «representation of the state's interest in the courts, in exclusive cases and according to the law» [7] part 1 of Art. 2 of the Law of Ukraine «On the Public Prosecutor's Office» provides that the Public Prosecutor's Office is vested with the function of «representation of the interests of a natural person or the state in the courts in cases specified in this Law» [8]. So, we can see that the Law of Ukraine «On the Public Prosecutor's Office» vests, contrary to the provisions of the Constitution of Ukraine (specifically, paragraph 3 of the first

part of Art. 131<sup>1</sup>) and its own provisions (specifically, part 3 of Art. 2), the Public Prosecutor's Office with the function of representation of the interests of a natural person in the courts.

Besides the above mentioned, part 1 of Article 2 of the Law of Ukraine «On the Public Prosecutor's Office» providing that the Public Prosecutor's Office is vested with the function of representation of the interests of a natural person in the courts contradicts the third part of Art. 131<sup>2</sup> of the Constitution of Ukraine establishing that «exclusively advocates perform representation of any other person in the courts» [7]. The notion «any other person» used in the said article of the Constitution of Ukraine comprises both types of persons envisaged in Ukrainian law: natural persons and artificial (legal) persons, so, pursuant to Art. 131<sup>2</sup> of the Constitution of Ukraine nobody (including the public prosecutor), but an advocate may represent a natural (as well as an artificial) person in the courts.

Some exceptions to the above rule are made for the cases, specified in the fourth part of Art. 131<sup>2</sup> of the Constitution of Ukraine, such as labor disputes, disputes on protection of social rights, disputes concerning elections and referendums, minor disputes and with respect of representation of immature or infantile persons as well as the persons who are announced fully or partially legally incompetent by a court of justice. Meantime, it should be mentioned here, that the Constitution does not vest the Public Prosecutor's Office with the function to represent the above listed persons in the above listed cases in the courts. So, pursuant to part 3 of Art. 2 of the Law of Ukraine «On the Public Prosecutor's Office», which provides that «the Public Prosecutor's Office may not be vested with other functions that are not envisaged in the Constitution of Ukraine» [7], the Public Prosecutor's Office may not perform representation of natural persons in the courts.

To summarize the above said concerning the authority of the Public Prosecutor's Office to represent subjects of legal relationship in the courts it should be underlined that in accordance with the Constitution of Ukraine the Public Prosecutor's Office may represent exclusively the state in the courts and no any other subjects of law.

Thus, paragraph 2 of part 1 of Art. 2 of the Law of Ukraine «On the Public Prosecutor's Office» must be amended and brought into consistency with the Constitution of Ukraine (specifically, paragraph 3 of the part 1 of Art. 131<sup>1</sup>) to read: «representation of the state's interest in the courts, in exclusive cases and according to the law».

Moreover, further to the said amendment the following wording has to be deleted from the Law of Ukraine «On the Public Prosecutor's Office»:

1) the words «natural person or» in paragraph 3 of part 5 of Art. 8; in the title, part 1, part 2 and part 4 of Art. 23; in the title of Art. 24; in Section XII; in paragraph 1 of Section XIII;

2) the words («citizen of Ukraine, foreign citizen or a natural person without citizenship») in part 2 of Art. 23;

3) the words «natural person or its attorney-at-law» in part 4 of Art. 23;

4) the words «as well as in the event of representation of the interests of a natural person» in part 4 of Art. 23.

Another problem concerning the legal status of the Public Prosecutor's Office in Ukraine to be addressed in Ukrainian law is participation of the Public Prosecutors in the judicial procedure that takes place in Economic Courts of Ukraine.

This problem arises from the provision of Art. 53 of the Economic Procedural Code of Ukraine and some other articles of the abovementioned Code that itemize the competencies of the Public Prosecutors in the economic judicial procedure. So, part 3 of the said article provides that «in the events specified in the law, a Public Prosecutor applies to the court with a statement of claim, takes part in the proceedings initiated by his/her claims, and on his/her own discretion may take part in the suite case initiated by other person prior to commencing the stage of adjudication, may submit statements of appeal and statements of cassation, pleas on reconsideration of court decisions due to newly discovered or exclusive circumstances» [9].

The said problem has two aspects as follows.

The first aspect of the problem of participation of the Public Prosecutors in the judicial procedure that takes place in Economic Courts of Ukraine relates to representation by the Public Prosecutors of natural persons in the economic courts. The essence of this aspect of the problem has been addressed above in this article and our advice is just to delete from the legislation any references to representation by Public Prosecutors of any natural persons for the reasons specified above.

The second aspect of the problem of participation of the Public Prosecutors in the judicial procedure that takes place in Economic Courts of Ukraine relates to representation by the Public Prosecutors of the state in the economic courts.

The main point of this problem is that all the provisions of the Economic Procedural Code of Ukraine where the Public Prosecutor is mentioned contradicts the PACE Recommendation 1604 (2003) On the Role of the Public Prosecutor's Office in a Democratic Society Governed by the Rule of Law, which Recommendation provides «that the powers and responsibilities of prosecutors are limited to the prosecution of criminal offences and a general role in defending public interest through the criminal justice system, with separate, appropriately located and effective bodies established to discharge any other functions» [4]. The judicial procedure that takes place in Economic Courts of Ukraine is definitely not within the criminal justice system and so public prosecutors in principle may not have any powers and responsibilities therein.

Another point of the problem relates to the issue whether Public Prosecutors may represent the state in the judicial procedure that takes place in the economic courts.

Part 3 of Art. 23 of the Law of Ukraine «On the Public Prosecutor's Office» provides that «the Public Prosecutors represent in the courts the legal interests of the state in the event such interests are not duly protected by the state bodies, bodies of local government or any other authority vested with respective competence as well as in the event of the absence of such a body. It is not allowed for the Public Prosecutors to represent the state interests in the name of state companies...» [8].

Taking into account, firstly, the fact that the state bodies and bodies of local government in Ukraine are endowed with the legal status of artificial (legal) persons, secondly, paragraph 3 of the first part of Art. 131<sup>1</sup> of the Constitution of Ukraine, which provides that the Public Prosecutor's Office may perform the function of «representation of the state's interest in the courts, in exclusive cases and according to the law» [7], and, thirdly, the third part of Art. 131<sup>2</sup> of the Constitution of Ukraine which provides that «exclusively advocates perform representation of any other person in the courts» [7], it becomes clear that the Public Prosecutors may represent exclusively the state of Ukraine and neither any business entities (i.e. companies) partially or wholly owned by the state, nor any state bodies and bodies of local government that are natural (legal) persons by definition.

Here the question arises whether the state of Ukraine itself (i.e. not in the name of state bodies or state owned companies having the status of legal persons) may be a party to a business dispute that

may be resolved in the economic courts via economic judicial procedure in order to be represented by Public Prosecutors. In our view, it may not since no business deal, dispute on which may be resolved in an economic court via economic judicial procedure, may be concluded directly in the name of Ukraine as a sovereign state.

Thus, summarizing the issue of participation the Public Prosecutors in the economic judicial procedure we come to the conclusion that all and any reference to participation of the Public Prosecutors in the economic judicial procedure must be deleted from the Economic Procedural Code of Ukraine, which together with other amendments to the Laws of Ukraine proposed above shall bring the legal status of the Public Prosecutor's Office closer to the said European standards.

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### **Проблеми невідповідності положень законодавства України, що визначає правовий статус прокуратури, європейським стандартам**

Окреслено проблеми невідповідності норм Закону України «Про прокуратуру» щодо представлення прокурорами інтересів фізичних осіб у судах, норм Господарського процесуального кодексу України щодо участі прокурора в господарському процесі положенням Конституції України та Рекомендаціям Парламентської Асамблеї Ради Європи № 1604 (2003) «Щодо ролі прокуратури в демократичному суспільстві, керованому верховенством права».

**Ключові слова:** прокуратура, функції прокуратури, участь прокурора в господарському процесі.