

АДМІНІСТРАТИВНЕ ПРАВО І ПРОЦЕС



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doi: 10.21564/2414–990X.152.226089
UDC 343.1:364–782

EXPERT AND LEGAL EXPERT AS PARTICIPANTS OF ADMINISTRATIVE PROCESS

In connection with Ukraine's European integration intentions, there is a need to update the procedural codes. The new Code of Administrative Procedure contains numerous novelties, in particular, the range of other participants in the trial has been expanded. This issue is relevant given the role of experts in the trial.

The Code of Administrative Procedure defines the legal status of an expert whose task is to promote effective justice. For the court, its opinion is of a recommendatory nature, because the final decision is made by the judge. A novelty of the Code of Administrative Procedure is that the participants in the

process have the right to provide an expert opinion and such an opinion is equivalent to the opinion of an expert appointed by the court.

In our opinion, such a novelty is a positive step forward. It should be noted that it is due to the expertise special knowledge is used and public legal disputes are effectively resolved. It is the expert who uses scientific and technical means to establish the circumstances that are relevant to the trial and thus promotes effective justice.

A new participant in the administrative process is a legal expert. The Code of Administrative Procedure of Ukraine determines the procedural status of this participant. This must be a person who has a scientific degree and is a recognized specialist in the field of law. However, the Code of Administrative Procedure of Ukraine does not specify which scientific degree it should be. This should be either a candidate of law or a doctor of law. In addition, the legal structure of "recognized specialist in the field of law" is debatable. The Code of Administrative Procedure of Ukraine gives the participants the right to submit to the court the opinion of such an expert.

It should be noted that the opinion of a legal expert is not evidence, is ancillary in nature and is not binding on the court. The judge's task is to draw an independent conclusion in fact. A legal expert does not replace a judge. However, in its decision, the court may refer to the opinion of a legal expert as a source of information that is contained therein.

The legal expert provides an opinion on a limited list of issues. However, judges have difficulties with the application of the analogy of law and norms of foreign law. Ultimately, this leads to a review and reversal of a judgment. Therefore, we consider that legal experts should be highly professional scholars who are able to provide effective assistance to judges in public legal disputes resolving.

Some practitioners consider that it is important for the court not only to have the opinion of a scientist, but also a lawyer-practitioner, who, although he does not have a scientific degree, but has practical experience and can provide appropriate recommendations for public legal disputes resolving. We do not agree with this opinion, as we consider that only a scientist can provide qualified assistance to a judge in public legal dispute resolving. Instead, a legal practitioner should make recommendations for a judge to resolve a relevant public legal dispute.

It is advisable to expand the circle of other participants in the trial. Both the expert and the legal expert contribute to the rule of law principles in the administration of justice.

Keywords: expert; legal expert; administrative process; participant in the administrative process; expert's opinion.

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Експерт та експерт у галузі права як учасники адміністративного процесу

У зв'язку з євроінтеграційними намірами України виникла необхідність оновлення процесуальних кодексів. Новий Кодекс адміністративного судочинства містить численні новели, зокрема розширено коло інших учасників судового процесу. Це питання є актуальним з огляду на роль експертів у судовому процесі.

Кодекс адміністративного судочинства визначає правовий статус експерта, який має своїм завданням сприяти ефективному правосуддю. Для суду його висновок має рекомендаційний характер, бо остаточне рішення приймає суддя. Новелою у Кодексі адміністративного судочинства є те, що учасники процесу мають право надати висновок експерта і такий висновок є рівноцінним з висновком експерта, якого призначив суд.

Така новела є кроком уперед. Слід зазначити, що саме завдяки експертизі використовуються спеціальні знання і ефективно вирішуються публічно-правові спори. Саме експерт використовує науково-технічні засоби для встановлення обставин, які мають значення для справи і тим самим сприяє ефективному правосуддю.

Новим учасником адміністративного процесу є експерт з питань права. Кодекс адміністративного судочинства України визначає процесуальний статус цього учасника. Це має бути особа, яка має науковий ступінь та є визнаним фахівцем у галузі права. Проте у Кодексі адміністративного судочинства України не зазначається, який саме науковий ступінь. Це може бути як кандидат, так і доктор юридичних наук. Окрім цього, правова конструкція «визнаний фахівець у галузі права» є дискусійною. Кодекс адміністративного судочинства України надає право учасникам справи подати до суду висновок такого експерта.

Слід зазначити, що висновок експерта у галузі права не є доказом, має допоміжний характер і не є обов'язковим для суду. Завдання судді – зробити самостійний висновок по суті справи. Експерт у галузі права не підміняє суддю. Проте у своєму рішенні суд може послатися на висновок експерта у галузі права як на джерело відомостей, які в ньому містяться.

Експерт з питань права надає висновок з обмеженого переліку питань. Однак саме із застосуванням аналогії закону, аналогії права та норм іноземного права у суддів виникають труднощі. У кінцевому результаті це призводить до перегляду і скасування судових рішень. Тому вважаємо, що експертом у галузі права мають бути високопрофесійні науковці, які здатні надати ефективну допомогу суддям у вирішенні публічно-правових спорів.

Деякі практики вважають, що для суду важливою має бути не лише думка вченого, але і юриста-практика, який хоч і не має наукового ступеня, але володіє практичним досвідом та може надати відповідні рекомендації щодо вирішення публічно-правових спорів. Ми не погоджуємося з цією думкою, оскільки вважаємо, що лише науковець може надати кваліфіковану допомогу судді при вирішенні публічно-правового спору. Натомість юрист-практик може надавати рекомендації щодо вирішення суддею відповідного публічно-правового спору.

Розширення кола інших учасників судового процесу є доцільним. Як експерт, так і експерт у галузі права сприяють реалізації принципу верховенства права під час здійснення правосуддя.

Ключові слова: експерт; експерт у галузі права; адміністративний процес; учасник адміністративного процесу; висновок експерта.

Problem statement. In connection with Ukraine's aspirations to become a full member of the European Union, an important task for our country is the approximation of Ukrainian legislation to the legislation of EU member states. The new procedural legislation distinguishes such a participant of the administrative process as an expert in the field of law (legal expert). Along with this, it is advisable to consider the legal status of an expert in administrative proceedings. Both participants in the process are important given their role in the trial. The study of the legal status of an expert and a legal expert is a topical issue today.

Recent research and publications analysis. The issue of the expert's legal status was studied in the works of S. Kivalov, V. Prokopenko, M. Saltevsyky, V. Shibiko, etc. However, the legal status of an expert in law is revealed only through the analysis of Art. 8 of the Law of Ukraine "On Private International Law"[1]. Such scientists as A. Dovgert, G. Galushchenko, V. Kalakura, V. Kysil, Y. Prytyka, A. Filip'ev etc. were engaged in research of this question.

The purpose of the article is to systematize and analyze the norms of the CAP (Code of Administrative Procedure) of Ukraine regarding determination of the procedural status of an expert and a legal expert as participants in the administrative process.

Presentation of the main material. Article 68 of the CAP of Ukraine determines the legal status of an expert which belongs to “other participants in administrative proceedings”. According to it, an expert may be a person who has the special knowledge that is necessary to clarify the relevant circumstances of the case. A novelty in the Ukrainian CAP is that the expert may be appointed by the court or be involved by participant in the case.

There are features associated with the examination at the request of the parties. Thus, the case participant has the right to submit to the court an expert’s report (opinion) made up at his request. The procedure of expert research conducting and expert’s report drawing up are based on the results of the out-of-court expert research is determined in accordance with the legislation. If the extrajudicial expert examination is related to the complete or partial destruction of the object of examination or change of its properties, the expert must notify the person who applied to him, in the manner prescribed by part four of Article 106 of the CAP of Ukraine. An expert’s report based on the results of an out-of-court expert examination, during which the object of examination, which is evidence in the case, was completely or partially destroyed, or its properties are changed, does not replace the evidence itself and is not a ground for exemption from the burden of proof. The expert’s report that is based on the results of an out-of-court expert examination, during which the object of examination was completely or partially destroyed or its properties were changed, shall not be accepted by the court, except in cases where the submitting will prove the possibility of additional examination and re-examination of the issues that are investigated in the expert opinion. The expert’s report states that the report has been prepared for submission to the court and the expert is aware of the criminal liability for a knowingly false decision. An expert who has drawn a report on the application of a party to the case has the same rights and obligations as an expert who carries out an examination on the basis of a court decision. Upon the application of the case participant on the existence of grounds for dismissal of expert who prepared the report on behalf of another person, such opinion shall not be accepted by the court for consideration if the court recognizes the existence of such grounds [2].

The court has the right, at the request of the case participants or on its own initiative, to summon an expert to provide explanations on his report.

In the legal literature there is a concept of “explanation of the expert’s report” – this is his testimony about the information that clarifies and discloses the content and meaning of the following provisions, such as: information on scientific and technical means that are used in the examination, on the identified features of the studied objects, certain terms and text formulation; features of objects preparation for research, conditions of experimental samples selection, quantitative and qualitative changes of objects after carrying out their research; the reasons of choosing or abandoning techniques or research methods of objects; contradictions between the research part and the final conclusions, the refusal of the expert to submit an opinion (report), the difference between the scope of the

questions and conclusions; criteria of the features assessing that the expert used in the interim and final conclusions.

The expert's opinion, which is absent in the main report, and its justifications, that are arising from his research, are a supplement to the expert's opinion. The need for clarifications and additions arises when the examination is considered to be insufficiently complete, as well as when there is a need to address issues that have not been asked to the expert; therefore, the expert may be assigned an additional examination [3, p. 221].

It should be noted that the materials for the examination of the expert are provided by either the court or the participant in the case. An expert may not independently collect materials for the examination, disclose information that became known to him in connection with the examination, or inform anyone, except the court and the participant in the case, on whose order the examination was conducted, about its results. The court-appointed expert does not have the right to communicate with the participants of the trial outside the court session, except in cases of other actions directly related to the examination.

In accordance with Article 106 of the CAP of Ukraine, the examination is conducted in court or outside the court, if it is required by the nature of the research, or if the object of research can't be brought to court, or if the examination is ordered by the participant of trial.

The interrogation of an expert is a way to verify the authenticity of the report and its significance for the case in trial. The questions to the expert may not go beyond the subject of his previous forensic and are limited by the circumstances that have been previously investigated. For example, during the interrogation of an expert who conducted a forensic commodity examination, he may not be asked questions concerning the information he received from the person against whom the examination was conducted. This procedural action is intended to clarify and supplement the expert's report [3, p. 221].

It should be noted that the opinion of an expert is not binding on the court. It is assessed along with other evidence.

The expert's opinion is evaluated according to the criteria of scientific reliability and probative value. The court or prosecutor, as noted by R.S. Belkin, AI Winbergta, I.L. Petrukhin, can and should check not only logic of expert proof, but also understand the expert's scientific positions to be convinced of reliability and completeness of the expert's report [4, p. 280].

If there are doubts about the correctness of the answers, the expert should give an opinion on the impossibility of the question resolving. By logic, this conclusion is an indirect proof of the established fact. The accuracy of the expert's opinion is checked and assessed by comparing the conclusions with other evidence gathered in the case, clarifying the question of whether the conclusion contradicts other materials, including other experts' opinions in the case. Evaluation of an expert opinion is a complex mental activity [5, p. 75]. The judge's task is to evaluate the expert's opinion. First of all, he must evaluate the competence of the expert and his opinion.

After reviewing the expert opinion, the judge needs to supplement or explain the expert's conclusions, to explain the meaning of special terms and wording, the content of research methods, discrepancies between the conclusions and the research part, the essence of differences between members of the expert commission (if they did not reach a single conclusion) or contradictions between the conclusions of different examinations, that is the subject of the expert's questioning is the content of the already issued conclusion (conclusions). It is not possible to conduct an expert examination until the expert's opinion is drawn up, because the subject of the examination is missing.

If clarifications and additions require the conclusions of the commission examination, the court has the right to summon for questioning one, several or all members of the expert commission, depending on which issues need to be supplemented and clarified whether the conclusion was signed by all members of the commission or whether any of the experts had a personal opinion [3, p. 221].

Legal expertise is the main form of special knowledge in public legal disputes using. The importance of considering of legal expertise institution in the administrative process is also due to a number of other factors. First, new types of objects are brought into the orbit of the judiciary, which carry information about the public legal dispute. Secondly, as a result of the development of forensic methods and techniques, the new branches of scientific knowledge achievements are used. These trends lead to the formation of new and improvement of existing types of legal expertise. Each new type of expertise requires the person who appointed it to solve numerous and difficult tasks, including a clear definition of the subject and possibilities of expertise, preparation of objects for special research, selection of expert and expert institution, and to assess and use in considering a specific administrative case after receiving the expert's opinion [6].

One of the novelties of updated procedural codes is the introduction of a legal expert institute (Article 69 of the CAP of Ukraine).

A legal expert may be a person who has a scientific degree and is a recognized specialist in the field of law. However it isn't specified what scientific degree it should be in CAP of Ukraine. It can be both the candidate of law, and the doctor of law. In addition, the legal construction of a "recognized expert in the field of law" is debatable.

Criteria such as experience of scientific work in the field of law; availability of scientific publications in professional publications of Ukraine and foreign countries, that are included in international scientometric databases, and published after the award of a scientific degree; the presence of a document confirming the assignment of academic rank; the degree of activity of participation in conferences, symposia, round tables, which are confirmed by the relevant documents and legalized in the order established by the current international agreements of Ukraine etc., should be taken into account when the court decides on the admission of a legal expert to participate in the case and instructs his opinion on the case file [7, p. 33].

In accordance with the CAP of Ukraine, the decision on admission to the case of a legal expert and the attachment of his opinion to the case materials is made by the court. A legal expert is obliged to appear in court upon summons, answer questions asked by the court, and provide explanations. In the absence of objections of the participants in the case, the legal expert may participate in the court hearing by videoconference. A legal expert has the right to know the purpose of his summons, to refuse to participate in the litigation if he or she does not have the relevant knowledge, and the right to pay for services and reimbursement of costs associated with the summons.

A legal expert may be involved by both the court and the parties to the case may submit a ready-made opinion of such an expert. The conclusions of such experts are equivalent. The task of the court is to assess such report and make an independent decision on the case. A problematic issue in practice may be the fact that other participants in the process will disagree with the legal expert's opinion that is submitted by the participant in the process.

In accordance with Part 1 of Art. 112 CAP of Ukraine, the parties have the right to submit to the court the legal expert's opinion on only two issues:

- 1) application of the analogy of law;
- 2) application of the foreign law norms' content in accordance with its official or generally accepted interpretation, practice of application, doctrine in the relevant foreign state.

As we can see, the range of issues is limited. In our opinion, a legal expert also can provide an opinion on the content of Ukrainian law, not just foreign one.

Some practitioners consider that it is important for the court not only to have the opinion of a scientist, but also a lawyer-practitioner, who, although he does not have a scientific degree, but has practical experience and can provide appropriate recommendations for public legal disputes resolving.

We do not agree with this opinion, because we believe that only a scholar can provide qualified assistance to a judge in resolving a public legal dispute regarding the application of analogy of law, the content of foreign law in accordance with its official or generally accepted interpretation, practice, and doctrine of foreign state. Instead, a legal practitioner can evaluate the evidence, analyze the relevant precedent and make recommendations for the judge to resolve the relevant public legal dispute.

Instead, a legal expert does not have the right to indicate how to resolve a dispute properly. He has no right to evaluate the evidence, to give instructions on the reliability or unreliability of particular evidence, on the advantages of some pieces of evidence over others. The expert's opinion is not binding for the court, it has advisory nature. In practice, judges often reject such conclusions because they consider that they themselves are experts in the field of law and are obliged to draw their own conclusions (opinions) on issues that need to be resolved in public legal dispute.

Attention should also be paid to the terminological conflict in the CAP of Ukraine. Some norms use the term "legal expert", other norms – "expert in the

field of law”. This conflict should be eliminated, because in practice it will generate discussions in court.

If we analyze the international experience of legal experts' involving, it should be noted that although this institution is new to Ukraine, it has been used in international law for a long time. The most famous example is the so-called “amicus curiae”, which literally means “friend of the court». This is a person (besides, not only physical), who is not procedural party of the case, has exceptional legal or professional knowledge on an important topic in a particular case, and at the same time participates in its consideration in order to facilitate a fair trial decision [8].

As a result of their work, such “friends of the court” give the court that is considering a particular case, “amicus curiae brief”, that is their opinion or report. This form of legal expertise is particularly common in the United States and the United Kingdom, but it is sometimes used in countries with legal systems of continental law [8].

At the same time, a somewhat similar form of legal expertise is the institution of Advocates General that operates within the structure of the Court of Justice of the European Union. Such “lawyers” assist judges by writing optional opinions that contain recommendations for the consideration of a particular case [8].

Prior to the amendments, the procedural legislation did not contain provisions on a legal expert. However, in 1995 the Law of Ukraine “On Scientific and Scientific-Technical Expertise” was adopted. The procedure for accreditation of relevant experts was approved by the order of the Ministry of Justice of January 12, 2014 № 12. It cannot be proved that these provisions can be applied in the legal sphere as well. Thus, the practice of court scientific and legal expertise submitting was quite common [9].

The parties provided a written opinion of the scientific and legal examination to substantiate their position, and the court had no grounds to refuse to include it in the case. Such a conclusion did not fall under the features of the forensic expert's report or the expert's opinion, but reflected a certain legal position on the application of the law, which the court had to take into account when considering the case [9].

If we analyze the case practice, the great share of cases are lawsuits to the Pension Fund for the obligation to take certain actions, where legal experts are involved as one of the participants in the process to define the concept of “discriminatory actions” (decisions in the USRCD № 74414107, 74227731, 74754485, 74782677, 74938567, 74936511, 75024971, 75072331, 75023248, 74978993, 74727702, 74868804). At the same time, in most cases the courts refuse to satisfy such motions, citing the dispositive powers of the court in this case and the lack of proper justification for the need to involve a legal expert in the process (decision in the USRCD № 71577211) [8].

Conclusions and suggestions. It should be noted that the CAP of Ukraine does not provide the liability of an expert for a knowingly false conclusion. Therefore, in practice, such conclusions of a legal expert may be called into question.

We believe that a legal expert as the new participant in administrative proceedings will help ensure fair justice, speed up the proceedings and ensure the unification of judicial practice. This will increase confidence in the judicial system.

It should be noted that a legal expert does not replace a judge, his activity does not violate the principle of judicial independence, but on the contrary, he promotes effective justice by assisting a judge. Such experts work in both the Supreme Court and the Constitutional Court.

Thus, in any case, both the opinions of experts and the opinions of legal experts promote the quality of justice, improve and facilitate the work of judges. The task of the relevant experts is to provide effective assistance to judges in resolving the relevant public legal dispute. The novelties of the CAP of Ukraine are a positive step forward for our state. They are based on international experience and approximate the legislation of Ukraine to the legislation of the European Union. However, the conflicts that we have identified must be eliminated by the legislator, as they create a number of inaccuracies.

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Эксперт и эксперт в области права как участники административного процесса

В статье рассматривается процессуально-правовой статус эксперта, эксперта в области права как участников административного процесса в соответствии с нормами Кодекса административного судопроизводства Украины. Исследована проблематика функционирования данных участников судебного процесса. Предоставляются предложения по совершенствованию законодательства Украины.

Ключевые слова: эксперт; эксперт в области права; административный процесс; участник административного процесса; вывод эксперта.

Рекомендоване цитування: Nesterova I. A., Shelever N. V. Expert and legal expert as participants of administrative process. *Проблеми законності*. 2021. Вип. 152. С. 69–78. doi: <https://doi.org/10.21564/2414-990X.152.226089>.

Suggested Citation: Nesterova, I.A., Shelever, N.V. (2021). Expert and legal expert as participants of administrative process. *Problemy zakonnosti – Problems of Legality, issue 152, 69–78*. doi: <https://doi.org/10.21564/2414-990X.152.226089>.

Надійшла до редколегії 01.02.2021 р.