UDC 342.951

CONCEPT AND STRUCTURE OF THE CONFLICT OF INTEREST IN PUBLIC ADMINISTRATION ACTIVITY

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SUMMARY

The article is devoted to the analysis of regulatory legal acts, legal scientific literature, which are devoted to the concept and structure of the conflict of interest in the public administration activity. Attention is drawn to the problematic issues of the relevant legislation regarding the concept of conflict of interests, the ranges of official and representative powers, the content of private interest, as well as their relationship to each other. Specific proposals for the improvement of anti-corruption legislation in this area are determined.

Key words: conflict of interest, potential conflict of interest, real conflict of interest, private interest, authority, public administration.

ПОНЯТИЕ И СТРУКТУРА КОНФЛИКТА ИНТЕРЕСОВ В ДЕЯТЕЛЬНОСТИ ПУБЛИЧНОЙ АДМИНИСТРАЦИИ

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АННОТАЦИЯ

Статья посвящена анализу нормативно-правовых актов, юридической научной литературы, которые посвящены понятию и структуре конфликта интересов в деятельности публичной администрации. Обращается внимание на проблемные вопросы соответствующего законодательства относительно понятия конфликта интересов, границ служебных и представительских полномочий, содержания личных интересов, а также их соотношения между собой. Вносятся конкретные предложения по усовершенствованию антикоррупционного законодательства в данной сфере.

Ключевые слова: конфликт интересов, потенциальный конфликт интересов, реальный конфликт интересов, частный интерес, полномочия, публичная администрация.

Introduction. A person entering the public service undertakes to comply with the requirements, restrictions and prohibitions related to the peculiarities of its passing. One of these requirements is the obligation to take measures to prevent conflicts of interest. Conflicts of interest set central place in more global issue of corruption in general, so the creation of a legislation that meets the requirements of legal certainty and aimed at settlement of conflicts of interest is an important part of counteracting corruption in general. Accordingly, society expects the public administration to perform its duties fairly and impartially. In order not to allow a conflict of interests on their part, it is first of all necessary to understand its concept and content, which seems difficult due to the lack of legally established terms "conflict of interests", "official powers", "representative powers". In the absence of a general definition of a conflict of interests, the legislator presented only its types (potential and real), the content of which does not fully reveal their features, time of occurrence, actions for settlement, etc.

Analysis of recent research and publications. It should be noted the low activity of scientists and practitioners regarding the study of conflicts of interest in public administration activity. Among the works devoted to specific aspects of this problem, we can distinguish such authors as T. Vasilevskaya, V. Galunko, N. Korchak, V. Lugovoy, D. Lukianets, A. Mikhalchenko, S. Rivchachenko, V. Senik and others. Such scientists as V. Aleksandrov, V. Kolpakov, M. Melnik, S. Rogulsky, S. Stetsenko, V. Tilchik, A. Tkachenko, G. Tuchak, I. Yatskivhave been researched common anti-corruption issues. At the same time, the concept of a conflict of interests and the characteristics of its structured elements have not been studied in a comprehensive manner.

The **purpose of the article** is to identify the problems of legal regulation of the definition and structure of conflict of interests in the activity of public administration, to determine specific proposals for their solution.

Statement of basic materials. In order to form a clear understanding of the order of preventing and settlement a conflict of interests, it is first of all required to disclose the nature and scope of the conflict of interest. The current Law of Ukraine "On Prevention of Corruption" [1] (hereinafter – the Law) does not contain a general definition of a conflict of interests.

There is no single approach to conflicts of interest in domestic science. It is defined as a system of norms governing the conflict of interests in the public service system (special legal understanding) [2, p. 488], a legal situation in which the party, by concluding an agreement, can potentially benefit, perform actions and cause damage to the other party [3]; the contradiction between the private interests of a public servant and the interests of the service, the presence of which may affect the objectivity or impartiality of decision-making, as well as the com-

mission or non-commissioning of actions in the course of his official activity [4, p. 7]; a conflict of state interests within the competence of the public service and the private interests of the person in charge of this post [5, p. 8]; situations in which the personal material or other interests of an employee or his dependence on other citizens or organizations can prevent or hinder the proper performance of official duties of a state or municipal official [6, p. 157]; particular dispute between the public-law obligations and the private interests of an authorized officer [7, p. 152].

The more correct in this context is the definition, enshrined in Art. 13 Model Code of Conduct for Civil Servants: "A conflict of interest arises in a situation where a civil servant has a personal interest that affects or may affect the impartiality and objectivity of his duties" [8]. It is precisely from this position that definitions of conflicts of interest in the national anti-corruption legislation are provided. A potential conflict of interest is defined as the presence of a person's private interest in the sphere in which it performs its official or representative powers, which may affect the objectivity or impartiality of its decisions, or the commission or non-execution of actions in the performance of these powers. A real conflict of interest takes place in the situation of a contradiction between the private interest of the person and his official or representative powers, which affects the objectivity or impartiality of the decision-making, or the commission or non-execution of actions in the performance of these powers. An analysis of these concepts provides an opportunity to reveal the structural components of the conflict (real or potential), in the presence of which it may take place, as well as the sphere of its occurrence. They are: 1) private interest; 2) official or representative powers; 3) the contradiction between private interests and powers that may affect or affect the impartiality of the performance of these powers.

Private interest is much harder to define exhaustively. In the context of conflict of interest laws, what constitutes a "private interest" has shifted over time. Historically, a private-capacity interest was conceived of as something objective, almost invariably referring to financial interests such as shareholdings or a directorship position in a corporation. It has been argued, however, that the concept of "private interest" has expanded over time to recognize that subjective private interests informed by ideological, personal, and political matters may improperly influence public duties [9, p. 3].

For example, Canada's Conflict of Interest Act contains a "preferential treatment" provision that can capture situations in which an official's private interest is not objectively ascertainable, but it is nonetheless clear that an individual or organization has received preferential treatment from the official on the basis of their identity [10].

As indicated in the Methodological Recommendations on the Prevention and Settlement of the Conflict of Interest, "practically this means that each employee, while performing his powers, must take into account the entire spectrum of his not only legal, but also social (private) relations that predetermine the emergence of property or non-property interest. In this case, only such private interest in the sphere of official or representative powers that may affect or affect the objectivity or impartiality of decision-making or the commission or non-execution of actions in the performance of these powers entails a real or potential conflict of interest. The law does not impose any prohibitions or restrictions on the existence of private interests as such. It is about observance of the rules of an official's ethical behavior and an appropriate assessment of private interests in the light of their possible negative impact on the objectivity of decision-making or actions of an official in the performance of his official or representative powers" [11] Private interest is defined by the Law as any property or non-property interest of a person, including those caused by personal, family, friendly or other non-governmental relationships with individuals or legal entities, including those arising from membership or activity in social, political, religious or other organizations (§ 1 of Art. 12). On my opinion it is impossible to capture the entire sphere of private employee's interest. It is also not advisable to derive an official relationship that arises in connection with activities in public or other organizations in a separate group, since all are non-governmental. In this context, the definition of private interest needs to be corrected in Law.

The next element of conflict of interest is official or representative authority. The law does not give the concept and content of representative powers. Their list is defined, as a rule, in the relevant laws defining the legal status of the relevant authorities and the persons authorized by them. Thus, the representative body of local self-government is an elective body (council), which consists of deputies and is empowered in accordance with the law to represent the interests of a territorial community and to take decisions on its behalf. The President of Ukraine represents the state in international relations, manages the foreign policy activities of the state, negotiates and concludes international treaties of Ukraine; decides on the recognition of foreign states; accepts credentials and diplomas from diplomatic representatives of foreign states, etc. Thus, representative powers enable the relevant officials to settle a certain range of problems and act in the interests of such persons in accordance with the law on their own behalf and/or on behalf of authorized agents (for example, a territorial community, a subject of authority).

The content and scope of official authority in the legal literature are determined differently. It should be noted that at the legislative level this concept is not fixed. Its content, as a rule, is disclosed through the prism of service crimes: abuse of power or official position; excess of authority or official authority by an official of a law enforcement body (Art. 364–365 of the Criminal Code of Ukraine [12]), etc., which are mainly committed by official persons. It means that the circle of such persons is limited to subjects of authority, officials of state or communal enterprises, institutions or organizations, as well as those who perform such functions under special powers.

As it is correctly stated in the Methodological Recommendations on the Prevention and Settlement of the Conflict of Interest, "the range of official authority is defined in job descriptions, labor contracts, sometimes – in assignments, etc. At the same time, instructions and other documents determine only the direct authority of a particular official, while a law or other normative legal act may additionally determine the scope of both direct and general service powers" [11]. But in this case it is a question of officials only.

According to the Law, the range of persons subject to the requirements for the prevention and settlement of conflicts of interest is wider and goes beyond the scope of official authority. In accordance with Part 1 of Art. 28 these are persons specified in clauses 1 and 2 of part one of Art. 3 of this Law, namely: persons authorized to perform functions of the state or local self-government (item 1) and persons who for the purposes of this Law equate to the specified persons (persons who are not civil servants, officials of local self-government but provide public services (auditors, notaries, private executives, appraisers, as well as experts, arbitration administrators, independent intermediaries, labor arbitration tribunals, arbitrators other persons specified by the law)), and representatives of public associations, scientific institutions, educational institutions, experts of the relevant qualification, and other persons.

Let's consider their status and duties. According to Art. 3 of the Law of Ukraine "On Notary" [13], a notary is a person authorized by the state, which carries out notarial activity in a state notary office, a state notary archive, or an independent professional notarial activity, in particular, certifies rights, as well as facts of legal significance, and performs other notarial acts actions prescribed by law in order to give them legal certainty. It should be noted that in the area of prevention of corruption, the notary is only forbidden to use its powers in order to obtain an unlawful benefit or accept a promise or offer of such benefit to themselves or others, as well as to engage in entrepreneurial, advocacy, to be the founder of advocacy associations, to be in state service or service in local self-government bodies, in the state of other legal entities, and also perform other paid work, except for teaching, scientific and creative activity. The fact that he is forbidden to perform notarial acts in a conflict of interest is only partially noted. The sphere of private interest in such cases are the husband or wife of the notary and his (her) relatives (parents, children, grandchildren, grandparents, grandparents, brothers, sisters), as well as employees of this notary's office and employees who are in labor relations with private notary public.

Such a provision is enshrined in Art. 16 of the Law of Ukraine "On bodies and persons engaged in enforcement of court decisions and decisions of other bodies" [14], which states that a private executor may be a citizen of Ukraine, authorized by the state to engage in compulsory execution of decisions in accordance with the procedure established by law and is a person of independent professional activity. The conflict of interests concerns situations where a private executor is prohibited from executing a decision if: the debtor or collector is the performer himself, the person close to him, related persons – legal entities and / or individuals whose relations may affect the conditions or results of their activities or activities of the persons they represent. Other areas of private interest due to personal, friendly or other relations are not mentioned.

According to Art. 3 of the Law of Ukraine "On Audit Activity" [15] the audit is carried out by independent persons (auditors), audit firms, authorized by the subjects of management for its conduct. By analogy with the aforementioned laws, the prohibitions of the audit relate to direct family relationships and personal property interests (Art. 20).

Statutory consolidation of the status and restrictions related to the pursuit of professional activities can be extended by appraisers, experts, arbitration managers, representatives of public associations, etc. The analysis of the relevant normative and legal acts shows that these persons are not official and do not perform official powers in accordance with the current legislation, and carry out independent professional activity representing the sphere of private law. At the same time, the scope of their private interest, enshrined in the law, is much narrower than that declared in the Law "On the Prevention of Corruption". However, this does not contradict the fact that such persons are endowed with certain rights and duties, which collectively constitute their non-official powers. In this regard, the achievements of academic lawyers regarding the meaning of the concepts of authority and official authority should be cited. They relate to each other as general and partial. Powers should be defined in the rules of law both at the legislative and sub-legislative levels.

The criminal law provides the responsibility for non-official persons (Art. 365–2 Abuse of authority by persons providing public services, Frt. 368–4 Bribing a person who provides public services) [12].

Proceeding from the above-mentioned legislative definitions of a real and potential conflict of interest, one can conclude that such conflicts may occur only in the performance of official powers, which greatly narrows the scope of their occurrence and means that the conflict of interests in the activities of the persons providing public services, representatives of public organizations, etc. cannot be due to the fact that they are endowed with other (non-official and non-representative) powers, which are not covered by the provisions of the legislation in the scope of prevention corruption.

The last element of the conflict of interest is the contradiction between private interests and powers that may affect (or affect) the impartiality of its performance of these powers. Such a meaning derives from the nature of social conflicts. At the same time, the conflict of interest is not a contradiction, which dictionary defines as a "situation in which any one excludes another, incompatible with or opposite to it; mismatch of something for some reason; the opposite of interests" [16, p. 1415]. In our situation, it occurs between the official and private interests of the person and is in their clash with each other. As already noted the law does not impose any prohibitions or restrictions on the existence of private interests as such, it is about observance of the rules of an official's ethical behavior. Not the contradiction of interests but their clash is the main content of the conflict, which should form the basis of its concept.

This circumstance has a double meaning: firstly, for the timely identification of the potential (objective possibility of offensive) and real (impact on the objectivity) of the conflict of interests, and secondly, to establish the composition of the corresponding offense in the event of violation of the established procedure of preventing and the settlement of a conflict of interests, which should be set separately for each case of the performance of powers by comparing them with private interests, with further determination of the possibility of its influence on objectivity or impartiality on decision committing acts officer and others.

This element presents some interpretive difficulty for two main reasons. First, it requires that we determine what constitutes proper performance of an official's duties and responsibilities in the pub-

lic interest. Although in some circumstances this determination will be black and white, there will be many cases in which the official finds him or herself in a gray area. Secondly, it requires that we make an assessment as to whether private interests could affect the proper performance of those duties and responsibilities. This task can be considered speculative in certain circumstances where the potential impact of the private interest is not easily verified. Generally speaking, these interpretive problems have been dealt with through the use of explicit prohibitions and aspirational, norm-generating provisions in legislation, policy instruments, codes of conduct and guidelines. Indeed, scholars have argued that, in contrast to the increasingly "subjective" element of the "interest" element, the "conflict" conceptualization has shifted from being understood as purely subjective to something that can be objectively verified, at least in law, through analysis based on a set of indicia [9, p. 10].

The analysis of normative legal acts regulating public relations in the sphere of prevention and settlement of conflicts of interest indicates the following: 1) in the national legislation, there is no legal definition of the conflict of interests, and its content and structure is revealed through the prism of legally defined types of conflict of interests – potential and real; 2) the constituent elements of the conflict of interests, based on the content of its types, are: a) private interest; b) official or representative powers; c) the clash between private interest and official authority, which affects (may affect) the impartiality of their performance. At the same time, the concept and content of official and representative powers are not legally defined and relates mainly to the notions of an official person, a representative body; 3) the requirement to prevent conflicts of interest extends not only to officials but also to other entities who do not have official authority. All this suggests that the legislative definition of conflicts of interest, which is associated exclusively with the performance of official authority, does not apply to the specified circle of persons who are not endowed with such powers; 4) the special laws regulating the activities of the such persons, the range of private interests in the performance of professional activities related to the provision of public services is reduced mainly to family relationships, which does not fit the requirements of legislation in the scope of prevention and counteraction to corruption. All these gaps and inconsistencies require appropriate legal intervention.

Conclusions. In this article, based on the analysis of the current legislation, the legal opinion, the concept and content of the conflict of interests are disclosed. It indicates the relevant shortcomings of the current legislation in this area, and suggests ways to settle them. In particular, as the first priority measures to eliminate these problems, it is proposed: a) to establish a concept of conflict of interests as a clash of the private interest of a person with his official, representative and other powers that may affect or affect the objectivity or impartiality of their performance; b) in the legislative definitions of a potential and real conflict of interests, the "official or representative powers" should be changed to "official, representative or other powers" and determined; c) the special laws regulating the activities of the entities providing public services should be supplemented by the norms that stipulate that the abovementioned persons are subject to the requirements for the prevention of conflicts of interest envisaged by the Law of Ukraine "On Prevention of Corruption".

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УДК 341.241

ИСТОРИКО-ПРАВОВЫЕ АСПЕКТЫ ПРОВЕДЕНИЯ МИРОТВОРЧЕСКИХ ОПЕРАЦИЙ ОРГАНИЗАЦИИ ОБЪЕДИНЕННЫХ НАЦИЙ

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АННОТАЦИЯ

В статье раскрываются исторические аспекты международно-правового регулирования миротворческой деятельности Организации Объединенных Наций, связанной с проведением миротворческих операций. Проанализированы этапы реформирования миротворческой деятельности Организации Объединенных Наций и проведения международных миротворческих операций. Доказано, что в современных условиях проведение миротворческих операций под эгидой Организации Объединенных Наций по сохранению мира и созданию коллективной международной безопасности является очень важным. Именно Организация Объединенных Наций как инструмент мира и международной безопасности имеет огромный потенциал, для реализации которого открываются новые возможности в условиях существенных изменений, произошедших в мире, широкого понимания необходимости объединения коллективных усилий в интересах выживания человечества. Определены семь этапов развития и реформирования миротворческой деятельности Организации Объединенных Наций в рамках проведения миротворческих операций.

Ключевые слова: миротворческие операции, миротворческая деятельность, международные отношения, Организация Объединенных Наций.

HISTORICAL AND LEGAL ASPECTS OF UN PEACE OPERATIONS

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SUMMARY

The article reveals the historical aspects of international legal regulation of United Nations peacekeeping activities related to peacekeeping operations. The stages of the United Nations peacekeeping reform and international peacekeeping operations are analyzed. It is proved that under the current conditions of peacekeeping operations under the auspices of the United Nations for the preservation of peace and the creation of collective international security is extremely influential and significant. The United Nations as a tool for peace and international security has enormous potential for the realization of which opens up new opportunities in the context of the radical changes that have taken place in the world, a broad understanding of the need to combine collective efforts for the survival of mankind. The main stages of development and reforming the United Nations peacekeeping activities in the framework of peacekeeping operations are determined.

Key words: peacekeeping operations, peacekeeping, international relations, United Nations.

Постановка проблемы. Последнее время тема миротворческих операций Организации Объединенных Наций (далее – ООН) стала крайне актуальной. Современные международные отношения характеризуются наличием многочисленных противоречий и конфликтов, которые создают угрозу международному миру и безопасности. Это обусловливает возникновение такой формы мирового сотрудничества, как миротворческая деятельность. Ведущая роль в этом принадлежит Организации Объединенных Наций. По нашему мнению, дискуссия о перспективах введения миротворческой миссии ООН и проведении миротворческих операций должна быть более обстоятельной.