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CONFLICTS OF INTEREST DIVISION INTO TYPES

Problem statement. One of the anticorruption constraints established by the Law of Ukraine "On Prevention of Corruption" of October 14, 2014 for public servants is the obligation to take measures to prevent conflicts of interest in their activities. At the same time, the law defines only two types of such conflicts (potential and real), the content of which does not fully reveal their features, time of occurrence, actions for settlement. Insufficient attention to the problem of conflicts of interests division into types is diced in the legal literature, which makes the process of their study unfinished. However, the classification of conflicts has important scientific and practical significance since it helps to identify the reasons for their occurrence and to identify effective measures for their settlement. Thus, the relevance and timeliness of research in this area is conditioned by the need to develop theoretical and applied principles for the classification of conflicts of interest in public-law relations.

Analysis of recent researches and publications. Certain manifestations of conflicts of interest in the activities of public administration were researched by such scholars as V. Galun'ko, O. Onyshchuk, S. Rivchachenko, O. Tokar-Ostapenko, T. Vasilevskaya, O. Yeschuk. At the same time, the division of conflicts of interests on species has not been explored in a complex way. The **task of this article** is to determine on the basis of the analysis of current legislation, the achievements of the legal science new scientific and practical approaches to the division of conflicts of interest into types.

Presentation of the main material. The distribution of various phenomena is carried out on various grounds, which characterize their internal content. In legal literature it is also called a criterion. In the etymological sense the criterion is defined as a characteristic sign of the phenomenon [1, p. 450]. Therefore, not every criterion can be used as a basis for classification, but only one that has a significant meaning. Often in legal literature, the source of a classification is called the basis, sometimes – a criterion. The question of their choice in the classification of various legal phenomena, including conflicts of interest, is important. In this regard, the importance of classification criteria that are not significant should not be exaggerated.

In the conceptual framework, the classification contributes to the scientific understanding of all types of conflicts of interest. In practice, it helps to identify problems in the work of officials, peculiarities of conflicts of interest, and how to settle them in situations where there is a need.

The classification method is often used in scientific research. The correct classification, on the one hand, summarizes the results of the previous development of a certain sphere of knowledge, on the other hand, is the starting point for a new stage of its development, which allows predicting the existence of previously unknown objects or revealing new relationships and interdependencies between those already known. Classification is a powerful tool in the methodology of the theory of law, which allows to arrange all the plurality of legal phenomena and processes according to certain criteria, to identify the essential and, conversely, secondary, subjective in these phenomena and processes.

Unfortunately, only a few attempts at a comprehensive approach to the classification of conflicts of interest have been implemented in domestic science. In the Law "On Prevention of Corruption", the division of conflicts of interest is made on the criterion of the ability of the private interest to impact on the performance of official duties: a) a potential conflict of interest – a situation in which an official has a private interest in the field of performance of his official authority, that only can affect the objectivity of its decisions, actions; b) a real conflict of interests – a situation in which the influence of the official's private interest on the impartiality of the official decision or action occurred. As noted at the beginning of this article, these definitions only superficially reveal the content and peculiarities of conflicts, the moment of their occurrence, which, in turn, complicates the further process of choosing the correct way of settlement them.

It should also be noted that foreign law also distinguishes the third type of conflict of interests – imaginary (apparent), when it seems that the private interests of an official can negatively affect the performance of his functions, although in reality it is not, his actions are negatively evaluated in the minds of people. As O. Polishchuk rightly points out, "the introduction of such a term and phenomenon as an apparent conflict of interests should have encouraged the subjects of power to strive for maximum ethical conduct, taking into account the assessment of society. However, such an idea was not supported by the Ukrainian legislator. It seems that our worldview is not yet ready to accept such, on the one hand, high, and on the other – simple philosophical and vital matters" [2].

Several criteria for the division of conflicts of interest in his dissertation on "Preventing and settlement conflicts of interest as a way of fighting corruption" was presented by S. Rivchachenko [3]. Without diminishing the importance of the role of this scientific work, it should be noted that some of the proposed criteria are not fully disclosed, others were left out of the attention of researchers.

For example, according to the subjects of prevention and settlement of conflict of interests S. Ryvchachenko distinguishes such conflicts of interests which are prevented and solved by: public authorities, local self-government bodies, other legal entities of public law, public councils formed under state bodies and involved in the preparation of decisions on personnel issues, preparation, monitoring, evaluation of the implementation of anti-corruption programs [3, p. 32] It is unlikely that this list of subjects can be considered exhaustive, since it does not cover the activities of other state bodies that are not part of the system of state authorities (National Bank of Ukraine, National Anti-Corruption Bureau, prosecutor's offices and others), officials and relevant public entities of the private sphere activities (auditors, notaries, private executives, appraisers, etc.).

Similar clarifications can be offered regarding the author's division of conflicts by the subjects in which it arose: officials of state authorities, local self-government, and other legal entities of public law (the question is: why such a conflict may arise only from officials of public administration, because the list of relevant subjects is not limited to them?), persons providing public services, members of public councils with state bodies.

It should be admitted that they are partly in line with the proposed S. Rychchachenko's criterion (status of legal entity, in such a kind of conflict as "a conflict of interest that arose in public councils formed by state authorities and involved in the preparation of decisions on personnel issues, preparation, monitoring, evaluation of the implementation of anti-corruption programs" [3, p. 33], since these councils do not become status a legal entity is formed on a voluntary basis to ensure transparency and civil control over the activities of the relevant authorities. Artificial also appears to be a "conflict of interest that arises in a legal entity formed by the association of persons providing public services". In this regard, and in general, it should be noted that conflicts of interest do not arise in a legal entity, but take place in the activities of its individual employees.

Somewhat illogical is the proposed classification based on a conflict of interest. The author, based on the legal definition of private interest, distinguishes conflicts of interest "caused by personal relationships, family relationships, friendly relations, other non-servitude relationships, as well as relationships arising from membership or activity in public, political, religious, or other organizations" [3, p. 33–34]. It seems that the attempt to enumerate all possible manifestations of the private interest of an official in a conflict of interest is such that he is doomed to be incomplete, since covering all the property and non-property interests of such a person, his external service is almost unreal. It is also not entirely appropriate to derive an official relationship arising from membership or activity in public or other organizations beyond the scope of a non-contractual relationship, since they do not relate to the performance of official or representative authority. All of the above relationships are and should be non-service.

As Joseph Mooney correctly points out, it can be difficult to determine when, and to what extent, a private-capacity interest is present. While interests that are quantifiable in financial terms (e.g., the prospect of personally gaining a significant amount of money as a result of a project approval being made) are relatively clear-cut, more abstract interests may be more difficult to identify and measure. Furthermore, it can be difficult to distinguish between a private interest and an interest stemming from one's membership in a broader class of persons [4, p. 3].

Similar remarks can be made about the following classification of conflicts of interest for the measures of their settlement by: 1) removing a person from performing a duty, committing an act, taking a decision or participating in its adoption in the conditions of a real or potential conflict of interests; 2) the use of external control over the performing of a particular task, actions or making decisions; 3) restriction of access of a person to certain information; 4) review of the scope of official authority of the person; 5) conflict of interests, which is solved by transferring a person to another position; 6) dismissal of a person. Again, note that this listing is not exhaustive. At the very least, it does not cover the possibility of an independent conflict resolution of interests, provided for in Part 2 of Art. 29 of the Law of Ukraine "On Prevention of Corruption", as well as actions to settle conflicts of interest among persons who are part of a collegial body (Part 2, Article 35 of the Law) and some others.

Of course, one of the first attempts by the researcher to apply complex classification method to conflicts of interest is a certain scientific interest, but does not reveal legally significant grounds for classification.

The ambiguous nature of conflicts of interest covering not only the sphere of activity of state and municipal bodies, but also the sphere of private business, requires a constructive approach to their classification, which does not exclude the study of this phenomenon in conjunction with other social conflicts. Consequently, when searching for criteria for classifying conflicts of interest in public-law relations, it is necessary to take into account classifications of a more general level – conflicts of interest in general. The reasons and mechanisms of the emergence and development of conflicts, as well as the principles and technologies of management of them, are the subject of such a system of knowledge as conflictology, whose representatives investigate the various patterns and manifestations of conflict social interaction, as well as practical management of them. The conflict is considered as an aggravation of contradictions and the opposition of two or more parties in solving their problem, accompanied by negative emotions. However, the type of conflict of interest we are considering has its own specifics: it takes place in the field of public-legal relations, is mainly unilateral in the absence of counteraction or struggle and one that is rarely accompanied by negative emotions. Therefore, not every demonstration of such a conflict can be covered by the object of conflictology, and therefore requires a special study.

It should be noted that due to general insufficient research of the theory of conflicts of interest

in public-legal relations, the only developed classification of such conflicts does not exist. The objective difficulties of their scientific justification are that they themselves represent a category beyond the generally accepted approaches to their essence and nature. At the same time, the classification of conflicts of interest is rational because they are characterized by constant features, content and structure.

To suggest the concept of classifying conflicts of interest is relevant both from a scientific and a practical point of view, as this will contribute to widening the limits of their understanding, peculiarities of demonstration and order of settlement. The corresponding criteria of classification, which allow to relate certain conflicts of interest to a particular group, have different character. In this article, we will draw attention to legally significant criteria for classification.

Conflicts of interest are quite diverse. Considering the conflict of interest as a special situation in the field of public relations, the following criteria for their division into types:

1) the degree of power in relations between the parties to the conflict: a) subordinational (arising in connection with the performance of powers of the head – subordinate, for example in the case of direct subordination between relatives); b) reordinational (take place in the absence of subordination relations);

2) the quantitative composition of subjects: a) one-sided (for example, in connection with the presence in the person of enterprises or corporate rights); b) multilateral;

3) the duration of time: a) one-time (most often occurs when an official performs an individual act or decision-making such as drawing up acts, conducting measurements, certifying facts, etc., are characterized by situational emergence); b) short-term (for example, within the framework of proceedings for consideration of a citizen's request regarding which an official has a private interest, bringing a person to liability); c) long-term (characterized by constant, continuous character, often occur during the performance of the authority of the head of the body or unit, to which the person close to him directly submits).

Based on the classification of the qualitative composition of the subjects of conflict of interest, two criteria can be distinguished. The first is related to persons who may have conflicts of interest and represent: a) state bodies; b) local self-government bodies; c) state enterprises, institutions, organizations; d) communal enterprises, institutions, organizations; e) areas of public service provision; e) people involved in the officials in the procedures for the formation of a public service, the performance of their supervisory and control powers, and others like that. The second one is connected with the entities authorized to settle conflicts of interest: a) heads of state bodies, local self-government bodies, state and communal enterprises, institutions, organizations, and their divisions; b) collegial bodies alone or with the participation of the representative of the National Agency for the Prevention of Corruption; c) the National Agency for the Prevention of Corruption; d) public associations; e) persons who have a conflict of interest.

Logical continuation of this classification is a criterion for choosing a way to settle the conflict: a) external (the settlement is carried out by the authorized person, the authority regarding the person who has a conflict); b) self-dependent (the settlement is carried out by a person who has a conflict of interests by own actions without the involvement of outsiders). Depending on the type of legal regulation, the settlement of conflict of interests can be divided into: a) general (carried out in accordance with the procedure established by the Law of Ukraine "On the Prevention of Corruption"); b) special (it has its own specifics, is determined by the laws regulating the status of officials and the principles of organization of the relevant bodies, for example, the head of state, people's deputies, members of the government, heads of state services, agencies and inspectorates, judges, chairmen of local councils, etc.).

In order to provide a clearer practical understanding of the essence and consequences of conflicts of interest by the criterion of their

wrongfulness, we can distinguish the following conflicts:

a) a perspective conflict of interest – the situation of the so-called "almost conflict", in which the official has a private interest in the field of the performance of his duties, which can in the future to affect on the objectivity of making decisions or actions. The two main components of this conflict of interest (official authority and private interest) as track rails go in parallel with each other and do not overlap. The law in such a situation is not violated and such a conflict, with proper behavior of the official, will remain positive (incomplete);

b) a retrospective conflict of interests – a completed conflict situation in which an official, despite the presence of his private interest in the sphere of his performance, takes actions that affect their objectivity and impartiality. In this case there is a violation of the legislation in the field of prevention of corruption and the guilty person may be prosecuted. The possibility, and not the obligation to prosecute, in this case, is due to the fact that anti-corruption legislation contains provisions that allow officials to perform power in a conflict of interest. This situation is stipulated in Art. 33 of the Law of Ukraine "On Prevention of Corruption" in the form of performing the authority of an official under external control. Such an exclusive external form of conflict resolution is used in cases where it is impossible to take other measures to settle the conflict, including the transfer of a person to another post or his dismissal. For example, an official informs the supervisor about potential conflict of interest in the conduct of an expert research in connection with the existing private interest, but the manager cannot transfer the performance of this work to another person due to a lack of specialists, nor grounds for the transfer or dismissal of this person. The research must be completed. The supervisor issues an order for the use of external control in the form of verification by the determined manager of the worker of the results of the performed research (control form) or obliges the person to conduct a research in the presence of another employee, which is also determined by the manager (the "tandem" form). Despite the steps taken by the supervisor, the official performs his work in a conflict of interest, which does not disappear, as well as the private interest of the person does not disappear. However, this conflict occurs in the legal scope and is accompanied by control measures, determined by the supervisor in accordance with the current legislation. Similarly, in the situation of a conflict of interest will act the person who works in the collegial body where as a form of external control has been used the participation of the authorized representative of the National Agency for the Prevention of Corruption in the status of observer without the right to vote in the work of this body. Despite the participation of an independent representative, a person votes in a conflict of interest, but, as in the first case, it occurs in the legal field.

Similar situations are described in other laws. For example, a deputy or chairman of the local council in accordance with Art. 59-1 of the Law of Ukraine "On Local Self-Government in Ukraine" [5] has the right to take part in the consideration and decision-making by a council in which they have a private interest in case of independent public announcement about it during a meeting of the council. That is, such an announcement is a legitimate basis for voting in a conflict of interest, but again – legal. Otherwise, the actions of a deputy or chairman of the local council will be considered illegal, for which administrative responsibility is provided. All this allows to distinguish such subtypes of a retrospective conflict of interests as legal and illegal.

Of course, the sphere of conflicts of interest is very voluminous due to a large number of subjects in which it may arise, as well as acts that regulate it, and therefore the criteria for their classification can be distinguished more. It is obvious that within each type of conflict it is possible to further classify them.

Conclusions. Current classifications of conflicts of interest are analyzed, their main features and disadvantages are indicated, the main

problems of approaches to their division into types are described in this article. As a result of significant features of the conflict of interests analyses, has been made an attempt to allocate new ones of their scientific and practical significance and to contribute to a deeper understanding conflicts of interest nature and diversity (subordinational and reordinational, general and special, perspective and retrospective, legal and illegal), which allowed disclosing the features of a conflict, to determine the legal consequences and the appropriate procedures for their settlement.

Summary

The article reveals actual problems of division of conflicts of interest into types. It is stated that the current anti-corruption legislation establishes only two types of conflicts of interest – potential and real, the content of which does not fully demonstrate their specificity, duration, content of the conflict situation. All this leads to difficulties in understanding the differences between these conflicts, as well as the problems of their proper interpretation and settlement by authorized entities. The question of the division of conflicts of interest into species is a rather new area of scientific search. The article presents the modern achievements of scientists in this field, emphasizes the importance of scientific and practical classification as a powerful tool in the methodology of the theory of law, which allows to organize conflicts of interest by certain criteria.

The research presents the division of conflicts of interest into types by such criteria as: degree of authoritativeness in relations between the parties to the conflict: quantitative composition of participants; the duration of the conflict; the qualitative composition of the parties to the conflict in which it arises and which settles it; method of conflict resolution; kind of legal regulation of conflict resolution. Within such a criterion as the degree of unlawfulness of a conflict, a perspective and retrospective conflict of interests was identified, within which its subspecies was defined: legal and unlawful, which made it possible to conclude that not every conflict of interest could be settled. In the context of legal conflict, officials may perform power or representative authority in a conflict of interest but in the legal plane.

The need for further research into the division of conflicts of interest into types is defined in order to identify new aspects of their demonstration in public administration activities.

Key words: conflict of interest, public administration, potential conflict of interest, real conflict of interest, imaginary conflict of interest, types of conflicts, legal conflict of interests.

Пастух І.Д. Поділ конфліктів інтересів на види

Анотація

У статті розкриваються актуальні проблеми поділу конфліктів інтересів на види. Констатується, що чинне антикорупційне законодавство визначає лише два види конфліктів інтересів – потенційний та реальний, зміст яких не в повній мірі демонструє їх специфіку, тривалість, зміст конфліктної ситуації, що призводить до складнощів розуміння цих конфліктів, відмінностей між ними, а також до проблем їх належного тлумачення та врегулювання з боку уповноважених суб'єктів. Питання поділу конфліктів інтересів на види є достатньо новим напрямом наукового пошуку. У статті представлені сучасні здобутки науковців у цій сфері, наголошується на вагомому науково-практичному значенні класифікації як потужного інструменту методології теорії права, що дозволяє впорядковувати конфлікти інтересів за певними критеріями.

У дослідженні представлено поділ конфліктів інтересів на види за такими критеріями, як ступінь владності у відносинах між сторонами конфлікту: кількісний склад учасників, тривалість конфлікту, якісний склад учасників конфлікту, у яких він виникає та які його врегульовують, спосіб урегулювання конфлікту, вид правового регулювання вирішення конфлікту.

У межах такого критерію як ступінь протиправності конфлікту виділено перспективний та ретроспективний конфлікт інтересів, в межах якого визначено його підвиди – легальний і протиправний, що дозволило зробити висновок про те, що не кожен конфлікт інтересів може бути урегульованим. У межах легального конфлікту службовці можуть реалізовувати владні або представницькі повноваження в умовах конфлікту інтересів, але в правовій площині.

Вказується на необхідність подальших досліджень поділу конфліктів інтересів на види з метою виявлення нових аспектів їх прояву у діяльності публічної адміністрації.

Ключові слова: конфлікт інтересів, публічна адміністрація, потенційний конфлікт інтересів, реальний конфлікт інтересів, уявний конфлікт інтересів, види конфліктів, легальний конфлікт інтересів.

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