РОЗДІЛ ІІІ. АДМІНІСТРАТИВНЕ ТА ФІНАНСОВЕ ПРАВО

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Restrictions for public servants on double job holding and positions overlapping with other types of activities: content and proposals for improving legal frameworks

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Special restrictions for public servants occupy pride of place among the diversity of means preventing a conflict of private and public interests in the public service They are called "special" due to their focus on special persons – persons empowered to exercise functions of the state or local self-government, and involve a special sphere of their coverage – public and official activities. One of the types of such restrictions is a restriction on double job holding and positions overlapping with other kinds of activities the fundamentals of which are consolidated in Art. 25 of the Law of Ukraine "On Prevention of Corruption". Introduction of a relevant "filter" of anti-corruption activities of public servants in the domestic legislation is consistent with international legal standards of anti-corruption nature (United Nations Convention against Corruption, Recommendations No R (2000) 10 of the Committee of Ministers of the Council of Europe to Member states on codes of conduct for public officials dated May 11, 2000, patterns of foreign anti-corruption rulemaking), however, it differs by specific features of immediate consolidation. The latter was manifested in a quite simplistic, generalized approach of the legislator to drafting a relevant regulatory framework. Thus, it stipulated the grounds for different interpretations and application of the provisions of Art. 25 of the Law in practice, avoidance of legal liability for violation of a particular law by offenders. Based on a thorough study of the content of Art. 25 of the Law, comparative and legal analysis of the experience of foreign countries in relation to the statutory definition of such restrictions, the authors propose a number of recommendations for improving legal frameworks of use of the resource of this kind of special restriction for public servants (it is the goal of the article). In particular, it is proposed to consolidate the definition of "other gainful activity" at the regulatory level with the preservation of its features that allows separating it from an entrepreneurial activity. The author substantiates the expediency of making amendments in the context of the accumulation of provisions, which determine the range of persons who are subjected to the relevant restriction; introduction of a restriction on "institutional political activity" of a person for the period of his performance of state or local self-government functions; substitution of the word "restriction" by "prohibition" in article title for conformity of the title with the content of the article; specification of regulatory frameworks on exceptions in the general prohibition in relation to certain types of activities (teaching, scientific, creative, etc.). Introduction of relevant amendments to Art. 25 of the Law will promote certainty, stability, and justification of legal frameworks of using this restriction as an effective "filter" of anti-corruption activities of public servants in Ukraine.

Обмеження публічних службовців щодо сумісництва та суміщення з іншими видами діяльності: зміст та пропозиції щодо удосконалення нормативних засад

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Ключові слова:
обмеження, публічний службовець, сумісництво, суміщення, «фільтр» антикорупційної діяльності, корупційне діяння, правопорушення, пов'язане із корупцією, виняток, законодавство.

У розмаїтті засобів запобігання конфлікту приватних та публічних інтересів у публічній службі своє чільне місце посідають спеціальні обмеження для публічних службовців. Останні визнаються «спеціальними» завдяки тому, що зорієнтовані на спеціальних осіб – осіб, уповноважених на виконання завдань і функцій держави або місцевого самоврядування, та передбачають особливу сферу свого поширення - публічно-службова діяльність. Одним із різновидів таких обмежень є обмеження щодо сумісництва та суміщення з іншими видами діяльності, засади якого закріплені у ст. 25 Закону України «Про запобігання корупції». Впровадження відповідного «фільтру» антикорупційної діяльності публічних службовців у вітчизняне законодавство узгоджується із міжнародними правовими стандартами антикорупційного змісту (Конвенцією ООН проти корупції, Рекомендацією № R (2000) 10 Комітету Міністрів РЄ державам-членам Ради Європи щодо кодексів поведінки державних службовців від 11 травня 2000 року, зразками зарубіжної антикорупційної нормотворчості, щоправда, й відрізняється специфікою безпосереднього нормативного закріплення. Останнє знайшло прояв у дещо спрощеному, узагальненому підході законодавця до формулювання відповідного нормативного положення. Це, у свою чергу, обумовило підстави для різноваріативного тлумачення та застосування положень ст. 25 Закону на практиці, уникнення винними особами юридичної відповідальності за порушення відповідного обмеження. На підставі детального опрацювання зміст ст. 25 Закону, компаративно-правового аналізу досвіду зарубіжних країн щодо нормативного визначення таких обмежень, запропоновано ряд авторських рекомендацій щодо удосконалення нормативних засад використання ресурсу цього виду спеціального обмеження для публічних службовців (це і визначено в якості мети роботи). Зокрема, запропоновано нормативно закріпити визначення «іншої оплачуваної діяльності», із закріпленням її ознак, що дозволяє відмежувати її від підприємницької діяльності. Автором обґрунтовується доцільність внесення змін стосовно акумулювання положень, які визначають коло осіб, на яких поширюється відповідне обмеження; впровадження обмеження щодо «інституційної політичної діяльності» особи на період виконання нею функцій держави або місцевого самоврядування; заміни у назві статті слова «обмеження» на «заборона» задля узгодженості назви і змісту статті; уточнення нормативних положень щодо винятків із загальної заборони стосовно окремих видів діяльності (викладацької, наукової, творчої тощо. Внесення відповідних зміст та доповнень до ст. 25 Закону сприятиме визначеності, стабільності, обґрунтованості нормативних засад використання цього обмеження як ефективного «фільтру» антикорупційної діяльності публічних службовців в Україні.

Recently, assurance of performance, effectiveness, quality of the public service, prevention of any corruption manifestation are mainly connected with eliminating any preconditions for the origin of a conflict of private and public interests among public servants in their professional activities that is a focus of the public service. Standardization of the relations, which are directly connected with a potential conflict of private and public interest in the activities of public servants and using of means for its solutions, in the national legislation while taking into account international legal standards, regulatory and law-enforcement experience of foreign countries and priorities of the domestic reform state-building and law-making processes is a quite justifiable. Ukraine is not an exception where the legislation consolidates "filters" aimed at preventing a potential conflict of private and public interests in the activities of public servants and providing guidance for impartial professional and careful fulfilment of state or local self-government functions to particular persons. One of these types of "filters" is a restriction for public servants on double job holding and positions overlapping with other kinds of activities and its principles are consolidated in Art. 25 of the Law of Ukraine "On Prevention of Corruption" dated October 14, 2014. Public service career of a person stipulates maximum concentration of his/her efforts and "all-out personal devotion" to serving public interests, and any "external activity" shouldn't prevent a public servant from such activity and moreover, disturb or contradict it. Thus, by defining the frameworks of using the restrictions for public servants as a "filter" of their anticorruption activities in section 4 of the above-mentioned law the legislator quite justifiable distinguishes both principles of the kind of special restriction on employees – restrictions on double job holding and positions overlapping with other types of activities, stipulating its specific features, which, in turn, determine the realities of its application. Unfortunately, analysis of law enforcement shows that there are numerous cases when a public servant simultaneously carries out activities, which are aimed at meeting public interests that is caused by the post held by a particular person, with other types of activities including one in the private sector. It, in turn, on the one hand, reduces the degree of "direct personal devotion" in performing public service activities and therefore, puts in doubts the expediency of person's tenure of a post on the public service. The value of such person for the public service raises concern towards the fate of the public service in general and, on the other hand, it can stipulate a conflict (discrepancy, contradiction) of private interests of the public servant in carrying out other activities and public interest which is ensured by his/her activities related to the occupation of the relevant post. It raises the question about a predominant interest. Can a person focus own efforts on meeting both private (personal) and public interest? Can a person be a public servant under such conditions? In this context, there is a question towards objectivity, efficiency and quality of public service activities of a person and the public service in general. The standardization of the "filter" of the influence of "external activity" of a person on his/her official activities not only should be but must be absolutely definitive, sustainable and secured by the coercive power of the state. Thus, it is important not only to consolidate provisions of resource use of a relevant restriction in an individual article of the special anti-corruption legislative act but also to do it in such a manner that in practice, application of the provisions of this article ensures the effectiveness of the prevention of a conflict of private and public interests in the public service. Taking into account the activation of rule-making domestic activity aimed at improving the content of anti-corruption legislation, including the part of "filters" for prevention of a conflict of interest in the public service, and the issue of analysis of this restriction is substantially updated, acquires theoretical and practical significance. The development of the scientific foundation will make it possible to formulate proposals for improving the current legislation in terms of the use of this type of restrictions and to increase the effectiveness of law enforcement in this sphere of public

relations eliminating the grounds for arbitrary subjective interpretation of legislative provisions, diversification of the practice of law enforcement, concealment of the act of infringing a special anti-corruption restriction and avoidance of legal liability by guilty persons. It is important not only to take into account the available theoretical achievements on a particular issue (for example, papers of T. Berdnikova, V. Chorna, O. Hladun, K. Hoduieva, S. Zimnieva, A. Chumakova, V. Vasylieva, R. Kukurudza ta others [1]) but also a theoretical analysis of regulatory frameworks, foreign experience of regularization of the relations with the simultaneous use of both general and special research methods that will allow to find out the specifics of this type of restriction for public servants, the disadvantages of regulatory consolidation of the frameworks of using its resource in the domestic legislation and formulate proposals for their possible elimination, which is the express purpose of this paper.

Among the diversity of the special restrictions (a name is caused by the specific nature of the subject they are oriented on, and by the specific nature of the activities they are directly related to) whose provisions are consolidated in the Law of Ukraine "On Prevention of Corruption", a restriction on double job holding and positions overlapping with other types of activities (Art. 25 of the Law) occupies its prominent place. Statutory consolidation of this type of restriction along with others is quite reasonable taking into account the main goal of public service activity of a person as a special subject due to which this restriction is available. If a person is vested with certain governmental powers to ensure the implementation and protection of public interest, it is important that this person is "personally oriented" on achieving this goal as best one can. And any of his/her "distraction" on other activities must be regulated that person doesn't use own special status not for (and moreover against) public interest. Consolidation of the relevant restriction in the domestic anti-corruption legislation is consistent with international standards for legal regulation of the relations of a conflict of interests on the public service, for example, p. 4 Art. 7 of the United Nations Convention against Corruption, Recommendations No R (2000) 10 of the Committee of Ministers of the Council of Europe to Member states on codes of conduct for public officials. They make it impossible for a public servant to hold any posts, carry out any activities, participate in different relations which are "incompatible" or "impede" the person to exercise the duties of special subject or envisage reports (procurement of permits) on "external activities" ("other gainful activity", "out-of-the-industry activities") under the established procedure. In addition, analysis of foreign legislation also indicates that this type of special restriction is quite common and a "model" of its regulation is "strict". Thus, for example, the USA consolidates a restriction for public servants to hold "civil posts by order" and carry out any gainful professional activity simultaneously that "involves confidential relationship" [2, p. 41] because such conduct of a public servant is considered as "unsuitable", "uncooperative" for the interests of the public service [3, p. 104]. In addition, the remuneration received by a public servant "out of business" may not exceed fifteen per cent of the official salary at the primary place of employment, and he/she is prohibited to receive "fee" for speeches, appearance in a public place, article's authorship [2, p. 41], however, an exception to this rule is stipulated for members of the Senate [3, p. 104]. The legislation of Canada, India, Australia, and South Africa stipulates a restriction for public servants to hold other concurrent "gainful posts", the legislation of Canada, Japan, and Great Britain etc. – to manage a business or have "certain relations in the private sector", the legislation of Spain, Sweden, Great Britain, Korea, Poland, Mexico, Hungary, Italy, Ireland and others [2, p. 34 – 41] – to hold concurrent posts in the bodies of different branches of the government. In addition, it is possible to distinguish several approaches in the regulatory consolidation of this provision conditionally, as follows: a) enumeration of those posts or activities that are forbidden a public servant to be engaged in (or hold) (for

example, the experience of Argentina, France, Hungary, Italy etc.), and they are considered "incompatible with holding a certain position" [2, p. 33]; b) generalized formulation towards posts, but with the absolute impossibility to hold concurrent "external post", engaging in "external activities" (for example, the experience of Germany, Spain). Despite the fact that such provisions are enshrined in the legislation of many countries, and in France, Poland, Germany and Spain they are "more stringent than in other countries" [4, p. 14]. Spanish legislation stipulates that "…individuals must perform their functions with complete devotion and have not to combine them, directly or with others, with any other public or non-public office where they can receive remuneration" [4, p. 38], "... they should refrain from holding ... other positions in organizations that can restrict their attendance of the workplace and devotion to the fulfillment of their main duties" [4, p. 36]. Restrictions cover both the private sector and various types of the public service and political activity. Thus, for example, Great Britain law provides "differentiation during the performance of official duties of institutional political and party political activity with the introduction of restrictions on double job holding and positions overlapping" [4, p. 45]. The main motto of rule-making of most foreign countries regarding the settlement of the issue of "external activity" of public servants is "... employees should not hold dual positions, participate in a commercial partnership or hold directorships in private companies" [4, p. 43]. Sometimes there is a statement that such activity is not obligatory gainful (for example, the legislation of the Czech Republic). Thus, restrictions or, more precisely, prohibitions on double job holding and positions overlapping are provided by legislation of many foreign countries choosing "strict" model of statutory consolidation, different detail degree of "external" posts or types of activities that, in its turn, also influences the effectiveness of law enforcement. Despite a certain distinction between "models" of normative consolidation of relevant provisions ("British", "French", "German", "Spanish" depend on detail degree and "rigidity" of the influence on a person [4, p. 43]). The main content of the latter is a typical – general prohibition (despite the fact that it is a "restriction for public servants") on "external activity" related to concurrent posts in different types of public servant in the private sector and sometimes in political activity. A steady tendency of rulemaking towards the relevant sphere of relations – indication of an entity which is subjected to the standardization of conduct, specification (or through enumerating "external" posts, types of activities, or additional consolidation of other "filters" – maximum amount of "external fees") of the content of a restriction or prohibition and reference to sanction for violation of a relevant provision. Their implementation in all their forms is effective due to specified and predicted nature, and stability of these provisions. Thus, consolidating a special restriction on dual job holding and combination of the main activities of a public servant with other activities, the domestic legislator should take into account both international standards of legal regulation of this type of relations eliminating conflicts of interest in the public service and positive experience in rulemaking and law enforcement of foreign countries proven by time and practice, which is considered one of the priorities of modern national rulemaking in the conditions of European integration and globalization.

In order to clear up the issue of conformity of the domestic counterpart with the specified international legal standards and models of foreign rulemaking and to mark its possible "problem" areas, it is worthwhile to focus on the analysis of the relevant provisions of the national legislation.

In the first place, it is necessary to turn attention to persons subjected to the relevant restriction. Thus, according to p. 1 of Art. 25 of the Law, they are considered "persons specified in paragraph 1 of part one of Article 3 of the relevant Law", ie, such persons are "persons authorized to exercise functions of the state or local self-government", and whose full list is given in the same paragraph of the article. An analysis

of this list shows that the legislator applies the appropriate restriction to all public servants and doesn't confine itself to civil servants or persons holding political office. And in this aspect, the domestic normative model of the standardization of relations, which are related to the restrictions for public servants on double job holding and positions overlapping with other activities, is consistent with international legal standards for regulating relevant relations and with foreign statutory analogues. At the same time, part 2 of Art 25 of the Law stipulates that the relevant restrictions "... are not applied to deputies of the Autonomous Republic of Crimea, local councils deputies (except those who exercise their powers in a particular council on a full-time basis) and jurors" [5]. Consequently, the legislator provides exceptions to the general rule for three categories of persons, and it is quite justifiable in the context of specific nature of their legal status and activities with which the legislator "binds a particular restriction. For these persons, the fulfilment of some functions of official nature does not involve a "permanent basis", acquisition of features of "permanent place of employment" and therefore, the performance of the relevant functions can be considered as the counterpart of double job holding. For this reason, the normative consolidation of an exception to the restriction on double job holding and concurrent positions for the above-mentioned persons, who are authorized to perform functions of the state or local self-government, is reasonable, logical, and justified. However, it is expedient to amend normative consolidation of this provision in Art. 25 of the Law. Instead of part 2 of Art. 25 of the Law which is directly devoted to the exception to the general rule, it would be quite possible to add "in addition to the deputies of the Supreme Council of the Autonomous Republic of Crimea, deputies of local councils (except those who exercise their powers in a relevant council on a regular basis), jurors" to part 1 of Art. 25 after the words "... Article 3 of this Law". It would help to maximize the concentration of attention on persons subjected to this restriction while studying the content of the article. At the very beginning of law enforcement, it is very important to determine the circle of subjects which are covered by this restriction and not to come round to it again after a detailed examination of restriction's content.

As noted above, although the legislator uses the word "restriction" in the title of Art. 25 of the Law, the text actually touches upon the prohibition. In addition, the same situation is typical both for normative regulation of the fundamentals of other restrictions in domestic legislation and for foreign rulemaking on this issue. Thus, for example, the legislation of Kazakhstan provides the "prohibition to engage in other gainful activities", Moldova – "impossibility to carry out other gainful activity ..." [6, p. 193]. The "prohibition" for double job holding for public servants can also be found in the legislation of Canada, the USA, Poland, Spain, France, and others. It should be fully aware that "prohibition" and "restriction" are concepts similar in meaning but they are identical by no means, and therefore their discretionary use is false. If a prohibition includes a total impossibility to perform any actions, a restriction has certain limits for the activity that is permitted or prohibited. A person abiding established limits carries out the legitimate activity. His/her activities are prohibited beyond fixed limits – "beyond limits" [7, p. 10, 31–32]. In this context, it is expedient either to amend the title of Art. 25 of the Law by substituting the word "restriction" with "prohibition" or to change the content of a relevant article by defining the borders of activities, which can be considered as one that is carried out concurrently or in overlap that it does not serve as a prerequisite for a conflict of interest in the public service.

Analysis of the content of Art. 25 of the Law makes it possible to distinguish conditionally three types of activities prohibited for some persons, as follows: a) entrepreneurial activity; b) other gainful activity; c) affiliation to a board of administration, other executive or supervisory bodies, supervisory board of an enterprise or organization with a view to profit. In general, the list of "prohibited

activities" proposed by the domestic legislator is in line with international legal standards and foreign counterparts of "gainful activity", "activity in the private sector", "activity in paid office", "activity related to financial interest", "activity related to business operations", etc. At the same time, in practice, there are problems with the provisions of Art. 25 of the Law during their interpreting. If the definition of "entrepreneurial activity" with its inherent features can be found in the domestic legislation and at the same time, there is a lack of the definition of "other gainful activity" that determines the preconditions for the manifestation of subjective discretion in the process of interpreting regulatory frameworks and their application. Analysis of p. 1 of Art. 25 of the Law shows that the legislator draws the line between entrepreneurial and other gainful activities, although, considers them the same for persons authorized to exercise state or local self-government functions and uses the conjunction "or" when enumerating them. Using the phrase "other gainful activities", the legislator emphasizes that it is: a) "activity", that is, a certain sequence of actions, specifically active actions (it is confirmed by the use of the term "activity", not "act"); b) gainful activity; c) activity that has no features of entrepreneurial activity; d) it "differs" with respect to one which should be performed by authorized person in order to exercise the functions of the state or local self-government (it is "the main" activity and its implementation is paid to the person from the budget), such activity is "external" in relation to the "primary" activity of the person. At the same time, the legislator indicated exceptions to "other gainful activity" noting that the following kinds of activity can be considered as such one: "teaching, scientific, creative activities, medical practice, instructor and judge practice in sports" (para.1 p. 1 of Article 25 of the Law). At first glance, everything is quite clear and consistent with the provision of foreign legislation (for example, in the legislation of Moldova "…teaching, creative or other gainful activities [6, p. 193]. Moreover, it is quite justifiable to use a practical experience of a public servant in teaching and learning activities of different education institutions for integration of the achievements of science and practice in his/her research activities etc. However, if such kind of activity obtains the features of "initiative", "systematic character", "autonomy", "at the sole risk" and "for profit" (features of entrepreneurial activity), it is not an "exception to "other gainful activity" but it is a prohibited entrepreneurial activity" [6, p. 196]. It would be advisable to make an appropriate clarification in para. 1, p. 1 of Art. 25 of the Law and hence, to eliminate the variability of the interpretation of this statutory phrase. It's no good to identify situations "when a person, even at the systematic basis, is engaged in a particular sphere as an expert in order to exercise one or another work type to receive a reward that is remuneration, not a profit" [6, p. 196] from his entrepreneurial activity including the list of mandatory features for such kind of activity.

Analysis of para. 1 p. 1 of Art. 25 of the Law shows that the above types of "other gainful activity" which are considered an exception to general rule and can be allowable not only in the case when they don't have the features of entrepreneurial activity, but also in the case "… if the Constitutions or laws of Ukraine don't provide other options". In other words, the legislator actually consolidated "the priority of the Constitution and special laws" with respect to the Law of Ukraine "On Prevention of Corruption" in resolving this issue. Defining the person who is subjected to the relevant restriction it is important to analyse a legislative act which directly identifies his/her status in the part of restrictions and prohibitions that are caused by the specific nature of a relevant status of the person, sphere, and content of his/her activities. Thus, in particular, Ukrainian people's deputies are prohibited to be engaged in the judicial practice and instructor practice in sports (Art. 3 of the Law of Ukraine "On the Status of People's Deputies of Ukraine"), it is also applicable to policemen (Art. 66 of the Law of Ukraine "On National Police"), and Ukrainian

Parliament Commissioner for Human Rights (p.1 of Art. 8 of the Law of Ukraine "On Ukrainian Parliament Commissioner for Human Rights"), and it is prohibited judges perform advocacy activities (p. 2 of Art. 54 of the Law of Ukraine "On the Judiciary and Status of Judges"), as well as the judges of the Constitutional Court of Ukraine (p. 3 of Art. 11 of the Law of Ukraine "On the Constitutional Court of Ukraine"). In addition, it is important that engagement in such kinds of allowable "other gainful activities" is possible only "outside of working hours", "out of duty" for some persons in the case of express indication in the Constitution of Ukraine and a legislative act. This covers people's deputies of Ukraine (Art. 3 of the Law of Ukraine "On the Status of People's Deputies of Ukraine"), members of the Cabinet of Ministers of Ukraine (p. 2 of Art. 7 of the Law of Ukraine "On the Cabinet of Ministers of Ukraine"), deputies of local councils working in relevant councils on a regular basis (Art. 6 of the Law of Ukraine "On Status of Deputies of Local Councils"). In this aspect, it is incomprehensible the viewpoint of the legislator regarding the separation (in the form of an individual part) of provisions on persons who are not subjected to the restrictions in Art. 25 and the neglect of the rather important issue of "priority" of statutory frameworks of various regulatory legal acts regarding persons who are subjected to such restrictions. It is quite logical to consolidate the official definition for "other gainful activity" indicating its features in Art. 1 of the Law of Ukraine "On Prevention of Corruption" along with other "basic concepts" as well as to detail the provisions concerning persons who are subjected to relevant restrictions in Art. 25 of the same Law.

It is quite difficult to percept the provision consolidated in para. 2 p. 1 of Art. 25 of the Law related to the restriction "to be a member of the government, other executive or control body, and supervisory council of an enterprise or organisation which is aimed at profiting (except cases when persons exercise the functions in managing shares (stakes, stocks) belonging to the state or a territorial community and representing the interest of the state or the territorial community in the council (supervisory council), audit commission of an economic organisation), if any other option is not provided by the Constitution or the laws of Ukraine (para. 2 p. 1 of Art. 25 of the Law). In general, the mentioned provision is congruent with foreign counterparts ("to hold posts in business", "to be employees of corporations, cooperatives", "to receive payment as members of the board of directors, officials of corporations or organizations", etc.), with international legal counterparts ("… to hold posts or to exercise functions…, which are incompatible with… the duties of servants" [6, p. 193]) and provides impossibility "to integrate business and public service". And it makes sense because the legislator clearly marks that this type of activity is related to "profits". In addition, the formulated conclusion from this provision deserves special attention that is the use of conjunction "and" which stipulates person's simultaneous realization of the functions of management of stocks that are owned by the state or a territorial community and representation of interests in a council, revision commission etc. In other words, it is a simultaneous participation of one person both in executive and control bodies. The reference to "profit" of enterprises and organizations allows simultaneously delimiting them from nonprofit counterparts as well as to relations where the restrictions on double job holding and positions combination of persons authorized to exercise the functions of the state or local self-government do not cover them. In this context, one may agree with authors of Scientific and Practical Commentary to the Law of Ukraine "On Prevention of Corruption" edited by M. Khavroniuk, with references to the Resolution of the Plenum of the Supreme Court of Ukraine dated May, 25, 1998 No 13 "On the Court Practice in Corruption Cases and Other Cases Related to Corruption", it is not a violation of a relevant restriction on concurrent combination of "affiliation to editorial board of periodicals (newspapers, journals), of different types of jury, councils, and even in the case when one

receives rewards for performed work if these bodies are established with the purpose to develop science, culture, art, medical practice improvement (para. 12 of the Resolution) [6, p. 210]. At the same time, supporting the legislator in its attitude on double jobholding in non-profit organizations, it is expedient to adopt positive experience of the introduction of the restriction on combination of the principal activities of particular persons with activities in political parties of Great Britain. Such double jobholding can "raise doubts about impartiality" of the principal activities of a public servant that should be a reason for "differentiation between institutional political activity and party political activities" [4, p. 45]. There is a logical consolidation of the restriction on job combination with institutional political activities (except deputies of all levels) for the period of functions performance in para. 1 p. 1 of Art. 25 of the Law in relation to persons who are authorized to exercise the functions of the state or local self-government. This will contribute not only to "filtering" activities of a public servant from any influence (distraction) of other activities but also to implement the principle of political impartiality of the public service (except implementation of powers by deputies of all levels).

Security of the implementation of the principles of public service, efficiency, quality and efficiency of the latter mainly depends on the "regulatory filters" developed to prevent the grounds for any abuse practice with the use of public service resources, the negative impact on the latter. Among the common preconditions for committing various kinds of unlawful acts in the public service sphere is the conflict of private interests of public servants and of public interest where they have power to satisfy and protect it and for which they are endowed with a certain amount of power. A system of means, including special anti-corruption restrictions for persons authorized to perform functions of the state or local self-government, is developed to prevent a conflict of interests. The restriction on double jobholding and positions overlapping with other activities is distinguished by a special resource. Although the introduction of a relevant type of restriction is consistent with the main anticorruption legal standards and the results of foreign rule-making and law enforcement and has found its normative consolidation in Art. 25 of the Law of Ukraine "On Prevention of Corruption" but, at the same time, a detailed analysis of its content and practice of its application shows that there are problematic aspects in the content of the relevant article that causes the diversification of the results of its interpretation and application, including the possibility to avoid legal liability of guilty persons. In order to use the resource of a relevant restriction, in particular on the ground of adopting positive foreign experience tested by time and practice, it is expedient to amend Art. 25 of the Law of Ukraine "On Prevention of Corruption" concerning: a) relocation of the content of p. 2 of Art. 25 in full in p. 1 of the same article and posting them after the words "... Article 3 of this Law"; b) expansion of para. 1 of p. 1 of Art. 25 of the Law after the words "entrepreneurial activity" in the form of the following phrase "or institutional political activity (except deputies of all levels)"; c) amendments to para. 1 of Art. 25 of the Law after the words "... or by the laws of Ukraine" in the form of the phrase "which are of priority importance before this Law"; d) to amend Art. 1 of the same Law in the form of the phrase "other gainful activity"; e) to amendment para. 1 of Art. 25 of the Law after the words "... judge practice in sports" in the form of the phrase "if they do not have any features of entrepreneurial activity"; e) to substitute the word "restriction" in article's title with the word "prohibition"

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References

1. Zimneva, S. and Chumakova, A. (2015), "Legal Regulqtion of Civil Servants in Russia and Germany Receiving Gifts", *Russian Law Journal*, Vol. III, Issue 3, pp. 142–151 ; Vasyleva, V.M. (2015), "Regulation of conflict of interest at civil service : Brazilian experience (part

2)", *Voprosy hosudarstvennoho i munitsipalnoho upravleniya.*. Iss. 3. pp. 165-190; Kolomoiets, T.O. and Kukurudz, R.O. (2018), "Conduct rules of public servants with gifts: comparative and legal analysis (as exemplified by Ukraine, Georgia, Singapore, Brazil)", *Visnyk Zaporizkoho natsionalnoho universytetu. Seriia : Yurydychni nauky*, no. 2, pp. 71-79 ; Hladun, O. and Hoduieva, K. (2017), "Corruption prevention trough restrictions on gifts reception", *Visnyk Natsionalnoi akademii prokuratury Ukrainy*, no. 1 (47), pp. 32–39.

2. (2017), "Parliament ethics in Ukraine : realties, needs, perspectives", Za materialamy doslidzhennia Tsentru doslidzhen armii, konversii ta rozzbroiennia ta Instytutu sotsialnykh tekhnolohii «Sotsiopolis», Geneva, Kyiv.

3. Dovzhanyn, V.M. (2015), "Legal regulation of prevention and counteraction of corruption according of the USA legislation", *Naukovyi visnyk mizhnarodnoho humanitarnoho universytetu. Seriia : Yurysprudentsiia*, no. 13, Vol. 1, pp. 102–106.

4. Manuel Villoriya, Steffan Sinneestrem, Yanosh Berto (2010), Etyka derzhavnoi sluzhby : zapobihannia konfliktu interesiv tv. Vymohy do zakonodavstva [Ethics of civil service : prevention of conflict of interest. Requirements for the legislation], Translated by Chupryna, I. Tsentr adaptatsii derzhavnoi sluzhby do standartiv Yevropeiskoho Soiuzu, Kyiv, Ukraine.

5. "On Prevention of Corruption" : the Law of Ukraine dated October 14, 2014 року, *Vidomosti Verkhovnoi Rady Ukrainy*, 2014, no. 49, art. 2505-6 (as subsequently amended).

6. Kharoniuk, M.I. (scientific editor) (2018), *Naukovo-praktychnyi komentar do Zakonu Ukrainy «Pro zapobihannia koruptsii»* [Scientific and practical commentary on the Law of Ukraine "On Prevention of Corruption"], Vaite, Kyiv, Ukraine.

7. Kolomoiets, T.O. (2018), Obmezhennia shchodo oderzhannia podarunkiv osobamy, upovnovazhenymy na vykonannia funktsii derzhavy abo mistsevoho samovriaduvannia, za zakonodavstvom Ukrainy : naukovo-praktychnyi narys [Restrictions on gifts reception by persons empowered to exercise the functions of the state or local self-government according to the legislation of Ukraine : scientific and practical essay], Vydavnychyi dim «Helvetyka», Zaporizhzhya, Ukraine.

Література

1. Zimneva S., Chumakova A. Legal Regulqtion of Civil Servants in Russia and Germany Receiving Gifts. *Russian Law Journal.* 2015. Vol. III. Issue 3. P. 142–151; Васильева В.М. Регулирование конфликта интересов на государственной службе: Бразильский опыт (часть 2). *Вопросы государственного и муниципального управления.* 2015. Вып. 3. С. 165–190; Коломоєць Т.О., Кукурудз Р.О. Правила поводження публічного службовця із подарунками: компаративно-правовий аналіз (на прикладі досвіду України, Грузії, сінгапуру, Бразилії). *Вісник Запорізького національного університету. Серія: Юридичні науки*. 2018. № 2. С. 71–79; Гладун О., Годуєва К. Запобігання корупції шляхом встановлення обмежено щодо одержання подарунків. *Вісник Національної академії прокуратури України.* 2017. № 1 (47). С. 32–39.

2. Парламентська етика в Україні: Реалії, потреби, перспективи. За матеріалами дослідження Центру досліджень армії, конверсії та роззброєння та Інституту соціальних технологій «Соціополіс». Женева-Київ, 2017. 56 с.

3. Довжанин В.М. Правове регулювання запобігання та протидії корупції за законодавством США. *Науковий вісник міжнародного гуманітарного університету. Серія: Юриспруденція.* 2015. № 13. Т. 1. С. 102–106.

4. Етика державної служби: запобігання конфлікту інтересів тв. Вимоги до законодавства/ Мануель Віллорія, Стеффан Синнєестрьом, Янош Берто; [пер. з англ.

І. Чуприна]. К.: Центр адаптації державної служби до стандартів Європейського Союзу, 2010. 104 с.

5. Про запобігання корупції: Закон України від 14 жовтня 2014 року. ВВР. 2014. № 49. Ст. 2505-6 (з наступними змінами та доповненнями).

6. Науково-практичний коментар до Закону України «Про запобігання корупції» / Наук. ред. М.І. Харонюк. К.: Ваіте, 2018. 472 с.

7. Коломоєць Т.О. Обмеження щодо одержання подарунків особами, уповноваженими на виконання функцій держави або місцевого самоврядування, за законодавством України: науково-практичний нарис. Запоріжжя: Видавничий дім «Гельветика», 2018. 40 с.

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Перспективи подальшого розвитку в Україні інститутів державної служби та адміністративної юстиції

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Ключові слова: *державна служба, адміністративна юстиція, публічна служба, адміністративне судочинство, правові потреби, адміністративно-правові потреби, механізм правового забезпечення суспільних потреб*

Статтю присвячено актуальній проблемі – формуванню нового підходу адміністративно-правового забезпечення подальшого розвитку інститутів державної служби та адміністративної юстиції. Розглядаються питання основних напрямків вдосконалення зазначених правих інститутів. Пропонується оригінальний варіант реформування державної служби та адміністративної юстиції в Україні за допомогою такої нової правової категорії як правові потреби.

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Prospects for the development of institutes of civil service and administrative justice in Ukraine

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Key words: *civil service, administrative justice, public service, administrative procedure, legal needs, administrative and legal needs, mechanism of legal support of social needs..*

The article is devoted to the topical issue – formation of a new approach to administrative and legal support to the further development of the institutes of civil service and administrative justice. In particular, it is stressed that the domestic government machine needs immediate improving taking into account incidence of corruption in Ukraine, an unpromising situation of implementation of the functions and tasks entrusted to the state and self-governing authorities.