

**AN OFFICIAL: THEORETICAL
AND PRACTICAL ISSUES**

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Problem The issue of application of rules of law to an official is of great theoretical and practical significance and requires further investigation.

Analysis of recent research and publications The works of such scientists as P.P. Andrushko, V.J. Tatsiy, M.I. Panov and others are devoted to the solution of this issue. However, the authors propose such aspect of the problem analyses that has not received an adequate solution yet.

The purpose of this article is to clarify the concept of «an official», apply provisions of existing legislation in relation to such entity of non-profit organizations, including NGOs and their associations.

Main results of the study Currently, under the Tax Code of Ukraine: «157.10. Income or assets of nonprofit organizations as defined in sections «A» and «C» of paragraph 157.1 of this Article shall not be distributed among its founders, partners or members and may not be used for the benefit of any individual founder, member or a member of such a non-profit organization, its officers (other than their remuneration and deductions for social events)» [1]. Of course, there is a provision in the Art 3 of the Law of Ukraine «On Public Associations» of 22.03.2012, № 4572-VI: «6. No property interest provides that the members (participants) of public associations have the right to share property and public association are not liable for its obligations. Income or property (assets) of a public association shall not be distributed among its members (participants) and may not be used for the benefit of any individual member (participant) of public association, its officers (other than their remuneration and deductions for social events)» [2].

Of course, both in the Tax Code of Ukraine and the Law of Ukraine «On Public Associations» there is no definition of «an official», since these regulations are not the basis for such determinations, unlike the Law of Ukraine «On Civil Service» [3]. Instead, according to Paragraph 2 Art 89 of the Commercial Code of

Ukraine to the officials of an economic society are referred the chairman and members of the executive board, the chairman of the auditing commission (auditor), and in case of a partnership board (supervisory board) – the Chairman and members of the Council [4]. For non-profit organizations such definition is missing.

Basing on the above mentioned and taking into account the need of clarifying the question: «who can relate to the officials of NGOs and their associations as well as the possibility of applying paragraph 2 Art 89 of the Commercial Code of Ukraine for the definition of «an officer» both for companies and non-profit organizations, including NGOs and their associations» the answer should be as follows:

1. In Ukrainian legislation, there are two terms «an official» and «an officer», but no legal act provides their intersectoral interpretation and the criteria of differentiation, therefore, at present there exists confusion in terms and uncertainty of their content. For example, in the Code of Ukraine on Administrative Offences the word «officer» in all cases shall be replaced by the words «official», while the Criminal Code of Ukraine operates with the term «officer».

In administrative law the term «officer» appeared in 1993 after the adoption of the Law of Ukraine «On Civil Service» (16.12.1993 № 3723-XII). Article 2 of this law established a narrow understanding of officer – officers are heads and deputy heads of state agencies and their staff, other government officials, who are entrusted by laws or other regulations with organizational, administrative and advisory functions [3].

Officials are granted powers under the regulations that define their meaning. These powers are conditioned by the competence of the organizational structure unit or its subdivision thereof.

Due to the definition that the second part of Art 2 of the above mentioned Law of Ukraine «On Civil Service» contains we should identify the following signs of an official:

- a) being in public service;
- b) filling the position in a public body or its apparatus;
- c) exercising the powers of head or deputy head;
- d) performance of organizational, administrative and advisory functions;
- e) performance of official duties for public expense.

The study of the Code of Ukraine on Administrative Offences of 07.12.1984 № 8073-X (CAO) allows to conclude that officials are determined as employees who are on state or public service and hold positions related to the performance of organizational and governmental and administrative and management functions, giving rise to certain legal consequences for individuals and organizations to whom they are addressed [5]. So CAO goes beyond public-service relations and considers the concept of an official in the broadest sense. Such interpretation allows to distinguish the following signs of an official:

- 1) serving at government agencies, other government organizations or public service;
- 2) performing administrative and governmental and administrative and management functions in accordance with the post;

3) causing legal consequences by their official activities for other participants in relationship.

Legal broad interpretation of the term «officer» is used in the Law of Ukraine «On Principles of Prevention and Combating Corruption» (of 07.04.2011 № 3206-VI). Specifically Article 4. of this law states that entities for corruption offenses are:

1) a person authorized to perform the functions of the state or local government: a) The President of Ukraine, Verkhovna Rada of Ukraine, his first deputy and deputy Prime Minister of Ukraine, First Deputy Prime Minister of Ukraine, Vice-Prime Minister of Ukraine, ministers and other heads of central executive bodies, that are not members of the Cabinet of Ministers of Ukraine, and their deputies, the President of the Security Service of Ukraine, the Prosecutor General of Ukraine, Chairman of the National Bank of Ukraine, Chairman of the Accounting Chamber, Ombudsman of Ukraine on Human Rights, the President of the Autonomous Republic of Crimea, the President of the Autonomous Republic of Crimea, and b) people's deputies of Ukraine, the Verkhovna Rada of the Autonomous Republic of Crimea, local councils, c) civil servants, local government officials and d) military officials of the Armed Forces of Ukraine and other established under the laws of military units, d) judges of the Constitutional Court of Ukraine, other judges, the President, members, disciplinary inspectors of High Qualifications Commission of Judges of Ukraine, officials of the Secretariat of the Commission, the President, Vice President, secretaries of sections of the High Council of Justice and other members of the High Council of Justice, people's assessors and jurors (in the performance of these functions), and officers of the internal affairs of the state penitentiary service bodies and subdivisions of Civil Protection, the State Department of special connection and Communication and Information Protection of Ukraine, the tax police, e) officials and employees of Prosecutor's office bodies, the Security Service of Ukraine, diplomatic service, customs service, the State Tax Service g) members of the Central Election Commission; g) and officials of other government bodies;

2) persons that for the purposes of this Act are equal to the persons authorized to perform the functions of the state or local government: a) officials of legal entities of public law, what are not specified in paragraph 1 of this Article, but are paid from the state or local budget and b) people who are not civil servants, local government officials, but provide public services (auditors, notaries, appraisers, experts, arbitration managers, independent brokers, members of labor arbitration, arbitrators in the exercise of these functions, and other persons in statutory cases) c) officials of foreign countries (those holding a legislative, executive or judicial office of a foreign state, including jurors and other persons exercising public functions for a foreign state, including a public agency or public enterprise) and foreign arbitrators, the persons authorized to decide civil, commercial or labor disputes in foreign countries in accordance with an alternative to judicial order d) Officials of international organizations (employees of international organizations or any other persons authorized by such an organization to act on its behalf), as well

as members of international parliamentary assemblies, in which Ukraine participates, and judges and officials of international courts;

3) persons that permanently or temporarily hold positions related to the performance of organizational administrative or administrative economic duties, or a person specifically authorized to perform such duties in private legal entities, regardless of the legal form according to the law;

4) officials of legal entities, individuals – in the case of receiving from them by persons referred to in paragraphs 1 and 2 of this Article or with the aid of those people undue advantage [6].

In addition, the legislation of Ukraine also contains legal definition of «an official».

Under Part 2 of Art. 89 of the Commercial Code of Ukraine (hereinafter – CC) officials of the company are recognized chairman and members of the executive board, chairman of the auditing commission (auditor), and in the case of a partnership board (supervisory board) – The Chairman and members of the Council [5].

According to Part 1, Art. 89 GC an important defining feature of an official is its official function, which is to perform the management of a business entity (management function).

Due to paragraph 15 Part 1 Art 2 of the Law of Ukraine «On Joint Stock Companies» of September 17, 2008 N 514-VI officials of the company – individuals – Chairman and members of the supervisory board, executive board, audit committee, auditor of the company and chairman and members of the other body of the company, if the formation of such a body is provided by the charter of the company [7].

According to Section 20 of this article members of the executive body are officials members of the collegial executive body. Status of the executive board is also a person who exercises powers of the sole executive body of the company.

Thus, business law states that to business officials are referred individuals who perform administrative functions being a part of the collegial executive body (head and members of the collegial executive body) or exercising powers of sole executive body of the company (e.g., head or director, CEO, president of the company, etc.) Board or Supervisory Board (Chairman and members of the supervisory board) Audit Committee (Chairman and members of the audit committee) or as sole auditor of the company, as well as being in other body of the company (Chairman and members of the other body of the company), if the formation of such a body is provided by the charter of the company.

The legislation secured the definition of «management functions» in art. 364 the Criminal Code of Ukraine of 5 April 2001 N 2341-III art. 364. Misfeasance or malfeasance.

Note1. Officials are persons permanently or temporarily performing the functions of government representatives, as well as holding positions temporarily or permanently at enterprises, institutions or organizations regardless of their ownership related to the performance of organizational administrative or administrative economic duties similar duties under special authority [8].

Thus:

1) persons permanently or temporarily holding in enterprises, institutions or organizations regardless of their ownership positions are also referred by legislator to the officials (as well as authorities), which means that officials exercise power functions;

2) the distinctive feature of officers (officials) is the performance of organizational, administrative, or administrative and economic responsibilities.

2. Applicability of the provisions of Part 2 of Art 89 of Commercial Code for the definition of «an officer» of non-profit organizations, including NGOs and their associations.

Part 1 Art 79 of CC implies that a business entity is the entity that carries out business (commercial) activity.

Under Part 1 Art 52 of CC noncommercial entities carry out an independent systematic economic activity aimed at achieving economic, social and other outcomes without an intent to gain profit.

According to Art 54 of CC, which is called «Regulation of nonprofit business» the entities engaged in non-profit activity are the subject to the general requirements for the regulation of economic activity, taking into account the peculiarities of its implementation by various entities, which are defined by this Code and other legislative acts.

Thus:

1) commercial and non-commercial activities are carried out by the subject of the entity;

2) the entities engaged in non-profit activity are the subject to the general requirements (of the provisions and other regulations of CC) to conduct economic activity, unless the law establishes certain features.

Since the CC does not set up entities engaged in non-profit activity, peculiar characteristics concerning performance of management, the provisions of Part 1 of Art 79 CC as for related officers may be applied to non-profit organizations with the peculiarities of the laws, regulations and administrative regulations governing the activities of certain organizational types of nonprofit enterprises and organizations;

3) in accordance with Part 2 Art 55 CC entities are:

economic organizations – legal entities established under the Civil Code of Ukraine, government, municipal and other enterprises established in accordance with this Code and other legal entities engaged in economic activity and registered as prescribed by law (Section 1).

Under Part 4 55 of CC entities – commercial organizations that operate on the basis of property rights, the right of economic or operational management, have legal status, as determined by civil law and the Code.

Thus, for entities that are commercial organizations the provisions of the Civil Code of Ukraine (hereinafter – CC) about legal entities are applied, except for the characteristics defined by BC arising from Articles 4, 7 BC.

However, according to Art 92 CC the activity of business entities is regulated by the Commercial Code, Civil Code and other legal acts. This provision is also enshrined in Art. 1.11 in the Law of Ukraine «On Business Associations».

According to Art 83 CC entities may be created in the form of associations, institutions and other forms prescribed by law.

In accordance with Part 2 Art. 83 CC companies are divided into entrepreneurial and non-entrepreneurial. In Part 1 Art 85 CC entrepreneurial societies are societies that do not have a profit for its subsequent distribution among participants [9].

That is, the Non-Commercial Society by CC is a non-profit company. Under Art. 54 CC to regulation of non-business companies can also be applied the provisions of Part 1 of Art. 79 CC about officials;

4) in accordance with 86 CC to non-commercial (for-profit) companies are referred associations of citizens [9].

In case of registration public associations (NGO and their association) become a legal entity. It means that the activities of NGOs and their associations are regulated by general provisions of the CC and Commercial Code that govern the business (commercial) and non-commercial (for-profit) companies, with the exception of the peculiarities established by law (Law of Ukraine «On Public Associations» of March 22, 2012, and other laws), the charter of the public association etc..

The problem raised may be solved through the analogy of law. Civil Code of Ukraine established the application of the law of analogy and analogies of law to fill gaps in the normative regulation: if civil relations are not regulated by this Code and other acts of civil law or contract, they are governed by the legal provisions of the Code and other acts of civil law that govern related civil relations (analogy of law). If you can not use the analogy of the law to regulate civil relations they are regulated in accordance with the general principles of civil law (analogy of law). This algorithm is intersectoral, well known principle of law and does not apply only in the case of a direct ban of legislator (e.g., application of the law on criminal responsibility for the analogy).

On the basis of Article 8 of the Civil Code of Ukraine we should apply the analogy of the law to clarify the concept of «an official» of the NGO and their associations.» As the Law of Ukraine «On Civil Service» regulates public relations, and the Law of Ukraine «On Business Associations» Commercial Code of Ukraine, the Law «On Public Associations» in relevant part – private ones, in this case you must use exactly the law «On Business Associations» and the Commercial Code of Ukraine. Thus, officials of NGOs and their associations are: the chairman and members of the executive board, chairman of the auditing commission (auditor), and in the case of creation of the supervisory board – the chairman and members of the council, i.e. executive, supervisory and regulatory authorities (collective or unit) and their members, regardless of their names and reasons to fulfill obligations (law, statute, order of temporary imposition of duties, etc.). General meetings (conferences, conventions) of members of the NGO as the highest statutory body of management (Article 23 of the Law «On Public Associations») and its members singly are not officials, similar to the Civil Code of Ukraine officials should be recognized as such statutory bodies, individuals that carry out day to day management, i.e., the executive, and regulatory and supervisory authorities, social

organization as a legal entity. General meetings, conferences, congresses of NGO participants can not be considered analogous to the supervisory board, as under Article 46 of the Law of Ukraine «On Business Associations» supervisory board of the general meeting is not identical to the general meeting of the entity participants, it includes only a part of shareholders representing interests of all shareholders in the period between the General meetings and within the scope defined by the statute, controls and regulates the activity of the executive authority.

The list of bodies with their competence is defined in the charter of the NGO according to the Law of Ukraine «On Public Associations». In case of doubt about the recognition of an employee of the organization as an official it should be guided by the provisions of the statute.

It should be noted that under the provisions of Article 8 of the Law of Ukraine «On Accounting and Financial Reporting in Ukraine» authorities regard as an official the head of the accounting department (or an accountant if he is the only representative of the service) of any legal person, including the one legalized in the established order of social organization [10].

Conclusion Thus, the study made it possible to state the following:

1) in the Ukrainian legislation, there are two terms «official» and «officer», but in no legal act it is provided their intersection interpretation and the criteria of differentiation, which adversely affects the practice;

2) necessary to come to a common terminology that would eliminate arbitrary interpretation of the term, namely to use only the term «official» to abandon the term «officer»;

3) reasonable to propose to the basic law of Ukraine «On Civil Service» an intersectoral term «officer»;

4) in case of registration of a public association (NGO and their associations) it becomes a legal entity, which means that the activities of NGOs and their associations are regulated by the general provisions of the Civil Code of Ukraine and the Commercial Code of Ukraine.

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Матвійчук В.К., Харь І.О., Погорелова Т.Ф. Посадова особа: теоретичні та прикладні проблеми

У статті досліджується поняття «посадова особа», розкриваються теоретичні та прикладні проблеми цього феномену в чинному законодавстві України, вирішуються можливості застосування положень п.2 ст. 89 ГК України для визначення поняття «посадова особа» неприбуткових організацій, у тому числі громадських організацій та їх об'єднань. Крім того, в роботі пропонується вирішити питання посадової і службової особи на міжгалузевому рівні.

Ключові слова: посадова особа, службова особа, функції, застосування.

Матвейчук В.К., Харь И.А., Погорелова Т.Ф. Должностное лицо: теоретические и прикладные проблемы

В статье исследуется понятие «должностное лицо», раскрываются теоретические и прикладные проблемы этого феномена в действующем законодательстве Украины, решаются возможности применения положений п.2 ст. 89 ХК Украины для определения понятия «должностное лицо» неприбыльных организаций, в том числе общественных организаций и их объединений. Кроме того, в работе предлагается решить вопрос должностного и служебного лица на межотраслевом уровне.

Ключевые слова: должностное лицо, служебное лицо, функции, применение.

V.K. Matviychuk, I.O. Khar, T.F. Pogorielova An Official: Theoretical and Practical Issues

The article considers the concept of «official», reveals the theoretical and applied problems of this phenomenon in the current legislation of Ukraine, resolves the applicability of paragraph 2 Art 89 of the Civil Code of Ukraine for the definition of «an official» of non-profit organizations, including NGOs and their associations. In addition, the paper proposes to solve the problem of officers and officials on the intersectoral level.

Keywords: official, officer, functions, applications.

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