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Current Issues of Improving Proceedings in Cases of Administrative Offenses in the Context of Compliance with International Standards of Human Rights and Freedoms

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Abstract

The article examines the case-law of the European Court of Human Rights on the recognition of inconsistency of the procedure for consideration by Ukrainian courts of certain categories of administrative offenses with the basic provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms of 04.11.1950. Based on the analysis of the ECHR judgment "Bantysh and Others v. Ukraine", the provisions of the Code of Ukraine on Administrative Offenses, the Law of Ukraine "On the Public Prosecutor's Office", and draft laws No. 10002 of 05.09.2023 and No. 10002-1 of 22.09.2023 on amendments to the current legislation of Ukraine on improving the proceedings in cases of administrative offenses, the author proves that the requirements of the European Court of Human Rights do not comply with the recommendations of the governing bodies of the European Union regarding the status of the public prosecutor's office in the system of law enforcement agencies, which may cause certain legal conflicts and problems with the application of the legislation on administrative offenses by the judicial authorities of Ukraine. Based on the results of the research, it is proposed to introduce changes to the current legislation of Ukraine in order to improve the status of the prosecutor in the proceedings in cases of administrative offenses and to determine the range of subjects authorized to represent the prosecution in relevant cases.

Keywords: *Administrative Offense, European Court of Human Rights, Prosecutor, Proceedings, Convention for The Protection of Human Rights And Fundamental Freedoms, Court, Human Rights.*

INTRODUCTION

Today, Ukraine is steadily implementing a strategic course aimed at becoming a full member of the European Union and the NATO defense alliance. This goal, in turn, imposes strict obligations on the state and its institutions to ensure fundamental human rights and freedoms. In particular, according to the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand, dated 27.06.2014, the parties shall attach particular importance to the establishment of the rule of law and strengthening of institutions at all levels in the field of governance in general and law enforcement and judicial bodies in particular. Cooperation between the parties to this agreement should be based on the principle of respect for human rights and fundamental freedoms.

In 1997, our country ratified the European Convention on Human Rights, according to which effective state guarantees were established in Ukraine regarding the development and protection of fundamental human and civil rights and freedoms. In addition, in 2006, a separate law was adopted "On the Execution of Judgments and Application of the Case Law of the European Court of Human Rights", which regulated social relations arising from the state's obligation to execute judgments of the European Court of Human Rights (hereinafter - the ECHR) in cases against Ukraine, with the aim of eliminating the causes of Ukraine's violation of the

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Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, as well as introducing European human rights standards into Ukrainian judicial proceedings and administrative practice.

Thus, it can be stated that public authorities and law enforcement agencies should exercise their powers in accordance with international and European human rights standards, take all possible measures to restore violated rights, and constantly improve the legal framework of their activities so that it is in line with established legal traditions and international instruments to which Ukraine is a party.

Unfortunately, despite the above, in recent years Ukraine has been among the top three countries in terms of the number of complaints filed with the ECHR. According to the report of this organization for 2022, 10.4 thousand complaints from Ukraine (14%) are under consideration at the European Court of Human Rights. Many of these complaints relate to proceedings in cases of administrative offenses in terms of violations of the case consideration procedure, unlawful imposition of administrative sanctions, etc. For example, on October 6, 2022, the ECHR made a decision in the case of Bantysh and Others v. Ukraine, which found a violation of Article 6, paragraph 1, of the Convention for the Protection of Human Rights and Fundamental Freedoms in terms of the impartiality of the court due to the absence of the prosecution in the proceedings on an administrative offense.After the relevant decision was made, the national judicial system found itself in a difficult situation, because despite the relevant provisions of the Code of Ukraine on Administrative Offenses (hereinafter - the CAO), the appellate courts were forced by their rulings to involve prosecutors in the consideration of cases, thus imposing on them the obligation to support the prosecution, which is not provided for by the current provisions of the CAO.

Over the past few years, many scientific works have been developed in Ukraine on the role of the prosecutor's office in proceedings in cases of administrative offenses (Boreiko, Bronevytska, Lisitsyna et al., 2019; Sobolieva, 2020; Panova, 2021; Zaiats, 2022; Kushnir, 2023; Shatrava, Dzhafarova, Pohorilets, 2023). It is also worth noting the scientific developments that studied the problems of implementing preventive activities, protecting the rights and freedoms of citizens by international bodies and institutions (Yevdokimenko, 2020; Voitsikhovskyi, 2022; Ishchenko, Buhaichuk, 2022). Based on the above, we believe that the relevant issue is up to date for the national legal science and requires proper scientific study.

THE PURPOSE OF THE ARTICLE is to provide a scientific analysis of current Ukrainian legislation in the area of organization of work of the prosecutor's office, in particular, with regard to the conduct of proceedings in cases of administrative offenses, and to determine their compliance with the European law enforcement practice, in particular, with the judgments of the European Court of Human Rights, and also to formulate relevant proposals for further improvement of the rules and provisions of administrative tort legislation of Ukraine.

METHODOLOGY. The study used a number of methods of scientific cognition, primarily the methods of analysis and synthesis. The former was used to clarify the content of international documents and legislation, while the latter made it possible to draw generalized conclusions formulated using the dogmatic method. As a result of using the visualization method, the author created diagrams demonstrating the dynamics of administrative offenses under Article 130 of the CAO during 2020-2022. The structural-functional method was used to describe, explain, establish interdependence, deepen knowledge and derive new provisions regarding compliance with international standards of human rights and freedoms in the course of proceedings on administrative offenses.

RESULT AND DISCUSSION

The ECHR judgment of October 06, 2022 in the case of Bantysh and Others v. Ukraine recognized a violation of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the Convention), which consisted in the impartiality of the court in view of the absence of the prosecution in the proceedings on an administrative offense. The ECHR judgment, inter alia, refers to the need to ensure the presence of the prosecution or the prosecutor during the consideration of a case on bringing a person to administrative responsibility. Additionally, the court stated that in the case of Mykhailova v. Ukraine (application of March 06, 2018 No. 10644/08), the court had already established violations similar to those

established in the case of Bantysh and Others v. Ukraine, and therefore, in its opinion, there is a need to optimize the legislative acts of Ukraine in terms of ensuring the participation of the prosecution in administrative offenses.

According to the ECHR judges, if we carefully examine the facts of the cases of Bantysh and Others v. Ukraine and Mykhailova v. Ukraine, we can see that the judges who considered these cases were not independent and impartial, in particular, due to the absence of the prosecution in the court hearing. Based on this, the judgment states that the judge concerned took over this function and acted as a prosecutor, actually directing the collection of evidence and its interpretation in favor of the prosecution, thus undermining his own impartiality. Therefore, the ECHR, taking into account the approaches defined in the cases of Thorgeir Thorgeirsson v. Iceland, Padovani v. Italy noted that the presence of the prosecution is usually necessary to eliminate reasonable doubts that may arise as to the impartiality of the court, and therefore, in these cases there is a violation of Article 6(1) of the Convention.

Subsequently, taking into account the above decisions of the ECHR and in order to correct the shortcomings of legal regulation of the status of the prosecutor in proceedings on administrative offenses, two draft laws were submitted to the Verkhovna Rada of Ukraine: "On Amendments to the Code of Ukraine on Administrative Offenses regarding the mandatory participation of the prosecutor in court proceedings on administrative offenses under Article 130 of the Code of Ukraine on Administrative Offenses" (Reg. No. 10002 of 05.09.2023) and "On Amendments to the Code of Ukraine on Administrative Offenses to Improve the Procedural Mechanism for Consideration of Cases on Administrative Offenses" (Register No. 10002-1 of 22.09.2023). These draft laws envisage expanding the list of articles in part two of Article 250 of the CAO in which the participation of the prosecutor in court proceedings on administrative offenses is mandatory, in particular, adding Article 130 of the CAO "Driving vehicles or vessels by persons under the influence of alcohol, drugs or other intoxicants or under the influence of drugs that reduce their attention and reaction time" (draft law No. 10002). It is also proposed to introduce mandatory participation in court proceedings of the authorized official who drew up the administrative offense report or an authorized representative of the body on whose behalf the report was drawn up (draft law No. 10002-1). In addition, the draft law No. 10002-1 proposes to supplement the CAO with Article 278-1 of the CAO, which will provide for exhaustive grounds, terms and procedural procedure for returning the report on an administrative offense; establish a single term for consideration of cases of administrative offenses - 15 days, except for cases of violations recorded in automatic mode or in the mode of photography (video recording); to leave the mandatory presence of a person held administratively liable only when considering cases of administrative offenses under Articles 172-4-172-9 of the CAO.

If we analyze the provisions of the Code of Ukraine on Administrative Offenses, we can distinguish the following powers of the prosecutor to participate in the relevant proceedings:

> The prosecutor, deputy prosecutor, supervising the observance and correct application of laws in proceedings on administrative offenses, has the right to participate in the proceedings. In proceedings on administrative offenses under Articles 172-4 to 172-9, 172-9-2 of this Code, the participation of the prosecutor in the court hearing is mandatory (Article 250 of the CAO).
>
> The prosecutor supervises the observance of laws in the application of measures of influence for administrative offenses by exercising the powers to supervise the observance of laws in the application of coercive measures related to the restriction of personal freedom of citizens (Article 7 of the CAO).
>
> In cases of administrative offenses considered by the bodies referred to in Articles 218 - 221 of this Code, under Articles 172-4 - 172-20, 185-4, 185-8, 185-11, prosecutors are entitled to draw up protocols on administrative offenses (Article 255 of the CAO).

> The decision on an administrative offense may be appealed by the prosecutor in cases provided for in part five of Article 7 of this Code, by the person against whom it was issued, as well as by the victim (Article 287 of the CAO).

If we examine the content of the Constitution of Ukraine and the Law of Ukraine "On the Prosecutor's Office", we can conclude that the issues of prosecutorial activity in proceedings on administrative offenses are not regulated by these legal acts at all. According to Article 131-1 of the Fundamental Law, the Prosecutor's Office of Ukraine carries out:

> support of public prosecution in court;
>
> organization and procedural guidance of pre-trial investigation, resolution of other issues in criminal proceedings in accordance with the law, supervision of covert and other investigative and detective actions of law enforcement agencies;
>
> representation of the state's interests in court in exceptional cases and in accordance with the procedure established by law

Article 2 of the Law of Ukraine "On the Prosecutor's Office" establishes the following functions of the Prosecutor's Office of Ukraine:

> maintaining public prosecution in court;
>
> representing the interests of a citizen or the state in court in cases specified by this Law and Chapter 12 of Section III of the Civil Procedure Code of Ukraine;
>
> supervising the observance of laws by bodies conducting operational and investigative activities, inquiries, and pre-trial investigations;
>
> supervising the observance of laws in the execution of court decisions in criminal cases, as well as in the application of other coercive measures related to the restriction of personal freedom of citizens.

Article 23 of the Law of Ukraine "On the Prosecutor's Office" states that the prosecutor may represent the interests of the state in court if these interests are not protected or are improperly protected by a public authority, local self-government body or other subject of power.

Article 24 of the Law of Ukraine "On the Prosecutor's Office" in terms of certain forms of representation of the interests of a citizen or the state in court, states that the prosecutor participates in civil, administrative and commercial proceedings, describes his powers to file complaints and applications in criminal proceedings, but again, the issues of the prosecutor's office in proceedings on administrative offenses are not covered.

Article 26 of the Law of Ukraine "On the Prosecutor's Office" states that the prosecutor has the following rights:

> at any time, upon presentation of a certificate confirming his/her position, visit places of detention where persons are taken for the purpose of drawing up a report on an administrative offense or where persons are forcibly held in accordance with a court decision or a decision of an administrative body;
>
> interview these persons in order to obtain information about the conditions of their detention and treatment, familiarize themselves with the documents on the basis of which these persons are held in such places;
>
> get acquainted with the materials, receive copies of them, check the legality of orders, instructions, other acts of the relevant bodies and institutions and, in case of non-compliance with the law, demand that officials or employees cancel them and eliminate violations of the law.

The prosecutor is obliged to immediately release a person who is illegally (in the absence of a relevant court decision, decision of an administrative body or other document provided for by law or after the expiration of the period provided for by law or such decision) kept in a place of detention, pre-trial detention, restriction or deprivation of liberty, an institution for the implementation of coercive measures, or other places.

Thus, the content of Article 26 of the Law of Ukraine "On the Prosecutor's Office" correlates with Article 7 of the CAO, which states that the prosecutor supervises the observance of laws in the application of measures of influence for administrative offenses by exercising the powers to supervise the observance of laws in the application of coercive measures related to the restriction of personal freedom of citizens. In our opinion, such measures of influence should include measures to ensure proceedings in cases of administrative offenses, administrative penalties related to the restriction of personal freedom.

Thus, it can be concluded that the Law of Ukraine "On the Prosecutor's Office" of October 14, 2014 No. 1697-VII changed its role and functions. In particular, the prosecutor's office was deprived of the function of supervising the observance of human and civil rights and freedoms, compliance with laws on these issues by executive authorities, local self-government bodies, their officials and employees. Additionally, it should be noted that upon joining the Council of Europe, Ukraine undertook to change the role and functions of the prosecutor's office (primarily in terms of abandoning the general supervision function) and transform this institution into a body that meets the generally recognized standards of the Council of Europe.

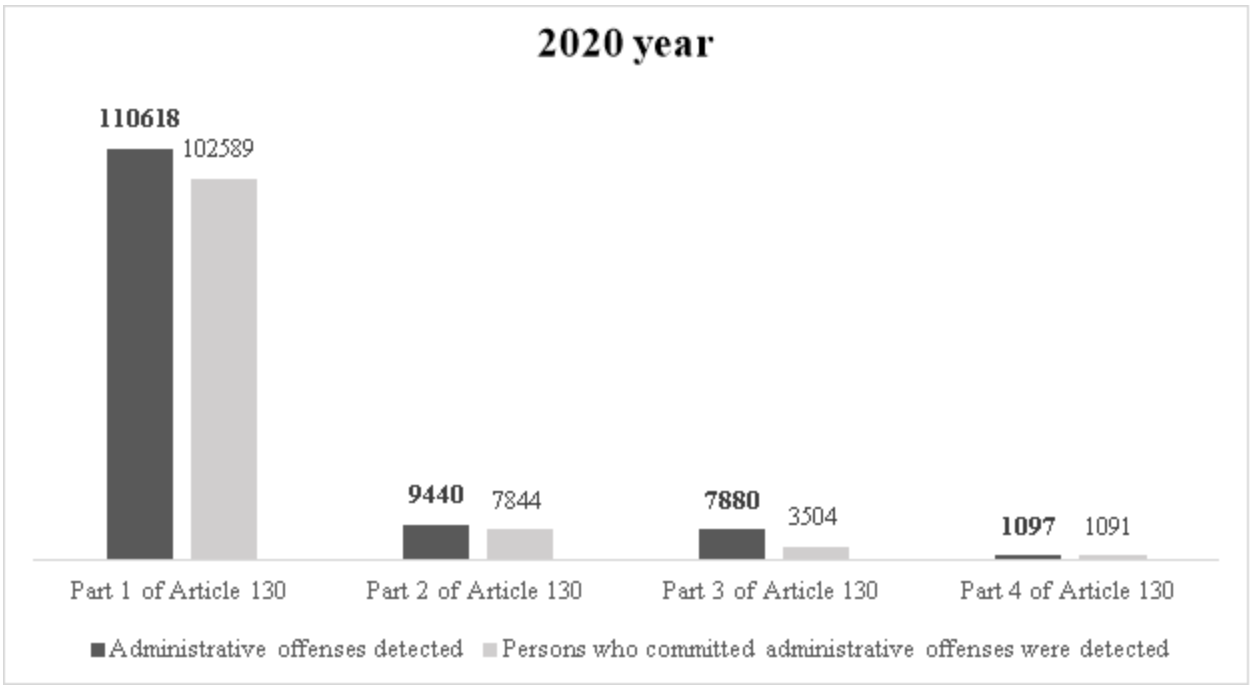
The Committee of Ministers of the Council of Europe, adopting Recommendation 19(2000) "On the role of the public prosecutor in the criminal justice system", expressed the position that the criminal sphere should be a priority area of activity of the prosecution service in member states. According to the Recommendations of the Parliamentary Assembly of the Council of Europe "On the role of the prosecutor's office in a democratic society based on the rule of law" dated 27.05.2003 No. 1604, regarding the functions of prosecutor's offices that do not belong to the field of criminal law, it is stated that it is important for member states to ensure such a situation , so that the powers and functions of prosecutors are limited to the sphere of prosecution of persons guilty of criminal offenses and the solution of general tasks to protect the interests of the state through the system of sending criminal justice, and separate effective state bodies were formed to perform any other functions.

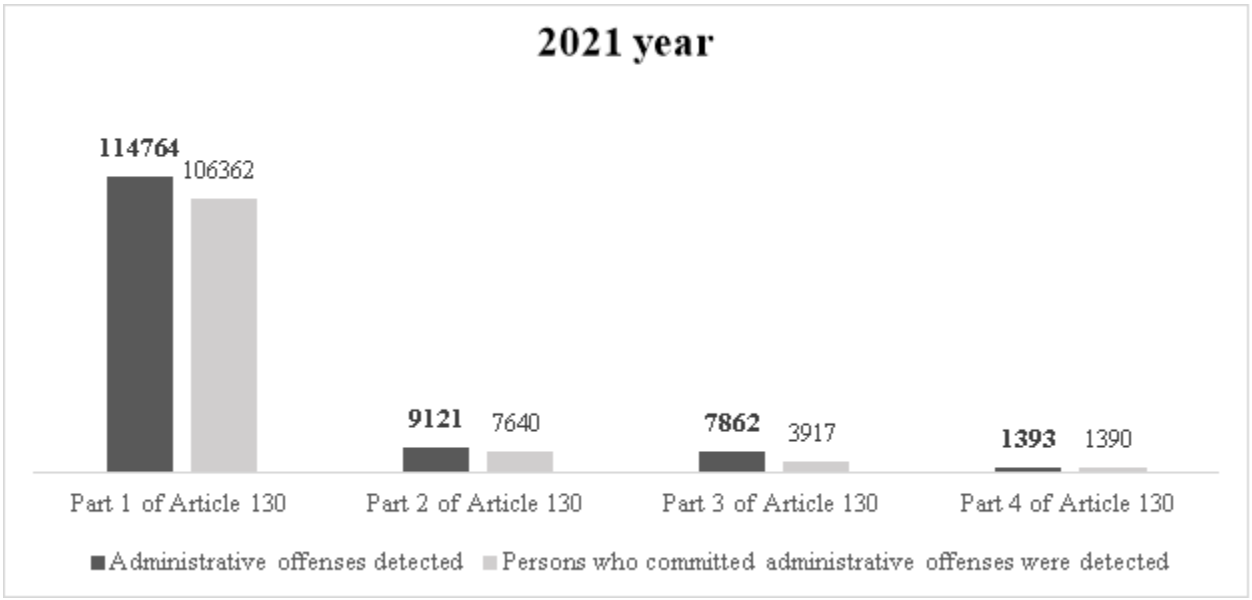
Thus, it can be argued that the outlined international standards of prosecutorial activity speak of the only and mandatory participation of the prosecutor's office in the field of criminal justice. At the same time, with regard to other social relations, these documents, on the contrary, establish the need for the formation of other public institutions in the member states with powers different from those of the prosecution service. This state of affairs is, in particular, mentioned in the scientific works of domestic experts who have studied the legal standards of the prosecution authorities in the context of European integration of our country (Lapkin, 2022, p. 73-74; Mykolenko, 2017, p. 220; Riabovol, 2021, p. 11-12).

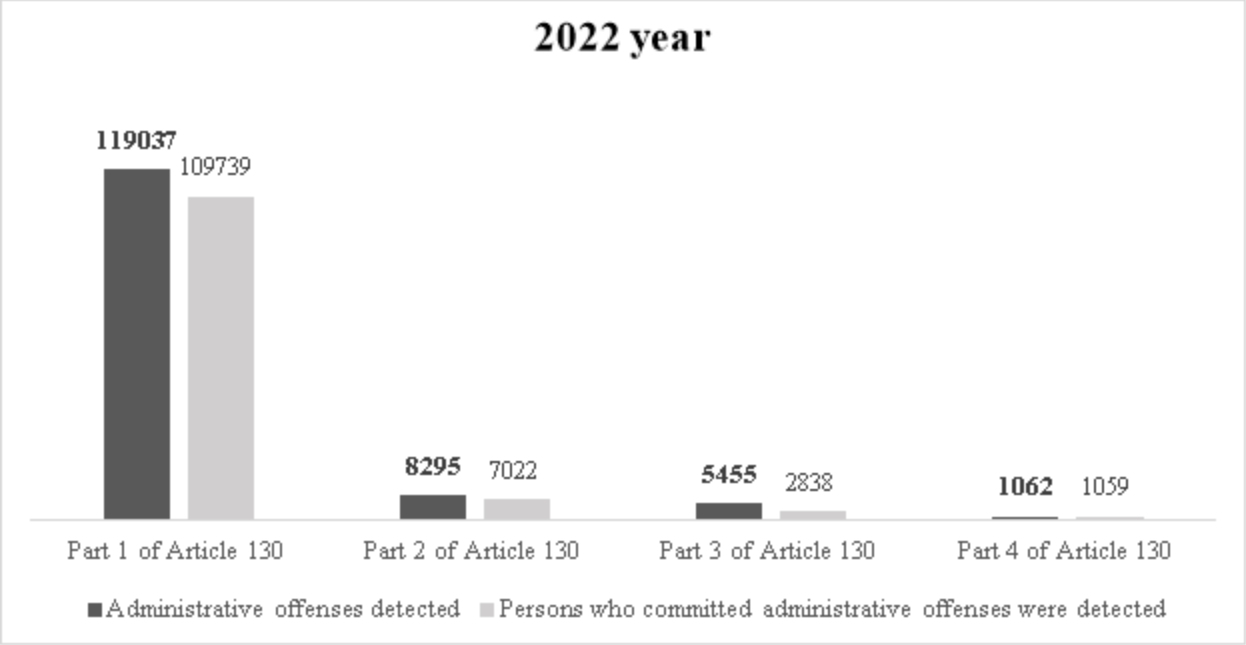
It should be emphasized that in the consideration of cases of administrative offenses that were the subject of appeal to the ECHR, the norms of the CAO regarding the participation of the prosecutor were not violated in any way, and therefore, we should focus on strengthening the role of the prosecutor's office in the consideration of cases of administrative offenses.

The simplest option would be to introduce provisions to the CAO that require the prosecutor to participate in all court hearings in cases of administrative offenses, in particular, under Article 130 of the CAO. At the same time, it should be borne in mind that according to Article 14 of the Law of Ukraine on the Prosecutor's Office, the total number of employees of the prosecutor's office shall not exceed 15,000, including the total number of prosecutors not exceeding 10,000. Thus, this version of the amendments will significantly affect the workload of prosecutors, which will prevent them from properly exercising their powers both in administrative offenses and criminal proceedings. Moreover, the number of administrative offenses committed annually under Article 130 of the CAO is estimated at hundreds of thousands. For example, according to the information of the Department of Information and Analytical Support of the National Police of 23.03.2023, the following number

of administrative offenses and perpetrators under Article 130 of the CAO were identified in 2020-2022 (the most common offenses are listed).







It is not entirely clear from the data provided how the mandatory presence of a prosecutor at all such court hearings can be ensured. Another aspect that should be taken into account when studying this draft law is that the ECHR judgment refers to the "prosecution", which does not necessarily have to be represented by a prosecutor. In our opinion, such a party may also be the National Police officers who drew up the relevant materials under Article 130 of the CAO.

CONCLUSIONS. *Based on the results of the study, the following conclusions and generalizations can be made:*

At present, the mandatory participation of the prosecutor in proceedings on administrative offenses contradicts the provisions of Article 19 of the Constitution of Ukraine and does not correspond to the functions of the prosecutor's office as defined in Article 2 of the Law of Ukraine "On the Prosecutor's Office". Even if we assume that such participation is representation of the state in court, it still means that, firstly, the court is obliged to confirm the need for such representation (which, by the way, requires a separate legal provision), and secondly, such representation of the state's interests can be carried out only in the absence of the party that drew up the relevant protocol on administrative offense.

The provisions of the current Law of Ukraine "On the Public Prosecutor's Office" provide for the participation of the public prosecutor exclusively in criminal, civil, commercial and administrative proceedings. Along with the above, the current Law of Ukraine "On the Prosecutor's Office" and the Code of Ukraine on Administrative Offenses do not have consistent provisions containing the tasks, rights and obligations of the prosecutor in the relevant proceedings. The Law of Ukraine "On the Prosecutor's Office" does not include prosecution in cases of administrative offenses as a prosecutor's task at all.

The maximum number of prosecutors enshrined in the institutional law, the number of administrative offenses detected, as well as the number of persons who committed them, in particular under Article 130 of the CAO, gives grounds to believe that it is physically impossible to ensure the participation of the prosecutor in all court hearings. To some extent, the violations recorded by the ECHR in cases of administrative offenses under Article 130 of the Code of Administrative Offenses may be eliminated by ensuring mandatory participation of the prosecutor in the appeal proceedings under the relevant article.

This situation calls for amendments and additions to the Law of Ukraine "On Public Prosecution" and the Code of Ukraine on Administrative Offenses in order to clearly define the legal status of the prosecutor in administrative offense proceedings, as well as to determine the appropriate entities to perform the function of

prosecution in the relevant proceedings in accordance with the recommendations of the Parliamentary Assembly of the Council of Europe "On the role of the prosecutor in a democratic society based on the rule of law" of 27.05.2003 No. 1604. At the same time, it should be noted that the relevant issue should be resolved taking into account the fact that the recommendations of the European institutions and the practice of the ECHR have logical contradictions and inconsistencies, and therefore this problem requires additional discussion in the expert community.

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