De facto and de jure legal basis for restriction of the property rights of the suspect, the accused, and other persons in the event of provisional seizure of electronic information systems or the their parts, and mobile terminals of communication systems

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Abstract. *The paper focuses on the study of the de facto and de jure legal basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems. There has been substantiated the necessity of review of the order of procedure for provisional seizure of electronic information systems or their parts, and mobile terminals for adjusting existing differences in legislation and harmonization thereof on the questions raised.*

Key words: *temporary seizure of property, restriction of human rights, electronic information systems, mobile terminals of communication systems.*

Problem statement

General problem statement and its interrelation with topical scientific or practical tasks. The issue of protection of the criminal proceedings participants against groundless seizure of the hardware persist to be topical in spite of the multiple attempts to solve them at the legislative level.

Yet, in February 2015, the procedure for provisional seizure of property as enshrined by the Criminal and Procedural Code of Ukraine (hereinafter – CPC of Ukraine) was amended as an inter alia measure aimed at deregulation and bringing the functions of controlling bodies in compliance with the European standards [1]. Specifically, Part Two of Article 186 of CPC of Ukraine [1] was added with the paragraph with the following text: “the provisional seizure of electronic information systems or their parts, mobile terminals of the communication systems for studying physical properties that are significant for the criminal proceedings, shall be carried out only if they are directly specified in the court order”.

However, under just three years thereafter, the issue of legislative adjustment of the problem in question came to the front of

deputy corps representatives' attention resulting in additional amendments made to operative legislation, at the end of 2017 year, in line with the Law of Ukraine "On Amendments to Some Regulatory Acts to Ensure that Law Enforcement Agencies Observe the Rights of Participants in Criminal Proceedings and Other Persons amid Pre-trial Investigations" [2].

In view of that restriction of subjectivism, and, respectively, assurance of legitimacy and reasonableness of procedural actions are achieved through establishment of certain grounds for their being carried out at the legislative level, we think that there is an urgent need in a scientific study of the legal basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or the their parts, and mobile terminals of communication systems.

The analysis of recent research and publications covering solutions to the problem, with focus on the previously unresolved aspects of the general problem raised in the article. Certain aspects of provisional seizure of property have already been the subject matter of the studies carried out by the following scientists: M. Rozin, V. Sluchevskyi, I. Foinytskyi, S. Alpert, V. Bozh'iev, M. Hazetdinov, M. Hoshovskyi, Yu. Hroshevyi, K. Hutsenko, P. Davydov, V. Daiev, T. Dobrovolska, V. Zelenetskyi, Z. Zinatullin, D. Kariev, L. Kokoriev, O. Kuchynska, V. Lukashevych, V. Maliarenko, O. Mykhailenko, M. Mykheienko, Ya. Motovilovker, V. Nor, I. Petrukhin, V. Popeliushko, I. Poteruzha, V. Savytskyi, M. Strohovych, L Shapovalova, V. Shybiko, P. Elkind, etc.

Yet, the state of knowledge of legal basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or the their part, and mobile terminals of communication systems in the context of amendments made to CPC of Ukraine over the last years is still insufficient.

Research objective. The articles aims at solving the following tasks.

To study legal basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems.

To set out the horizons for further exploration on the issues in question.

Statement of basic materials. On 16.11.2017, the Law of Ukraine "On Amendments to Some Regulatory Acts to Ensure that Law Enforcement Agencies Observe the Rights of Participants in Criminal Proceedings and Other Persons amid Pre-trial Investigations" was adopted [2]. On 20.11.2017 already, the Ukrainian Internet Association (UIA), a voluntary association of legal entities of various forms of establishment which activity is related to the sector of the Internet and information and communication technologies, comprising over 140 existing and over 50 associate members, sent a letter to the President of Ukraine requesting not to sign the Law of Ukraine "On Amendments to Some Regulatory Acts to Ensure that Law Enforcement Agencies Observe the Rights of Participants in Criminal Proceedings and Other Persons amid Pre-trial Investigations" and report it out to the Verkhovna Rada of Ukraine for revision, in particular, with reference to the adopted amendments to Part Two of Article 168 of CPC of Ukraine (reference number of the letter No 189 dated 20.11.2017 [3]).

The request, ex facto, sets anyone somewhat wondering. This is so because, under explanatory note to the draft of the law No 7275 dated 10.11.2017 [4], which later acquired the status of the Law of Ukraine "On Amendments to Some Regulatory Acts to Ensure that Law Enforcement Agencies Observe the Rights of Participants in Criminal Proceedings and Other Persons amid Pre-trial Investigations" [2], the draft law Ukraine "On Amendments to Some Regulatory Acts to Ensure that Law Enforcement Agencies Observe the Rights of Participants in Criminal Proceedings and Other Persons amid Pre-trial Investigations" was developed in pursuance of the minutes of the meeting chaired by the Prime-Minister of Ukraine V.B. Groysman with reference to consideration of the concerns with violation by the law enforcement agencies of business entities' rights, inter alia, the rights of foreign investors and businesses with foreign ownership, having into account the guidelines of Business Ombudsman Council.

"The law enforcement agencies carrying out groundless seizure of the originals of documents and hardware from business

entities, which actually paralyzes the activity of business entities" was named by the authors of the draft law as the issue which, inter alia, arises in the course of pre-trial investigations performed by the law enforcement agencies with participation of the business entities, and which was proposed to be solved by making respective amendments to CPC of Ukraine [5].

For the purpose of protection of the participants of criminal proceedings against groundless seizure of documents and hardware, it was proposed to foresee in Articles 160, 164, and 165 of CPC of Ukraine the obligation for the prosecuting authority to substantiate the necessity to seize the documents and the copies thereof, and in Article 168 of CPC of Ukraine – to set forth prohibition on seizure of electronic information systems and the obligation for the prosecuting authority to make copies of the information required without seizing the hardware containing it, with an expert being engaged therein [4].

However, as the letter from UIA dated 20.11.2017 [3] states, the amendments proposed to be made to Part Two of Article 168 of CPC of Ukraine would not allow for ensuring de facto protection for owners (holders) of electronic information systems or their parts, mobile terminals of communication systems against the unlawful actions on provisional seizure or actions performed ultra vires thereon and vice versa might give rise to additional range of conflict of laws and violation of the rights of telecommunication operators and providers. Special mention was made of the fact that the Law of Ukraine "On Amendments to Some Regulatory Acts to Ensure that Law Enforcement Agencies Observe the Rights of Participants in Criminal Proceedings and Other Persons amid Pre-trial Investigations" [2] did not establish that the necessity to apply exclusive cases for provisional seizure of electronic information systems or their parts, mobile terminals of communication systems was confirmed by the expert engaged and with the order of the court as it had been set out in the previous version of corresponding article of the Code. Therefore, law enforcement officers may provide reasons for any actions on provisional seizure by not having enough evidences of such necessity. This circumstance as well as provision of the alternative way for copying information or seizure of media at the court's discretion, following the opinion the UIA experts, have significantly enhanced the corruptive opportunities when a pre-trial investigation is being carried out [3].

Thus, with adoption of the Law of Ukraine "On Amendments to Some Regulatory Acts to Ensure that Law Enforcement Agencies Observe the Rights of Participants in Criminal Proceedings and Other Persons amid Pre-trial Investigations" [2], the problem of illegitimate seizure from the part of law enforcement agencies and disabling the activity of business entities was not solved, as, theoretically, any provisional seizure of electronic information systems or their parts, mobile terminals of communication systems may be motivated with the following [3]:

1) their provision together with the information they contain shall be a pre-requisite for expertise to be made, as, nowadays, the operative legislation does not set out the exhaustive list of the questions for expertise of electronic information with obligatory use of electronic information systems or their parts, and mobile terminals of communication systems. The necessity to carry out the expertise, in view of law enforcement officers, exists nowadays in all the cases of provisional seizure. Thus, the point at issue is cancellation of any precautions for law enforcement agencies concerning seizure of electronic information systems or their parts. At the same time, uncertainty as to whether it is permitted to make copies (it may be allowed to make copies, and at the same time it is allowed to seize the hardware) gives rise to visible corruption risks;

2) access to electronic information systems or their parts, mobile terminals of communication systems shall be restricted by the owner thereof, holder or possessor, as the generally established procedure of access is not available, whereas such restriction may sometimes be the consequences of "artificial actions" of certain law enforcement officers, for instance, wrongfully specified information, etc.;

3) access related to logical protection system bypass. As far as operative legislation on telecommunications neither provides the definition of the notion nor specifies it with the following text of the draft Law, the phrase "logical protection system bypass" remains vague for to be clearly understood when applying Article 168 of CPC of Ukraine.

The problem of lack of the unified understanding of the legal relations and terminology in applying Part Two of Article 168 of CPC of Ukraine [1] is, in our opinion, a component of a larger general scientific problem of establishment of the legal basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems.

In the course of the analysis of the legal basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems it is necessary to take into consideration the existing differences between the notion of "basis" and "pre-requisites" for taking measures of criminal proceedings enforcement. Not all the cases does the operative CPC of Ukraine distinguish as the basis for taking measures for criminal proceeding enforcement and as the pre-requisites for carrying out of them.

We deem necessary to uphold the position of those scientists who think that the basis for investigative (search) action are the conditions under which it is performable, and such pre-requisites are divided into those de facto and de jure ones [6, p. 22]. The adoption of such classification, apart from the theoretical problems, ensures a more adequate understanding and application of the law with reference to performance of investigative (search) activities in practice, and exercising prosecutor's supervision, in-house monitoring, and court control. This is so because both de facto and de jure basis for carrying investigative (search) activities out may be the subject matter of the prosecutor's supervision, in-house monitoring and court control. Both de jure and de facto circumstances may become the subject matter of appeal and are an independent matter of legitimacy and reasonableness for carrying investigative (search) activities out [7, p.68].

With this approach employed in the study of the subject matter of the paper, the analysis shall be primarily focused on the analysis of the de facto and de jure legal basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems.

De facto legal basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems.

The de facto basis for restriction of human rights while the procedural activities are being performed shall presuppose availability of the data set sufficient for adopting a decision under legislation as to the necessity to restrict certain rights of an individual during performance of such actions [8, p.214]. There is also a widespread definition of the de facto basis for procedural activities in the academic literature which implies availability of the data sufficient to assume that the information may be obtained from the sources specified in the Law, which is the purpose of certain procedural activity [9, p.23]. It means that the reasonableness for carrying certain procedural activity out is directly related to availability of respective basis for performance of such activity.

We hold the scientific opinion according to which the restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems include such elements as purpose of the measure and the amount of factual data that point out at the possibility to achieve that purpose. Under these conditions, the purpose and the character of respective factual data, as clearly defined in the Criminal and Procedural Code, shall be an obligatory re-requisite for accurate formulation of the basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems.

Therefore, in line with Part Two of Article 168 of CPC of Ukraine [1], the de facto basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic

information systems or their parts, and mobile terminals of communication systems shall the data set pointing out at that provision of such objects together with the information contained therein shall serve the necessary pre-requisite for carrying out an expertise, or, if such objects have been obtained as a result of commitment of a criminal offence or have been the means or instrument of commitment thereof, and also, if the access thereto is restricted by the owner, holder or possessor thereof, or related to logical protection system bypass.

At the same time, the question as to which exactly factual data and in what amount may serve the de facto basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems, must be further clarified. We consider that the data obtained exclusively in the course of performance of investigative (search) activities may serve the basis for such restriction.

Taking into account the foregoing, it becomes quite obvious that the data received in the course of performance of investigative (search) activities may point out to that such objects as electronic information systems or their parts, and mobile terminals of communication systems, have been acquired as a result of commitment of a criminal offence or are either the means or the instrument for having committed it.

At the same time, there remains open the question on how the necessity to carry out expertise, or the mere fact of restricted access (including that with logical protection system applied) to the information system, or, what is more, to the mobile terminal of communication systems, may serve the de facto basis for provisional seizure of the above mentioned object may include? This is so because the majority of mobile terminals for access to the operation thereon require passing an identification procedure. Thus, the operative criminal procedure legislation in its current version foresees as enshrined therein the possibility to seize practically every mobile terminal of communication system identified not only upon detention of an individual in the manner prescribed in Articles 207, 208 of CPC of Ukraine [1], but also during a visit and search. Beyond any doubt is the fact that such indiscriminate restriction of rights of general public urges for further review from the point of view of human rights envisaged by the Constitution of Ukraine.

De jure legal basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems.

Inquiring into the question of de jure legal basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems, it is necessary, first of all, to proceed from that the general grounds for provisional seizure of property are enshrined in Article 167 of CPC of Ukraine [1].

Pursuant to that article, provisional seizure of property means actual deprivation of the suspect of the possibility to possess, use, and dispose of certain property until the issue of attachment or return of property is decided. The property in the form of objects, documents, money, etc. may be provisionally seized if there is sufficient grounds for the belief that such property:

1) has been found, fabricated, adapted, or used as means or instruments of the commission of criminal offence and/or preserved signs of it;

2) has been intended (used) to induce a person to the commission of a criminal offence, financing and/or providing material support to or as a reward for its commission;

3) has been an object of a criminal offence related inter alia to its illegal circulation;

4) has been gained as a result of commission of a criminal offence and/or is proceeds of such as well as any property to which they have been converted in full or in part.

At the same time, further requirements are foreseen for the cases of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems in operative CPC of Ukraine [1]. Thus, pursuant to Paragraph Two of Part Two of

Article 186 of CPC of Ukraine [1], the provisional seizure of electronic information systems or their parts, mobile terminals of the communication systems for studying physical properties that are significant for the criminal proceedings, shall be carried out only if they are directly specified in the court order.

In this regard, A.E. Rudenko's work [7] quite fairly points out at the necessity to clarify the question as to which court order should directly specify the possibility for the provisional seizure of electronic information systems or their parts, mobile terminals of the communication systems for studying physical properties that are significant for the criminal proceedings. This is so because Chapter 16 "Provisional Seizure of Property" of CPC of Ukraine [1] does not contain references to such de jure basis for provisional seizure of property as the court order for any other cases apart from that as specified in Paragraph Two of Part Two of Article 186 of CPC of Ukraine [1].

The question shall be given a special attention, as some scientists do not deem the objects provisionally seized if an investigating judge has given a permit for the seizure thereof during a search [10, p. 311]. The objects and documents, seized on the basis of an investigating judge's order ruled following the results of consideration of an investigating officer's petition in the manner prescribed in Chapter 15 of CPC of Ukraine, are not deemed seized either [1]. Therefore, supplementing Part Two of Article 186 of CPC of Ukraine with Paragraph 2 has given rise to legal conflict meaning that when the court order specifies certain property which is subject to seizure (in this case – electronic information systems or their parts, mobile terminals of communication systems) such property may not be deemed provisionally seized. For the purpose to solve the conflict, A.E. Rudenko suggests amendments be made to Paragraph Two of Part Two of Article 186 of CPC of Ukraine [1], which must foresee that the provisional seizure of electronic information systems or their parts, mobile terminals of the communication systems for studying physical properties that are significant for the criminal proceedings, shall be forbidden. The seizure of such objects is proposed to be made solely in the event of they are included into the list subject to direct permission for tracing the order permits conducting a search [7, p.83].

Summarizing the foregoing, the de jure legal basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems shall be the requirements of Article 167 of CPC of Ukraine [1]. Whereas in the event of provisional seizure of electronic information systems or their parts, mobile terminals of the communication systems for studying physical properties that are significant for the criminal proceedings, such legal basis shall be the court order directly specifying them.

At the same time, considering that Article 167 CPC of Ukraine [1] contains an exhaustive list of the grounds for provisional seizure of property, we may find that such grounds for the seizure of electronic information systems or their parts, mobile terminals of communication systems, as "the cases where provision of information systems or their parts, mobile terminals of communication systems together with the information contained therein is a necessary pre-requisite for conducting an expertise", "the cases where access to information systems or their parts, mobile terminals of communication systems is restricted by an owner, holder or possessor thereof", and "cases where access to information systems or their parts, mobile terminals of communication systems is related to logical protection system bypass" enter putative conflict with the requirements of Article 167 CPC of Ukraine [1].

Conclusion

Following the results of the study of the de jure legal basis for restriction of the property rights of the suspect, the accused, and other individuals in the event of provisional seizure of electronic information systems or their parts, and mobile terminals of communication systems, we can arrive at conclusion that the amendments made to CPC of Ukraine in 2017 on provisional seizure of electronic information systems or their parts, mobile terminals of communication systems, instead of adjusting

the issues of concern existing in this area, have introduced additional contraventions to the framework law which has been governing the criminal proceedings order in the territory of Ukraine.

In view of the foregoing, we consider that there is an urgent necessity to review the procedural order for provisional seizure of electronic information systems or their parts, and mobile terminals for the purpose of adjusting existing differences in legislation and harmonizing thereof with regard to the questions raised.

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