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DEKLARACJA NIEPRAWDZIWYCH INFORMACJI JAKO PODSTAWA DO PROWADZENIA DZIAŁAŃ DOCHODZENIOWYCH (POSZUKIWAWCZYCH)

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Adnotacja. Artykuł uzasadnia celowość prowadzenia działań dochodzeniowych (poszukiwawczych) podczas dochodzenia w sprawie wykroczenia karnego przewidzianego w art. 366-2 „Deklaracja nieprawdziwych informacji” Kodeksu Karnego Ukrainy.

Okazuje się, że głównymi środkami gromadzenia dowodów w analizowanym postępowaniu karnym jest przeprowadzenie takich czynności dochodzeniowych (poszukiwawczych), jak: przesłuchanie osób (świadków, podejrzanego), oględziny rzeczy (przedmiotów i dokumentów), przeszukanie mieszkania lub innego majątku osoby, przeprowadzenie ekspertyz sądowych. Uwaga skupia się na tym, że podczas dochodzenia w sprawie tego rodzaju wykroczeń karnych mogą wystąpić sytuacje, w których istnieje potrzeba wykorzystania specjalistycznej wiedzy. Z ich pomocą można znaleźć dane faktyczne, które później mogą stać się dowodem w postępowaniu karnym, a także racjonalnie wykorzystywać zasoby podczas prowadzenia innych działań dochodzeniowych (poszukiwawczych).

Słowa kluczowe: deklaracja, nieprawdziwe informacje, wykroczenie karne, postępowanie śledcze (poszukiwawcze), przesłuchanie, kontrola, przeszukiwanie, korupcja.

DECLARATION OF INVALID INFORMATION AS A GROUND FOR INVESTIGATIVE (SEARCH) ACTION PERFORMANCE

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Anotation. This paper justifies the appropriateness of investigative (search) actions performance in the course of investigation of a criminal offense under Article 366-2 «Declaration of invalid information» of the Criminal Code of Ukraine.

It has been established that the primary means for evidence gathering in the analyzed criminal proceedings include the following investigative (search) actions: interrogation of persons (witnesses, suspects), examination of items (objects and documents), search of a person's dwelling or other property, conducting forensic examination. Attention is focused on the fact that during the investigation of this type of criminal offense certain situations may occur when special knowledge is required. It may assist in the process of factual data identification which later transform into evidence in criminal proceedings, as well as help to optimize the use of resources in the course of other investigative (search) actions performed.

Key words: declaration, invalid information, criminal offence, investigative (search) action, interrogation, inspection, search, corruption.

ДЕКЛАРУВАННЯ НЕДОСТОВІРНОЇ ІНФОРМАЦІЇ ЯК ПІДСТАВА ДЛЯ ПРОВЕДЕННЯ СЛІДЧИХ (РОЗШУКОВИХ) ДІЙ

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Анотація. У статті обґрунтовано доцільність проведення слідчих (розшукових) дій під час розслідування кримінального правопорушення, передбаченого ст. 366-2 «Декларування недостовірної інформації» Кримінального кодексу України.

З'ясовано, що основними засобами збирання доказів в аналізованому кримінальному провадженні є проведення таких слідчих (розшукових) дій, як: допит осіб (свідків, підозрюваного), огляд речей (предметів і документів), обшук житла чи іншого володіння особи, проведення судових експертиз. Увагу зосереджено на тому, що під час

розслідування цього виду кримінального правопорушення можуть виникнути ситуації, коли є потреба у використанні спеціальних знань. За їх допомогою можна з'ясувати фактичні дані, які згодом можуть стати доказом у кримінальному провадженні, а також раціонально використати ресурси під час проведення інших слідчих (розшукових) дій.

Ключові слова: декларування, недостовірна інформація, кримінальне правопорушення, слідчі (розшукові) дії, допит, огляд, обшук, корупція.

Introduction. In current environment the issues related to corruption dissemination and its elimination are still of ultimate relevance. First of all, it is directly connected with the difficult situation in the state as regularly mass media present numerous reports on the exposure of persons having committed corruption-based criminal offenses and offenses related to corruption. There are many truly frightening facts which confirm the involvement of persons taking extremely important positions in the state agencies and bodies. In this regard a significant amount of legislative acts are being drafted and adopted, special anti-corruption bodies are established as well to comply with the anti-corruption state policy, and the number of relevant non-governmental organizations, actively involved in the process of tackling this negative social phenomenon, is constantly growing. One of crucial steps aimed at improving the anti-corruption mechanism was the introduction of special articles to the Criminal Code of Ukraine, in particular Article 366-1 «Declaration of invalid information» (recognized as unconstitutional by the Constitutional Court of Ukraine), and the subsequent adoption of Article 366-2 «Declaration of invalid information» by the Verkhovna Rada of Ukraine in 2021 (new edition).

Despite the fact that the declaration of invalid information (Article 366-1 of the Criminal Code of Ukraine) was not included in the list of corruption-based crimes contained in the note to Article 45 of the Criminal Code of Ukraine, V. Andriyeshyn duly pointed out that social relations in the corruption prevention area are an additional mandatory direct object of this crime (Андрієшин, 2018: 129). That is why V. Shchyrskaya offered to classify this crime as corruption-based and introduce therefore amendments to Article 45 of the Criminal Code of Ukraine (Щирська, 2019: 62).

The results of studies (subject – investigation of criminal offenses related to public and professional activity in the framework of public services provision with focus on certain aspects of investigating the declaration of invalid information) are outlined in the publications by the following scholars: V. Peresada, Z. Toporetska, M. Havroniuk, R. Shama, R. Shekhavtsov. Selected aspects of investigative (search) actions (ISA) performance during the investigation of the invalid information declaration are covered in thesis by A. Cherenkov.

However, many issues have become obvious which require in-depth research and relevant solutions in connection with the data entry to the Unified Register of Pre-Trial Investigations (URPTI), the initiation of an investigation of invalid information declaration, and ISA performance.

Purpose. The aim of this paper is to identify ISA which are the most feasible to perform in order to detect and confirm the facts of declaring invalid information with relevant criminal liability stipulated by the Article 366-2 of the Criminal Code of Ukraine. The following tasks must be completed to achieve the abovementioned goal: ensure the legal classification of this criminal offence and analyze selected ISA through its prism which may be used to collect evidence.

Problem statement. In connection with the adoption of the Law of Ukraine "On Prevention of Corruption" dd. October 14, 2014 Article 366-1 «Declaration of invalid information» of the Criminal Code of Ukraine has come into force with its content being amended twice in 2016. However, this article was decriminalized due to the adoption of decision of the Constitutional Court of Ukraine (CCU) in a case initiated by 47 MPs with a constitutional petition regarding the conformity of selected provisions of the Law of Ukraine «On Prevention of Corruption», the Criminal Code of Ukraine (No. 13- p/2020 dd. October 27, 2020) with the Constitution of Ukraine (constitutionality). Having analyzed the relevant decision of the Supreme Court of Ukraine, we've concluded that its aim was to eliminate the mentioned article of the Criminal Code of Ukraine due to its inconsistency with the principle of the judges' independence which led to a violation of the rule of law principle, pushing judges beyond the jurisdiction of this article. Also one Dissenting Opinion and three Separate Opinions were outlined for the relevant CCU decision elaborating the opinion on groundlessness of terminating the Article 366-1 of the Criminal Code of Ukraine.

After the abovementioned events, on November 2, 2020, the Verkhovna Rada of Ukraine received a draft of the Law № 4304 «On Recovery of Selected Provisions of the Law of Ukraine On Prevention of Corruption» and the Criminal Code of Ukraine with proposal to restore the validity of the specified article.

The adoption of this draft law had been justified by the need for elimination of legal limbo in the corruption prevention and countering area in relation to the abovementioned CCU decree, namely:

- «consider the Association Agreement between the European Union and the European Atomic Energy Community and their member states, of the one part, and Ukraine, of the other part, ratified by the Law of Ukraine № 1678-VII dd. September, 2014, as well as a number of international anti-corruption treaties of Ukraine, which constitute a part of the national legislation of Ukraine according to the Constitution of Ukraine, in particular the United Nations Convention against Corruption, ratified by the Law of Ukraine № 251-V dd. October 18, 2006, the Criminal Law Convention on Corruption, ratified Law of Ukraine No. 252-V of October 18, 2006, Civil Law Convention on Corruption, ratified by the Law of Ukraine № 2476-IV dd. March 16, 2005,

- emphasize the irreversibility of European integration processes in Ukraine with fight against corruption being identified as one of the priority tasks,

- take into account that fight against corruption is one of the key aspirations of Ukrainian people, outlined in the policies and plans of the political parties majority having formed the parliamentary factions in the current convocation of the Verkhovna Rada of Ukraine,

- affirm the support of civil society for the anti-corruption reform implemented in Ukraine» (Про відновлення дії окремих положень Закону України «Про запобігання корупції» та Кримінального кодексу України: проект Закону, 2020).

Within the legal characteristics of the criminal offense in question we should note that Ukrainian system of corruption prevention (in terms of the procedure established by law for the submission of declarations by persons authorized to perform the functions of the state or local self-government, by the subjects of the declaration) comprises the direct object of this crime (Науково-практичний коментар до ст. 366-1 Кримінального кодексу України).

Based on the analysis of this article, we come to the conclusion that objective element of the crime is characterized by the following actions:

- 1) submission of knowingly invalid data in the declaration;
- 2) deliberate failure to submit a declaration.

According to the note of Article 366-2 of the Criminal Code of Ukraine, «declaration subjects are persons who, according to parts 1 and 2 of Article 45 of the Law of Ukraine “On Prevention of Corruption”, are obliged to submit declaration of person authorized to perform the functions of the state or local self-government» (Кримінальний кодекс України, 2001).

The declaration of a person authorized to perform the functions of the state or local self-government is an official electronic document that validates certain legal facts, it is drafted in compliance with the template established by the National Agency for the Corruption Prevention (NACP), and is submitted by a person authorized to perform the functions of the state or local self-government (subject of declaration). The declaration contains data on the subject of the declaration and one’s family members, recorded with use of technical means on the official NACP website, provided by the Law (Щирська, 2019: 130).

The declaration of a person authorized to perform the functions of the state or local self-government is submitted to ensure the transparency of the activities of persons authorized to perform the functions of the state or local self-government, as well as to identify and prevent conflicts of interest in their activity (Науково-практичний коментар Кримінального кодексу України, 2018).

The income statement of the declaration subject, placed on NACP website, is a primary document subject to investigation and examination under pre-trial investigation in the event of mentioned criminal offense (Черенков, 2018: 123).

According to Article 45 of the Law of Ukraine «On Prevention of Corruption», the following types of declarations are stipulated:

- annual declaration of the person authorized to perform the functions of the state or local self-government, submitted prior to April 1 of the reporting year, for the previous year;
- declaration of the relevant subject who terminates the activities related to the performance of the state or local self-government functions, for the period not covered by previously submitted declarations;
- declaration of the relevant subject having terminated the activities related to the performance of the state or local self-government functions, submitted during the year which follows the cancellation of requirement to submit annual declaration;
- declaration of a person who is a candidate for vacant position related to performance of the state or local self-government functions, submitted prior to appointment or election for a selected position (contains data for the full reporting year preceding the year of candidacy (submission of application for employment)).

According to A. M. Cherenkov, sources of information on the declaration of invalid data include the following:

- 1) notification of the NACP;
- 2) mass media notices (publications);
- 3) independent detection of features and signs of declared invalid information by a law enforcement officer (primarily an investigator, detective), in particular, by carrying out the analytical tasks or in the course of criminal offense investigation;
- 4) statements (notifications) from citizens, in particular whistleblowers, CSOs;
- 5) other law enforcement bodies’ materials (introduced if beyond the jurisdiction of pre-trial investigation bodies having initiated the criminal proceedings) (Черенков, 2018: 126).

At pre-trial investigation stage, in order to implement the tasks of criminal proceeding and reveal true facts about the commission of the specified criminal offense, authorized law enforcement agencies carry out a number of procedural actions, in particular investigative (search) actions (ISA). Effective and high-quality performance of ISA ensures that the required amount of evidence is obtained regarding the declaration of knowingly invalid information and deliberate failure to submit the declaration by the subjects.

According to Article 223 of the Criminal Procedure Code (CPC) of Ukraine, ISA are defined as actions aimed at obtaining (collecting) evidence or validation of previously collected evidence in a specific criminal proceeding (Кримінальний процесуальний кодекс України, 2012).

Declaration of invalid information is identified as crime of minor gravity (part 4 of Article 12 of the CCU) – therefore, covert investigative (search) actions shall not be performed during the investigation. According to part 2 of Article 246 of the CPC, the abovementioned actions are performed in case when it is impossible to obtain data

on criminal offence and the offender in a different way and exclusively within the criminal proceeding on grave or extremely grave crimes (Criminal Procedure Code of Ukraine, 2012). Covert investigative (search) actions may be performed if grave or extremely grave crime is being investigated in parallel with declaration of invalid information.

Considering the investigative and judicial practices of anti-corruption agencies (National Anti-Corruption Bureau of Ukraine, Specialized Anti-Corruption Prosecutor's Office, Higher Anti-Corruption Court) during the investigation of this criminal offence, we can outline the most common ISAs.

Interrogation is one of the universal ISAs, carried out in all criminal proceedings.

Interrogation is a method to obtain information from persons with specific procedural status in criminal proceeding regarding the circumstances they are aware of. The aim of the interrogation is to get information which, according to Article 95 of the Criminal Procedure Code of Ukraine, is granted the status of testimony – sources of evidence (Авраменко, Благута, Гуцуляк. Слідчі (розшукові) дії : навч. посіб., 2013: 53).

Practitioners rightfully recognize interrogation as one of the most complex investigative actions, which requires an investigator with high level of professional skills to ensure its proper conduct (Весельський, 1999: 5).

The abovementioned ISA is ambiguously characterized by specialists: some believe that it is inexpedient to spend a lot of time for interrogation since it has no evidential value in court proceedings; instead, the majority stresses on its significance and outlines the following recommendations for its preparation and conduct:

- ensure thorough preparation for the interrogation;
- interrogations are conducted after collection of the ultimately exhaustive array of data on the crime event, in particular documents (for example, copies and/or title documents for movable and immovable property), which should be presented in the course of this ISA;
- perform the videorecording of interrogation;
- to provide an opportunity for the interrogation subject to ipresent information regarding the declaration and relevant objects ndependently;
- while interrogating the witnesses, it is necessary to emphasize the testimony related to validation of previously declared objects; at the same time, questions on validation of data about undeclared objects should be put in parallel, without extra attention paid (Черенков, 2020: 158).

Persons who may be subject to interrogation at the stage of pre-trial investigation regarding the facts of commission of a crime under Article 366-2 of the Criminal Code of Ukraine – witnesses and the suspect.

Family members, relatives, close acquaintances, neighbors, hired staff, colleagues and other persons who may be aware of the failure to submit the declaration or validation of inaccurate information in it may be witnesses. NACP employees, who can also be recognized as witnesses in a case with corresponding criminal offense involved, play an important role. Considering the positive result given by the recovery of certain NACP rights and duties, which were terminated by CCU decision № 13-r/2020, with the draft law № 4304 or other proposed state mechanism NACP representatives can exercise certain powers in accordance with the applicable legislation of Ukraine. In particular, according to par-s 6 and 8 of Article 11(1) of the Law of Ukraine «On Prevention of Corruption», they are able to: monitor and control the enforcement of legislative acts on ethical behavior, prevention and settlement of conflicts of interest within the activity of persons authorized to perform the functions of the state or local self-government, and persons with equal status; to carry out, in accordance with the procedure defined by this Law, control and validation of the relevant subjects' declarations, the storage and publication of these declarations, and the monitoring of subjects' lifestyle. Therefore we conclude that they may possess information regarding the submission or non-submission of both relevant inaccurate information in the declaration and the declaration itself (Про запобігання корупції: Закон України, 2014).

We consider A. Cherenkov's opinion regarding the suspect's interrogation to be rational and justified. He outlines that it is obligatory to identify the date of one's appointment and dismissal. At the same time, one must be asked of how the crime was committed. It is necessary to ask suspect, accused of failure to submit declaration, for additional data: whether one had been familiarized with the regulatory provisions establishing the obligation and terms of submitting a declaration; whether one received a notification from NACP on one's failure to submit a declaration; whether one received a notification from employer on the obligation to submit this document; what are the reasons for failure to submit the declaration, did one have valid excuse to refrain from submitting the declaration; whether he had/has the opportunity to submit the relevant declaration; whether one intends to submit the required declaration. If a suspect entered invalid information into a declaration, one must provide details regarding the content and relevant reasons (Черенков, 2020: 163).

Examination is another important ISA.

Examination is an investigative (search) action which includes detection, direct perception, evaluation and recording of the state, properties and features of material objects in order to obtain factual data which are significant for establishing the truth in criminal proceeding (Авраменко, Благута, Гуцуляк. Слідчі (розшукові) дії : навч. посіб., 2013: 41).

In order to identify the aim of examination under investigation of invalid information declaring, it is necessary to partially analyze the trace pattern of relevant crime.

Detection of such information in the completed electronic declaration and various documents (receipts, statements, purchase and sale contracts, valuation reports for real estate or motor vehicles, etc that refute this information) can be identified as traces of entering knowingly invalid information in the declaration. If a person was preparing to enter knowingly invalid information in the declaration, one could make draft notes both in electronic documents

(on a personal computer, smartphone) and in written form, send e-mails to receive advice on how best to fill out the declaration to conceal certain property or funds. That is why these draft notes (both electronic and written) may be considered as material traces of preparation for a crime. Non-material crimes may be identified in the form of eyewitnesses' memories (e.g., sale and purchase, valuation of movable and immovable property etc) (Пересада, 2018: 271).

Considering this trace pattern, it can be noted that in the course of this criminal offense investigation examination of items (objects and documents) is mostly performed.

The following examined objects should be singled out:

- declarations of persons authorized to perform functions of the state or local self-government;
- NACP web-pages;
- web-pages covering electronic registries and databases, where information about the subject of the declaration and one's property can be displayed;
- NACP notifications on the failure, notification on the obligation to submit declaration (e.g., from the employer);
- personal profiles of persons authorized to perform functions of the state or local self-government etc.

In addition to the specified ISA there are also cases when suspect is searched under Article 366-1 of the Criminal Code of Ukraine (or members of one's family/relatives).

A search is an investigative (search) action conducted with the purpose to identify and record information about the circumstances of criminal offense commission, means used to commit a criminal offense or property having been obtained as a result of its commission, as well as establish the location of wanted persons (Кримінальний процесуальний кодекс України, 2012).

Undoubtedly, this action is performed in exceptional cases – it is mostly preceded by granting temporary access to items and documents. If a person failed to submit certain documents according to the court's ruling, this is a valid ground for investigative judge to issue a ruling which justifies search of the person's dwelling or other property where the items in question may be kept.

According to the results of research carried out by A. Cherenkov, the following search objects are discovered in the course of relevant inspection: cash (49.6%); property subject to declaration (68.4%); documents which validate financial liabilities (62.4%); documents validating ownership of property or its disposal (58.1%); mobile phones (40.6%); computers, other media (38.7%); other documents and any information validating the entry of knowingly inaccurate information (3.6%) (Черенков, 2020: 170–171).

Use of special knowledge during the investigation of invalid information declaring is defined as one of the most significant among the outlined ISAs. According to Articles 242–244 of the Criminal Procedure Code of Ukraine, employees of pre-trial investigation agencies may engage an expert to conduct an examination. Such examinations can be carried out in cases involving the forgery of various contracts: property sale and purchase, inheritance, lease, assessment of the property value etc.

It is appropriate to involve a specialist in accordance with Article 71 of the Criminal Procedure Code of Ukraine, who can provide assistance during the examination of, for example, ICT equipment, a specific object of declaration or recovery of data deleted from electronic devices, or provide preliminary information regarding the transfer of funds to offshore companies, etc.

Conclusions. On the basis of conducted research we may conclude that the most appropriate ISAs to be carried out at the stage of the pre-trial investigation during the establishment and validation of inaccurate information declaring are: interrogation of persons (witnesses, suspect), item examination (objects and documents), search of person's dwelling or other property, involving an expert to conduct an examination. In addition, such ISAs should be thoroughly planned and executed in a logical sequence to obtain as much evidence as possible. During the investigation of this specific type of crime, any situations may arise with experts' special knowledge required. Therefore, the pre-planned participation of a specialist during the ISA will ensure the achievement of one's tasks.

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