The legal status of a lawyer in the countries of the European Union

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This article is devoted to the study of the theoretical and scientific-practical nature of the institution of representation in the EU countries and the development of proposals based on them on improving the legal status of a lawyer in Ukraine, taking into account the best European practice. The place of the advocacy in the modern legal system can be characterized as one of the ways of self-restraint of state power through the creation and functioning of an independent human rights institution that promotes its activities by fulfilling the constitutional function of the state – the realization and protection of human rights and freedoms. The constitutional and legal status allows advocates to participate in ensuring the rights not only of everyone, but of the whole civil society, to implement the human rights function, ensuring the interaction in the activity of the institutional systems of the state and civil society. Since 2012, the advocacy reform has been initiated and brought to the standards of the European Union. However, over 6 years have passed, but no significant positive changes have taken place in this field. Ensuring the constitutional rights and freedoms of citizens still leaves much to be desired. The issue of voluntary admission of lawyers to the National Association of Advocates of Ukraine will be resolved, and so-called "lawyer's monopoly" needs to be substantially revised. Therefore, the review of the grounds, the rules, and the regularity of the prosecution in civil proceedings, which is carried out by the two advocates, needs a substantial improvement. In order to create in Ukraine the model of legal assistance taking into account modern legal frameworks, that is a guarantee of the right of accessibility and effectiveness of judicial protection in civil proceedings.

Keywords: lawyer; institution of representation; lawyer's self-government.

Introduction

The majority of foreign scientists, who are confounded by the legal requirements, are studying interconnection between the legal acts and the type of current systems (legal system). In some common law countries, a characteristic feature is that the outcome of the case, as a rule, depends on the fullness of the parties' participation in the conflict, the provision of evidence and the oratorical skills of lawyers. Correspondingly, the competition leads to the reasonable results. In the Roman-Germanic legal system, the key factor is the image of the justice as the truth, and its search needs the best judges. The lawyers are also appointed to assist judges in investigating a real truth. This distinction makes it clear that the legal advancement is more important in the countries of common law, where the competition provides the full responsibility of lawyers for studying, investigation and foundation of dealings.

In the continental legal system, in the revealed factual objections, the judges are of the utmost importance to express their views, and it is possible to take place in the court without the representative. In other words, "competitive" general-interest thinking tends to adhere to the idea that access to the law can only be done through a lawyer's representative, whereas continental logic is best served by the assurance that a poor person can have a lawyer when considering a case in court. The result of these peculiarities is that the countries of common law spend more money on a large number of different legal services, in order to ensure that the level of litigation in court is fair. And vice versa in the continental legal system, the law enforcement agencies are based on the proper practice of the defender.

Goals of article

Conducting a study on the legal status of a lawyer and law enforcement bodies in the EU countries to find specific areas for improving the legal regulation of representation relations in Ukraine and overcoming the gaps in existing legislation by adapting the best European practices to Ukrainian realities.

Materials and Methods

The materials and reports provided in this article are the result of the analysis of the legal status of a lawyer and law enforcement bodies in the countries of the European Union in order to establish their relationship with legal aid programs to the population and the quality of the provision of such services. In particular, using the comparative legal method modern models and main directions of improvement of legal regulation of the representation institute abroad are investigated; the ways of improvement of the domestic legislation are determined taking into account foreign experience. The analytical-synthetic and system-structural methods are used by the author in studying the legal status of the representatives of the representation relations, the protection of the rights and freedoms of the participants in these relations, and justifying the changes and additions to the legislation of Ukraine.

Results: certain proposals of the Ukrainian Institute of Representation were formulated based on the investigation of the legal status of the lawyer and the bodies of attorneys' self-government in certain countries of the EU.

Discussions

The general rule for the organization of advocacy is the legal and organizational structure of the bar, created for the effective realization of the tasks assigned to it. With the help of organizational structures, the advocacy itself is carried out directly, and legal, social and other guarantees of this activity are provided, including the protection of lawyers from unlawful actions and interference in state activities. The organizational structure (system) is understood as a collection of self-government bodies, law-enforcement agencies, public associations of lawyers and diverse relationships between them, which ensures the integrity of the bar as a human rights institution, preserving its basic properties under various internal and external changes.

In the countries of the EU, there are different types of organizations of municipal governing of law.

Firstly, the classic model, in which the membership in the advocacy association with the affiliation of lawyers. Thus, the structure acts on the basis of the principle of corporate governance, in which some members of the delegation delegate to the governing bodies. The activity of the advocates is carried out on the basis of the statute of the organization, where the membership and payment of the membership fees are compulsory. A person who is not a member of the professional organization of the lawyers does not have the right to practice the lawyer's activity. This model is followed by Spain, the Netherlands, Belgium, France, Italy, Greece.

Secondly, the model at which the chambers are organized on a territorial basis and connect all the advocates that are included in the list in the territory of one or another federal land. The jurisdiction of each party is extended to the territory of the federal state for which this chamber was established, and also to all lawyers who have been added to the list of this chamber of lawyers. The typical representative of this model is Austria. Self-government advocacy in Germany includes obligatory features of each model.

Thirdly, a model involving self-government by association through unions. For example, the Association of Attorneys in Sweden, the Bar Association in Switzerland.

Fourthly, the model for implementing the board through the Inns of Court, the latter is the management with the help of the legal community (The United Kingdom). This model with certain reservations include Switzerland (Bar Association), Sweden (Bar Association).

Thus, all of these models, in addition to the model, which foresees co-administration with advocacy through associations and unions, unites the fact that membership in the Chamber, the board, Inns of Court is compulsory.

Taking into account the diversity of models of lawyer's self-government, it is necessary to study their content on the example of individual European states. For example, the French Bar is a self-governing corporation with appropriate collective self-government bodies with the President, the Council of Order, the General Assembly of Advocates and the National Council of Board. Its positive difference is the age-old tradition of corporate identity and the unconditional implementation of the law. The opinion of lawyers on a number of important issues to the life of the country is very much appreciated in the public life of France.

Lawyers in France have the right to work independently, or to unite on a mental partnership with other lawyers. In addition, the lawyer can hire for work in his/her office of other lawyers. An attorney who works for another attorney does not have the right to have his/her own client. The lawyer-employer is fully liable for the work of this lawyer. An attorney, who works with a hired worker, is obliged to inform his lawyer about what lawyer he is working on. The forms of cooperation of lawyers are quite different. Traditionally, the most widespread organizational forms are chambers and civil-professional societies. Chamber – this is a union of lawyers, where each is personally responsible to the client. The members of the chambers are independent and autonomous.

Civil professional societies are subject to registration as legal entities are entered for the list of lawyers' fees. The members of these societies are jointly and severally liable for the debts of the partnership. The client of each lawyer is transferred to the whole association. A lawyer does not receive fees, and only a share of the company's profits with a share capital. Each lawyer does not pay taxes individually.

The company can open additional offices in the offices of its members. The latter work only on its behalf. They do not want to be members of other associations of lawyers or to practice individually. Members of the society devote it all their activities and inform about each other, while maintaining professional secrecy (Fedorov, 1994).

Attorneys in France are united into bar association at each second instance court (Article 1 of the Decree on the

Settlement of the Profession of a Lawyer dated 27 November 1991). The bar associations formed within the jurisdiction of the Court of Appeal may unite in order to form a united panel – The Order of Barristers (Article 2 of the Decree) (Polyakov, 2006). The decision is taken by voting in each board by a majority of votes. All bar associations are equal in rights, independent and autonomous. The main function of the advocate's council is to coordinate the actions of lawyers who are part of it, to provide general needs, to protect the interests of lawyers within their competence and to take care of the quality of the legal assistance provided, providing access to justice.

According to the Law of France dated December 31, 1971, №71-1130 about the reform of some judicial and legal professions, the Bar Association has a civil legal personality (Article 21 of the Law). Lawyers' orders provide two categories of tasks. The first is administrative activity, and the second is disciplinary jurisdiction. The Bars provide for the observance of professional ethics by lawyers, consideration of complaints filed by private individuals, state bodies, public organizations and the lawyers themselves. The Council of the Bar Association in Paris defined the legal nature of the bars of lawyers as a public institution subordinated to the special (private) rules set forth in the normative acts.

The Montpellier Court of Appeal, dated June 25, 1979, noted dualism in the bar associations, based on the fact that they have signs of a legal entity of private law and a legal person of public law. However, there is another position, professional orders belong to legal entities of private law, providing utility services. The legal nature of the lawyers' orders remains unclear (Buynova, 2001).

Each higher court with a bar association controls the acceptance of new members and exclusion. The constitutional leadership of each bar is carried out by the Council Board, which is elected by the General Assembly of Lawyers for a term of 3 years. The supreme body of lawyer's self-government in France is the National Council of Advocates, founded on December 31, 1991, which consists of 80 members, who are elected by lawyers by open ballot. Each association is independent, accepts the internal rules of its activity and owns its property.

At the national level, the French Bar Association is represented by the Council of Bar Associations, which is elected by members of the Association. The main activity of the Council in France is the coordination of training centers for advocates, representation of the interests of the lawyers community by public authorities and the public. So the Council is entitled to take disciplinary and ethical standards for the entire profession. The Council performs a representative, educational function, and also has the authority to decide on the admission of foreign citizens to be the lawyers in France. The Council Board has rather wide powers and exercises power functions on a par with the chairman of the board.

In France, as in Italy, Austria and Germany, the number of members of the Council of Bar Associations depends on the number of registered attorneys in one or another bar that operates in this area. The head of each of the bar is called the *bâtonnier* and has wide powers. The functions of the chairman of the bar are determined at the legislative level, and respectively, the chairman represents the bar in all

spheres of public life; prevents and resolves professional disputes between members of the bar and examines all complaints submitted by third parties; manages the bar, represents it in all legal documents, and also in administrative and public institutions. As stated in the literature, nowhere is written that the chairman must be elected among its members of the Council of Bar, "however, the tradition requires that" (Borysova, Baranova, Beghova, 2011).

Thus, the system of legal regulation of French advocacy has been worked out in detail – this is an indication of its fundamental and organizational effectiveness. As for the lawyers' self-government, the law of France solved the actual problems of regulating control procedures, as well as liability and financial security.

At the same time, as in other European countries, the advocacy in France combines the state control functions (represented by the higher courts) for advocacy with clear organizational and disciplinary connections of lawyers within each board, as well as between the bars, due to the enormous authority of the historically formed relationship between self-governing bodies in each bar: the Chairman, the Council of Order, the General Assembly of Advocates and the National Council of Bar.

Some features of the lawyer's self-government in Italy. All persons who have acquired the status of a lawyer in the manner prescribed by law are included in the professional register of the advocates of a certain bar, which is a professional association of lawyers in each administrative district (in each province and province where the Tribunal is, so-called the court of first instance).

Organizationally, the Italian Bar is composed of 160 bar associations, available in each judiciary. The main body of the bar is the Council of Order (*Consiglio dell'ordine*). It is the Council that decides on the inclusion of applicants in the professional list of lawyers. The order for inclusion in the list, adopted by the Council of the Order, is issued publicly and from this moment becomes an official administrative act, which gives the lawyer a "status of a professional". The council consists of at least 5 members (with the total number of registered attorneys in this court area of up to 50), 7 members (with 50-100 registered), 9 members (at 100-500 registered), 15 members (registered more than 1500). The council consists of the president, secretary and treasurer (Bartoshek, 2004).

In general, the authority of the Council are: decision-making in the scope of its competence; advisory functions, including those concerning the size of lawyers' fees; administrative control over the practice of advocacy and adherence to the professional ethics of lawyers; disciplinary functions; the establishment of the amount of the annual fee (contribution) within strictly defined limits for the expenses of the bar for registration in the professional list, as well as the amount of the fee for issuing certificates and assessments of fees; functions relating to the conduct of the list of lawyers; administrative functions (issuance of certificates of membership, assessment of fees, etc.).

The Council may be dissolved by the Ministry of Justice, which carries out administrative and control functions for the professional activity of lawyers, taking into account the opinion of the National Judicial Council.

The highest body of self-government in the professional community of all Italian lawyers is the National Advocate's Council. At each district of the Court of Appeal (Corte di Appello) located in the regional centers of Italy, the lawyer's community is elected a lawyer from among the admitted to the representation in the higher courts, who becomes a member of the National Advocacy Council for a term of 3 years.

Thus, the Italian Bar is under the control of public authorities (the Ministry of Justice, higher courts) in the form of a self-governing corporation with developed centralized structures and single bodies of self-government: the Council of the Order and the General Meeting of all the members.

The bar associations in Germany are formed by the territorial principle and unite the lawyers assigned to the court of the same land. The Department of Justice of the land may agree to the formation of a new bar in the district, but only if the number of lawyers practicing there exceeds 500 persons (Ghelecjka, 2005).

As for Germany, the Bar Association is united into a single Federal Chamber of Attorneys. The supreme body of the bar is a general meeting of its members that are collected on the initiative of the chairman of the bar or at the request of not less than ten percent of the lawyers who are members of it. Quorum issues and procedures are decided by the statute or the internal rules of the respective board.

All decisions of the general meeting are accepted by a simple majority of votes, and with their equality, the vote of the chairman becomes decisive. There is one exception to this rule: if there are no majority votes in favor of a candidate the lottery is decisive. The general meeting elects the board of directors, establishes the size of membership fees and the procedure for their payment, resolve issues of social security of the bar's advocates and members of their families, the issue of internship, allocation of funds for general-purpose needs, reimbursement of expenses of members of the board and members of the court of lawyer's honor.

The executive body of the bar is a board, which usually consists of seven people. However, not all German lawyers are united in the board. According to German law, bar associations are classified as "corporations of public law", which in itself should mean that joining them is a voluntary matter. But if the lawyer is not a member of the board, he/she will never be able to work in the Federal Supreme Court. He/she may have a number of other problems. In particular, any person admitted to a lawyer's practice is obliged to open his/her office in a court to which the lawyer is assigned.

The German Bar Association's governing body consists of the Board, the Presidium and the General Bar Association meeting. The reason for the formation of the Board of the Bar is § 63, § 64 of the Federal Law on Advocacy (2018).

The Board consists of 7 members and is elected by the General Meeting of Advocates. Inside the board, special departments can be created, consisting of at least 3 people. It is very unusual to have an imperative rule that does not allow a lawyer to refuse to be elected as a member of the board. According to § 67 of the Federal Law on Advocates, a person may refuse to be elected a member of the Board in the following cases: 1) if he/she is sixty five years old; 2) if

he/she has been a member of the board for the past four years; 3) if he/she is not able to perform his/her duties in the board on a regular basis in a state of health.

Board members are elected for four years. Re-election allowed. Every two years, half of the members come from the board, with an odd number of the first time it turns out more than half. Members who leave the board for the first time are determined by lottery. The board should protect the interests of the Chamber of Lawyers and promote their satisfaction. The duties of the Board include: 1) counseling and training the members of the Chamber about their professional duties; 2) to act as an intermediary in case of disputes between members of the Chamber; to make proposals for conflict regulation; 3) to act as an intermediary in case of disputes between members of the Chamber and their customers; to make proposals for conflict regulation; 4) monitor the execution of duties by members of the Chamber and exercise the right to appeal; 5) to nominate advocates for appointment as members of the court in the affairs of lawyers and the court of lawyers; 6) to submit to the Chamber of Deputies an annual report on property management, etc.

The Board may condemn the actions of the lawyer, in which he violated the duties assigned to him, if the lawyer's fault is insignificant, and there is no need to file an application for the opening of legal proceedings in the case of a lawyer. An important body of the Bar Chamber is the Presidium that is elected by the Board. The Presidium carries out cases governed, transferred to it in accordance with the law or with the decision of the board. The Bureau decides on the management of the property of the Chamber of Attorneys, reports quarterly to the Board (2018).

The supreme body of the Advocate's Chamber is the general meeting of the members of the Chamber convened by the chairman of the Chamber on his own initiative, and when it demands in a written form one tenth of the members of the Chamber, indicating the subject to be discussed at the meeting. Due to the mandatory membership, the lawyer is supervised by the Chamber of lawyers and thus the jurisdiction of the Bar. The Department of Justice of the Land carries out state supervision of the Chamber of Lawyers. Supervision is limited to ensuring compliance with the law and the statute, in particular the performance of tasks entrusted to the Chamber of Attorneys. Board members should (even after leaving the Board) maintain a secret on cases involving lawyers, claimants and other persons who became known to them in the course of their activities in the Board, and not to disclose it to anyone. This also applies to the lawyers involved in the cooperation and the Chamber of the Lawyers.

Thus, the advocacy in Germany is based on a combination of state control (the Land Ministry of Justice and higher land courts) for advocacy with self-government lawyers in chambers with such bodies of government as the board, the presidium and the General Assembly of the members of the Chamber.

German lawyers managed to create a fairly simple and understandable system of association of lawyers, combining elements of compulsory and voluntary membership. Its main advantage is the clear delineation of the objectives, tasks and powers of two parallel acting lawyers' professional associations: the Federal Bar (Chamber) of Attorneys (with

mandatory membership and the presence of disciplinary supervision functions), which includes regional bar associations and German association of lawyers (a voluntary organization, which includes the vast majority of lawyers in Germany). So, the two organizations do not compete, but complement each other.

As for Ukraine, the role of representation in civil procedural law is due to constitutional guarantees of the realization of citizens' rights, as well as Ukraine's commitments to international and European institutions for the implementation and protection of human rights. Accordingly, significant steps have been taken in Ukraine to adapt advocacy to EU requirements and standards. In particular, in accordance with part 3 of Article 4 of the Law of Ukraine "On Advocacy and its activity", an attorney may practice advocacy individually or in the organizational and legal forms of a lawyer's office or association of advocates (organizational forms of advocacy)". At the same time, in this article the legislator has defined a list of organizational forms of lawyers' activity.

Firstly, the lawyer, who carries out advocacy activity individually, is a self-employed person (Article 13 of the Law of Ukraine "On Advocacy and its activity"). The Tax Code of Ukraine in Article 14.1.226. defines a self-employed person as a taxpayer who is an individual entrepreneur or carries on an independent professional activity, provided that such person is not an employee within such entrepreneurial or independent professional activities.

Secondly, by establishing a law office. In accordance with Article 14 of the Law of Ukraine "On Advocacy and its activity", the Law Office is a legal entity created by one lawyer and operates on the basis of the statute. The name of the law office should include the name of the lawyer who created it. A special feature is that the lawyer must inform about the creation, reorganization or liquidation of the law office in written form within three days from the date of making the corresponding information to the Unified State Register of Legal Entities, individuals – entrepreneurs and public organizations, informs the relevant council of advocates of the region.

Thirdly, participation in the Bar Association. A lawyer association is a legal entity created by combining two or more lawyers (participants), and operates on the basis of the

statute. About the creation, reorganization or liquidation of the Bar Association, the changes to its membership structure, the Bar Association within three days from the day the relevant information is submitted to the Unified State Register of Legal Entities, individuals – entrepreneurs and public formations, in written form inform the relevant council of advocates of the region. A lawyer association may engage in the implementation of contracts for the provision of legal assistance by other lawyers deposited by the association on a contractual basis.

Conclusions

Thus, at the present stage, the role of lawyers in the provision of legal assistance at a high professional level is extremely high. At the same time, the advocacy reform launched in 2012 brought its negative consequences. In particular, all lawyers were united into a single professional organization – the National Association of Advocates of Ukraine. The result of this association was that today, tens of thousands of lawyers are required to pay their professional associations an annual contribution (in 2018 this amount was 1762 hryvnias) and to keep the bureaucracy of a professional organization. Another problem was the so-called "lawyer's monopoly" on the judicial representation provided by the law. Thus, in accordance with the "Transitional Provisions" of the Constitution of Ukraine, a person must be represented by a lawyer (from January 1, 2017, in a court of cassation, from January 1, 2018 – in an appellate court, from January 1, 2019 – by courts of first instance). Such a "monopoly" actually prevented the work of legal advisers, especially those working in state bodies and institutions, and so on. Accordingly, in such conditions it will be useful for Ukraine to study the best practice of legal regulation of the representation institution in the EU. Since the legal regulation of the grounds, forms and procedure for providing legal assistance in civil legal proceedings, carried out by lawyers, needs to be improved in order to create in Ukraine a legal model for providing legal assistance taking into account modern legal systems, which is a guarantee of ensuring the availability and effectiveness of judicial protection in civil legal proceedings.

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