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REGARDING THE PROBLEM OF SUBMITTING ELECTRONIC EVIDENCE

Right – this is primarily a regulator of social relations. Therefore, we can say that any changes in the society development, the spread of certain new trends can cause, respectively, certain changes in the law and in the legal regulation of social relations. Accordingly, an important role in the legislation of any country playes the dissemination of electronic technologies. As for Ukraine, the introduction of e-governance can be as such as example. In addition, the transition from paper management in state authorities and local government to electronic methods, with the use of technical means, has already begun. Undoubtedly, it is also affected on the Judiciary system of Ukraine, in particular, on a system of electronic court documents that anticipated phase-out of paper forms (but of course, this is impossible). Moreover, it is very important that it is concerned the system of the automated determination of judges which protects against the determination of a biased or interested judges. Also, a Unified Judicial Information and Telecommunication System should be introduced, which will provide a simpler and more efficient communication among the courts, more qualified electronic office work and other important functions of the system.

One of the steps of implementing of technologies in the Judicial System of Ukraine is the introduction of such a category as electronic evidence. The legislator does it simultaneously in relation to three types of process: civil, administrative and economic at the time of adoption of new editions of codes in 2017. Such changes, in my opinion, have become not just one of the steps of reforming the legislation, but they have already been a need that arose in the practical application of the provisions of the law. Already for more than a year, the question arose: To which group of evidence to attribute electronic documents? Video and audio recordings? In addition, is there information from the Internet? What should be the procedure for filing such evidence? There has already been some judicial practice, which included, for example, electronic documents to the written evidence, video to the material evidence. Therefore, to regulate such relations, the legislator and made appropriate changes to the procedural codes.

In particular, in the Civil Procedure Code (hereinafter referred to as the CPC) two articles were devoted to this issue – 100 and 101 (Section 5, Clause 5 of the CPC). Firstly, it should be noted that in accordance with Article 100, paragraph 1 of the CPC, electronic evidence is information in an electronic (digital) form containing information about circumstances relevant to the case, in particular, electronic documents (including text documents, graphic images, plans, photos, video and audio, etc.), websites (pages), text, multimedia and voice messages, metadata, databases and other data in electronic form. [1]

Based on this definition, it is appropriate to highlight certain types of electronic evidence; they are electronic documents (including text documents, graphic images,

plans, photographs, video and audio recordings, etc.); websites (pages); text, multimedia and voice messages; metadata; the database and other data in electronic form. Thus, one can immediately assume that there should also be a separate submission procedure for the proofs of each of the groups. However, the legislator did not regulate such a clear order. Paragraphs 2 and 3 of Article 100 of the CPC only set out the following general provisions for the submission of electronic evidence: "Electronic evidence is filed in the original or in electronic copy, certified by an electronic digital signature. The participants in the case have the right to file electronic evidence in paper copies certified in accordance with the procedure provided for by law. Paper copies of electronic evidence is considered written evidence."[1]

Thus, we can say that such a narrow regulation of civil procedural legal relations in the part of electronic evidence leads to significant problems in submitting electronic evidence in practice. Therefore, let us list some of these problems and analyze them.

One of the problems is using the new institute of evidence in the civil process associated with the definition of the original and a copy of the electronic evidence. The law only points to the existence of these two concepts, but does not give meaning to them. The consequence of such uncertainty is further difficulty in assessing the electronic evidence by the court of admissibility. It would be logical to turn to the profile of such issues of the Law of Ukraine "On Electronic Documents and Documentation". According to Art. 7 of this Law, the original of an electronic document is an electronic copy of a document with mandatory requisites, including an electronic signature of the author or a signature equivalent to his own signature in accordance with the Law of Ukraine "On Electronic Digital Signature". Therefore, based on the provisions of this Law and the CPC, one can immediately point out that it is difficult to distinguish the original of the electronic proof from its copy. In practice, this is associated with the identification of the concept of "original electronic device" and "original electronic evidence", which leads to the need to attach electronic devices to the case. [2]

For a more simple understanding, let us give an example: if you have taken a picture on a mobile phone, the photo on this phone is the original electronic confirmation, and the phone is the physical (technical) data medium on which it is stored. Therefore, providing the original electronic evidence to the court, we must file the above-mentioned phone. If we copy this photo to another device (flash drive, CD, etc.), this will be an electronic copy of the electronic proof. If you print this image, it will be a paper copy of the electronic proof.

Proceeding from this, problems with the certification of copies will also arise. For example, it is not clear how to submit a copy of the video to the court, if in order to make a copy of the video. An electronic digital signature must certify the video, which is technically impossible. Therefore, if the civil process is not able to obtain the original video (for example, a video taken on a live stream on a web site, videos from video surveillance cameras stored in a cloud service over the Internet), then they will not be able to submit such materials as a copy of the electronic proof. In any case, the court must directly accept the evidence and be sure of its integrity. The problem with sound recordings is similar. Therefore, a procedure such as a review of evidence of their location (paragraph 7 of Article 85 of the CPC) may come to the aid. The court can itself initiate such a procedure, or carry it out on the request of the party. But, in my opinion, such a provision is also ineffective since with the spread of the Institute of Electronic

Evidence, such situations can often arise and the court will not be able to physically examine dozens of cases per day and also should go to places for watching videos, listening to audio and viewing the web, pages.

These difficulties arise from the more complex types of electronic evidence (video, sound recordings). Nevertheless, in practice the court challenges the integrity of copies of ordinary text documents, even if an electronic digital signature certifies them. There are cases when the court requires the registration of such records on the media itself. Otherwise, such evidence would be inappropriate because of the problem in the structure of the data placement on the data medium, attachment of the attribute file in connection with the access to the media. That is, the court requires "confirmation of evidence". You need to capture the process of downloading files (taking pictures or monitoring video) to the media. You must submit to the court and this data medium. In addition, you need information about the media itself. In some cases, in order to record properly, you need special knowledge in technology and programming.

Consequently, before settling on the legislative level, the issue of the certification of copies of electronic evidence from the parties to the proceedings will be possible to submit electronic evidence only in original. In addition, the legislator does not adequately regulate the order of submission. Therefore, it remains open to question what exactly to consider the original of electronic evidence. Consequently, the court may have questions regarding the assessment of this evidence. [3, p. 13]

Therefore, we believe that the introduction of such changes to the Code (even several codes) was hasty and unexplored. The changes do not eliminate the existing problems, but instead create new ones. At the time of their introduction, a certain practice has already been associated with the submission of electronic evidence, which is even clearer than the current provisions of the Law.

Consequently, we believe that today the Institute of Electronic Evidence is difficult to apply in practice or ineffective at all. Therefore, we propose to amend the relevant provisions of the Civil Procedural Code. In the first place, it is necessary to determine what it is necessary to consider as the original of the electronic proof, and what a copy. In my opinion, the original must be an electronic proof of attachment to the medium where it created for the first time. However, such provisions should not apply to the originals of electronic text documents certified by an electronic digital signature, since such a document is an original regardless of its original source. In addition, a more detailed definition of the procedure for filing electronic evidence is particularly necessary, since the violation of such a procedure creates the grounds for the admission of evidence to be inadmissible. It is necessary to regulate the direct procedure for submitting electronic evidence, which grounds on the recognition of a copy of electronic evidence as inadmissible evidence. Therefore, we could be noted that such a new institute of civil procedural law as electronic evidence is imperfect today and clearly needs legislative changes to create an effective and realistic opportunity to use this type of evidence in civil justice.

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