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Electronic Evidence in Administrative Proceedings

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Abstract

The study established the role of electronic evidence in the system of administrative procedures in Ukraine and in the member states of the Council of Europe. Direct observation, comparison and analysis of the content of the documents were used. The key results of the study were the peculiarities identified from the use of electronic evidence in administrative procedures among the 47 member states of the Council of Europe; established sources of creation, origin of electronic evidence to be used in administrative procedures; the resolute attitude of the European Court of Human Rights and the Committee of Ministers of the Council of Europe towards electronic evidence in administrative proceedings. Unlike paper documents, electronic documents require special attention to their review, search and involvement in the case. It is concluded that the study of electronic evidence should be approached from the point of view of the knowledge and skills of specialists, experts and interpreters who have the appropriate license and experience. The prospects for further investigations are establishing the importance of law enforcement agencies in the field of cybersecurity in ensuring the integrity of electronic evidence used in administrative proceedings.

Keywords: administrative proceedings; administrative court; electronic evidence; electronic documents; digital law.

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Prueba Electrónica en Procedimientos Administrativos

Resumen

El estudio estableció el papel de las pruebas electrónicas en el sistema de procedimientos administrativos en Ucrania y en los estados miembros del Consejo de Europa. Se utilizó la observación directa, la comparación y el análisis del contenido de los documentos. Los resultados clave del estudio fueron las peculiaridades identificadas del uso de evidencia electrónica en procedimientos administrativos entre los 47 estados miembros del Consejo de Europa; fuentes establecidas de creación, origen de pruebas electrónicas para ser utilizadas en procedimientos administrativos; actitud decidida del Tribunal Europeo de Derechos Humanos y del Comité de ministros del Consejo de Europa hacia la prueba electrónica en los procedimientos administrativos. A diferencia de los documentos en papel, los documentos electrónicos requieren especial atención a su revisión, búsqueda e implicación en el caso. Se concluye que el estudio de la evidencia electrónica debe abordarse desde el punto de vista del conocimiento y las habilidades de especialistas, expertos e intérpretes que tengan la licencia y experiencia adecuadas. Las perspectivas de nuevas investigaciones están estableciendo la importancia de los organismos encargados de hacer cumplir la ley en el campo de la ciberseguridad para garantizar la integridad de las pruebas electrónicas utilizadas en los procedimientos administrativos.

Palabras clave: trámite administrativo; juzgado administrativo; prueba electrónica; documentos electrónicos; derecho digital.

Introduction

The issue of their role of electronic communication technologies in the relationship between government and society is acute in the age of their rapid development. At the same time, there is a rapid comprehensive transformation of the results of governmental activity into electronic form.

The opposing parties in the administrative proceedings are public authorities and local self-government bodies, on the one part, and individuals and legal entities — on the other. The parties use a variety of evidence, including electronic, to protect their interests. In this regard, the public need has prompted to enshrine electronic evidence in the legislation. It is expected that electronic evidence in judicial proceedings will soon become the only type of evidence (Polishchuk, 2019).

Electronic evidence is a relatively recent addition to the instruments of evidence in judicial proceedings. After all, one should know their distinctive features and characteristics to properly assess the possibility of

using electronic evidence. Most electronic gadgets are now permanently or intermittently connected to other digital devices or networks (internal or Internet). Traces of created files and history logs can form a large volume of electronic evidence (Weir and Mason, 2017).

The collection of digital evidence is relevant in all types of judicial proceedings. Public authorities have powerful legal opportunities to collect the necessary evidence, including digital (Kasper and Laurits, 2016). The functioning of the national system of administrative justice has certain features that distinguish it from other judicial proceedings. The purpose of administrative proceedings is to effectively protect the rights, freedoms and interests of individuals, the rights and interests of legal entities from violations by power entities (Verkhovna Rada of Ukraine, 2005). Therefore, individuals and legal entities are not on an equal footing with the state in obtaining and using the necessary electronic evidence to protect their rights and interests.

Besides, the case law is ambiguous in deciding which electronic evidence (in what form or on what medium) to consider admissible instruments of evidence. The issue of electronic evidence research is becoming increasingly important in view of the frequent controversial debate among lawyers and the ambiguous case law on the relevance and admissibility of electronic evidence in administrative proceedings. The procedure for registration, submission and examination of electronic evidence remains unregulated (Manzhula, 2020).

In judicial proceedings in general, electronic evidence means a proof that is stored in electronic form by the service provider or on their behalf at the time of its request and consists of: data on the signatory, access data, transaction data and content data (Tosza, 2020). In this regard, the Committee of Ministers of the Council of Europe emphasizes on the necessity of appropriate and secure manner of collecting the electronic evidence as the risk of destruction or loss of this type of evidence is much higher than of non-electronic ones, so the specific procedure of collecting and seizing the electronic evidence must be developed.

Evidence in electronic or printed form is a different type of independent complete evidence that can be used in administrative proceedings (Alifian Geraldi Fauzi et al., 2021).

However, electronic evidence can be found in emails, digital photos, ATM transaction logs, in text documents, messenger histories, files saved in accounting programmes, spreadsheets, in the history of Internet browsers, on a computer hard drive, in tracks of the global positioning system (GPS), logs of hotel electronic door locks, video or audio files. However, digital evidence has no physical weight, but it is difficult to destroy it without leaving electronic traces. At the same time, they are easy to change, copy and easier to access (Dubey, 2017).

The aim of the article is to establish the significance and features of the use of electronic evidence in the administrative proceedings at the national level and in the member States of the Council of Europe. The aim involved a number of objectives: study the features and characteristics of the use of electronic evidence in courts during administrative proceedings; analyse probable sources of origin and creation of electronic evidence; identify possible forms of electronic evidence and their features that enable them to be appropriate and admissible evidence.

1. Methods and Materials

The study was conducted by studying modern scientific thought and position on the peculiarities of the use of electronic evidence in administrative proceedings in the world and at the national level. The legislative regulation of the procedure for submission and examination of electronic evidence in the administrative courts of the member States of the Council of Europe was compared.

To achieve the aim of the article, the concept of electronic proof was studied, the typical structure of an electronic document and the role of a digital signature in it were clarified. The author developed types of electronic evidence in administrative proceedings by source of origin and source of creation, and distinguished the features of electronic evidence among other types of evidence.

The study was conducted using the following methods: *direct observation* established the opinion of modern scholars and researchers in the field of administrative proceedings; *the method of comparison* helped to identify common features and differences that distinguish electronic evidence among other types of evidence*; the method of analysis of the content of documents* allowed determining the main forms of electronic evidence that occur during administrative proceedings.

The means of obtaining the necessary sources of information were the views and positions of scholars on the use of electronic evidence in administrative proceedings. There were a total of about 30 sources and references used.

2. Results

The growing need for the use of electronic evidence in administrative proceedings indicates the rule-making development of the European Union (hereinafter — the EU) legislation. In the internal market, the eIDAS Regulation sets the standard for electronic signatures, electronic messages,

timestamps, electronic delivery services and website authentication certificates. The fundamental principle of the eIDAS Regulation establishes the presumption of legal force of electronic evidence. The eIDAS Regulation is used in the interstate financial transactions, one of the parties to which is a European organization (Jokubauskas and Świerczyński, 2020).

Electronic evidence consists of three main elements: binary data (ones and zeros); a storage device on which this data can be stored; software for the proper reading, decoding and interpretation of this data. Evidence of modern financial transactions or documents can in fact only be in electronic form.

The specifics of the study of documentary evidence are that witnesses are involved in this process. The evidence which contains factual data, not indirect information is considered to be real (Stanfield, 2016). The Law of Ukraine "On Electronic Documents and Electronic Document Circulation" contains a definition of the term "electronic document". In particular, an electronic document is a type of document that is electronic data, the mandatory part of which is the details and digital signature (Verkhovna Rada of Ukraine, 2003).

Besides, the evidentiary information recorded on a paper document differs from that contained on an electronic medium. The hard copy (paper) is inextricably linked physically with information and information cannot exist by itself without it. On the contrary, electronic data can be moved between different media without distortion. In addition, the environment of electronic evidence can be many different media, where data reading and interpreting requires software created by humans. Complex issues may arise regarding the integrity and security of electronic evidence due to their unique characteristics, although the authentication of complex forms of electronic evidence will differ from less complex forms of electronic evidence, such as emails or text messages.

The European Committee on Legal Co-operation conducted a study on the use of electronic evidence in administrative proceedings among the 47 member States of the Council of Europe. It was established that none of these states has normatively defined rules on the procedure for obtaining electronic evidence. Polish law does not provide for the definition of any type of "electronic evidence" in all types of proceedings. In Turkey, the Code of Administrative Procedure also does not provide for separate rules on the procedure for submitting electronic evidence. Croatia, Czech Republic, Estonia, Greece, Romania and Serbia provide for the obligation to certify electronic evidence with an electronic signature.

In France, a party may submit a copy of a website or a screenshot to prove a legal fact, but the court may deem it necessary to request information to clarify it. In Lithuania, court rules provide for the submission of original

documents, and if copies are provided — the notary or lawyer involved in the case must certify them. An electronic digital signature is used to identify the person who signed the electronic document, not its contents (Avramenko, 2019). Among the surveyed European countries, the use of a modern electronic signature demonstrates the authenticity of electronic proof in Belgium and Spain. In England and Wales, as well as in Montenegro, the law on electronic signatures provides for the reliability of electronic evidence, which is duly certified by an electronic signature.

If electronic evidence violates standards or special procedures, the court will evaluate it in an ordinary way, taking into account all the technical evidence provided. In turn, the court usually requires that copies of Internet websites be provided in such a way as to preserve their authenticity (Mason and Rasmussen, 2016) (Figure 1).

There are ways to ensure authenticity of copies of electronic evidence	**There are legal provisions on the procedure for presenting evidence**	**A particular form of the electronic signature is required**	**Certain types of electronic evidence are distinguished**
Andorra, Croatia, France, Lithuania, Turkey	Croatia, Poland, Serbia	Estonia, Belgium, Ukraine, Czech Republic, Germany, Greece, Romania, Montenegro	Latvia (electronic documents, demonstration evidence), Turkey (electronic data accepted as documents)

Figure 1: Electronic evidence in different countries

Source: Authors.

However, the guidelines of the Committee of Ministers of the Council of Europe on the use of electronic evidence in administrative proceedings state a different position. Courts should not deny the legal force of electronic evidence just because it does not contain a digital signature. It should also be noted that the probative value of electronic evidence is determined exclusively by the court, taking into account national law. Courts should also be aware of the probative value of metadata and the possible consequences of not using it. Besides, electronic evidence must be submitted in its original electronic format without the need to submit it in

hard copy. As for their admissibility and reliability, there are no priorities for other types of evidence.

In our opinion, the adoption of the Guidelines by the Council of Europe is of great importance for improving the process of using electronic evidence in administrative proceedings. These principles must be adopted and put into practice by lawyers, judges and IT professionals. Moreover, the efficiency of the modern justice system be significantly increased only with the help of electronic evidence (Oręziak and Świerczyński, 2019).

The European Court of Human Rights has repeatedly recognized electronic documents as appropriate evidence for the protection of citizens' rights in the course of administrative proceedings. The examples are as follows.

- The case of *Catt v. The United Kingdom*. The Court held that there had been a violation of Article 8 (right to respect for private life) of the Convention. It found, in particular, that the personal data stored in the police database were of a political nature and that such information needed special protection;
- The case of Gaughran v. The United Kingdom. The court ruled that there had been a violation of Article 8 (right to respect for private life) of the Convention. The Court found that the United Kingdom's actions constituted a disproportionate interference with the applicant's right to respect for his private life, which could not be considered necessary in a democratic society. The court also noted that the decisive factor was not the duration of storage of the man's personal data (DNA profile, fingerprints and photograph), but the lack of certain measures to preserve them (European Court of Human Rights, 2021).

The collection of electronic evidence has its peculiarities. In particular, digital evidence is stored on servers owned by service providers. Most providers are foreign entities of American descent: Google (which owns YouTube), Facebook (which owns Instagram and WhatsApp), Microsoft (Skype); Apple and Amazon. However, such data can be managed by their Europe-based branches. In this case, the servers can be kept in large data centres in another country. For example, a huge Facebook data centre is located in Sweden (Sverdlik, 2018).

According to the source of origin, electronic evidence in administrative proceedings is divided into three groups (Figure 2).

Obtained from publicly available Internet sources	Substantive evidence	Identify the user (not content)
- from websites; - from social networks.	- stored on servers (e-mail; cloud storage); - stored on electronic media or devices (digital documents; photos; videos)	- metadata; - traffic data; - GPS coordinates about the movement of a person or vehicle; - digital signature; - login and e-mail name

Figure 2: Types of electronic evidence in administrative proceedings by source of origin

Source: Authors.

Digital data	Analogue data	Digitilised data or things (created manually or mechanically)
Digital photo, video, audio recordings of a digital video camera etc.	Records of a video camera or voice recorder that uses a video or audio tape, digitilised or used with a suitable device, if available.	Scanned hard copies of documents, paper photos, camera film negatives etc.

Figure 3: Sources of electronic evidence in administrative proceedings

Source: Authors.

Electronic documents are a particularly important form of electronic evidence. However, the best form of electronic evidence is the original (primary) data, not a digital or digitalised copy (Institute of Advanced Legal Studies, 2019).

In turn, we propose to single out the following forms of electronic evidence that are accepted in administrative proceedings: electronic

document; media data; databases; digital traces of activity on electronic devices.

Electronic evidence is equivalent to other types of evidence, in particular: physical evidence, witness statements, expert opinions, etc. (Zlenko *et al*., 2019). The Supreme Court ruled that judges should not consider printed e-mails to be improper evidence because all types of evidence have the same legal force (Supreme Court of Ukraine, 2018). However, the Universal Declaration of Human Rights imposes certain restrictions. Personal correspondence through electronic devices can be used as evidence either with the consent of the addressee and the addresser of the messages or by court decision, if the content of the messages contains relevant evidence (United Nations, n. d.)

An electronic document is a document that is created in electronic form without its prior setting out on paper, and signed with an electronic signature in accordance with the law (Karasev *et al.,* 2021). In this case, metadata (file information) is part of the electronic document.

Any evidence, electronic or material, if collected in violation of the law will be considered inadmissible by the court (Leroux, 2004). For the admissibility of electronic evidence in court, two conditions must be met simultaneously: 1) they must be obtained with the permission of the competent authorities; 2) they must be validated by information technology experts (Moussa, 2021).

The rules on the admissibility of electronic evidence generally do not depend on the complexity of such evidence. However, the amount of evidence to establish the reliability of digital data may vary depending on the complexity of the evidence. The use of digital evidence can create additional tools to establish the truth during litigation. At the same time, if we responsibly collect, store and use them, they can retain their authenticity and provability for a long time (Global Rights Compliance, 2017).

In this regard, the Committee of Ministers of the Council of Europe emphasizes that electronic evidence should be collected in a proper and secure manner. Given the higher risk of potential destruction or loss of electronic evidence compared to non-electronic evidence, Member States should establish procedures for the safe caption and collection of electronic evidence.

Traditional methods of storing electronic data — printing, blocking cloud or server storage — are largely dependent on the operator or administrator. So, traditional methods are not effective in the age of big data. They should be replaced by cybersecurity agencies, timestamp certification and a blockchain system (Shang and Qiang, 2020). A blockchain is an electronic structure in which individual network nodes record shared data to their storage. In other words, each network node has a repository that stores data

hosted on multiple nodes (Kim *et al.,* 2021). Besides, the imposition of large fines on those who destroy electronic evidence is a well-established case law in the United States to prevent the destruction or damage of electronic evidence (Nechyporuk, 2020).

The use of artificial intelligence at the stage of analysis and evaluation of evidence is unacceptable, as it violates the main principles of justice: legality and fairness. Interpreters should be involved to establish the true meaning of evidence and legal norms (Karasev *et al.,* 2021).

The main features of electronic evidence in administrative proceedings, which distinguish them from other types of evidence, are: the amount of electronic evidence is larger because they are faster and cheaper to create; it is more difficult to get rid of electronic evidence, because traces remain on electronic devices after their removal; the content of electronic evidence can change (be distorted) even without human intervention; electronic evidence requires special protection against damage; unlike paper evidence, they can be copied from one device (media) to another; electronic evidence is faster to find; the court should involve specially trained experts for a fair assessment of electronic evidence.

3. Discussion

In scientific sources, electronic evidence in administrative proceedings is understood as evidence that is stored in electronic form, which reflects the results of the activities of authorities or persons and contains: data on signatories, access data, transaction data and content data (Tosza, 2020). We partially agree with this definition. Digital evidence must have four mandatory features to be legally admitted to trial: they must be reliable, accurate, comprehensive, and convincing (Yeboah-Ofori and Brown, 2020). Admissibility of evidence is such a sign that provides the legitimacy of their involvement in the case (Edward and Ojeniyi, 2019).

It is considered that evidence in the form of electronic information and electronic documents, as well as documents printed on paper are the types of equivalent and independent evidence that can be submitted in the proving process to the state administrative court (Alifian Geraldi Fauzi *et al*., 2021). At the same time, digitally signed electronic documents may be modified by a third party. Verification of documents and digital signatures allows finding out whether the electronic document was changed after signing.

Research shows that there is no special law or procedure for evaluating electronic evidence in many countries. However, judges can do this in two ways: either with the help of experts or digital evidence specialists; or draw conclusions based on simple electronic evidence that is accurately considered (Chaudhry *et al.,* 2020).

In turn, a specialist who examines electronic evidence must have certain knowledge and skills, in particular: be able to investigate the case; have sufficient knowledge of a specific problem; sufficient legal knowledge; appropriate communication skills (for oral and written explanations); sufficient knowledge of the language contained in the electronic evidence. As a rule, the ISP provides the requested electronic data directly to the requesting authority. However, sometimes coercive state intervention in such a process is necessary. At the same time, the combination of the results of all possible tools used to extract evidence and study all data sources, electronic or not, will significantly improve the effectiveness of establishing the truth in the case (Reedy, 2020).

All the advantages and possibilities of electronic evidence in administrative proceedings are promising and inevitable. Video conferencing is an important means of simplifying and speeding up the collection of electronic evidence, however, it is not widely used. The diversity of administrative cases and people's capacity to access electronic evidence and electronic devices on which they can be attached to the case reflects the principle of access to justice in the country. To this end, the government must propose and provide ways for society to access e-justice (Putrijanti and Wibawa, 2021).

Conclusions

Electronic evidence is important in administrative proceedings, as it is the main evidence of the activities of public authorities. It is proposed that administrative courts make extensive use of electronic evidence, as it will become the main type of evidence in the near future. Unlike paper documents, electronic documents require special attention to their study, search and involvement in the case. To ensure the admissibility of electronic evidence, courts must pay special attention, as they are easy to destroy, damage or modify. They are easier to access and easier to find the necessary proof.

Not all member States of the Council of Europe have ways to ensure the authenticity of copies of electronic evidence or legal provisions on the procedure for presenting evidence. Not all countries also require a specific form of electronic signature to establish the admissibility of electronic evidence. In this regard, there must be a presumption of admissibility of electronic evidence in administrative proceedings. At the same time, the study of electronic evidence should be approached from the perspective of knowledge and skills of specialists, experts and interpreters who have the appropriate license and experience.

Electronic evidence in administrative proceedings is used ambiguously and chaotically, without taking into account their features and characteristics. Courts should involve relevant specialists for the examination of electronic evidence in the course of administrative proceedings, and take into account the sources of origin and creation of electronic evidence for their comprehensive assessment.

An electronic document is a form of electronic evidence, and a digital signature allows identifying the signatory of an electronic document. This simplifies the procedure for examining the appropriateness of electronic evidence. In most Council of Europe member States, the absence of a digital signature does not deny its legal force, as all types of evidence are equivalent. In this case, the administrative court must adhere to the principle of individual consideration of each case and verify electronic evidence from the moment of their creation, transmission, reception, storage and collection.

Electronic documents can also be encoded to prevent others from viewing and modifying them. Electronic evidence is a broader concept than an electronic document.

The prospect for further research may be the role of cybersecurity law enforcement agencies in maintaining the integrity of electronic evidence in

administrative proceedings.

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