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ЕЛЕКТРОННІ ДОКАЗИ В ЦИВІЛЬНОМУ ПРОЦЕСІ: ПОНЯТТЯ ТА ВИДИ

У статті досліджується комплекс питань, безпосередньо пов'язаних із ефективним використанням сучасних джерел інформації в межах сучасного етапу розвитку цивільного судочинства. Автори зазначають, що реалізація права на справедливий судовий розгляд є неможливою без створення умов для всебічного та повного з'ясування обставин справи.

Ураховуючи це, метою статті є визначення основних засад використання електронних засобів доказування в цивільному процесуальному праві з урахуванням структурних, видових та процедурних особливостей дослідження та оцінки доказів у цивільному судочинстві.

Під час проведення наукового дослідження аналізуються ключові базові категорії цивільного судочинства, зокрема поняття доказів. Комплексне дослідження відповідних наукових підходів дало змогу визначити власну думку стосовно досліджуваного концепту. Зокрема, під поняттям доказів пропонується розуміти зібрану з дотриманням процесуальної форми доказів за допомогою передбачених законом засобів доказування інформацію про факти та/або обставини, на підставі якої суд доходить висновку про наявність або відсутність фактів і обставин, що обґрунтовують вимоги та/або заперечення осіб, які беруть участь у справі, та інших обставин, які мають значення для розгляду і вирішення справи. Особливу увагу приділено варіативності дефінітивних підходів у визначенні сутності електронних доказів.

Також висвітлюється проблема визначення видів електронних доказів, а також проведення їх класифікації. Наголошується на тому, що наукові спроби здійснити відповідну класифікацію позбавлені логічного та прикладного сенсу, оскільки неможливим є дотримання

єдиного критерію як підстави поділу, та визначення усіх можливих видів електронних доказів. Тому робиться висновок стосовно доцільності формулювання широкого визначення (дефініції) поняття електронних доказів шляхом перерахування їхніх найважливіших сутнісних ознак. На основі цього було виокремлено найбільш поширені види джерел цифрової доказової інформації.

Дослідивши теоретичні та практичні аспекти використання електронних доказів у межах цивільного процесу, як висновок автори пропонують власні підходи до визначення поняття електронних доказів. Так, під ними пропонується розуміти зібрану з дотриманням процесуальної форми доказів за допомогою передбачених законом засобів доказування інформацію про факти та обставини в цифровій формі, яка зафіксована за допомогою передбачених законом електронних матеріальних носіїв, або така, що передається по каналах електрозв'язку, на підставі якої суд доходить висновку про наявність або відсутність фактів і обставин, що обґрунтовують вимоги та/або заперечення осіб, які беруть участь у справі, та інших обставин, які мають значення для вирішення справи.

Ключові слова: *цивільний процес, доказування, електронні докази, справедливий судовий розгляд, електронний документ, електронні носії.*

Article 1 of the Civil Procedure Code of Ukraine stipulates the tasks of civil proceedings, which presupposes fair, impartial review, as well as handling all pending civil cases in a timely manner. Particular legal prescription is designed in order to protect violated, unrecognized or disputed rights, freedoms or interests of individuals, rights and interests of legal entities, interests of the State. The provision of the aforesaid law is consistent with the Paragraph 1 of Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which enshrines the right to a fair trial. Admittedly, certain right has found its interpretation in the practice of the European Court of Human Rights, where the substantiated court decisions are considered to be one of the major elements of the investigated right. In its turn, the substantiated character of the judicial decisions is immanently connected with their legality and appropriateness.

The implementation of the right to a fair trial is impossible without establishing the conditions for a comprehensive and complete clarification of the circumstances of the case and providing the parties and other persons involved in the case with the opportunity to provide, secure and examine the evidence necessary to establish the circumstances of the case in the most convenient and effective way. The Institute of Evidence is an important structural element of judicial proceedings in civil procedural law. Its scope is quite broad, so that the issues of both theoretical and practical essence were the focus area of majority of legal thinkers, particularly: S. S. Bychkova, Yu V. Bilousov, O. T. Bonner, K. L. Barnovytskyy, L. A. Vaneeva, E. V. Vaskovskyy, O. P. Vershinin, S. P. Vorozhbit, A. H. Golmsten, M. V. Horelov, M. A. Gurvych, P. P. Hureev, I. M. Zaytsev, O. F. Kleinman, V. V. Komarov, V. A. Kroitor, S. V. Kuriliov, V. Yu. Mamnytskyy, E. O. Nefedyev, V. K. Puchynskyy, I. V. Reshetnikova, V. I. Reshetniak, T. V. Ruda, T. V. Sakhnova, S. I. Semyletov, M. S. Strohovych, V. I. Tertyshnikov, M. K. Treushnikov, F. N. Fatkulin, S. Ya. Fursa, D. M. Tsekhan, D. M. Chechot, N. O. Chechina, M. Ya. Shtefan, K. S. Yudelson, V. V. Yarkov, as well as other representatives of procedural law.

Despite the considerable attention of jurists to the challenges arisen from the evidence in the civil process and the investigation of certain sources of evidence, there are still several shortcomings existing at the level of domestic legal science, namely at the dissertation level. In particular, among them are following: legal nature of electronic forms of evidence, their classification and problems of their use in civil proceedings.

To some extent, this is an obstacle to efficiently using of modern information sources. Also, it impedes the development

of relations with the use of modern information and communication technologies, in particular, e-commerce. This situation is caused, along with the aforementioned, by the lack of legislative regulation of electronic forms of evidence in the system of means of proof in general, and, in particular, by the lack of established mechanisms for their presentation, investigation, evaluation, securing, etc.

In foreign countries, the implementation of new information technologies has become one of the key issues in the modernization of civil processes. E-forms of communication, in particular, the World Wide Web, reached the level of development on the practical use and influence significantly on public life that they require a certain regulatory regulation, especially when used in the process of civil case resolution. Otherwise, acknowledging the value of such communication networks, they will remain inaccessible for use in the judicial process in civil cases.

Therefore, there has been an increasing tendency to elaborate the electronicization of communications within the framework of legal proceedings. Curiously, such a tendency is inherent for the domestic civil process. Namely, in accordance with the Order issued by the State Judicial Administration of Ukraine of May 31, 2013 No. 72 «On the implementation of the project on the exchange of electronic documents between the court and the participants in the judicial process», the subjects of civil procedural legal relations already have the opportunity to exchange electronic documents with the court. Remarkably, they can receive judicial summons and messages via SMS messages or participate in the court session via videoconference, etc. Nevertheless, within the framework of civil procedural law, the issues related to the use of electronic forms of evidence have still remained largely unresolved. In this regard, achieving the objectives of civil proceedings, stipulated in Article 1 of the Civil Procedure Code of Ukraine, it is quite important to investigate the question of evidence in the context of the use of electronic means of proof.

Against this backdrop, the necessity in scientifically examination of electronic forms of evidence as a specific theoretical and applied problem is obvious enough. Above suggested circumstances predetermine the relevance of the chosen topic, particularly, its theoretical and practical significance. Within this framework, the question arises regarding the determination of certain rules (principles) for their use during the evidentiary process in civil proceedings. Along with this, there is an urgent need for faithful interpretation of the existing material and procedural norms, as well as examination of practice of their application, with the special focus to the characteristics of electronic means of proof in civil proceedings.

The aim of the current investigation is to determine the basic principles of the use of electronic forms of evidence in civil procedural law, with the special reference to the structural, peculiar and procedural features of the investigation and evaluation of evidence in civil proceedings.

At first view, an e-document is hardcopy information presented in electronic form, that is, in a form appropriate for human perception using electronic computing machine, as well as for information transmission over the telecommunication networks or processing in information systems. Basically, an electronic document is a collection of data in the memory of an electronic computing machine designed for human perception using appropriate software and hardware.

According to O. P. Vershynin, the essential features of an e-document are its content (information) and form (technical electronic data storage device). An e-document is information recorded on electronic media, which contains details that allow it to be identified[1]. However, this definition has its own substantial shortcomings, the main of which is that the specificity of the document (that was emphasized earlier) as

[1] А Вершинин, *Электронный документ: правовая форма и доказательство в суде* (2000) 40–41.

a whole is not taken into account at al. Additionally, it is worth noting that, in contrast to a regular document, the e-document can be «scanned», or rather converted into a form that is accessible to human perception only via special technical means (personal computer, etc.), and sometimes with using special programs and / or special knowledge and skills.

In its turn, another legal thinker suggests defining an e-document as the information about persons, objects, facts, events, phenomena and processes, presented in a digital form and recorded on a computer system by means of electromagnetic influence or via the transmission through telecommunication channels by electromagnetic signals details, which allows the recipient to identify such information[1].

In our opinion, the following characteristic features of the e-document as an instrument of proof can be marked out.

1. The impossibility of direct perception by a human of information recorded in an e-document in an electronic-digital form. At the same time, the creation and reproduction of an e-document requires the use of hardware and software in order to bring its information into a form appropriate for the perception.

2. The presence of the requisites (technical properties), allowing to identify the recorded information. These details are attached to the main content of the document, and allow the recipient to determine the source of the information, its purpose, the time of documentation, and in some cases provide protection against forgery. Identification requisites must be recorded on the same media as the data identified. Among such specific requisites is an electronic signature.

3. Availability of electronic data storage device. It may be the object of the material world, which is appropriate for the use by technical means for specific information storage, such as magnetic or optical disk, flash card and the like.

4. The ability to change the form of recording the documented information. In contrast to the traditional hard-copy, there is no inextricable link of information in electronic forms, since the same document can easily change the data medium and simultaneously exist on several media without any threat of losing its content and details. At the same time, the existing copies of the electronic document are identical originals, and therefore have equal legal force. Based on the above, it is appropriate to talk about an electronic copy of an e-document.

5. The document should contain the information necessary for use in the relevant purposes, primarily to establish the circumstances in certain civil cases.

Quite deliberative is the question regarding the place of an electronic document among the evidence. In legislative framework, there are several approaches on the place of an e-document among the evidence. From the general perspective, an e-document is suggested to be classified (with separate comments) either to material or documentary evidence. The justification of these approaches is most easily traced via the example of the domestic legislation, where the status of an e-document is defined most clear way. For instance, in civil procedure of UK, in accordance with the Section 10 (1) of the Evidence Act of 1968, such type of evidence is defined as a documentary. The latter is considered to be the information, included in a particular data medium by means of signs, as well as information that has been materialized in photographs, maps, on disks, magnetic films or other media on which such an information can be reproduced with or without instruments, as well as information recorded in films, negatives, or other tools through the which visual images are reproduced[2]. It is significant enough that UK legislation

[1] В Вехов, 'Электронные документы как доказательства по уголовным делам' (2004) 2 *Центр исследования компьютерной преступности* <http://www.crime-research.ru/articles/Wechov3/> дата звернення 16.11.2018.

[2] Civil Evidence Act 1968 <http://www.legislation.gov.uk/ukpga/1968/64/pdfs/ukpga_19680064_en.pdf> accessed 16.11.2018.

widely interprets the concept of documentary evidence, and even includes sound and video recordings that the current Civil Procedural Code of Ukraine refers to as material evidence.

Otherwise, the legislation also elaborates the approach, according to which an e-document is recognized as documentary evidence[1]. It seems that if we are talking about the e-document as the type of documentary evidence, the legislator proceeded from the fact that documentary evidence is information about facts recorded via the certain symbols in accordance with established rules. Since an e-document is the information storage within the sequence of numbers, it should be classified as documentary evidence. Despite the logical nature of this approach, one cannot unambiguously agree with it, since everything depends on the interpretation of the term «documentary evidence».

Along with this, in the electronic sphere the term «file» in its broadest concept is treated as a single element of the creation, storage and transmission of information in the electronic environment. Therefore, the file can contain audio and video information, graphic images, and also includes electronic documents and messages, that is, it is equivalent to the concept of evidence in the electronic sphere.

Apparently, based on the specifics of each type of electronic forms of evidence, it is relevant to divide them into the three groups:

1. Sound and video recordings that have a long history of use in civil proceedings and are the most investigated type of electronic forms of evidence. Their particularity is that they contain audio and / or visual information.

2. An e-document is equivalent to a document as the documentary evidence, taking into account the specific features that distinguish it from the others. However, it should be noted at the outset that in line with the terminology of the Code of Civil Procedure of Ukraine, documents are documentary evidence, and therefore, to maintain consistency in the use of terminology, it is unacceptable to include in this concept material that does not meet the criteria of documentary evidence.

3. An informational message (other information in electronic form) is the electronic equivalent of a group of other documentary evidence. This group of electronic forms of evidence does not have the necessary requisites to obtain the status of the document, but remains the source in which the information is recorded via the signs that are accessible in their nature. The most common example is information posted on website pages or electronic correspondence.

Moreover, according to the form of existence, scientists distinguish material and virtual e-documents[2]. Material e-documents are objects recorded on electronic media containing information that is meaningful and exist only in an electronic environment. A virtual document is a document that presupposes a collection of informational objects and is created as a result of interaction between the user and the information environment.

Finally, according to the source of origin, it can be marked out two types of files: 1) files that are created by the user and 2) files that are created by the computer system (that is, the electronic medium itself). Special attention should be paid to the latter due to the fact that in case of concluding electronic transactions, for example, when purchasing goods through an online store, all information about the transaction exists exclusively in electronic form and is created automatically via the seller's and buyer's computers[3]. Since a human does not affect the content and the formation of these elec-

[1] Гражданский процессуальный кодекс Российской Федерации: Федеральный закон от 14.11.2002 № 137-ФЗ <http://docs.cntd.ru/document/901832805> дата звернення 16.11.2018.

[2] Т Кукарникова, 'Электронный документ в уголовном процессе и криминалистике' (автореф. дисс. … канд. юрид. наук: 12.00.09 2003) 16–17.

[3] Reed Ch, The Admissibility and Authentication of Computer Evidence – A Confusion of Issues' (1990–1991) 2 Computer Law and Security Report <http://www.bileta.ac.uk/content/files/conference%20papers/1990/The%252

tronic forms of evidence, they are inherently objective and neutral.

Thus, in the doctrine and theory of procedural law there is no consensus about the concept of electronic evidence. Therefore, modern domestic science needs complex scientific research, which provided for following investigations: 1) the concept of electronic evidence; 2) their characteristics and properties; 3) legal nature; 4) structure; 5) types of electronic evidence and their distinctive features; 6) legal nature; 7) features of legislative regulation of the use of electronic evidence in the civil procedure of Ukraine, as well as in foreign countries; 8) the study of specific terminology related to the use of electronic evidence in civil proceedings; 9) features of the principles of civil procedural law on the use of electronic evidence, as well as the principles of electronic court proceedings; 10) specific features of the evidence process using electronic evidence (collection, including security, submission, investigation, evaluation, etc.); 11) the specifics of using electronic evidence in certain categories of civil cases, etc. Since there are no such studies in Ukraine, the problems of understanding and using electronic evidence are still open to the science of civil procedural law.

Based on the above conducted analysis, the author suggests to understand electronic evidence as collected information on facts and circumstances in digital form, which is recorded using electronic material medium prescribed by law, or which is transmitted via the telecommunications channels, within which the court concludes that there are facts or circumstances that substantiate the claims and / or objections of the persons participating in the case and other circumstances relevant for the case resolution.

The above definition of investigated concept seems to encompass two key features of electronic evidence that makes it possible to distinguish them from the others: first, this is a specific, direct form of information objectification, which is digital, which a person cannot perceive without converting it into other forms via the computer. And secondly, it is a special way of recording information, which is expressed in the form of a specific material medium, and in case of its absence – an indication of the source from which the relevant information was sent (can be sent) or received (can be received) and can be recorded.

Given definition of electronic evidence is fully consistent with the structural components of the concept of evidence. Primarily, it reflects the specific properties of both their component element (digital information) and formal (electronic media).

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Zakharova O., Tkachuk V. Electronic evidence in civil proceedings: regarding the issue of its definition and types.

The article constitutes an initial attempt to examine a set of issues directly related to the effective use of modern information sources within the current stage of civil justice development. Its central theme is an argument that the realization of the right to a fair trial is impossible without establishment of the conditions for a comprehensive and complete clarification of the circumstances of the case.

Against this backdrop, the overall purpose of the article is to determine the basic principles of the use of electronic evidence in civil procedural law, with the special reference to the structural, specific and procedural features of the investigation and evaluation of evidence in civil proceedings.

During the presented scientific research, key basic categories of civil proceedings were analyzed profoundly, in particular, the concept of evidence. A comprehensive study of relevant scientific approaches allowed the authors to outline their own point of view regarding the researched concept. Specifically, the notion of evidence is suggested to be understood as the collection of information made in compliance with the procedural form of evidence on certain facts and / or circumstance, on the basis of which the court concludes that there are facts or circumstances that justify objections of persons involved in the case, and other circumstances relevant to the consideration and resolution of the case.

Special attention is paid to the variability of definitive approaches in the determination of the essence of electronic evidence. Thus, this article contextualizes the problem of identification the types of electronic evidence, as well as their taxonomy. It is emphasized that scientific attempts to implement the appropriate classification are devoid of logical and applied meaning, since it is impossible to meet a single criterion which could be used as a basis for delineation, and to identify all possible types of electronic evidence. Therefore, it is concluded that it is appropriate to formulate a broad definition (notion) of the concept via revealing their key features. Within this framework, the most common types of sources of digital evidence were identified.

Having analyzed both theoretical and practical aspects of using electronic evidence within a civil process, as a conclusion the authors offered their own approach to the definition of electronic evidence. Namely, it was defined as collected information on facts and circumstances in digital form, which is recorded using electronic material medium prescribed by law, or which is transmitted via the telecommunications channels, within which the court concludes that there are facts or circumstances that substantiate the claims and / or objections of the persons participating in the case and other circumstances relevant for the case resolution.

Key words: *civil procedure, evidence, electronic evidence, fair trial, electronic document, electronic media.*

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