DOI: 10.33498/louu-2019-05-164

Vladislav Fedorenko

Doctor of Law, Professor, Director of the Scientific & Research Center of Forensic Expertise on Intellectual Property of the Ministry of Justice of Ukraine, Honored Lawyer of Ukraine, forensic expert of the higher qualification class (Kyiv, Ukraine)
ORCID ID: http://orcid.org/0000-0001-5902-1226
fedorenko900@gmail.com

Oleksiy Sobin

Head of the Laboratory of Copyright and Information Technologies of the Scientific & Research Center of Forensic Expertise on Intellectual property of the Ministry of Justice of Ukraine, a forensic expert of the first qualification class (Kyiv, Ukraine)
ORCID ID: http://orcid.org/ 0000-0003-4653-5986
aksobin@yahoo.com

Sergiy Zazimko

forensic expert of the Laboratory of Economic Research of the Scientific & Research Center of Forensic Expertise on Intellectual property of the Ministry of Justice of Ukraine, a forensic expert
(Kyiv, Ukraine)
ORCID ID: http://orcid.org/ 0000-0002-9343-7046
szazimko@gmail.com

УДК 343.148 (477)

ADVISORY MESSAGE ON THE RESULTS OF EXPERT RESEARCH: CONCEPT, CONTENT, SCOPE

Abstract. The publication is devoted to the actual problems of the theory and practice of an advisory message as a form of expert research results implementation in Ukraine. The scope of application of the advisory notice is determined. The advisory notice is delimited with the conclusion of the court expert, the expert's opinion on the order of the participant in the case and the conclusion of the expert study.

The contents of the advisory consultative message and its intrinsic features, revealing the scope of its application by court experts preparing an advisory message. It turns out that the conclusion of an expert study and an advisory message have common features: conducted in accordance with Art. 7-1 of the Law of Ukraine "On Forensic Examination", on the basis of an agreement on the order of individuals or legal entities; answer the specific questions of the customer (physical or legal person); may be of a complex nature, taking into account the objects of expert research and the content of the questions posed by the customer of such research; conducted by forensic experts certified by a forensic expert in the subject of expert research; based on specialist knowledge of a forensic expert; embody the results of expert research, etc. At the same time, an advisory notice is used to provide an expert assessment of the legitimacy of individual administrative procedures, in particular, when applying the negotiation procedure for the purchase of intellectual property rights (software products, hardware and software complexes, support and/or upgrade services, etc.)

The conclusion is that the consultative (from the French *consultatif*, which takes its origins from Latin cosulto – "advise" and means *'an advisory, which has advisory rights <…>'*) message – a written document, based on the results of an expert study, providing answers to specific questions with the application of special knowledge and methods of forensic examination among certified in the relevant specialties of forensic experts, in which an independent position of court experts has been formed to take into account authorized subjects during the administrative procedures.

Keywords: forensic examination; consultation; expert research; advisory notice; special knowledge; forensic expert; State Scientific&Research institutions of forensic expertise; administrative procedure; negotiation procedure of procurement.

Forensic reform and modernization of the current procedural legislation and other normative legal acts in this area, in particular, the Law of Ukraine "On Forensic Examination"[1], in 2016–2019, in conjunction with the development of transparent mechanisms for conducting public procurements and improving law-making and enforcement activities in the field of public services, substantially changed the legal landscape of forensic expert activity of State Scientific&Research institutions of forensic expertise (hereinafter – SSRIFE), as well as for forensic experts who are not employees of SSRIFE. In particular, the institute of expert opinion on the request of a party to the case provided for in Art. 102 of the Civil Procedural Code of Ukraine[2], other novels on forensic examination, attracting the attention of scientists and practicians.

It should also be noted that the potential of forensic expert activity is not limited to conducting forensic examination and drafting conclusions at the request of a participant in a civil case. Analysis of the activity of the Research Center for Forensic Examination on Intellectual Property of the Ministry of

[1] Про судову експертизу: Закон України від 25 лютого 1994 р. № 4038-XII. *Відомості Верховної Ради України*. 1994. № 28. Ст. 232.
[2] Цивільний кодекс України: Закон України від 16 січня 2003 р. № 435-IV. *Відомості Верховної Ради України*. 2003. № 40. Ст. 356.

Justice of Ukraine *(hereinafter referred to as the Center)* shows that about 65 % of the total number of forensic examinations and expert studies conducted by the Center in 2018 were conducted at the request of individuals or legal entities, according to By the Resolution of the Cabinet of Ministers of Ukraine of 27.07.2011 No. 804, and carried out '<…> with the use of means and methods of forensic examination, the results of which are issued as the conclusions of expert studies, consulting, requiring special knowledge'[3].

Hence, such expert investigations are conducted before or outside of forensic and pre-trial proceedings, which allows them to be conditionally defined as "extra-procedural expert studies".

The above-mentioned conclusions of expert research and advisory reports, provided on the results of non-procedural expert research on intellectual property issues have multiple purposes and are used not only to prepare for a lawsuit in the field of intellectual property. Based on the experience of conducting relevant expert studies at the Center in 2016–2018 *(Picture 1)*, it can be stated that they were used to ensure:

– requirements for termination of violation of the rights to an object of intellectual property;

– a legal position in applying the procedure of pre-trial (mediation) reconciliation of the parties;

– carrying out administrative procedures, in particular, tender procedures for the purchase of software products and software and hardware complexes etc. by negotiation procedure (Article 35 of the Law of Ukraine "On Public Procurement"[4] of 25.12.2015);

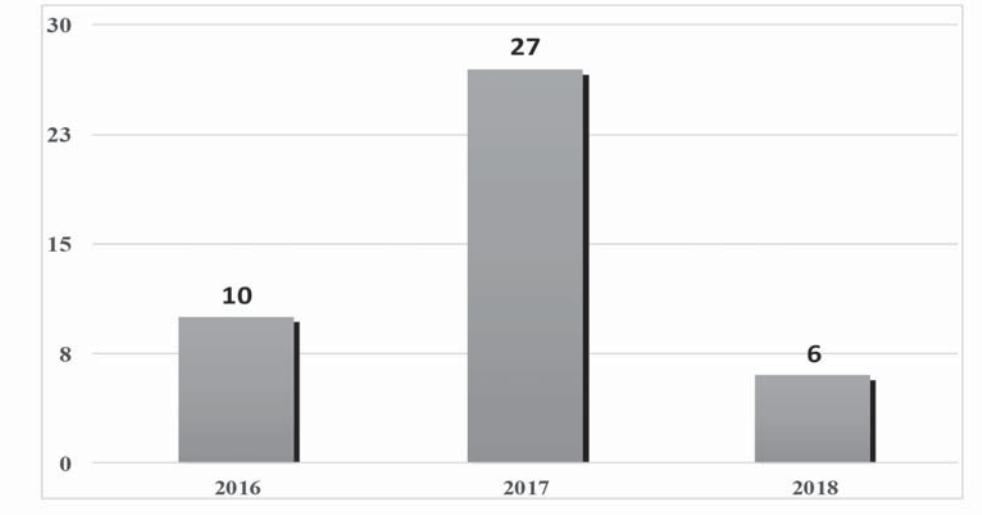
– a lawsuit on violation of the rights to an object of intellectual property, etc.

However, while the conclusions of the expert investigation, the order of its compilation and legal force are fairly systematically regulated by current Ukrainian legislation and studied in legal science, then '<…> providing consulting that requires special knowledge'[5] remains less investigated phenomenon in legal science. Often such consultations include any of not prohibited by the current legislation forensic expertise, forms of professional advice of a forensic expert to individuals and legal entities in relation to the grounds and conditions for conducting expert investigations or writing an expert opinion on the order of the participant in the case, etc. Therefore, questions regarding the legal nature of an advisory message require proper investigation and justification of its scientific background.

[3] Деякі питання надання платних послуг науково-дослідними установами судових експертиз Міністерства юстиції України: Постанова Кабінету Міністрів України від 27 липня 2011 р. № 804. *Офіційний вісник України.* 2011. № 57. Ст. 2296.

[4] Про публічні закупівлі: Закон України від 25 грудня 2015 р. № 922-VIII. *Відомості Верховної Ради України.* 2016. № 9. Ст. 89.

[5] Там само.



Picture 1. Quantitative indicators of advisory reports based on the results of expert studies at the Center in 2016–2018

The purpose of this research is the scientific justification of the content, the essential features, legal grounds and the legal consequences of providing an advisory notice, which draws up the result of an expert study based on the specific knowledge of certified forensic experts, as well as the formation of proposals for improving this type of forensic expertise.

Problems of the theory and practice of forensic examination and expert studies, the design of its results were investigated in the works of O. Doroshenko, P. Krainev, E. Simakova-Yefremen, N. Tkachenko, A. Stefan, and other experts. At the same time, the question of the content and the essential features of an advisory message based on the results of expert research has not received enough attention by scientists.

Forensic expert activity in Ukraine, by its definition, is aimed primarily at protecting legitimate interests, human rights and freedoms in the court (Article 55 of the Constitution of Ukraine)[6], ensuring the activity of courts and parties of pre-trial investigation, as well as other legal entities of public and private law, regardless of the forms of their activities.

The main forms of forensic expertise in Ukraine are forensic expertise and expert research. In the Law of Ukraine "On Forensic Examination" the legislator defined the category "forensic examination", but somewhat ignored the expert study. In addition, the same definition of forensic examination

[6] Конституція України: Закон України від 28 червня 1996 р. № 254к/96-ВР. *Відомості Верховної Ради України*. 1996. № 30. Ст. 141.

in Art. 1 of this Law is submitted through the use of the word "research": 'Forensic examination is a study on the basis of special knowledge in the field of science, technology, art, crafts, etc. objects, phenomena and processes in order to provide an opinion on matters that are or will be the subject trial'[7].

For different types of forensic expertise are inherent in their particularities, primarily related to the objects of research. In particular, forensic expertise on intellectual property issues is a deliberate activity aimed at obtaining evidence on the protection of the right on intellectual property, the content of which is to investigate by court experts on the basis of special knowledge in the field of copyright, trademark rights for goods and services, the rights of industrial property, the economy of intellectual property, objects, phenomena and processes, in order to provide objective and properly substantiated conclusions that are or will be the subject of forensic review.

Consequently, the research is the determining form of forensic expertise, which is inherent in conducting both forensic examination and expert research, determining their scientific character. The affinity of forensic examination and expert research is also confirmed by normative legal acts.

Thus, the Instruction on the appointment and conducting of forensic examinations and expert studies, approved by the order of the Ministry of Justice of Ukraine of 08.10.1998, No. 53/5, which, based on the content of its title, is aimed at normalizing the organization and conduct of forensic examination and expert research in Ukraine and, in our opinion, quite successfully fulfills this task, points to the similarity of the legal nature of forensic examination and expert research on their subject; methods; the order of conducting; presentation of results etc. In particular, in paragraph 1.3 of this Instruction it is stated that by forensic experts '<…> expert studies are conducted that require special knowledge and the use of methods of forensic science and forensic examination'[8], and Clause 4.23 pointing that: 'Expert investigations are performed in an order, foreseen for conducting of examinations. The course and results of such studies are described in the conclusion of the expert study'[9].

But, in our opinion, the results of forensic examination and expert research are well known to scholars and forensic experts not only in their legal force, but also in the form of the implementation of the results of relevant research. The content of the above analyzed normative legal documents in the field of forensic examination allows us to assert that the outcome of forensic

[7] Про судову експертизу (н 1).

[8] Про затвердження Інструкції про призначення та проведення судових експертиз та експертних досліджень та Науково-методичних рекомендацій з питань підготовки та призначення судових експертиз та експертних досліджень: наказ Міністерства юстиції України від 8 жовтня 1998 р. № 53/5. *Офіційний вісник України.* 1998. № 46. Ст. 1715.

[9] Там само.

examination is embodied in the opinion of a forensic expert, the content, structure and procedure of its execution, as well as features (notification of the impossibility of giving a conclusion, etc.), set in paragraphs. 4.14–4.2110 and does not require additional comments in the context of this publication.

As for the purpose of the expert's conclusion, then one can agree with A. Stefan that such a conclusion: '<…> is directed not to the establishment of known and undisputed facts, but to the search for certain new knowledge that is necessary for establishing the circumstances of the case and can not be obtained by the court in any other way'[11].

The cited opinion of the scientist once again emphasizes that the expert research should be understood, first of all, as a kind of scientific research with the use of special knowledge (including, in combination with the general knowledge of other sciences – logic, mathematics, etc.), which forms new knowledge or a system of new knowledge (when carrying out a complex examination or expert research) that help the court to establish the truth when considering cases.

It is obvious that such legal characteristics as a whole are inherent in the expert's opinion on the order of the participant of the case. In this context, the following universal definition is successful:

> <…> the expert's conclusion is a means of proof, which is formed by an expert as a result of a study based on the use of special knowledge, on request of a party to a case or on the basis of a court order on the appointment of an examination and is made in the form and in the manner prescribed by law[12].

With regard to the results of the expert study, section 4.23 of the Regulations stipulates that the conclusion of the expert study consists of the same content and structure as the expert's conclusion, with the exception of the following:

> <…> in the introductory part of the opinion it is noted who and when asked the institution or directly to the expert with an order for the study; the entry concerning the responsibility of the person conducting the research is dropped for giving a knowingly false conclusion[13].

[10] Про затвердження Інструкції про призначення та проведення судових експертиз та експертних досліджень та Науково-методичних рекомендацій з питань підготовки та призначення судових експертиз та експертних досліджень (н 8).
[11] А Штефан, 'Висновок експерта у цивільному судочинстві' (2018) 2 Теорія і практика інтелектуальної власності 19.
[12] Там само 26.
[13] Про затвердження Інструкції про призначення та проведення судових експертиз та експертних досліджень та Науково-методичних рекомендацій з питань підготовки та призначення судових експертиз та експертних досліджень (н 8).

The above requirement for a conclusion of an expert research is not an "indulgence" for a court expert who conducts expert research, but extends its possibilities on the basis of special knowledge (including in combination with general scientific knowledge in the field of logic, law, economics, cybernetics, etc.) and methods of forensic expertise to synthesize new knowledge to solve problems that a customer or individual or legal entity faced.

In carrying out expert research, the expert shall be subject to all obligations and prohibitions established by the Law of Ukraine "On Forensic Examination", the Instruction and other normative-legal acts. At the same time, the content of paragraph 2.3 of the Instruction on the prohibition '<…> to enter contacts with individuals not provided for by the procedure of examination, if such persons are directly or indirectly interested in the results of examination'[14] is not canceled, but has features of its implementation during expert research. Obviously, the forensic expert has no right to contact the expert survey with any persons (the so-called "third party") that are not customers of the expert investigation, as well as in accordance with clause 2.2 of the Instruction:

> <…> not to disclose without the permission of the body (person) who (appointed) has appointed an expert examination (the expert has been involved), information that has become known to him in connection with the performance of his duties or not to communicate to anyone , except for the body (person) that appointed the expert examination (invited expert) or the court on the progress of the examination and its results[15].

Although the pre-cited duty of a forensic expert instructs the Instruction to conduct a forensic examination, but in the systematic interpretation of paragraph 4.23 of the same Instruction on conducting expert studies in the same manner as the forensic examination, it can be concluded that the course of expert research and its results can not be disclosed to a third party without the consent of the customer, or otherwise than on the basis of a court decision, including a court decision on temporary access to the materials of a particular expert research. Similar provisions, as a rule, get their consolidation and in typical contracts with an expert or expert institution on the provision of services for conducting expert studies.

In turn, we note that the customer of an expert study may apply to a forensic research institute with a letter (application) for conducting expert research both via mail and directly. Most types of expert research on the subject and subject of their research are rather complex, as an example of forensic examinations

[14] Про затвердження Інструкції про призначення та проведення судових експертиз та експертних досліджень та Науково-методичних рекомендацій з питань підготовки та призначення судових експертиз та експертних досліджень (н 8).
[15] Там само.

on intellectual property issues. Therefore, it is not uncommon for the customer to contact the institute for consultation, in preceding submission of a letter (application) about conducting expert research.

As, in accordance with the Resolution of the Cabinet of Ministers of Ukraine dated July 27, 2011 No. 804 "Some Issues of Granting Payable Services by Research Institutions of Forensic Examination of the Ministry of Justice of Ukraine"[16], expert studies are conducted as paid services on a contractual basis, it is natural that the customer and the executor (the head of the SSRIFE or the forensic expert who is not a SSRIFE employee) can discuss the essential terms of the contract before it is concluded: the object of the research; questions put to the expert's consideration, their content and quantity; terms of the research; the cost of such research, etc.

Forensic expert during the expert investigation may also specify questions of expert investigation, request to receive additional materials, documentation, information, etc., necessary for conducting expert research, and receive them. In case of detection by the customer of an expert investigation of technical errors and/or deficiencies, the expert of the expert study, within a reasonable time (determined in a specific contract), is obliged to ensure the elimination of such technical errors and/or disadvantages.

At the same time, the parties who have concluded an agreement on expert research, under no circumstances cannot violate the principles of forensic examination, enshrined in Art. 3 of the Law of Ukraine "On Forensic Expertise", namely, the principles of legality, independence, objectivity and completeness of the study[17].

Unlike a forensic analysis or a conclusion on the order of a participant in a case, the results of which are embodied in the expert's conclusion, the forms of reflection of the results of expert research are more diverse. Thus, already mentioned in the introduction of this publication, the Cabinet of Ministers of Ukraine dated July 27, 2011, No. 804 determines at least two forms of the implementation of the results of expert research: firstly, we have already investigated the conclusion of an expert study (not rarely the conclusion of an expert study, since it is prepared by forensic experts and defined in the title of the results of this study as "expert opinion"); and secondly, '<…> providing advice that requires special knowledge'[18].

At the same time, the current legislation does not stipulate clear criteria for demarcating the conclusion of an expert study (expert opinion) and an advisory notice, which in both cases is the result of an expert study and, in

[16] Деякі питання надання платних послуг науково-дослідними установами судових експертиз Міністерства юстиції України (н 3).
[17] Про судову експертизу (н 1).
[18] Деякі питання надання платних послуг науково-дослідними установами судових експертиз Міністерства юстиції України (н 3).

accordance with paragraph 4.16 of the Regulations, contain '<…> the results of the study in the form of answers to the questions the issue to the sequence defined in the introductory part'[19], as well as carried out by experts certified by an expert specialty. That is, the conclusion of an expert study and an advisory message have the following common features:

– conducted in accordance with Art. 7-1 of the Law of Ukraine "On Forensic Examination", on the basis of an agreement ordered by of individuals or legal entities[20];

– answer the specific questions put by the customer (physical or legal person);

– can be of a complex nature, taking into account the objects of expert research and the content of the questions posed by the customer of such research;

– conducted by forensic experts certified by a forensic expert in the subject of expert research;

– based on specialist knowledge of a forensic expert;

– implement the results of expert research, etc.

That is, the expert opinion and the advisory notice provided by the expert study should be duly reasoned, objective and comprehensively consistent with the written questions put by the customer.

But, do advisory posts have its particular differences, which allow them to be clearly distinguished from the results of other types of forensic expertise? As for the provision of such consultations among scientists and practitioners, there is no single point of view.

In some SSRIFE, such consultations are considered as forensic analyses, including oral consultations provided to individuals and legal persons by the leaders and experts of the institute. In other SSRIFE oral consultations of individuals and legal entities that precede the ordering of their expert research, are not considered as paid services and are carried out in the mode of work with the appeals of citizens. However, at the same time, according to the results of expert research, the client is provided with written advice letters, the scope of which is quite diverse: from the provision of a lawsuit – to the customer's participation in public procurement by negotiation procedure.

The Center has the experience of drawing up relevant advisory reports based on the results of expert research *(Picture 1)*. However, the above indicators do not allow us to conclude that the dynamics of drawing up advisory reports at the Center are not increasing/decreasing, but rather give grounds for asserting

[19] Про затвердження Інструкції про призначення та проведення судових експертиз та експертних досліджень та Науково-методичних рекомендацій з питань підготовки та призначення судових експертиз та експертних досліджень (н 8).

[20] Про судову експертизу (н 1).

the phenomenology of the experience of relevant forensic expert activity. This experience shall be the empirical basis for our study of the legal nature of the advisory message in Ukraine.

So, what does the "advisory notice" mean? As you know, the word "advisory" comes from the French. *consultatif*, which takes its origins from the Latin. *cosulto* – "advise" and 'advisory, which has advisory rights <…>'[21]. In its turn, the message is a document that informs about something – notification. Thus, an advisory notice is a document in which, based on the results of an expert study, a written consultation is presented, the content of which is to provide answers to specific questions, applying special knowledge and methods of forensic examination, by certified by the relevant specialties forensic experts.

Obviously, SSRIFE are required to act only on the basis and within the limits of authority and in the manner prescribed by the current normative and legal acts of Ukraine, including those concerning the forms of implementation of the results of their professional activities. The provision of advisory messages by the research institutes of the forensic examination is envisaged, as previously described, by the Decree of the Cabinet of Ministers of Ukraine dated 27.07.2011 No. 804[22], as well as their statutory documents.

In accordance with clause 2.1 of the Statute of the Center (hereinafter referred to as the *"Statute"*), the purpose of the activity of this SSRIFE is to:

> Realization of the needs of the parties of pre-trial investigation, forensic bodies, other state bodies, as well as legal and natural persons in providing them with an independent, qualified and objective expertise aimed at maximizing the use of scientific and technological achievements[23].

In pursuance of this purpose and tasks of its activity, the Center, in accordance with clause 3.3.3 '<…> provides advice within the framework of the main statutory tasks of the Center, conducts other work on the order of individuals and legal entities in accordance with the procedure provided by Ukrainian legislation'[24]. Therefore such advisory activity is one of the important types of statutory activities for the Center and the majority of other SSRIFE in meeting the needs of individuals and legal entities in the field of forensic expertise.

In addition, the Statute is not limited to the statement of advisory activity, but also clearly defines the grounds and conditions for its implementation,

[21] С Морозов та Л Шкарапута (уклад), *Словник іншомовних слів* (Наукова думка 2000) 291.
[22] Деякі питання надання платних послуг науково-дослідними установами судових експертиз Міністерства юстиції України (н 3).
[23] Статут Науково-дослідного центру судової експертизи з питань інтелектуальної власності Міністерства юстиції України (нова редакція), затверджений наказом Міністерства юстиції України від 10 червня 2015 р. № 914/5.
[24] Там само.

as well as the forms of implementation of this type of expert activity. Thus, according to Clause 2.3 of Section 2 "Purpose and Object of Activity" of the Statute, it is established that:

> The results of the Center's activities include legal expertise, as well as expert studies, scientific and research and methodological works, technical programs, advisory reports, reviews, lecture materials, documents on participation in procedural actions and court hearings[25].

Thus, the "advisory message", in our opinion, is an independent form of implementation of the results of the statutory activities of the Center, which compiles the results of expert studies conducted by certified forensic experts '<…> with the use of means and methods of forensic examination' and aims to '<…> providing advice that requires special knowledge'[26].

With regard to the scope of the use of advisory messages by customers, it is slightly different from the scope of the findings of expert studies outlined in the introduction of this article. Based on the advisory reports provided by the Center in 2016–2018 on the results of expert studies, in most cases, the relevant documents were ordered to comply with the requirements of administrative procedures and the need for negotiation procedures for public procurement.

Thus, the current Law of Ukraine "On Public Procurement" of December 25, 2015 in Part 1 states that the negotiated procurement procedure is: '<…> a procedure used by the customer as an exception and according to which the customer concludes a procurement contract with the participant after conducting negotiations with one or more participants'[27].

The relevant procedure is used as an exception, according to the discretion specified in part 2 of Art. 35 of the Law of Ukraine "On Public Procurement". Thus, in clauses 1 and 2 of part 2 of Art. 35 of this Law allows negotiated procurement procedure as an exception, in the case of:

> 1) <…> procurement related to the protection of intellectual property rights <…>;
> 2) the absence of competition (including for technical reasons) in the relevant market, and, as a result, an agreement on the purchase can be concluded with only one supplier, in the absence of this alternative[28].

Accordingly, professional research of software and hardware complexes, computer programs, telecommunication systems and facilities, other objects

[25] Статут Науково-дослідного центру судової експертизи з питань інтелектуальної власності Міністерства юстиції України (нова редакція) (н 23).
[26] Деякі питання надання платних послуг науково-дослідними установами судових експертиз Міністерства юстиції України (н 3).
[27] Про публічні закупівлі (н 4).
[28] Там само.

that are objects of intellectual property rights and, can be subject to public procurement by negotiation procedure, require the necessary special knowledge. The holders of such special knowledge are, first of all, forensic experts, who, according to Part 1 of Art. 10 of the Law of Ukraine "On legal expertise", '<…> may be individuals who have the necessary knowledge to express an opinion on the investigated issues'[29] and shall issue such assessment, according to the already repeatedly mentioned in this article Decision of Cabinet of Ministers of Ukraine of 27 July 2011 No. 804, in the form of advisory reports.

Such special knowledge refers to forensic experts of the Center and other SSRIFE Center of the Ministry of Justice of Ukraine and expert services of the Ministry of Internal Affairs of Ukraine, certified in the prescribed manner in various forensic expert fields, such as: "10.9 – Investigation of computer hardware and software products"; "10.17 – Research of telecommunication systems (equipment) and facilities"; "13.1.2 – Studies related to computer programs and data compilations (databases)" and others. Thus, expertise and expert studies by expert specialties 10.9 and 10.17, referred by the "Provision of expert qualification commission and certified forensic experts, approved by the Ministry of Justice of Ukraine dated 03 March 2015 Number 301/5", to the types of forensic examinations and expert specialties, according to which the qualification of a forensic expert is assigned exclusively to specialists of SSRIFE[30], to which the Center belongs.

Some doubts about the possibility of using advisory messages for negotiation procedure purpose may arise by subordinate legal acts. Thus, paragraph 14 "Forms notice of intention to conclude an agreement on the use of negotiation procedures", approved by the Ministry of Economic Development and Trade of Ukraine (MEDT) of 22 March 2016 Number 490 "On approval of documents on public procurement", details above quoted requirements of the Law of Ukraine "On Public Procurement", and specifies that: 'substantiation of the negotiated procurement procedure (reference to expert, normative, technical and other documents confirming the existence of conditions for the application of the procurement procedure)'[31].

At the same time, MERTU did not elaborate on exactly which forms of "expert documents" are involved in "substantiating the negotiation procedure". The current legislation on forensic expertise also does not mention the phrase "expert documents" in any case. This urges to refer to the definition of the etymology of the category "document" in its legal sense.

[29] Про судову експертизу (н 1).
[30] Про затвердження Інструкції про призначення та проведення судових експертиз та експертних досліджень та Науково-методичних рекомендацій з питань підготовки та призначення судових експертиз та експертних досліджень (н 8).
[31] Про затвердження форм документів у сфері публічних закупівель: наказ Міністерства економічного розвитку і торгівлі України від 22 березня 2016 р. № 490. *Офіційний вісник України.* 2016. № 25. Ст. 1014.

The "Great Encyclopedic Legal Dictionary" defines the category "document" (Latin *documentum* – "instructional example") as 'the material form of displaying, disseminating, using and storing information that gives it legal force'[32]. Thus, one could argue that the phrase "expert documents" – an umbrella term for all kinds of documents that finalist and legalize all results of forensic activities prepared by certified experts and issued in any form that current legislation allows (forensic expertise, expert opinion at the request of the participant in the case, conclusion of the expert study, advisory notice, etc.) SSRIFE of the Ministry of Justice and forensic experts who are not employees of SSRIFE of the Ministry of Justice. But, unlike the advisory message, the conclusion of the forensic examination and the expert's conclusion, at the request of the party to the case, are provided on the basis of an already open rather than hypothetically anticipated trial.

The Constitution of Ukraine, in the first part of Article 19, establishes the fundamental position of the rule of law stating: 'The legal order in Ukraine is based on the principles under which no one can be compelled to do what is not provided for by law'[33]. Therefore, the demand by the public authorities and their officials to provide specific expert documents, in particular – namely, the "forensic experts conclusion" if there is another legitimate document – "advisory message" seen such unreasonable and contrary to the Constitution and laws of Ukraine.

It is obvious that the provision of SSRIFE, in particular the Center, advisory messages based on the results of an expert study on the application of a negotiated procurement procedure related to the protection of intellectual property rights (software products, hardware and software components, maintenance and/or upgrade services, etc.) are important, but not the only area of application of the advisory message. Obviously, advisory messages in the near future can be established in Ukraine as a legitimate tool for protecting the legitimate interests and rights of individuals and legal entities when receiving and providing them with other administrative procedures and services. For example, in the field of moving goods that contain signs of objects of intellectual property rights across the state border of Ukraine, etc.

Accordingly, the category "advisory notice" according to the results of expert research is a well-established and well-grounded position of court experts, based on their use of special knowledge on issues raised for research, which is taken into account by a special authority in the administrative procedure or, at least, considering administrative disputes in the extra forensic (arbitration)

[32] Ю Шемшученко (ред), *Великий енциклопедичний юридичний словник* (Юридична думка 2007) 218.
[33] Конституція України (н 6).

order. In addition, the use of the phrase "advisory notice" provided for by the Statute of the Center is now a well-established practice of drawing up the results of relevant expert studies, which also aims to distinguish them from a related, but not identical phrase, "the conclusion of an expert study".

REFERENCES

Bibliography

Edited books

1. Morozov S ta Shkaraputa L (red), *Slovnyk inshomovnykh sliv [Dictionary of foreign language words]* (Naukova dumka 2000) (in Ukrainian).
2. Shemshuchenko Yu (red), *Velykyi entsyklopedychnyi yurydychnyi slovnyk [Great Encyclopedic Legal Dictionary]* (Yurydychna dumka 2007) (in Ukrainian).

Journal articles

3. Shtefan A, 'Vysnovok eksperta u tsyvilnomu sudochynstvi' ['The Conclusion of an Expert in Civil Proceedings'] (2018) 2 Teoriia i praktyka intelektualnoi vlasnosti 16-28 (in Ukrainian).

Владислав Федоренко
Олексій Собін
Сергій Зазимко

КОНСУЛЬТАТИВНЕ ПОВІДОМЛЕННЯ ЗА РЕЗУЛЬТАТАМИ ЕКСПЕРТНОГО ДОСЛІДЖЕННЯ: ПОНЯТТЯ, ЗМІСТ, СФЕРА ЗАСТОСУВАННЯ

Анотація. Публікація присвячена актуальним проблемам теорії та практики консультативного повідомлення як формі втілення результатів експертного дослідження в Україні. Консультативне повідомлення розмежовується з висновком судового експерта, висновком експерта на замовлення учасника справи та висновком експертного дослідження, визначається сфера застосування консультативного повідомлення.

Розкривається зміст консультативного повідомлення та його сутнісні ознаки, особливості складання консультативних повідомлень судовими експертами і сфера їх застосування. Доводиться, що висновок експертного дослідження та консультативне повідомлення мають спільні ознаки: відповідно до ст. 7^1 Закону України "Про судову експертизу" проводяться на підставі договору за замовленням фізичних або юридичних осіб; відповідають на конкретно поставлені замовником (фізичною або юридичною особою) запитання; можуть мати комплексний характер, з огляду на об'єкти експертного дослідження та зміст питань, поставлених замовником такого дослідження; проводяться судовими експертами, атестованими за судово-експертною спеціальністю у межах предмета екс-

пертного дослідження; ґрунтуються на спеціальних знаннях судового експерта; втілюють результати експертного дослідження тощо. Водночас консультативне повідомлення застосовується для надання експертної оцінки легітимності окремим адміністративним процедурам, зокрема при застосуванні переговорної процедури закупівлі, пов'язаної із захистом прав інтелектуальної власності (програмних продуктів, програмно-апаратних комплексів, послуг щодо їх підтримки та (або) модернізації тощо).

Обґрунтовується висновок, що консультативне (з фр. *consultatif*, яке бере свої витоки від лат. *cosulto* – "раджуся" та означає "дорадчий, який має дорадчі права…") повідомлення – це документ, у якому за результатами експертного дослідження викладається письмова консультація, зміст якої полягає в наданні відповіді на конкретні запитання із застосуванням спеціальних знань і методів судової експертизи з боку атестованих за відповідними спеціальностями судових експертів, в якій сформована незалежна позиція судових експертів для врахування спеціально уповноважених суб'єктів при проведенні адміністративних процедур.

Ключові слова: судова експертиза; консультація; експертне дослідження; консультативне повідомлення; спеціальні знання; судовий експерт; науково-дослідна установа судової експертизи; адміністративна процедура; переговорна процедура закупівлі.