

circumstances of specific cases. In order to properly apply the legal position of the ECHR, it is imperative to investigate the facts in which the ECHR has been formulated. Of course, it may not be about absolutely identical “twin circumstances” or ideal similarities, but the relevant circumstances should have a fundamental similarity and have no fundamental differences and differences with the facts of a particular case” [2].

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ADMISSIBILITY OF ELECTRONIC EVIDENCE IN THE CONTEXT OF ECHR CASE LAW

Key words: *European Court of Human Rights, electronic evidence, evolution of evidence.*

The institute of evidence is justly regarded as the fundamental basis of court proceedings. The European Court of Human Rights (hereinafter – ECHR), using the traditions and peculiarities of the general continental law,

seeks to adhere to the democratic principles of proceedings enshrined therein; these principles directly influence the organization of the Court's activities in terms of compliance with the criteria of a fair trial.

The ECHR reiterates that it does not serve as a new instance, whereas the main task of the national courts is to study and assess evidence to establish objective truth. At the same time, the European Court develops its own procedures by improving the standards of proving for the implementation of international justice.

Currently, the ECHR does not hold a specific position regarding the appropriateness and admissibility of electronic evidence. However, there are a number of circumstances that may assist in investigating the implementation of the mechanism for using the latter by Strasbourg Court. Firstly, in the case of *Nachova and others v. Bulgaria*, the court explained that it was not bound by any rules in assessing evidence and, therefore, it adheres to the position of free evolution of all evidence. Furthermore, in the judgment on this case, the ECHR emphasized that it is susceptible to any evidentiary difficulty faced by the parties [10].

The positions of Ukrainian legislators should also be considered in the aspect of «evolution of evidence». There was no definition of electronic evidence at the legislative level in Ukraine prior to 2017, which resulted in the qualification of sound and video records to material evidence, whereas electronic correspondence and electronic documents were qualified as written evidence. Controversial judicial practice additionally testifies to the fact. Thus, one of the decisions of the Higher Commercial Court states that electronic correspondence is inappropriate and inadmissible evidence (the ruling of January 17, 2017 in the case No. 924/473/16). In other cases, such correspondence was acknowledged to be valid and admissible evidence (ruling dated 10.3.2017 in case No 903/821/16) [5].

The solution of the problem issue concerning the implementation of the mechanism for the use of electronic evidence has been regulated by the Law of Ukraine No 3147-VIII of 10/03/2017. Henceforth, a new means of proving – electronic evidence [2] has been introduced at the level of the Economic Procedural, Civil Procedural Codes and the Code of Administrative Procedure.

Electronic evidence is, therefore, considered to be information in the electronic (digital) form that contains data regarding facts relevant to the case, particularly electronic documents (including text documents, graphic images, plans, photographs, video and audio recordings, etc.), the web-sites (pages), text, multimedia and voice messages, metadata, databases and other data in electronic form. Such data may be stored, for example, on portable devices (memory cards, mobile phones, etc.), servers, backup systems, and other places of electronic data storage (including the Internet) [3].

However, the informatization of social life objectively affects the peculiarities of the criminal proceedings. In particular, this applies to such an important category as the source of evidence. Under Article 84 of the CPC of Ukraine, evidence in criminal proceedings is factual data obtained in the manner prescribed by the Code. Current legislation recognizes witness testimony, material evidence, documents and expert opinions to be the

procedural sources of evidence. Unfortunately, this list has failed to include such an independent source as electronic evidence. However, electronic evidence is mentioned in paragraph 1 part 2 of Article 99 CPC of Ukraine, which refers to materials of photography, sound recording, video recording and other media (including electronic) [1].

The introduction of electronic evidence in the criminal procedural law is a necessity caused by the practical need to recognize such objects as a source of evidence in criminal proceedings due to – it should be mentioned again – different judicial practices. Thus, according to the verdict of the Podilsky district court of Kyiv, the court, having examined the screenshots of the correspondence in the Viber between the witness and the defendant, found that this correspondence confirmed the agreement to provide unlawful benefits to the suspect. As a result, the latter was convicted under Article 368 of the Criminal Code of Ukraine, namely, «Adoption of a proposal, promise or obtaining an unlawful benefit by an official» [3]. At the same time, in another criminal proceeding, the detectives of the National Anti-Corruption Bureau of Ukraine needed information of Viber-correspondence from one of the board members of the Odesa Portside Plant. According to NABU's position, «this correspondence in Viber may indicate involvement in the transfer of funds and their subsequent conversion». The Bureau planned to use correspondence as evidence in a criminal proceeding. However, the court rejected this petition of the detectives [4].

The ECHR case law does not specifically use the term «electronic evidence». However, the case of *Schenck v. Switzerland*, specifically dealt with the refutation of the so-called electronic (digital) evidence. In the case in question, the applicant argued that the recording of his telephone conversations and use thereof as evidence violated Clause 1 of Article 6 of the Convention. He also insisted that the use of illegally obtained evidence was sufficient to make the trial unfair and that his conviction was based mainly on the tape record. In its judgment, the ECHR noted that the tape recording of the telephone conversations was not the sole evidence on which the sentence was based. The ECHR further concluded that the use of tape recordings did not deprive the applicant of a fair trial and, consequently, did not violate Article 6 § 1 of the Convention [7].

To date, it is solely in the context of administrative, economic and civil proceedings that the issue of appropriateness and admissibility of electronic evidence is highlighted at the international level. In support of this, the guidelines of the Committee of Ministers of the Council of Europe on electronic evidence in civil and administrative proceedings of January 30, 2019 should be considered. According to the guideline, electronic evidence means any evidence obtained from the data contained on any device, the operation of which depends on the software or data stored in or transmitted via a computer system or network.

The aforementioned guidelines consolidated the principles of using electronic evidence that are binding on all courts, including national ones. Therefore, in the process of implementation of international justice, the ECHR should presently take into account the following: the courts should not reject

electronic evidence and should not deny their validity solely because they are collected and/or submitted electronically and deny the validity of electronic evidence solely because they lack an advanced, qualified or similarly secure electronic signature; the parties should be allowed to submit electronic evidence in their original electronic format without the need for a printout.

Moreover, the guidelines clarified the issue of appropriateness and admissibility of electronic evidence. Therefore, paragraph 10 of the Guidelines provides that electronic evidence must be collected in an appropriate and secure manner and transmitted to the courts using reliable services such as trust. According to paragraph 18, the courts may require the analysis of the electronic evidence in question by experts, especially where complex issues of proving arise or where manipulations with electronic evidence are anticipated. The courts must decide whether such persons have sufficient experience in this matter. As regards reliability, paragraph 19 points out that the courts must take into account all relevant factors relating to the source and authenticity of electronic evidence. Courts need to be aware of the value of trust services to establish the reliability of electronic evidence. Under paragraph 21, electronic data should be accepted as evidence, unless the authenticity of such data is challenged by one of the parties. Paragraph 22 specifies that where a government authority transfers electronic evidence independently of the parties, such evidence is final in relation to the content, unless otherwise proven. Courts must decide on the potential evidentiary value of electronic evidence in accordance with the national law, and the electronic evidence itself must be assessed in the same way as other types of evidence, in particular regarding their admissibility, authenticity, accuracy and integrity [9].

Thus, when deciding on the compatibility of evidence obtained illegally with Article 6 of the Convention, the Court will consider three main issues – the availability of procedural safeguards, the quality of the evidence per se and its importance for the conviction [6, p. 13].

Taking into account the above, it should be summarized that criminal procedural legislation of Ukraine does not contain the concept of electronic evidence either, although this does not become an obstacle to its use in proceedings – it is subject to general criteria of appropriateness and admissibility. Therefore, in this case, the ECHR can be guided by the general provisions on the use of electronic evidence. However, the doctrine of «inevitable discovery» should not be abused, its essence being that the impugned part of the evidence «would inevitably be revealed by lawful means». In the long run, the admission of illegally obtained evidence through the doctrine of «inevitable detection» strongly undermines the deterrent effect of the rule of inadmissibility of the evidence obtained illegally [8].

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