

Conducting Forensic Examination as Part of Measures to Secure Evidence Prior to Filing Lawsuit in Administrative Proceedings

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Despite high level of development of interdisciplinary procedural evidence doctrine, rather narrow aspects; appointment of forensic examination as a way of securing evidence before commencement of proceedings in administrative case, difference between territorial jurisdiction and authority to secure evidence by its location have not been the subject of attention of researchers of administrative proceedings or forensic researches, at least recently. In particular, there are no clear comments on forensic research on issues that will only be the subject of judicial consideration. At the same time, theoretical potential of the issue of securing evidence before the commencement of administrative proceedings seems to be high determined the purpose of this article, namely: investigate specified procedural mechanism through the prism of appointment of forensic examination by the court in proceedings that have not yet been initiated by any court. The following tasks are subordinate to this purpose: identify legislative grounds for such a court decision, to determine nature of the court authority to secure such evidence, including existence of relevant rights in a general local court. Using a special

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legal dogmatic method, systematic interpretation and comparative analysis, it was found that pre-litigation provision of evidence does not require a clearly formulated subject of the dispute and evidence obtained through such provision, including forensic expert conclusions can be used outside the administrative proceedings (even in case of violation of requirement to further file a claim), since the actual receipt of evidence was carried out in accordance with the law. Conclusions were drawn according to which satisfaction of the evidentiary needs of potential plaintiff by the courts of first instance does not overlap with the concept of topical or territorial jurisdiction and is a unique phenomenon that is only formally, but not substantively, covered by instance jurisdiction.

Keywords: *evidence loss risk; forensic science; application for evidence provision; administrative proceedings; territorial jurisdiction; court of first instance; equality of parties; obligation to file claim statement; evidence obtained in accordance with law; procedural relations outside proceedings.*

Research Problem Formulation

Constitution of Ukraine guarantees everyone the right to appeal in court decisions, actions or inaction of State authorities, local self-government bodies, officials and service personnel (P. 1 of Art. 55) ¹. Such an appeal generally corresponds to a public-law dispute that is resolved in the administrative judicial procedure. On the other hand, the above-mentioned subjects are required to act within the limits of their powers, in the manner and on the basis of the Constitution and laws of Ukraine (P. 2 of Art. 19 of the Constitution of Ukraine) ². Therefore, two competing presumptions have been formed: (1) legality of the actions and requirements of a person as a participant in public-law relations (clearly formulated in Art. 15 of the Law of Ukraine: *On Administrative Proce-*

dure ³), that includes the legality of actions on appeal and (2) the legality of the actions and decisions of government bodies (validity of which is increasingly being understood by legal science). With the separation of administrative proceedings into an independent method of administering justice, it borrowed, sometimes in an almost verbatim presentation, the norm under which the aforementioned right of everyone to appeal is exercised in general adversarial conditions; corresponding complaint in the form of a statement of claim should be based on evidence. Thus, constitutional guarantee has been significantly clarified: filing complaint with the court or a statement of claim is subject to a fee (a court fee is charged), it should comply with a certain form, be filed in a certain manner, meet specific requirements (in particular, contain a subject

1 Конституція України : Закон України від 28.06.1996 р. № 254к/96-ВР (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text> (date accessed: 21.04.2026).

2 Там само.

3 Про адміністративну процедуру : Закон України від 17.02.2022 р. № 2073-ІХ (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/2073-20#Text> (date accessed: 21.04.2026).

matter, formulate claims and be based on evidence). In case of non-compliance, the court leaves such a complaint (statement of claim) without consideration, without action or returns it to the person.

However, evidence as data on disputed facts is not always available to complainant in sufficient volume. Without evidence, it is difficult or impossible to determine specific violation content, choose a method of protecting the violated right. In addition, both by themselves and as a result of legal dispute development, evidence can be lost even before the filing of a claim. Thereby administrative proceedings borrowed from other procedural regimes of justice administration, already formed at the time of its occurrence, idea of securing future proceedings, creating appropriate conditions for taking action on the appeal. In the *Code of Administrative Proceedings* of Ukraine, such *pre-procedural security* covers influence on the behavior (primarily: the power) of the future defendant (securing the claim) and evidence protection of that can be lost (securing evidence)⁴. Both of these security measures can be applied later, during or after the filing of a claim. But then nature, content, status and circle of participants in the relations regarding such security will differ significantly from those related to procedural legal relations that arise before the moment of submitting the dispute to the court, id est before the beginning of the administrative proceedings as such. The subject of such, conditionally speaking, *pre-claim security* is the court, the initiator is not yet the plaintiff, but the *person who can become the plaintiff*. The court adopts binding decisions, limits and obliges the holders of evidence, orders an examination, interrogates witnesses in a case that can only be

initiated on the basis of a future statement of claim. Although the *person who can become the plaintiff* has an obligation to file a lawsuit in the event of satisfaction of his application for securing evidence, legal liability for its violation does not arise, and the consequences are limited to procedural sanctions. This seems reasonable, since otherwise constitutional right would turn into a burden, an obligation to complain. Meanwhile, it is evidence content of the obtained through their provision that can prompt a person to reconsider his or her opinion regarding the validity of the dispute and the grounds for the appeal. The result of such a review is generally positive, providing procedural economy and, in the best-case scenario, termination of legal conflict between the person and the State.

However, application of the above legal conditions to the examination makes possible to State some obvious risks for the expert system in terms of execution terms of relevant court decision, sources of its financing, further handling of information, research object and the actual obtained evidence.

The analysis of the issue of *pre-suit* securing of evidence (as well as, more broadly, securing of proceedings) opens up an interesting, but, in the author's opinion, underestimated direction availability in administrative (and, apparently, in civil and commercial) proceedings of a fourth type of jurisdiction not directly articulated by procedural law – security. It is only partially conditioned by the instance – since such *pre-suit* securing is entrusted to the first instance. The procedural consequences of failure to comply with “security” jurisdiction are not as clear as, for example, a violation of subject or ter-

4 Кодекс адміністративного судочинства України від 06.07.2005 р. № 2747-IV (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 20.03.2026).

ritorial jurisdiction. We raise the question of the ability of evidence obtained within the framework of *pre-suit* securing of evidence, but prohibited from use in other cases, in administrative proceedings to have probative force in other types of proceedings. Jurisdiction choice for the purpose of protecting a violated right is a person's right. It can dispose of it up to the moment of filing a complaint within one or several types of legal proceedings at the same time. If answer to the question is positive, institution of securing evidence acquires *inter-jurisdictional* dimension.

Analysis of Essential Researches and Publications

Legality presumption of actions and decisions of the authorities mentioned during the formulation of the problem contains such ideological directions as "*presumption of legality of an administrative act*"⁵, "*presumption of constitutionality and legality of acts of power subjects*", which in con-

ditions of the rule of law is obviously inferior to human-centered presumptions; result of this priority was the presumption defendant guilt, power subject, characteristic of administrative proceedings⁶.

Topic of the available work is evidence admissibility, that is the conclusion of forensic examination, prepared at the request of parties during various stages of administrative proceedings and ambiguous approaches of judicial practice to the suspension of procedural deadlines in connection with the need to conduct such forensic examination⁷, procedural and functional justification of the deadlines for conducting judicial examinations⁸. Topic of the publications is the analysis of judicial practice regarding the evidentiary procedure in administrative proceedings (in particular, in terms of securing evidence)⁹. The position on appointment of procedural mechanism for securing evidence that consists in obtaining and preventing its probable loss, substantiating the relevant risk with objective facts, was

- 5 Ситников О. Критерії оцінки правомірності рішень, дій чи бездіяльності суб'єкта владних повноважень / Advokat Post : вебсайт. 11.07.2025. URL: <https://advokatpost.com/kryte-rii-otsinky-pravomirnosti-rishen-dij-chy-bezdiialnosti-sub-iekta-vladnykh-povnovazhen-advokat-sytnykov/> (date accessed: 21.04.2026).
- 6 Берназюк Я. Презумпції в праві: види та значення / Національна школа суддів України. Програма підготовки та підвищення рівня кваліфікації за стандартизованою програмою помічників суддів окружних та апеляційних адміністративних судів // Верховний суд : офіц. вебсайт. 07.11.2023. 37 с. URL: https://supreme.court.gov.ua/userfiles/media/new_folder_for_uploads/supreme/2023_prezent/presumption_bernaziuk.pdf (date accessed: 21.04.2026).
- 7 Халюзов Є. Експертний висновок в адміністративному судочинстві. *Зовнішня торгівля: економіка, фінанси, право*. 2025. № 2. С. 95—105. DOI: 10.31617/3.2025(139)08 (date accessed: 21.04.2026); Його ж. Призначення експертизи судом як підстава для підготовки висновку експерта в адміністративному судочинстві. *Правова держава*. 2025. № 58. С. 89—97. DOI: 10.18524/2411-2054.2025.58.330998 (date accessed: 21.04.2026).
- 8 Годзь В. С., Рябенко І. Ю. Строки у судовій експертизі: проблемні питання та шляхи їх вирішення. *Криміналістика і судова експертиза*. 2024. Вип. 69. С. 5—19. DOI: 10.33994/kndise.2024.69.01 (date accessed: 21.04.2026).
- 9 Зелінська Я. Особливості доказування в адміністративному судочинстві. *Вісник Національної асоціації адвокатів України*. 2024. № 3 (99). С. 51—59. URL: https://unba.org.ua/assets/uploads/news/vidannya/2024-04-01-vidannya-v-snik-3-2024_660abd5a402f3.pdf (date accessed: 21.04.2026).

formulated by the Grand Chamber of the Supreme Court in 2019 (*cf.* paragraphs: 19-22 of the Resolution)¹⁰.

Admissibility issue of conducting forensic examination prior to commencement of court proceedings has been analyzed on numerous occasions in practice-oriented publications. The authors focused on fundamental admissibility of such examination, expert's warning regarding criminal liability and disadvantage to the other party in the dispute, who was unable to ask expert questions, unlike in examinations conducted during proceedings. There is no shortage of court decisions across various types of proceedings where expert examination conducted before the parties to the case acquired their procedural status was challenged as

having been obtained in a manner not prescribed by law.

In general, addressed issues concern the question of evidence and the burden of proof in administrative proceedings as a whole. A wide range of authors focus on the concepts and evidence classification¹¹, principle of official fact-finding¹² and the status of parties to the proceedings¹³. However, such research papers concentrate on the evidence presentation within the context of *already initiated* proceedings and do not treat the *pre-litigation* stage as a separate research context. Research papers devoted to preservation of evidence in civil proceedings are somewhat closer to the issues outlined here; however, specific nature of administrative proceedings¹⁴, in particular, public-law

- 10 Постанова Верховн. Суду від 09.10.2019 р. Справа № 9901/385/19. Провадж. № 11-9293ai19 / ЄДРСР: вебсайт. URL: <https://reyestr.court.gov.ua/Review/84900513> (date accessed: 21.04.2026) ; Те саме від 03.07.2019 р. Справа № 9901/845/18. Провадж. № 11-3433ai19 / Там само. URL: <https://reyestr.court.gov.ua/Review/82998205> (date accessed: 21.04.2026).
- 11 Мельник М. П. Поняття доказів у адміністративному судочинстві України. *Держава і право*. 2010. Вип. 48. С. 269—274. URL: <https://nasplib.isoftware.kiev.ua/server/api/core/bitstreams/5d194b28-eaf6-4514-8e61-f14fca05ace5/content> (date accessed: 21.04.2026) ; Калмикова Я. С. Належність та допустимість доказів в адміністративному судочинстві. *Юридична осінь 2012 року* : зб. тез доп. та наук. повідомл. учасн. всеукр. наук.-практ. конф. молод. учен. та здобув. (Харків, 13.11.2012). Харків, 2012. С. 152—155. URL: <https://dspace.nlu.edu.ua/server/api/core/bitstreams/421d0c9a-1356-4e51-a201-832606b7c0f5/content> (date accessed: 21.04.2026) ; Рекуненко Т. Доказування в процесі розгляду справ про адміністративне правопорушення. *Підприємництво, господарство і право*. 2019. № 3. С. 169—173. URL: <http://pgp-journal.kiev.ua/archive/2019/3/32.pdf> (date accessed: 21.04.2026) ; Козинець І. Г., Кравченко В. Я. Окремі питання доказів та доказування в адміністративному судочинстві на сучасному етапі. *Юридичний науковий електронний журнал*. 2021. № 2. С. 173—177. DOI: [10.32782/2524-0374/2021-2/40](https://doi.org/10.32782/2524-0374/2021-2/40) ; Колеснікова М. В. Докази та доказування в адміністративному судочинстві. *Аналітично-порівняльне правознавство*. 2024. № 4. С. 378—383. DOI: [10.24144/2788-6018.2024.04.61](https://doi.org/10.24144/2788-6018.2024.04.61) (date accessed: 21.04.2026).
- 12 Колпаков В. К., Гордєєв В. В. Принципи офіційного з'ясування всіх обставин у справі в системі принципів адміністративного судочинства. *Право України*. 2014. № 3. С. 47—56 ; Рябовол Л. Т. Принцип офіційного з'ясування всіх обставин у справі: питання теорії та практики. *Вісник Запорізького національного університету. Юридичні науки*. 2020. № 3. С. 111—117. DOI: [10.26661/2616-9444-2020-3-16](https://doi.org/10.26661/2616-9444-2020-3-16) (date accessed: 21.04.2026).
- 13 Гордєєв В. В. Суб'єкти доказування в адміністративному судочинстві України. *Форум права*. 2022. № 72 (1). С. 6—12. DOI: [10.5281/zenodo.5529542](https://doi.org/10.5281/zenodo.5529542) (date accessed: 21.04.2026).
- 14 Лезін Є. Поняття і зміст забезпечення доказів у цивільному процесі України. *Jurnalul Juridic Național: Teorie și Practică*. 2017. Dec. С. 93—97. URL: <https://surl.li/ceddux> (date accessed: 21.04.2026).

nature of the dispute and peculiarities of jurisdictional rules; prevent direct transfer of relevant scholarly findings. At the same time, the *pre*-litigation preservation of evidence through appointment of forensic examination has not been studied as an independent analysis topic in Ukrainian administrative procedural doctrine.

Article Purpose

Thus, available theoretical and judicial-practical basis is sufficient to conclude that it is relevant to consider in detail the issue of conducting a *pre*- or *extra*-procedural forensic examination in administrative proceedings. Without setting ourselves the goal of generalizing various views on this issues or joining its discussion in terms of all aspects, we will focus only on the issues of the grounds, conditions and procedural consequences of conducting an examination on issues that will be the subject of judicial consideration in administrative proceedings. Such consideration is the **purpose** of our article. Since the issue of independent involvement of experts (examination ordered by the parties) has already been studied by other authors, we will set ourselves a less studied **task**; its conduct under a court decision adopted: a) before filing statement of claim; b) after such filing, but before the start of consideration of the case on the merits; c) without further filing; d) by judicial body other than the one conducting consideration (or should conduct it in accordance with its jurisdiction). Since forensic examination is directly related to the issue of evidence in legal proceedings, above aspects should be considered through the prism of the category of *evidence* in administrative legal proceedings. In particular, this concerns procedural status of evidence and the methods of

collecting it in a possible, not yet initiated legal proceedings, but already with application of binding nature of court decision, *id est* an application to the administrative court and accordingly, its decision to secure evidence before filing claim.

Research Methods

The task set by us requires an appeal, first of all, to the *Code of Administrative Proceedings of Ukraine* of Ukraine and the Law of Ukraine: *On Judicial Examination* (hereinafter referred to as the *profile Law*), which determines the use of a special legal dogmatic method and the method of systematic interpretation as the main means of achieving research goal. Isolated constructions that testify to understanding of basic concepts were analyzed by means of the comparative method and categorical analysis. At all stages of writing the work, search and editorial tools were used as an auxiliary tool, available within the group of information technologies under the general name of *artificial intelligence*, with careful control of the results obtained in this way.

Main Content Presentation

According to parts 1 and 2 of Art. 114 of the cap of Ukraine (hereinafter, except for specially specified cases, it will be about the articles *Code of Administrative Proceedings* of Ukraine):

*"1. The court, at the request of a party to the case or person who may acquire the status of a plaintiff, must provide evidence if there is reason to believe that the **means of proof** may be lost or collection or submission of relevant evidence will subsequently become impossible or difficult.*

2. Application for provision of evidence may be filed with the court both before and

after *filing statement of the claim*.“¹⁵ [*Emphasis added, bold type and their combination* in our quotations.— *Auth.*].

Therefore, application for securing evidence may be filed before filing claim by a person who “may acquire” the status of a plaintiff.

It follows from Art. 115, P. 9 of Art. 117 that one of the ways to provide evidence by the court is appointment of forensic examination¹⁶. In the light of the provisions of relevant Law, this means that court decision is the basis for the examination¹⁷.

1. Forensic examination preceding trial

In administrative proceedings, trial as such can be preceded by pretrial settlement, can be mandatory in cases provided for by law. In particular, in accordance with Art. 17: “*The parties shall take measures for the pre-trial settlement of the dispute by agreement between themselves or in cases where such measures are mandatory according to the law*” (please note that here participants in the legal relationship are called *parties*, although there is no proceeding at this stage by definition), and “*persons who have violated the rights and legitimate interests of other persons are obliged to renew them without waiting for the filing of a lawsuit*”¹⁸. Any administrative procedure can be considered as a separate method of such pre-trial settlement,

which is mandatory for a wide group of subjects of power. Within its limits, the administrative body appoints an examination, in cases provided for by law (Art. 57 of the Law of Ukraine: *On Administrative Procedure*)¹⁹. Therefore, administrative legal relations in conditions that may cause a dispute, for conflict-free development or settlement of the dispute in a *pre-trial* procedure, require expertise. Is it possible to say that this examination, carried out knowingly before the trial, is subject to all the prescriptions of a special legislative act – the specific Law – and, accordingly, is a *forensic* examination? The authors are inclined to a positive answer. Since the party in the administrative procedure is always (P. 1 of Art. 2) subject of the authorities, which very often is the administrative body itself²⁰. The issues arising from the legal relationship with him are obviously compatible with the characterization “will be the subject of legal proceedings”.

However, it is impossible not to notice categorical nature of the definition of *forensic examination*; it is a research “on issues that are or will be the subject of litigation” (Art. 1 of relevant Law)²¹. They cannot be (as, for example, “*statements of claim and other statements, complaints and other procedural documents determined by law that are submitted to the court and may be the subject of litigation*” – P. 2 of Art. 18 of the cap of

15 Кодекс адміністративного судочинства ... URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 21.04.2026).

16 Там само.

17 Про судову експертизу : Закон України від 25.02.1994 р. № 4038-XII (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/4038-12#Text> (date accessed: 21.04.2026).

18 Кодекс адміністративного судочинства ... URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 21.04.2026).

19 Про адміністративну процедуру ... URL: <https://zakon.rada.gov.ua/laws/show/2073-20#Text> (date accessed: 21.04.2026).

20 Кодекс адміністративного судочинства ... URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 21.04.2026).

21 Про судову експертизу ... URL: <https://zakon.rada.gov.ua/laws/show/4038-12#Text> (date accessed: 21.04.2026).

Ukraine ²²), namely: *they will be*. At what point does such certainty arise?

The answer or part of it is securing of evidence examined in this article. In particular, securing carried out before filing a claim involves such a method as conducting forensic examination (Art. 115) ²³. The application satisfaction for such securing imposes on the person who may be the plaintiff the obligation to file a statement of claim within ten days from the date of the decision to secure evidence (P. 4 of Art. 114) ²⁴; sanctions for failure to comply with this requirement consist in impossibility of using evidence obtained, in particular, the conclusions of experts (Para. 2 of P. 4 of Art. 114) and in the reimbursement of court costs and losses caused by such securing of evidence (P. 5 of Art. 114). Severity of these sanctions seems sufficient to argue that the issues submitted for examination when it is appointed under the court decision to secure evidence before filing claim *will be* the trial issue. Do these sanctions serve as guarantees against abuse of the right to appeal to the court? Only to extent that financial losses can deter them at all. There is a danger that the instrument of securing evidence may be used to obtain difficult-to-reach information, restrict the right to property ownership or dispose of information. There is no unified accounting of such requests for information or requirements for questioning witnesses, prohibitions or obligations regarding certain behavior in relation to evidence, reinforced by judicial

authorities. The initiator of the support does not need to indicate in his application the content of the alleged dispute only the justification for the need for security, its method and circumstances for which they are necessary to prove. At the same time, there are safeguards against abuse: first, the cancellation of the decision to secure evidence in the event of failure to submit a statement of claim within ten days after the issuance of such a decision; secondly, recovery of damages caused in connection with securing evidence (P. 5 of Art. 114; it is noteworthy that such damages are defined separately from court costs therefore, not limited to – cf. Art. 132 ²⁵; they can include, for example, lost profits – a type of damages provided for in P. 2 of Art. 22 of the Civil Code of Ukraine ²⁶). On the other hand, such an explicit guarantee instrument as advance payment of court costs (P. 1 of Art. 136 of Code of Administrative Proceedings of Ukraine of Ukraine), in particular, those related to securing evidence, can be applied by the court only to a participant in the case and not to a person who may only become a plaintiff. At the same time, from the legal structures that regulate securing of evidence, we can come to a different conclusion: court costs may arise before the start of proceedings, before the case itself, since the document on payment of the court fee is attached to the statement of claim (P. 3 of Art. 161) and to the statement on securing evidence (P. 2 of Art. 116) ²⁷. In contrast, it is impossible to call the costs caused by the pre-procedural securing

22 Кодекс адміністративного судочинства ... URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 21.04.2026).

23 Там само.

24 Там само.

25 Там само.

26 Цивільний кодекс України від 16.01.2003 р. № 435-IV (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/435-15#Text> (date accessed: 21.04.2026).

27 Кодекс адміністративного судочинства ... URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 21.04.2026).

of evidence belonging to another type of court costs related to case consideration. Therefore, during the further distribution of court costs in case of satisfaction of the claim (P. 1 of Art. 139), with specific provisions regarding the costs of subject of public authority related to involvement of witnesses and conducting expert examinations (P. 2 of Art. 139), legality of the former belonging to the latter becomes controversial one²⁸.

Hence, another prerequisite for abuse: evidence provision in the way of examination has the consequence of its conduct by a court decision.

It is even more certain that issues which have arisen and are being clarified through appointment and conduct of forensic examination during preparatory proceedings should be considered relevant to the case to be heard in court. Thus, pursuant to Art. 180, during the preparatory hearing, the court, among other things, “*determines whether the parties have submitted evidence <...>; decides on the preservation of evidence, if such issues have not been resolved previously*” (Para. 7, P. 2 of Art. 180)²⁹ and separately “*decides on the appointment of an expert examination, the summoning of experts and witnesses to the court hearing, and the involvement of an interpreter or specialist*” (Para. 8, P. 2 of Art. 180). An objection is possible: here it is correct to say not “will be” but “are” the subject of judicial review. Administrative proceedings, by definition, are activities involving the consideration and resolution of administrative cases (Para. 5, P. 1, Art. 4)³⁰. Therefore, preparatory proceedings, since and if they are conducted in an administrative case, are

already an element of the proceedings; they do not precede the proceedings in the broad sense, but are a component thereof. It precedes only the consideration on the merits but remains within the bounds of, for example, *reasonable timeframe for the court consideration* of the case. Thus, there are two stages of case consideration: preliminary and on the merits. Therefore, forensic examination appointment (in particular, during preparatory proceedings in the court of first instance) is carried out in the context of issues that have *already* become the topic of judicial consideration, since a statement of claim is already in place, the plaintiff has exercised their procedural capacity and has submitted their dispute for judicial consideration.

The need for evidence arises for the parties to a legal dispute as soon as the dispute arises and before it is brought before a court. Ability to formulate a position and defend it in adversarial proceedings depends directly on possibility assessment of proving its validity before the court. Evidence plays a leading role even before a court proceeding is initiated. As a general rule, the initial (Art. 160(5)(8), Art. 161(4)) and counterclaims (Art. 177), the answer to the complaint (Art. 162(2)(6), (4)(1)), a reply to the answer (P. 2 of Art. 163; Para. 6 of P. 2, Para. 1 of P. 4 of Art. 162), a defense (P. 2 of Art. 164; Para. 6 of P. 2, Para. 1 of P. 4 of Art. 162) and a third party's statement regarding the complaint or answer (P. 2 of Art. 165; Subparagraph 6 of P. 2, subparagraph 1 of P. 4 of Art. 162) shall be submitted together with evidence confirming the circumstances on which the claims, objections, etc., are based; the parties may use the instrument of securing evidence as

28 Кодекс адміністративного судочинства ... URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 21.04.2026).

29 Там само.

30 Там само.

a supplement to their own capabilities for its collecting³¹. Thus, the substantiation of a procedural position with specific evidence occurs even before the commencement of the trial on the merits, given the acquisition of party status. All parties to the case may file a motion for preservation of evidence. It can be filed by a person who may become a plaintiff, but not by so-called *other persons who may obtain party status*, as mentioned in P. 3 of Art. 117³².

Specificity of administrative proceedings is combination of principle of adversarial proceedings with the principle of official clarification of all circumstances. The latter consists in the independent clarification of significant circumstances by the court. This principle determines activity of the court, the non-binding of its decisions exclusively on the arguments and evidence of the parties - the administrative court has a more independent role from the parties in resolving the dispute, supplementing the role of the arbitrator with the rights of the investigator. However, this principle is not comprehensive, and the court's tools for collecting evidence differ from those provided by the parties. Thus, court takes the measures necessary to clarify all circumstances in the case, in particular, to identify and request evidence on its own initiative, but not any, namely those specified by law (P. 4 of Art. 9), and also *"may offer the parties to provide evidence and collect evidence on their own initiative, except in cases specified by this Code"* (P. 4 of Art. 77)³³. After all, according to P. 4 of Art. 80, the court may request evidence before filing a claim, but precisely *"in the manner established by Arti-*

cles 114–117 of this Code" that is, upon application, and not independently³⁴. Limitation of "officiality", in particular, is embodied in the norms on the procedure for appointing an expert examination on the initiative of the court. Thus, the court cannot appoint an expert examination on issues already clarified in forensic examinations conducted on the initiative of the parties, in the absence of reasonable doubts about the correctness of such conclusions (Clause 2, P. 1, Art. 102), unlike the parties, at whose request an "extrajudicial" (Art. 104) forensic examination³⁵ can be conducted. In addition, the court, that seems can and should collect evidence, does not have at its disposal such a means of protecting it from possible loss as securing evidence. The court issues a ruling on such securing only if there is an application from one of the parties. Similarly, an offer to the parties to provide evidence, which the court may resort to, can hardly contain an offer for one of them to file an application for securing evidence, since in this case impartiality disappears. In addition, within the framework of securing evidence, it is not the participants in the case who provide evidence, but the court, upon application of one of them, appoints forensic examination, requests and examines it, etc.

The principle of official clarification applies to circumstances of the case itself. Pre-procedural clarification is not available to the court limited, as a general rule, to the statement of claim and requirements (P. 2 of Art. 9)³⁶. When, as noted above, there is no case, but only a well-founded or not, bona fide or abusive, application for

31 Кодекс адміністративного судочинства ... URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 21.04.2026).

32 Там само.

33 Там само.

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35 Там само.

36 Там само.

securing evidence, the court must issue one of the decisions: satisfy or refuse to satisfy the application (P. 5 of Art. 117) ³⁷. At the same time (unlike other decisions that are made already in the proceedings) such an application cannot be verified by the court within the framework of officiality principle. Opposite adversarial principle does not work in the same way as in the proceedings: procedure for considering application, although it assumes the participation of the applicant and other persons who may acquire the status of participants in the case, still does not determine the right of them to submit motions, objections, evidence, etc. Provision of P. 7 of Art. 117, Clause 1, P. 1, Art. 294, possibility of appealing a ruling on securing evidence is not accompanied by regulations on the subjects and terms of such an appeal ³⁸. Such a ruling belongs to executive documents (P. 9, Art. 117), however, there are exceptions to such affiliation ³⁹. Thus, ruling on securing evidence is not an executive document in the case of securing evidence, in particular, “*by... conducting forensic examination*” ⁴⁰. Therefore, actions regarding executive documents (correction of errors, suspension of execution, renewal of terms, joint and several obligation (P. 5, P. 7, article 373), recognition as not subject to execution for certain reasons (P. 2, Art. 374) ⁴¹) are impossible here.

Consequently, there are no safeguards typical for administrative proceedings to mislead the court about the actual purpose of applying legal restrictions, prohibitions and obligations for owners and managers of property and information, for subjects of expert activity, etc.

Let us recall that justification for securing is the risk of loss, difficulty in collecting evidence. Thus, in view of Art. 114, the court should secure evidence if there are grounds to assume that “*means of proof can be lost or the collection or presentation of relevant evidence will subsequently become impossible or difficult.*” ⁴² The court adopts the appropriate decision, namely: ruling only upon application by a party to the case or a person who may acquire the status of a plaintiff. Therefore, the court, even in the face of the risk of the further existence of evidence, cannot ensure its preservation, even when it seems necessary for it.

The court decision to secure evidence is not based on a proven fact of a threat, but on a reasonable assumption about. This corresponds to the standard of probability, not reliability. Before filing a claim, court ability to verify validity of such an assumption is extremely limited: principle of official clarification of circumstances does not apply at this stage, nor does the principle of adversarial proceedings. In such a case, initial operational condition of the court decision becomes assumption of the applicant good faith, as well as trust in his statement about the risk. This trust is not blind and works in the same way as a rebuttable presumption: court may refuse to secure evidence if the applicant's arguments appear to be clearly unfounded. However, *Code of Administrative Proceedings* of Ukraine does not provide for a mechanism for substantive verification before filing a claim. Therefore, court decides the issue of restricting the rights of other persons in fact under conditions

37 Кодекс адміністративного судочинства ... URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 21.04.2026).

38 Там само.

39 Там само.

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41 Там само.

42 Там само.

of information asymmetry in favor of the applicant. The legal and teleological justification for such a decision is a combination of two factors: the protection of the evidentiary needs of the person before the commencement of proceedings as a condition for the exercise of the constitutional right to judicial protection, and the double assumption of the applicant's good faith and the sufficiency of his statements about the risk. The court in this case bears its own risk. Not only reputational one, but related to the interests of persons whose rights are limited by its binding decisions.

Institution of limitation of actions assumes that occurrence of dispute is somewhat remote in time from the legal statement of its existence in case of missing deadline without good reason too remote for the court to have the right to resolve such a dispute. Therefore, it would seem that a public-law dispute is always a certain event, and not possibility of its occurrence. However, this is not so. The law, judicial practice and doctrine as the main sources of law operate with such categories as *legitimate expectations*, *threat*, *risk*, *term*, etc. All of them are only a hypothesis, assumption about the development of events. In particular, condition for securing evidence is the possible loss of evidence or the difficulty of collecting or presenting it. However, the conditions for collecting evidence of an event, preservation of evidence are secondary: they are not the subject of the disputed legal relationship; only a sign of circumstances that are important in such a dispute. However, is the dispute topic that has arisen not an actual, but only a possible event? This is more likely an exception than a rule. Confirmation of "prospective"

legal relations is contained, for example, in clause 10, part 5, article 160 of the Code of Administrative Proceedings of Ukraine, according to which the statement of claim in cases of challenging regulatory legal acts shall provide information about the application of contested regulatory legal act to the plaintiff or the plaintiff's belonging to the subjects of legal relations in which *this act has been or will be applied* ⁴³. However, here the disputed act already exists.

Administrative proceedings, unlike criminal proceedings, for which the main feature of a public-law dispute is public danger, are much more "real". Accordingly, evidence as a material sign of such reality should be something factual, available regardless of physical form. This approach can be seen in the Law of Ukraine: *On Access to Public Information*; they provide information (in the document form, etc.) that is already available that does not need to be created ⁴⁴. However forensic expert conclusion that is a source of evidence is not yet a real fact in the general sense (we deliberately do not consider the situation of requesting an opinion as an already existing document).

The right to file an application for the provision of evidence before filing a statement of claim is vested only in a person *who can acquire the status of a plaintiff*. What about other potential case participants? After all, they will also need to reinforce their position with evidence.

The procedure for considering application for evidence provision before filing a statement of claim provides for the possibility of the presence of other persons during consideration of such an application by the court, "*who may receive the status of participants in the case*" (P. 3

43 Кодекс адміністративного судочинства ... URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 21.04.2026).

44 Про доступ до публічної інформації : Закон України від 13.01.2011 р. № 2939-VI (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/2939-17#Text> (date accessed: 21.04.2026).

of Art. 117), except for certain exceptions (P. 4 of Art. 117) ⁴⁵.

From the point of view of the Code of Administrative Proceedings of Ukraine, if the dispute affects someone's interests, the relevant person may acquire the status of a *third party*. Code of Administrative Proceedings of Ukraine does not determine the rights of the applicant or other potential participants in the case during the consideration of the statement of claim for evidence provision ⁴⁶.

Third party who asserts independent claims to topic dispute has the rights of a plaintiff but does not have the status of a plaintiff. Before filing a claim, relevant *person* cannot have the rights of a person who *may become a plaintiff* the law, in addition to the right of a participant in the case, grants the third party only the rights of a plaintiff. Defendant (who is not a subject of public authority) has the right to counterclaim. However, even in this case he remains a defendant, although compared to a person who may become a plaintiff, granting a party who is not a subject of public authority the right to a counterclaim makes such a defendant a person who can become a (opposite) plaintiff; however, such a legal effect does not arise. There is logic in this: if there are grounds to file an application for securing evidence, the defendant and the third party can, after acquiring the status of participants in the case. Therefore, in particular, in a dispute with a predictable development of events (for example, when a subject of authority, who commits actions that obviously limit the interests

of a person, and does not intend to change this decision except by court decision), person who can become a defendant need to conduct an examination. But should he really expect to file a lawsuit or does he have the right to act proactively? Even with a logically affirmative answer, such a right does not extend to the right to apply to the court for protection from the risk of loss of evidence or means of proof.

2. Jurisdictional aspects of pre-trial examination appointment

In Ch. 2: *Administrative Jurisdiction* Section I of Code of Administrative Proceedings of Ukraine, three groups of powers of courts are defined: subject (Articles 19-21), instance (Articles 22-24) and territorial (Articles 25-30) jurisdiction ⁴⁷. All of them concern the consideration of cases. Such specific issues as the powers of local courts as administrative (Art. 20), exclusive jurisdiction (Art. 27), powers of appellate administrative courts as courts of first instance (Art. 22), and the jurisdiction of cases at the choice of the plaintiff (Art. 25) are related to dispute topic ⁴⁸. They require clarity in which question, in relation to what, what the claim is related to, what the cases are related to. Certainty is needed in a broader sense, given the provisions on what the jurisdiction of administrative courts does not apply to (P. 2 and 3 of Art. 19) ⁴⁹. The court of first instance (depending on the subject matter of the dispute) can be a local general court, the High Anti-Corruption Court, or the Supreme Court. Therefore, jurisdic-

45 Кодекс адміністративного судочинства ... URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 21.04.2026).

46 Там само.

47 Там само.

48 Там само.

49 Там само.

tion is determined by all three coordinates simultaneously. However, with *pre-litigation* provision of evidence, the subject coordinate is eliminated: any administrative court of first instance becomes competent at the location of the means of evidence regardless of which court will be responsible for considering the case on the merits.

By definition, an administrative case is a public law dispute submitted to an administrative court for resolution (Clause 1, P. 1, Art. 4) ⁵⁰. Such a dispute is a real event, as evidenced by the verb “arising” in its definition (Clause 2, P. 1, Art. 4) ⁵¹. The court has the right to determine the validity of the dispute. However, it is the plaintiff who claims its existence. Disputes that are resolved in a pre-trial procedure or left unresolved due to failure to apply to an administrative court within the statute of limitations do not raise the issue of determining jurisdiction. Therefore, its prerequisites are clarity regarding the subject matter, nature of the dispute, status and location of its participants, the plaintiff’s decision to transfer its resolution to the court. This makes possible, first of all, to outline administrative jurisdiction, distinguishing it from constitutional jurisdiction and to determine the competent court within the limits of administrative jurisdiction.

However, at the time of filing application for evidence provision, wording claim topic is not required, unlike another application that can be filed earlier for the claim; statement of security for the claim (Para. 3 of P. 1 of Art. 152) ⁵². Thus, spe-

cific legal relationship, type of dispute in application for the provision of evidence before its submission has not yet been determined. Similarly, there is no strict requirement to indicate a specific defendant in this application that is significant from the point of view of territorial jurisdiction (in particular, Art. 26) ⁵³. Thus, application for securing the claim shall indicate the name or the name of *other party* (parties), *if it is known to the applicant*.

Instead, P. 3 of Art. 114 of Code of Administrative Proceedings of Ukraine states as follows: “*Provision of evidence before filing a statement of claim shall be carried out by the court of first instance at the location of the means of proof or at the place where the relevant procedural action is to be taken*” ⁵⁴.

Of course, such a location may differ from any place that is significant for determining the court that will have jurisdiction over the case: residence or location of the plaintiff or defendant. Obviously, “provisional” jurisdiction has different rules.

Satisfaction of the application obliges the person who filed it within ten days to file a lawsuit in court. If this requirement is not met, “*the court shall revoke the decision to take measures to secure evidence no later than the next day after the expiration of such a period*” (P. 4 of Art. 114) ⁵⁵.

It would seem that since the permission was granted by a certain court and he must exercise control, it is to this that application should be filed. However, this is not the case: “*If, after taking procedural actions to secure evidence, the statement of claim is filed with another court, the protocols*

50 Кодекс адміністративного судочинства ... URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 21.04.2026).

51 Там само.

52 Там само.

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54 Там само.

55 Там само.

and other materials to secure evidence are sent to the court considering the case” (P. 8 of Art. 117)⁵⁶. Therefore, Code of Administrative Proceedings of Ukraine does not link the place of the procedural action under the court decision with the place subject to the jurisdiction of the court to which the statement of claim is filed⁵⁷.

The law does not oblige the plaintiff to notify the court through which the evidence was secured of his filing of a statement of claim, he must only file a statement of claim. This is sufficient for the non-cancellation of ruling on securing evidence. Therefore, the clarification of the negative fact: failure to file a statement of claim within the specified period is entrusted to the court through which the evidence was secured.

Thus, from the point of view of P. 8 of Art. 117, statement of claim may be filed with another court. Does this prevent a person: applicant from completely changing the method of protecting his or her right and exercising such protection under the rules of another type of legal proceedings – civil or criminal (that allows filing a statement of claim in criminal proceedings)? In a literal interpretation – yes. According to the text of the Code of Administrative Proceedings of Ukraine, the word *court* in its glossary is limited to the composition of only an administrative court (Clause 4, P. 1, Art. 4)⁵⁸. It is interesting that Art. 128 of Criminal Procedural Code of Ukraine that provides for filing of a civil (not administrative!) claim in criminal proceedings, takes into account the consequences of decisions in other types of legal proceedings: accor-

ding to its P. 6, “refusal of a claim in civil, commercial or administrative proceedings deprives the civil plaintiff of the right to file the same claim in criminal proceedings”⁵⁹. Can another rule be derived from this on the admissibility or inadmissibility for other types of legal proceedings of evidence obtained in the process of preparing a claim within the limits of administrative legal proceedings? To what extent does the prohibition on the use “in another case” (Para. 2 of P. 4 of Art. 114 of Code of Administrative Proceedings of Ukraine) of evidence obtained before the administrative court’s ruling on the cancellation of measures to secure evidence as a sanction for failure to file a claim affect other types of legal proceedings? Any answer to these questions is debatable. However, there are no signs that this debate is ongoing. Thereby forensic research is carried out, in particular, with a general understanding of the type of legal proceedings in which the relevant conclusion will be applied. This is important, since procedural codes define the rights and obligations of an expert in a similar, but not identical, way.

A person who can acquire the status of a plaintiff is the only person who can file an application with the court for the provision of evidence before filing a claim. Compared to the later moment (after filing claim statement), the jurisdiction of the court branches out: the provision of evidence at the *pre-litigation* stage is carried out by the court of first instance either at the location of the means of proof, or at the place where the relevant procedural action is to be taken. Such jurisdiction

56 Кодекс адміністративного судочинства ... URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 21.04.2026).

57 Там само.

58 Там само.

59 Кримінальний процесуальний кодекс України від 13.04.2012 р. № 4651-VI (зі змін. та допов.). URL: <https://zakon.rada.gov.ua/laws/show/4651-17#Text> (date accessed: 21.04.2026).

is related to the evidence and not to the rules for determining territorial jurisdiction. This forms an interesting phenomenon of non-jurisdictional jurisdiction.

It should be noted that Code of Administrative Proceedings of Ukraine recognizes the powers of local general courts as administrative (P. 1 of Art. 20) ⁶⁰. Given the mentioned absence of the subject of the claim, they can be application addressees for the provision of evidence before filing a claim.

Conclusions

Providing evidence before filing a statement of claim is worthy of theoretical understanding and a procedural means of administrative proceedings that is significant for practical application. Its peculiarity is functioning in lack of proceedings as such proceedings. The court decision made in this mode is binding despite the fact that the case has not yet been opened and its subject matter has not been determined. This can be viewed from the perspective of managing the risk of scattering evidence-based information.

The purpose of forensic examination as a way of securing evidence differs markedly from other ways of such securing. Since the non-conducted study cannot be “lost” within the meaning of P. 1 of Art. 114 of Code of Administrative Proceedings of Ukraine, tangible basis for forensic examination appointment of an is not the risk of loss of a means of proof, but the risk of loss of research object of characteristics of procedurally accessible carrier of evidence-based information. This is the reason for expediency of this method of ensuring while the object undergoes rapid and irreversible changes.

Prior to the claim, provision of evidence forms a special type of jurisdiction, not directly articulated by *Code of Administrative Proceedings* of Ukraine along with the subject, instance and territorial. The “security” jurisdiction is tied not to the location of the parties or the subject matter of the dispute, but to the location of the means of proof. This gives rise to the phenomenon of non-jurisdictional jurisdiction: case can be tried by one court, and the provision of evidence can be carried out by another. Consequences of non-compliance with such jurisdiction are not defined by applicable law. The issue of “migration” of evidence between proceedings in different types of legal proceedings attracts attention because of being at the crossroads between formal and strict requirements of admissibility of evidence and procedural tolerance for ways to substantiate positions in legal dispute.

Lack of requirement in the application for the provision of evidence to indicate the topic of a future claim (given the limited ability of the court to verify the applicant’s arguments before the commencement of proceedings) creates a risk of abuse by institution of the evidence provision. Existing safeguards: cancellation of the ruling in case of failure to file a claim and compensation for damages are insufficient.

Проведення судової експертизи в межах заходів забезпечення доказів до подання позову в адміністративному судочинстві

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Попри високий рівень розроблення міжгалузевого процесуального вчення про докази, доволі вузькі аспекти — призначення

⁶⁰ Кодекс адміністративного судочинства ... URL: <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (date accessed: 21.04.2026).

експертизи як способу забезпечення доказів до початку провадження в адміністративній справі, відмінність територіальної юрисдикції від повноважень із забезпечення доказів за їх місцезнаходженням — не були предметом уваги дослідників адміністративного судочинства або експертології, принаймні останнім часом. Зокрема, відсутні чіткі коментарі щодо судово-експертного дослідження з питань, які лише будуть предметом судового розгляду. Водночас теоретичний потенціал питання про забезпечення доказів до початку адміністративного провадження видається високим, що й зумовило мету цієї статті — дослідити зазначений процесуальний механізм крізь призму призначення судом експертизи в провадженні, іще не розпочатому жодним судом. Такій меті підпорядковано завдання: виокремити законодавчі підстави такого судового рішення, визначити природу повноважень суду з такого забезпечення, включно з наявністю відповідних прав у загального місцевого суду. За допомогою спеціально-юридичного догматичного методу, системного тлумачення й порівняльного аналізу з'ясовано, що допозовне забезпечення доказів не потребує чітко сформульованого предмета спору, а здобутими завдяки такому забезпеченню доказами, включно з висновками експертизи, можна користуватися і за межами адміністративного провадження (навіть у разі порушення вимоги про подальше подання позову), оскільки власне одержання доказів здійснено відповідно до закону. Сформовано висновки, згідно з якими задоволення судами першої інстанції доказових потреб потенційного позивача не накладається на поняття предметної або територіальної підсудності та є самотнім явищем, яке лише формально, але не змістовно охоплено інстанційною підсудністю.

Ключові слова: ризик утрати доказових можливостей; судова експертиза; заява про забезпечення доказів; адміні-

стративне судочинство; територіальна юрисдикція; суд першої інстанції; рівність сторін; обов'язок подання позовної заяви; доказ, одержаний відповідно до закону; процесуальні відносини поза провадженням.

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