

АВТОРСЬКЕ ПРАВО. ІНФОРМАЦІЙНЕ ЗАБЕЗПЕЧЕННЯ НАУКОВОЇ ДІЯЛЬНОСТІ

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THE DEVELOPMENT AND MANUFACTURE OF SPECIAL MEANS: LEGAL REGULATION

The issue of an administrative and legal regulation of R & D activities on the development and production of special means for carrying out the operational and technical measures by law enforcement bodies is considered.

Keywords: science activities, science and technical activities, R & D activities, licensing, special means.

According to the Bill of Ukraine “About Scientific and Scientific-Technical Activities” central executive bodies in the sphere of scientific and scientific-technical activity within their competence carry out management in the sphere of scientific and innovation activity and are charged with the level of scientific and technical development of the relevant spheres; define the directions of the development of scientific and scientific-technological potential of the spheres, lead and control the activities of subordinated to them scientific organizations; are involved in the formation of priority directions of the development of science and technics in Ukraine, are engaged in the State scientific and technical programs as well as a government work; form the program of scientific and technical development of the relevant industries and arrange their implementation; organize development and manufacture of modern competitive products based on the use of new high technologies, equipment, materials and informational support; prepare proposals for the improvement of an economic mechanism for the scientific and technical development of the relevant spheres; exercise other powers mentioned in the legislation of Ukraine [1].

So, as we can see, central executive bodies are the main organizers of scientific and scientific-technical activity in the relevant areas of social life. To the sphere of scientific and scientific-technical activity of law enforcement bodies belongs such a kind of the activities as the development of special means for carrying out the operational and technical measures. The Bill “About Licensing of Certain Types of Economic Activities” [2] defines the types of business activities which are subject to licensing, licensing procedure, establishes the State control in the sphere of licensing, responsible entities and organs of licensing for the violation of legislation on licensing. According to art. 6 of the Bill [2] licensing authority performs the following functions: provides performance of licensing legislation; approves the license terms for a certain kind of economic activity and monitors their compliance with the agreement of the specifically authorized body on licensing, except of the provided by this law; publishes duplicate licenses for a certain kind of

economic activity, makes a decision about the recognition of licenses as invalid; carries out within its competence the control over the observance of enforcing licensing conditions; gives the order to eliminate violations of license conditions; cancels the license for a certain kind of economic activity; creates and maintains the license directory.

The concept of licensing conditions and their essence is considered in the Art. 8 of the Bill [2]. The license conditions are a regulatory act, which dispositions set qualifying, organizational, technological, and other requirements for doing a certain kind of economic activity. The entity is obliged to carry out a certain kind of economic activity that is the subject of licensing, according to the established for this type of licensing requirements. Standards for supervision and control in the field of licensing are stated in the Art. 20 of the Bill [2]. State supervision over the compliance with the requirements of the legislation by the licensing bodies in the field of licensing provides specially authorized body for licensing through the executing of the scheduled and unscheduled inspections according to the Bill of Ukraine "About Basic Principles of the State Supervision (control) in the Sphere of Economic Activities" [3]. Control over the availability of licensed entities is engaged in executive bodies, that according to the legislation on the functions of control over the availability of licenses carry out scheduled and unscheduled inspections. And control over the observance of license requirements is carried out by the licensing authorities shall within its powers by carrying out planned and unscheduled inspections [2].

Summarizing the consideration of the Bill of Ukraine "About Licensing of Certain Types of Economic Activities" [2] we should note that it creates the basis and sets appropriate standards for licensing of certain types of activity, including the sphere of the development and manufacture of special means for operational policing. This Bill supports the normative regulation of the State supervision over the activities in order to prevent abuses.

To the regulatory documents that set the standards in the field of licensing of certain types of economics is referred the Bill of Ukraine "About the Basic Principles of the State Supervision (control) in the Sphere of Economic Activity" [3]. This Bill defines the legal and organizational principles, guidelines and procedure for exercising the State supervision (control) in the sphere of economic activity, the powers of the State supervision (control), their officers and the rights, duties and responsibilities of the subjects during the exercise of the State supervision (control).

According to the analysis of the General Requirements to the State supervision (control) defined in Art. 4 of the Bill [3] it should be noted the norm prohibiting the organ of the State supervision (control) to exercise State supervision (control) in the sphere of economic activities. Norma is written very well, clearly establishes the reglamentation of the State supervision and determines the range of subjects that can make it. Also the stop of the production may be carried out only on the pursuant to a substantiated written decision of the Chief of the organ of the State supervision (control) or his Deputy [3].

Due to the fact that the sphere of the development and manufacture of special means for the operative and search activity of law enforcement bodies needs to ensure a regime of limited access to an information, it is advisable to consider the Bill of Ukraine "About State Secret" [4]. This Bill regulates the social relations related to the referring of an information to the State secrets, declassifying, classifying its material

objects, and the protection of the State secret in order to protect the national security of Ukraine. An authorized State body in the field of protection of the State secrets according to Art. 5 of the Bill [4] is the Security Service of Ukraine. Information that can be attributed to the State secret is stated in Art. 8 of the Bill [4]. So to State secrets is referred an information: in the field of defence; in the field of economy, science and technology; in the sphere of State security and public order.

Analysing art. 8 of the Bill [4], we should note that the design and production of special means for operative and search activities is referred to the defense sector and areas of economy, science and technology, as well as to the sphere of the State security and public order. Therefore special means and the researches on their creation, as we see, have a universal character and belong to all the areas mentioned in the art. 8 of the Bill [4] with regard to the definition of an information that can be referred to State secrets.

Discussing the questions of the licensing in the sphere of the development and manufacture of special means for enforcement it should be mentioned the State licensing in this sphere. So, according to the clause 9 of the List of licensing [5], which was approved by the Cabinet of Ukraine, dated November 14, 2000 No. 1698, the Security Service of Ukraine was approved as the licensing authority, as the next type of economic activity – development, manufacturing of special means for the removal of information from communication channels and other means of secret information.

Then let's consider the further Procedure of the development, manufacture, sale and purchase of special technical means for the removal of information from communication channels, other means of secret information [6], which was approved by the Cabinet of Ukraine, dated 27 October 2001 No. 1450. Norm established in the paragraph 2 of the Order [6] defines the subjects that could be customers of the development and manufacture of the special technical means. However, in our opinion, this rule is not clear towards the units that carry out operational and search activities, as well as for the determination of government customers. So we propose paragraph 2 of Regulation [6] to present in following edition: the customers of the development, production and acquisition of the special technical means can be central executive bodies, intelligence agencies, units which are entitled according to the normative documentation for carrying out operative and search activities (hereinafter – State customers), the international law enforcement organization, special services and law enforcement agencies of foreign States (hereinafter referred to foreign customers).

The definition of government customers is established in the following paragraph of the order [6]. So, according to the item 3 of the Order [6] government customers of the development, production and acquisition of the special technical means can be: the Security Service, intelligence organs, Ministry of Interior, the State Tax Administration, the State Border Service, Office of State Protection, the Ministry of Defense within the specified legislation. The performers, if it is necessary, participate in the order of development and manufacturing of the special means. They may be according to clause 4 of the Order [6] the scientific organizations, enterprises and other economic entities, regardless of the form of an ownership, that have appropriate licenses, as well as economic entities of foreign states and government customers. Therefore, the customers of the development, production and sale of the special technical means on the territory of Ukraine can be only State bodies, the list of

which is established in par. 3 of the Order [6]. In our opinion, a more appropriate is to define government customers on the basis of normative documents, which give the right to carry out operative and investigation activities, without their concretization in the Order [6].

According to the par. 5.2.2 of the Standard 3973-2000 “The System of the Development and Launching Products to the Production. Rules for the Implementation of Research Works. General Dispositions” [7] and par. 5.2.3 of of the Standard 3974-2000 “The System of the Development and Launching Products to the Production. Rules for the Implementation of Design Works. General Dispositions” [8] the customer arranges support and control at all stages. Given the above mentioned, and also the fact that the special means do not apply to military equipment, the US proposed to state the clause 11 of the Order [6] in the following edition: quality control over the manufacturing of the special means at all stages of their development, production, handling, installation and supply of public customers, their timely implementation is carried out in the prescribed manner by a military delegation of the State of the customer. Otherwise it is carried out by the customer independently or by bringing military officers on the contractual basis, or a military delegation of the performer in the case of an adoption of the corresponding decision of the government customer. Having examined the procedure for the development, manufacture, sale and purchase of special means for the removal of information from communication channels, other means of secret information [6] and finding out that the Security Service of Ukraine is approved by the licensing authority, as a kind of economic activities, we’ll consider a normative document, regulating the activities of the Security Service of Ukraine, namely the Bill of Ukraine “About the Security Service of Ukraine” [9].

According to the art. 1 of the Bill [9] the Security Service of Ukraine is the State special-purpose law enforcement entity that provides public safety of Ukraine. According to the art. 2 of the Bill [9] The Security Service of Ukraine carries out the defense of the State sovereignty, the constitutional order, territorial integrity, economic, scientific-technical and defence potential of Ukraine, the legitimate interests of the State and the rights of citizens, from the intelligence and subversive activities of foreign special services, encroachments on the part of organizations, groups and individuals, as well as ensuring the protection of the State secrets. The tasks of the Security Service of Ukraine also include prevention, detection, termination and detection of crimes against the peace and security of mankind, terrorism, corruption and organized criminal activities in the field of management and economics and other illegal actions that directly endanger vital interests of Ukraine. In addition, according to paragraph 1 of art. 24 of the Bill [9] of the Security Service of Ukraine it is obliged to carry out the information and analytical work in the interests of the efficient public authorities, solving the problems of the defence, socio-economic construction, scientific and technological progress, ecology and other issues related to the national security of Ukraine. Considering the establishment of the special means for operative and search activities, we have already found out that the customers for the development and manufacturing of the special technical means may be only the State structures. Can the special technical means be owned by the citizens, associations, etc.? The resolution of the Supreme Council of Ukraine “About Ownership of Certain Types of Property” [10] from June 17, 1992, No 2471-XII approved the list of types of property that can be owned by citizens, public associations, international organisations and

legal entities of other States on the territory of Ukraine, as well as established a special procedure for the acquisition of property rights of citizens on the certain types of property.

According to the Clause 7, to the List [10] of the types of property that can not be owned by citizens, public associations, international organisations and legal entities of other States on the territory of Ukraine are included the special technical means of secret information. In addition, according to the note to par. 7 [10] of the List of the special means of secret information can't also be owned by legal entities of non-state forms of ownership. Analyzing the Special Procedure of the Acquiring Ownership of Citizens on Certain Kinds of Property, which is approved by the Supreme Council of Ukraine "About Ownership of Certain Types of Property" dated June 17, 1992, No 2471-XII [10] we should note that there are no the special means of the implied information in this order. Therefore special means of secret information there may not be the property of citizens, public associations, international organisations and legal entities of other States on the territory of Ukraine. Then you should consider licensing business activities with the development, manufacture of special technical means for the removal of information from communication channels, other means of secret information, trade of special technical means for the removal of information from communication channels, other means of secret information [11], which was approved by the Central Department of Security Service of Ukraine from January, 30, 2011 N 35 and registered in Ministry of Justice of Ukraine on February, 23, 2011 N 225/18963. According to the par. 2.1 of the Licensing Requirements [11] licensing authority issues licenses for business activities with the development, production and trade of the special means in full or partially.

Analyzing the norms established in the Clause 3.2 of the Licensing Requirements [11] we should note that the positive one is the establishment of the procedure for the development and manufacturing in accordance with the standards of the system development and launching products to the production. This disposition ensures the development of the special means with an observance of all the requirements that are set by the State and industry standards for the R & D, manufacture of technical means and their production. Development of the new or upgrade the existing designs of the special means are carried out by the licensee (licensees) in accordance with the Clause 4.2 of Licensing Requirements on the order of the State (foreign) customers or in a proactive manner by fulfilling the research and experimental-designing works. R & D of the developing new or upgrading the existing special means to the order of the State (foreign) customers are performed according to the technical task, agreed by a licensing body. Technical Requirements for the R & D are being developed by the licensee or shared state (foreign) customer and by the licensee on the basis of the original requirements of the State (foreign) customer. Initiative R & D with developing new or upgrading existing special means are performed after the agreement with the licensing body of the Technical Requirements. In the Technical Requirements for the development of the special means they are necessarily determined by their belonging to the special means [11].

Summarizing the consideration of basic regulations concerning the sphere of the development and manufacture of special technical means for operatively-search activities, law enforcement agencies, including R & D activities we should note that current regulations create a corresponding legal system for carrying out works on the

development of special means. Comments and amendments proposed to the regulations are aimed at the improving of the activity in the sphere of creation of the special technical means. It should be noted, as we see from the analysis of the regulatory support for the creation of the special means that these activities require the implementation of an appropriate action according to the established regulations regarding the support of the regime of secrecy, creating the appropriate conditions for enterprises-licensees and research institutions when carrying out the research on the development of the special means.

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