The article explores the concept of «imposition of pecuniary penalty» within the frame of criminal process studies. It defines and differentiates factual and formal legal grounds for imposition of pecuniary penalty in criminal proceedings. Certain issues in application of the researched measure ensuring criminal proceedings are highlighted and therefore amendments and additions to the Criminal Procedure Code of Ukraine are proposed.

Keywords: measures ensuring criminal proceedings; failure to comply with procedural obligations; imposition of pecuniary penalty; participants in criminal proceedings.

Problem formulation. The Criminal Procedure Code of Ukraine of 2012 (the CPC of Ukraine) has reinforced system of coercive measures in the criminal proceeding aimed to overcome countering in achieving its objectives from the part of the criminal process participants.

B.B. Bulatov reasonably acknowledges: «It becomes ever more evident that possibilities to achieve goals of the criminal judicial proceeding, to ensure its normal course to the large extend if not directly are depended on prompt and efficient application by the relevant officials and courts of available to them state coercion potential, namely measures of criminal procedural coercion, criminal and administrative legal sanctions...»
etc. Despite the fact that they are widely applied in the criminal judicial proceedings, yet it does not correspond to the real state of crime, especially in the criminal proceedings in respect to the most dangerous crimes» [1, 3].

Currently objective need of the criminal proceeding to be followed by procedural coercion is implemented by the means of widening possibilities in respect to imposition of coercion measures in the CPC of Ukraine, in particular it foresees number of essential legal innovations namely by introducing Section II Measures to Ensure Criminal Proceeding and Grounds for Application of Such Measures, separate Chapter 12 Imposition of Pecuniary Penalty and defining types of measures to ensure criminal proceeding in Article 131 of CPC of Ukraine.

The Legislator considers imposition of pecuniary penalty to be an important procedural measure to ensure proper conduct of the participant of the criminal proceeding at the stage of pre-trial investigation and litigation that contributes to efficiency of procedural activity.

Currently such innovations determine emergence of new developments in procedural theory with regards to analysis of general and specific issues of criminal procedural coercion.

Analysis of recent studies and publications. In criminal procedural study the matter of state coercion was researched by such Ukrainian and foreign scholars processualists as: Y.P. Alenin, Y.M. Grosheviv, O.M. Gumin, V.S. Zelenetskiy, Z.Z. Zinatullin, O.P. Kuchinska, L.M. Loboiko, O.R. Mykhailenko, A.V. Moldavan, I.L. Petrukhin, V.V. Rozhkova, T.V. Sadova, V.S. Chystiakiv, O.G. Shylo and others. With regards to legal definition and imposition of pecuniary penalty the most relevant respect analysis of this coercion measure was made by B.B. Bulatov, M.K. Gafizov, G.K. Kozhevnikov, Y.O. Kuzovenko, O.V. Nikitina, V.T. Ocheredniy, S.M. Smokov.

However in modern studies the matter of imposition of pecuniary penalty is not considered either within the general system of measures ensuring criminal procedures in Ukraine or within specific matters of criminal procedural coercion despite reasonable relevancy to be scientifically interpreted and justified.

The purpose of this Article (objective) is to diagnose issues of doctrinal and law-enforcement nature in respect to imposition of pecuniary penalty in criminal proceeding, to describe and differentiate them aiming to determine framework for further study of this measure ensuring criminal proceeding.

Description of basic research material. Of course scientific problem is complex of new, dialectically complicated theoretical or practical challenges contradicting current knowledge or practical methods that should be resolved by the means of scientific research. Based on theoretical groundwork and practical results we believe that general diagnosis of criminal process issues should comprise such consistent and incremental steps as follows: 1) problem exploration; 2) specification; 3) problem statement; 4) priority evaluation.

Foremost we face a number of issues of defining matter. In compliance to provision 2, part 2, Article 131 of the CPC of Ukraine one of the measure to ensure criminal proceeding is imposition of pecuniary penalty regulated by the Article 114–147 of the present Code. The definition of the notion «imposition of pecuniary penalty» is not introduced.
It should be noted that in current criminal process studies one unified approach in defining this legal category has been not formed. Hence according to I.V. Govliuk pecuniary penalty is a measure to ensure criminal proceeding imposed on the participants of criminal proceeding for failure to perform procedural obligations without reasonable excuse related to adverse effect by laying on person obligation to face restriction of a material nature in the amount as set forth in the CPC of Ukraine [2, 339]. V.V. Gevko in his turn while defining pecuniary penalty as procedural liability notes that it concept is to penalize participants of criminal proceeding which intentionally without reasonable excuse evade encumbered on them by the law or the court obligations by recovering monetary means to the state revenue [3, 319].

At the same time O.V. Nikitina in the light of qualitative determination considers pecuniary penalty as «other coercion measure». It is «... traditionally in criminal procedure legislation implied as possibility to impose state coercion on participants of criminal judicial proceedings who due to failure to perform or improper performance of encumbered on them obligations obstruct or could have obstructed criminal procedure activity. Pecuniary penalty is imposed as the measure of criminal procedural coercion only if it is directly stipulated by the article of a law as a sanction for failure to perform procedural obligation» [4, 16]. M.K. Gafinov comprehends pecuniary penalty as measure to ensure proper conduct of the certain range of participants of procedural activity and litigation that practically appears during proceeding under the criminal case as a sanction for breaching norms of criminal procedure law [5, 15].

Y. O. Kuzovenkova believes that imposed in the course of criminal judicial proceeding pecuniary penalty is a sanction of criminal procedural liability [6, 227]. In her other study she insists on that pecuniary penalty is foreseen by the criminal procedure legislation coercion measure. Along with general features distinctive for any coercion measure, pecuniary penalty has individual characteristics, has specific load in criminal process being a sanction of criminal procedural liability. Its nature is punitory and it is a method for punishing persons who have committed criminal procedure offence as it causes adverse effect in the form of material responsibility in case of commission of an offence – failure to perform procedural obligations or disobeyance of the legal orders made by the authorized officials or state bodies [7, 17].

Hereinabove mentioned group of problems also includes the issues of determining the place of pecuniary penalty in the system of criminal procedure coercion measures foreseen by the CPC of Ukraine and issues of substantiating system of relevant procedural offences and procedure of this measure imposition for committed by the separate participants of the criminal proceeding.

The above mentioned leads to emergence and structuration of another group of problems related to definition and differentiation of factual and formally legal grounds for imposition of pecuniary penalty and its importance in ensuring legality and rights of the participant of criminal process.

Systematic analysis of the norms of the CPC of Ukraine regulating the order of application of the researched measure provides for the opportunity to differentiate the cases when the pecuniary penalty is imposed on the participants of criminal proceeding.

First of all the suspect, accused, witness, victim or civil defendant who has been summoned in the manner stipulated by present Code (in particular, presence of
confirmation of receipt of the subpoena or of learning its content in other way), did not appear without valid reason or did not inform on reasons for his non-appearance, he shall be the subject to imposition of pecuniary penalty in the amount of: 0.25 to 0.5 times minimum wages in case of non-compliance with court summons of investigator, public prosecutor; 0.5 to 2 times minimum wages in case of non-compliance with court summons of investigating judge, court (part 1 Article 139 of the CPC of Ukraine).

Secondly in case if the suspect, accused is notified, in written form against his signature, of duties imposed on him, and advised that in case of non-observance, he may be applied a more strict measure, and he may be imposed a pecuniary penalty in the amount of 0.25 to 2 times minimum wages (parts 1, 2 Article 179 of the CPC of Ukraine).

Thirdly in case of non-fulfillment by warrantor of assumed obligations, when applying to the suspect, accused preventive measure in the form of personal warranty, he shall be imposed pecuniary penalty in the amount:

a) in proceedings on a criminal offense punishable by imprisonment for a term of no more than three years, or by other, less severe punishment, of two to five times minimum wages;

b) in proceedings on a crime punishable by imprisonment for a term of three to five years, of five to ten times minimum wages;

c) in proceedings on a crime punishable by imprisonment for a term of five to ten years, of ten to twenty minimum wages;

d) in proceedings on a crime punishable by imprisonment for a term of over ten years, of twenty to fifty times minimum wages (part 5 Article 180 of the CPC of Ukraine).

Fourthly if the accused against whom such measure of restraint as keeping in custody was not enforced, does not appear, upon summons, in court session, the court may pass the ruling on imposition of pecuniary penalty in accordance with the procedure laid down in Chapters 11 and 12 of the CPC of Ukraine (Article 323 of the CPC of Ukraine).

Fifthly if the summoned victim, civil defendant duly notified on the date, time and place of the court session, does not appear in court, the court may impose pecuniary penalty on them in accordance with the procedure provided for by the Article 139, 144–147 of the CPC of Ukraine (also see Article. 325, part 2 Article 326, part 1 Article 327 of the CPC of Ukraine).

Sixthly in case of a breach of the obligation by the parents, custodians or caretakers to ensure appearance of the underage suspect, accused before investigator, prosecutor, judge, court or his proper conduct they shall be the subjects to imposition of pecuniary penalty in the amount of two to five times minimum wages (part 5 Article 493 of the CPC of Ukraine).

As it was already mentioned according to part 1 Article 139 of the CPC of Ukraine for the failure of suspect, accused, witness, victim, civil defendant to appear without valid reason upon subpoena of investigator, prosecutor, investigating judge, court, he shall be subject to imposition of pecuniary penalty. For reasons not well understood the civil claimant is not mentioned in the norm. At the same time he is also obliged to appear upon subpoena of investigator, prosecutor, investigating judge and court. The conclusion can be made on the basis of the content of part 3 Article 61 of the CPC of Ukraine according to which the claimant has shall have the rights and duties of a victim,
as provided for by this Code and is required to appear upon such subpoena (provision 1 part 1 Article 57 of the CPC of Ukraine).

Thereafter we believe that part 1 Article 139 of the CPC of Ukraine should be extended with the provision on imposition on the civil claimant of pecuniary penalty if he fails to appear without valid reason or fails to notify the reasons for his non-appearance.

Depending on the stage of the criminal proceeding pecuniary penalty is imposed 1) in the course of pre-trial investigation – upon the judge ruling based on the motion made by the of the investigator, the public prosecutor or own initiative; 2) in the course of the judicial proceedings – upon the judge ruling upon motion of the public prosecutor or own initiative.

Hereunder the close attention will be given only to the consideration of such matter in the course of pre-trial investigation.

Part 2 Article 144 of the CPC of Ukraine stipulates that in the course of pre-trial investigation the investigating judge based on the motion made by the investigator or the public prosecutor or on his own initiative adopts the ruling to impose pecuniary penalty on the participants of criminal proceeding in the cases and amounts as set forth by the present Code for non-performance of the procedural obligations.

The attention should be paid to the fact that part 2 Article 144 of the CPC of Ukraine does not stipulate whether the investigator is ought to get an approval of the public prosecutor in respect to the motion for imposition of pecuniary penalty. We consider it to be defect that should be eliminated. In this respect G.K. Kozhevnikov notes that the public prosecutor supervision over observance to the laws when conducting pre-trial investigation in the form of procedural guidance over pre-trial investigation requires his active participation in the criminal proceeding, that is why the public prosecutor should examine if the law was observed by the investigator when deciding to impose pecuniary penalty. Foremost the public prosecutor should examine correspondence of the form and content of the motion for imposition of pecuniary penalty [8, 92]. Therefore according to Article 145 of the CPC of Ukraine motion for imposition of pecuniary penalty on a person in the course of the pre-trial investigation shall contain the following information: 1) name of criminal proceedings and registration number thereof; 2) procedural status of the person for whom the motion for imposition of pecuniary penalty was made, his last name, first name, patronymic and place of residence; 3) duty imposed on this person by this Code or by ruling of the investigating judge; 4) circumstances under which this person failed to fulfill his duty; 5) facts that corroborate the person’s failure to fulfill his duty; 6) last name, first name, patronymic and position held by the investigator or public prosecutor; 7) date and place of making the motion. Listed requirements to the content of the motion of the investigator, the public prosecutor for the matter of imposition of pecuniary penalty is of an imperative nature whereof non-compliance to it shall have legal implications that should be equal to those stipulated by part 3 Article 151, part 2 Article 156 of the CPC of Ukraine etc., in particular having established that motion for imposition of pecuniary penalty does not comply with Article 145 of the present Code, investigating judge returns it to public prosecutor and adopt a ruling thereon [9, 270].

Copies of the materials used by the investigator or public prosecutor to support their arguments shall be attached to the motion. We mean the materials proving that the person was summoned in a due manner and presence of confirmation of receipt of the
subpoena or of learning its content in other way and non-appearance to the summon; materials proving non-performance by the warrantors of the obligation to ensure suspect’s compliance with his duties according to the article 194 of the CPC of Ukraine and obligation to ensure his appearance before the pre-trial investigation agency upon the first request; materials proving non-performance by the parents, custodians and caretakers of the obligations to supervise underage suspects [2, 340].

Also motion for imposition of pecuniary penalty should enclose extract from the Unified Register of Pre-trial Investigations. This is a general rule applicable to any motion for imposition of any measure to ensure criminal proceeding.

Further the public prosecutor should examine presence in the criminal proceeding materials of the evidences proving that the person was aware about his duty to perform certain procedural obligation and intentionally did not perform it without valid reason [8, 93].

In compliance to part 2 Article 132 of the CPC of Ukraine motion for imposition of pecuniary penalty shall be submitted to local court within the territorial jurisdiction of which the pre-trial investigation agency conducting respectful investigation is located. Such motion shall be considered by the investigation judge which is appointed by An automated workflow system functioning in court as set forth by part 3 Article 35 of the present Code.

Examination of the motion for imposition of pecuniary penalty is regulated by Article 146 of the CPC of Ukraine. Part 1 of this Article stipulates that in the course of pre-trial investigation, the motion made by the investigator or public prosecutor for imposition of pecuniary penalty shall be examined by the investigating judge no later than three days after the date of submission of the motion to the court. The official who filed the motion and the person on whom pecuniary penalty may be imposed on shall be notified of the time and place of consideration of the motion; however their default in appearance shall not impede examining this issue.

The provision of part 1 Article 146 of the CPC of Ukraine that default in appearance of the of official who filed the motion for imposition of pecuniary penalty shall not impede examining this issue draws objections. Whereby such official (who is investigator, public prosecutor) presence at the court hearing is mandatory to prove that participant of the criminal proceeding has failed to perform his procedural obligation. Hereby we consider it necessary to withdraw from part 1 Article 146 of the CPC of Ukraine provisions as follows: default in appearance of the official who filed the motion for imposition of pecuniary penalty shall not impede examining this issue.

The investigating judge or the court upon establishing that the given person failed to fulfill his procedural duty without valid reasons shall impose pecuniary penalty on this person. A copy of the corresponding ruling shall be sent to the person on whom pecuniary penalty was imposed no later than the next working day after taking the decision (part 3 Article 146 of the CPC of Ukraine).

The content of part 3 Article 146 of the CPC of Ukraine provides for the conclusion that the investigating judge may adopt a ruling to deny the motion for imposition on a person of pecuniary penalty if established that such person failed to fulfill his procedural duty due to valid reasons.

Upon consideration of the motion for imposition of pecuniary penalty investigating judge has the right to adopt a ruling to return it for correction if the motion filled by the
investigating judge has not complied with requirements stipulated by Article 145 of the CPC of Ukraine. The reasons why the motion was returned should be duly grounded and the errors to be corrected should be such that prevented investigating judge from adoption of legally binding decision.

In order to prevent unreasoned application of the abovementioned measure to ensure criminal proceeding Article 147 of the CPC of Ukraine foresees the possibility for the investigating judge to revoke his own decision on imposition of pecuniary penalty. This Article states that the person on whom pecuniary penalty was imposed and who was absent during consideration of this issue by the investigating judge shall have the right to lodge a motion for revocation of the ruling on imposition of pecuniary penalty on him. This motion shall be filed with the investigating judge who passed the ruling on imposition of pecuniary penalty.

The investigating judge having recognized the validity of the person’s arguments may revoke the ruling on imposition of pecuniary penalty at his own discretion, or schedule a court session for examining the motion for revocation of the ruling on imposition of pecuniary penalty. The person who filed this motion, as well as the investigator or public prosecutor whose motion became the grounds for imposition of pecuniary penalty shall be notified of the place and time of consideration of the motion; however their default in appearance shall not impede such consideration.

The investigating judge shall revoke the ruling on imposition of pecuniary penalty on a person based on the results of consideration of this motion during the court session, provided it is established that the penalty had been imposed unfoundedly, or in other case shall reject satisfaction of the motion.

As it appears the matter of reaction of the participant of criminal proceeding who does not agree with the ruling of the investigation judge on imposition on him of pecuniary penalty should be regulated by the CPC of Ukraine in the different manner. It is reasonable to entitle such participant to the right to appeal to such court ruling.

Conclusions. Imposition of pecuniary penalty being the type of criminal procedural liability imposed on the participants of criminal proceeding for the failure to perform their procedural duties is an efficient measure to ensure their proper conduct for execution of the tasks of criminal proceeding. However we believe that legal regulation of the analyzed measure ensuring criminal proceeding aiming in order to increase its efficiency requires improvements considering herein stated suggestions.

REFERENCE LIST:


Imposing pecuniary penalty on the parties of criminal proceedings (problem diagnoses), P. 62-69