

# Ruling on Enforcement of Compulsory Measures of Educational Character: Cases, Grounds of Adoption and Standard of Proof

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## ABSTRACT

The article deals with the a) cases of passing a ruling to enforce compulsory measure of educational character (CMEC) by the court of first instance from the standpoint of their interconnection with final decisions of the pre-trial investigation stage; b) grounds for adoption of a ruling to impose CMEC by the court of first instance with regard of applicable standard of proof. Authors concluded that the court of first instance passes the ruling to enforce CMEC only in case a motion to impose CMEC was sent to the court from the pre-trial investigation stage. Such situation is possible solely in criminal proceedings in respect of a minor that committed socially dangerous act having reached the age of eleven and prior the age of criminal responsibility. Factual circumstances of criminal proceedings to be proved are the grounds for rendering a ruling to enforce CMEC. Approximate list of the circumstances is given in Art. 91 Para. 1 and Art. 485 of the Code of Criminal Procedure of Ukraine (CCP of Ukraine). Given that the ruling to enforce CMEC is a decision where the minor's involvement in the commission of the alleged act shall be shown, the court shall be bound by the beyond a reasonable doubt standard. However, given the provisions of Arts. 17, 485 and 501 of CCP of Ukraine it is demonstrated that the questions arising while deciding whether to enforce CMEC shall be addressed by the court with account of probabilistic nature of circumstances to be ascertained. In addition, the law does not require the prosecution party to prove all circumstances specified in the law beyond a reasonable doubt.

**Keywords:** *minor, compulsory measures of educational character, grounds to pass a ruling to impose compulsory measures of educational character.*

## 1. INTRODUCTION

Legality and justice (including in respect of a minor in conflict with law) are in focus of constant attention of United Nations, Council of Europe. In numerous conventions, resolutions, and recommendations adopted under their aegis, the ways of improving the access to justice and court proceedings are defined. The core of quality of justice lies within the court decisions. Consultative council of European judges (CCEJ) in their Opinion No. 11 of 2008 (Opinion No. 11) in the quality of judicial decisions in para. 7 stresses that *'the purpose of a judicial decision* is not only to resolve a given dispute providing the parties with legal certainty, but often also to establish case law which may prevent the emergence

of other disputes and ensure social harmony' [1, para. 7].

CCEJ and Committee of Ministers of the Council of Europe encourage the research in the area of improving the quality of court decisions and child-friendly justice; participation of 'external' persons in the evaluation [1, para. 70; 2]. Such research may result in the review of current national legislation which should be in conformity with Convention of human rights and fundamental freedoms and relevant case law of the European Court of Human Rights (ECtHR). The CCEJ in its Opinion No. 11 (para. 11) underlines that 'the quality of judicial decisions may be affected by over- frequent changes in legislation, ... uncertainties in the content of

law, and by deficiencies in the procedural framework' [1]. Unfortunately, such shortcomings are common to current criminal procedural legislation of Ukraine, including, in the part that regulates grounds and procedure of adoption a ruling to enforce CMEC. Hence, the paper seeks to conduct a comprehensive research of the following issues:

cases of adoption of a ruling to enforce compulsory measure of educational character (CMEC) by the court of first instance from the standpoint of their connection with final decisions of the pre-trial investigation stage with respect to legal certainty (that implies the need for establishing legal cases in which the court of first instance passes the ruling to enforce CMEC; inconsistencies among provisions of Criminal Code of Ukraine (CC of Ukraine) with Code of Criminal Procedure of Ukraine (CCP of Ukraine) and also with international standards of administration of justice);

grounds for adoption of a ruling to impose CMEC by the court of first instance with respect to interconnection with standard of proof (that implies adjustment of theory on grounds for passing a ruling to enforce CMEC and applicable standard of proof).

## 2. METHODOLOGY

In order to ensure scientific soundness of the results of the present paper the set of general-science and special methods were used. The research was based on the utilization of dialectic method, use of which made possible to formulate problems examined in the unity of their social essence and legal form. By using method of systematic analysis of provisions of CC and CCP of Ukraine, legal positions of the Supreme Court the following is established: 1) cases of passing a ruling on enforcement of CMEC by the court of first instance; 2) types of court decisions in which the issue of enforcement of CMEC may be addressed; 3) interconnection between final decisions of pre-trial and trial proceedings which address the issue of enforcing CMEC; 4) circumstances which serve as grounds for passing a ruling to impose CMEC. Discussion was possible due to use of critical analysis method of theoretical foundations, legislation, and law-enforcement practice. Generalization method led to presentation of own finding regarding the question raised above.

## 3. RESULTS AND DISCUSSION

### ***3.1. Cases of passing a ruling on enforcement of CMEC by the court of first instance (or interconnection between final decision of pre-trial investigation and adoption of a ruling to enforce CMEC by the court of first instance)***

Pre-trial investigation and court proceedings in the court of first instance are interconnected phases (stages)

of criminal proceedings. Procedure and scope of court proceedings initially depend on the final decision of pre-trial investigation that is sent to the court (however, there are cases for altering the procedure and scope of court proceedings later).

The ruling to enforce compulsory measures of educational character (CMEC) can be passed by the court of first instance in case when the appropriate motion to enforce CMEC is sent to the court (Art. 499 Para. 5 of CCP of Ukraine). The decision could be rendered only in criminal proceedings against a minor that has committed socially dangerous act after reaching the age of eleven but *prior the age of criminal responsibility*. Such conclusion stems from the provisions of Art. 97 Para. 2 of CC of Ukraine and Art. 489, Art. 500 Para. 2 of CCP of Ukraine. In such case cannot be considered as a subject of criminal procedure as he/she has not reached the age of criminal responsibility, however is regarded as the actor of the defense party, and thus, could be characterized as 'the person in whose respect CMEC could be enforced or in whose respect enforcement of CMEC is considered' (Art. 3 Para. 1 (10) of CCP of Ukraine). However, based on the analysis of national courts' practice, some judges disregard this provision and utilize different terms in rulings on enforcement of CMEC (particularly, in the introductory part) in regard of a minor, such as juvenile perpetrator' [2] (which is inconsistent with the presumption of innocence), 'minor' [3] (which does not conform to the requirement of legal certainty, as it's not clear what procedural status the person has).

The court may decide on the issue of enforcing CMEC in respect of *a minor who committed criminal offence (i.e., has reached the age of criminal responsibility but is not an adult)* when makes one of the following final decisions: a) judgement (subject to presence of conditions and grounds for release from punishment by enforcement of CMEC, "due to the minor's genuine repentance and further irreproachable conduct" (Article 105 Para. 1 of CC of Ukraine). This type of court decision may be passed on the consideration of an indictment; b) ruling to close criminal proceeding and release a person from criminal responsibility, including by enforcing CMEC. Under Article 97 Para. 1 of CC of Ukraine 'a minor who committed non-grave reckless offense for the first time, may be released from criminal responsibility, provided that his reformation is possible without punishment'. The court may adopt the decision, provided that 1) a motion to release the minor from criminal responsibility by enforcing CMEC has been lodged at the pre-trial investigation stage, or 2) during the consideration of an indictment in trial on the motion of a party seeking enforcement of CMEC as well as proprio motu. Currently dissolved, the High Specialized Court of Ukraine for Civil and Criminal Cases had stated that '...it is appropriate [for the courts] to enforce CMEC and release a minor from criminal responsibility, provided there are relevant conditions

provided for by the law, regardless whether the relevant motion has been filled by a prosecutor' [4, para. 16].

The question of *in what cases the pre-trial investigation ends with the submission to the court of a motion to enforce CMEC* is subject of debate. As we've mentioned before, completion of pre-trial investigation by submitting a motion to enforce CMEC is possible *only* in respect of minors who committed socially dangerous act, prior to the age of criminal responsibility [5, p. 137]. However, there is an alternative position expressed in the scientific literature that pre-trial investigation can be completed by drafting and submitting a motion to enforce CMEC to the court in respect of a minor that reached the age of criminal responsibility but is not an adult (Drozd V. H. [6, p. 371-372] and others). Such position is also supported by prosecutors [7, p. 17].

In our opinion such position is grounded on vague wording of Article 497 of CCP of Ukraine, which are consistent with neither other provisions of CCP of Ukraine (namely, Article 42 Para. 2, etc.) nor provisions of CC of Ukraine (Article 97 Para. 1). According to Article 497 Para. 1 of CCP of Ukraine if at the stage of pre-trial investigation, public prosecutor concludes that the minor who is accused of committing a criminal misdemeanor, or a reckless non-grave crime for the first time, may be corrected without imposition of criminal sanction, the public prosecutor shall draft a motion to enforce CMEC to the minor *accused person*, and sends the motion to the court. *Firstly*, the question arises as to how is it possible for a person to have a procedural status of an accused at the pre-trial investigation stage? Since under Article 42 Para. 2 of CCP an accused is the person an indictment in whose respect has been submitted to the court as outlined in Article 291 of CCP of Ukraine. At the pre-trial investigation stage a person may enjoy the rights and duties of a suspect. *Secondly*, the analysis of provisions of Article 97 Para. 1 of CC of Ukraine and Article 497 Para. 1 of CCP of Ukraine leads to the conclusion that it regulates conditions and grounds of *release from criminal responsibility* by enforcing CMEC such as 'commission of a criminal misdemeanor or a non-grave crime by a minor'. As to minors that committed a criminal offence, a prosecutor must draft a motion to release from criminal responsibility, including by enforcing CMEC, as provided for by Art. 97 Para. 1 of CC of Ukraine in case necessary conditions are met [5, p. 137; 8, p. 140].

We believe that such approach will contribute to coherency between provisions of CC and CCP of Ukraine, promote legality and legal certainty of both a) final decisions of pre-trial investigation in criminal proceedings in respect of minors and further court proceedings as well; b) procedural status of a minor in whose respect the issue of enforcing CMEC to be resolved.

### **3.2. Grounds to pass a ruling to enforce CMEC by the court of first instance and applicable standard of proof**

Establishing the grounds for rendering a decision to enforce CMEC by the court of first instance is connected to the question: *what are the grounds for making any procedural decision?* In the course of research on these issues [9] we concluded that factual circumstances of criminal proceedings defined in the law are the grounds to adopt any criminal procedural decision (Lukashkina T. V. [10, p. 32], etc.). Besides that, it stems from the analysis of Art. 91 Para. 2, Art. 370 Para. 3, Art. 501 Paras. 1 and 2 of CCP of Ukraine as well as other articles, Opinion No. 11 (2008) of the Consultative Council of European Judges: '...the judicial decision includes an examination of the factual and legal issues lying at the heart of the dispute.' [1, para. 42].

*What factual circumstances shall be considered as grounds to make a ruling to impose CMEC?* Current CCP of Ukraine does not address the questions. Under Art. 501 Para. 1 of CCP of Ukraine when passing a ruling in criminal proceedings in respect of enforcement of CMEC, the court shall establish the following factual and legal issues: 1) whether a socially dangerous action has really occurred; 2) whether such action was committed by the minor concerned in the age from eleven till the age of criminal responsibility for this act;

3) whether it is necessary to impose CMEC and, if so, what measure exactly. (It should be noted that in the second paragraph of the article the term 'circumstances' are used instead of 'issues'). However the abovementioned list of issues is not complete as the court shall consider the general list of issues to be established ('subject of proof') (Art. 91 Para. 1) and specificities of its application in respect of minors (Art.

485) (Romaniuk V.V. [8, p. 99]). Besides that it should be considered that in cases in respect of minor that committed socially dangerous act prior the age of criminal responsibility, the act couldn't be described as a criminal offence but socially dangerous act, and it's not possible to use the term 'guilt of a person' but the fact that the socially dangerous was committed by a that person. Such approach has been formulated in the scientific literature (Hidulianova Ye. M. [11]) and decisions of the Plenary of the Supreme Court of Ukraine [12, para. 18].

Thus, when passing a ruling in criminal proceedings in respect of enforcement of CMEC, the court shall establish the following circumstances: 1) time, place, method, and other circumstances of socially dangerous act; 2) whether such action was committed by the minor in the age from eleven till the age of criminal responsibility for this act. The age of a minor shall be considered by the court when making a ruling to enforce CMEC. The Supreme Court also draws attention to this

requirement by stating that ‘CMEC are imposed ... if at the time of passing a ruling to enforce such measures the person in question is still a minor [13]. In addition, a court shall consider that certain CMEC provided for in Art. 105 Para. 2 are terminable, and thus require a person to fall within the category of a ‘minor’ for some time; 3) type and amount of damage caused by criminal offence, as well as amount of procedural expenses; 4) circumstances which aggravate, mitigate the committed criminal offense; 5) circumstances confirming that cash, valuables and other property subject to special confiscation have been gained as a result of commission of a criminal violation and/or are proceeds from such property or that they were designed (used) to induce a person to commission of a criminal violation, finance and/or provide logistical support to a criminal violation or remunerate its commission, or are an object of a criminal violation related inter alia to their illicit circulation or seeking, manufacturing, adjusting or use as means or instruments of criminal violation; 6) full and comprehensive information on the personality of the minor person concerned: his age (date, month and year of birth), state of health and level of development, other social and psychological personal traits which should be taken into account when individualizing his liability or imposing a measure of restraint of educational nature. Where information is available on the minor person’s mental deficiency not related to a mental disease, it should also be ascertained whether he was capable to be fully aware of the meaning of his actions, and to what he was capable to be in control of his actions; 7) the minor person’s attitude towards his actions; 8) environment in which the underage lives and is brought up. For instance, information on the minor’s parents (whether there are criminal records, deprivation of parental rights, ability to have an educational impact on the minor and continuous control over his attitude), circumstances that had negative impact on the minor; 9) existence of adult instigators and other accomplices in criminal offence; 10) whether it is necessary to impose CMEC and, if so, which measure exactly. It should be considered that ‘... any form of deprivation of liberty of children should be a measure of last resort and be for the shortest appropriate period of time’ [14, para. 19]. As stated in the judgement of the ECtHR in the case of *Osman v. the United Kingdom*, ‘...a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved’ [15, para. 147].

The mentioned list of circumstances would be the same for all types of criminal proceedings, however the content of them will differ (as to the specificities of circumstances in regard to specific type of criminal proceedings which may be established during pre-trial investigation by using different search measures and tools, for instance digital forensic tools [16] and

procedures [17]. Moreover, considering the stable growth of minor engagement in social media, it would be reasonable to employ instruments of behavior analysis [18], including signs of aggression [19]).

Such approach is aimed to a) full, comprehensive, and objective examination of circumstance of criminal proceedings; b) ensure that the chosen CMEC is proportional to the gravity of socially dangerous act as well as the personality of a minor in question. It is fully consistent with international standards on administration of justice in respect of minor. Namely, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) of 29 November 1985 (Paras. 5(1) and 17(1)), Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 [14, para. 24].

Establishing the named factual circumstances is conducted during pre-trial investigation by collecting, examining, and evaluating evidence. Thus, the question arises: *at what point the court (or a particular judge) can consider the collected body of evidence as sufficient to pass a ruling to enforce CMEC?* Article 501 of CCP of Ukraine does not address this issue and have only the list of three questions that shall be answered by a judge. Partially, the answer to the formulated question may be found in the Article 17 of CCP of Ukraine where the provisions of the presumption of innocence are laid out. It guarantees that the person may be subject of criminal penalty (which certainly includes CMEC) [20, p. 54] only in case the guilt of the person is proved *beyond a reasonable doubt*.

Beyond a reasonable doubt is a standard of proof which shall be satisfied by the prosecution party in order for a judge to pass a judgement. Standard of proof is certain criterion (threshold) of proof in order to find a fact in question as established. Beyond a reasonable doubt standard, in turn, as a criterion for decision-making presupposes the probable character of the court decisions that could be expressed in terms of ‘credibility’, where the judge’s lack of reasonable doubts is the practical form as the highest degree probability [21, p. 461]. Other researchers also emphasize the probable character of the standard that shall be used by the courts in while taking decisions on the guiltiness of the person in question [22]. Similarly, the High Anti-Corruption Court of Ukraine holds that the requirement of ‘beyond a reasonable doubt’ standard is not the same as ‘absolute certainty’ that implies inviolability and absence of hesitation [23]. The Supreme Court employ different articulation of beyond a reasonable doubt standard, however quite comparable. For instance, in the decree of 29 January 2019 the Supreme Court stated that under the beyond a reasonable doubt standard it is insufficient for the version of the prosecution party to be more probable than the defense

party version [24].

Considering that the court's ruling to enforce CMEC shall demonstrate a minor's involvement in commission of a socially dangerous act, the court shall use the beyond a reasonable doubt standard when addressing the first two questions of provided for by Art. 501 Para. 1. Such conclusion is also backed by the provisions of the Art. 501 Para. 2 of CCP of Ukraine which require the court to pass a ruling on the denial of imposition of CMEC shall close criminal proceedings in case during the trial, one of the questions will be answered negatively.

Nonetheless, considering that imposition of CMEC requires establishing circumstances of different character (general and special) which was demonstrated above, ascertainment of certain groups of circumstances does not require following such strict standard of proof. It will be proved with the two group of circumstances established in Art. 485 Para. 1 of CCP of Ukraine, namely a) the minor's attitude towards his/her actions, and b) environment in which the minor lives and is brought up. The groups mentioned does not affect the minor's 'involvement' in commission of the alleged socially dangerous act, nor provides additional information on the essence of the act, and thus, should be considered solely as circumstances that shape the type of CMEC to be imposed. Therefore, it could be argued that the prosecution party is not required to prove the abovementioned groups of circumstances beyond a reasonable doubt due to the provisions of Arts. 17, 485 and 501 of CCP of Ukraine.

#### 4. CONCLUSION

Legality and validity of a ruling to enforce CMEC depends on appropriate (coherent) legal regulation of conditions, grounds, and procedure of its adaptation. Due process shall be guaranteed and adhered to over the course of criminal proceedings (both at pre-trial investigation and trial stages). Such approach would meet the rule of law and legal certainty requirements as well as comply with the case-law of the ECtHR.

Under CCP of Ukraine the court of first instance adopts the ruling to enforce CMEC only in case the motion to enforce CMEC was filed at pre-trial investigation stage. Such situation is feasible in criminal proceedings in respect of a minor that committed socially dangerous act upon reaching the age of eleven but prior the age of criminal responsibility. In criminal proceedings in respect of a minor that committed socially dangerous act (i.e., has reached the age of criminal responsibility), the issue of whether it is needed to enforce CMEC shall be resolved by the court when making a decision of a) judgement, or b) ruling to close criminal proceedings and release of a person from criminal responsibility by enforcing CMEC. Judgement is passed by the court following the examination of an indictment. The ruling to close criminal proceedings and

release of a person from criminal responsibility by enforcing CMEC may be passed by the court when it has received from the pre-trial investigation stage either 1) a motion to release a minor from criminal responsibility by enforcing CMEC, or 2) an indictment.

Given that the ruling to enforce CMEC is a decision where the minor's involvement in the commission of the alleged act shall be shown, the court shall be bound by the beyond a reasonable doubt standard. However, given the provisions of Arts. 17, 485 and 501 of CCP of Ukraine is it demonstrated that the questions arising while deciding whether to enforce CMEC shall be addressed by the court with account of probabilistic nature of circumstances to be ascertained. In addition, the law does not require the prosecution party to prove all circumstances specified in the law beyond a reasonable doubt.

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