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Criminal Corruption Offences: Conceptual Problems in the Context of Reforming the Criminal Legislation of Ukraine

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Abstract

The scientific originality of the study is that it: 1) highlights the problems of defining a criminal corruption offence and ways to solve them; 2) identifies shortcomings in the definition of a corruption crime provided for in the Draft General part of the Criminal Code of Ukraine 2020, formulates proposals for their elimination; 3) clarifies the main advantages and disadvantages of the list of corruption offences contained in the note to Art. 45 of the Criminal Code of Ukraine; 4) improves the classification of criminal corruption offences by the method and subject of their commission; 5) defines the content, positive and negative aspects of criminal law consequences of a criminal corruption offence. The purpose of the study is to identify problematic issues related to the construction of legal provisions concerning criminal corruption offences, both in the Criminal Code of Ukraine and in the draft General part of the Criminal Code of Ukraine 2020, and to determine ways to solve them. The study used a set of scientific methods: terminological, system-structural, formal-logical, and comparative-legal. The theoretical basis of the research consists of the papers of Ukrainian and foreign researchers, the provisions of the Criminal Code of Ukraine, and the practice of its application. According to the results of the study, the following conclusions were formulated: 1) the absence of the definition of “corrupt criminal offence” in the Criminal Code makes it impossible to determine the criminal-legal content of this group of torts and establish what criminal offences and crimes are included to them; 2) during the establishing of this definition, it must be consistent with the definition of a criminal offence, corruption offences, and corruption; 3) the concept of a tripartite understanding of the unlawful benefit (as subject, purpose, and means of committing the crime) in the definition of corruption should transform the design similar to “acts consisting in the offer or the promise of providing unlawful benefits, its provision, acceptance of an offer or promise of such benefits on receiving the request or demand to provide”; 4) the list of corruption offences proposed in the note to Art. 45 of the Criminal Code of Ukraine, on the one hand, does not cover all of criminal offences related to corruption, and on the other – includes criminal offences that should not be attributed to corruption; 5) criminal corruption offences by way of commission is proposed to be subdivided into: a) unlawful acquisition of certain property abusing the official position; b) abuse of power, official position or authority; c) offer, promise to provide unlawful benefit and the provision of such benefits for the commission or omission of certain actions (active bribery); d) the acceptance of an offer or promise of such benefits, obtaining it, request or the requirement to provide (passive bribery); d) other corrupt criminal acts (conditional corruption, quazi-corruption, and criminal offences that are included in the notes to Art. 45 of the Criminal Code unjustified); 6) analysis of the negative criminal law consequences of criminal corruption offence shows the law in certain cases equated these offences to grievous and extremely grievous crimes; 7) in the context of the reform of the criminal law it is necessary to improve the foundation of different types of confiscation, prohibition to engage in certain activities or to hold certain positions, and to consider the criminalization of concealment of criminal corruption offence

Keywords:

corruption; corruption crime; corruption offence; anti-corruption; official; confiscation; unlawful benefit

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Introduction

Corruption has been, is, and will continue to be (at least in the near future) one of the largest and major problems in Ukraine. Even though a number of systematic measures have been taken to combat corruption in recent years, it is still widespread in various spheres of the public life of Ukrainians [1]. The Ukrainian state annually loses billions from embezzlement in all areas of public life, as a result of which a substantially lower quality of services, goods, the level of social and material security, and most importantly – irreparable human losses. For example, embezzlement in medicine causes an increase in the level of morbidity of the population, its mortality, and in defence – an increase in irreparable losses among military personnel, volunteers, and the civilian population [1].

Corruption is a socially dangerous phenomenon not only for Ukraine but also for other states. It makes it impossible to establish and maintain internationally accepted rules and is one of the main reasons that the least developed countries still remain so [2]. Corruption increases operating costs, limits investment incentives and, ultimately, leads to a decrease in economic growth [3], public confidence, productivity of the social and political economy, increases inequality [4], and is one of the most substantial factors that undermine the quality of public administration [5]. The high level of corruption and low level of public administration that is observed in most modern countries harm the well-being of society and undermine public confidence [4].

Among all the manifestations of corruption, the highest danger is represented by criminal corruption offences. Therefore, ensuring criminal legal protection of public relations from criminal corruption offences is a priority area of modern criminal law policy in Ukraine.

To this end, the law on criminal liability establishes a number of criminal law provisions that define the types of criminal corruption offences, measures of influence that can be applied to the persons who committed them, and other legal consequences of committing such torts.

In recent years O.O. Dudorov, T.O. Kolomoiets, S.M. Kushnir & O.L. Makarenkov [3] and other researchers have been working on solving the problems of criminal corruption offences. However, at present, a single concept of a criminal offence, which would provide an opportunity to formulate a definition of this concept, highlight its features, determine the list of such torts, and justify their criminal-legal consequences, increasing the effectiveness of countering criminal offences and crimes of this category has not been formulated.

The purpose of the study is to identify problematic issues related to the construction of criminal law

provisions concerning criminal corruption offences, both in the Criminal Code of Ukraine and in the draft General part of the Criminal Code of Ukraine 2020, and to determine ways to solve them.

Results and Discussion

A systematic analysis of the provisions of criminal legislation allows identifying a number of shortcomings in the construction of an appropriate mechanism for criminal-legal counteraction to persons who commit criminal corruption offences. The Criminal Code of Ukraine does not define the concept of “criminal corruption offence”, which makes it impossible to clearly outline the criminal legal content of this group of torts, and therefore, establish which criminal offences and crimes belong to them.

Since a criminal corruption offence is a type of criminal offence, it is characterised by the following features:

- it is a socially dangerous act (commission or omission);
- it is provided for by the Criminal Code of Ukraine;
- it is a culpable act;
- it is committed by the subject of a criminal offence.

Therewith, a criminal corruption offence should logically have the characteristics of a corruption offence (part 1 of Art. 1 of the Law of Ukraine “On prevention of corruption” of October 14, 2014) or, at least, should not contradict them.

A corruption offence is an act containing signs of corruption committed by a person specified in part 1 of Art. 3 of the Law of Ukraine “On prevention of corruption” of October 14, 2014, for which the law establishes criminal, disciplinary, and/or civil liability [6]. That is, a criminal corruption offence, considering its belonging to corruption offences, should have three more features:

- it is an act that contains signs of corruption;
- it is committed by the person specified in part 1 of Art. 3 of the Law of Ukraine “On prevention of corruption” of October 14, 2014;
- it has a criminal liability established for it. A comparison of these signs with the signs of individual criminal corruption offences gives grounds to assert that there are certain discrepancies in the relevant categories.

Socially dangerous manifestations of corrupt criminal offences are not limited to three forms of corruption:

- use of official powers or related opportunities for the purpose of obtaining unlawful benefits;
- accepting an unlawful benefit or promising/offering such benefit to oneself or others;
- promise/offer or provision of unlawful benefits to a person specified in part 1 of Art. 3 of the Law

of Ukraine “On prevention of corruption”, or at their request to other individuals or legal entities to persuade this person to illegally use the official powers granted to them or related opportunities [6]. They also cover other acts (for example, misuse of budget funds, illegal enrichment, etc.).

In addition, there are more subjects of criminal corruption offences than the subjects defined in part 1 of Art. 3 of the Law of Ukraine “On prevention of corruption”. For example, in the case of an offer, promise, or provision of an unlawful benefit, the subject is general, which is not mentioned in part 1 of Art. 3 of the Law of Ukraine “On prevention of corruption”.

Thus, when formulating the definition of a criminal corruption offence, it is necessary to consider the fact that it must be consistent with the definition of a criminal offence (part 1 of Art. 11 of the Criminal Code of Ukraine), a corruption offence and corruption (part 1 of Art. 1 of the Law of Ukraine “On prevention of corruption” of October 14, 2014). Therewith, it cannot be excluded that if the definition of a criminal corruption offence is constructed, it may be necessary to make appropriate changes to the definitions of corruption offence and corruption to coordinate these concepts.

Corruption crime in the draft Criminal Code of Ukraine 2020. Unlike the current Criminal Code of Ukraine, the draft new Criminal Code of Ukraine defines a corruption crime. A crime that has two mandatory characteristics is recognised as corrupt:

a) unlawful benefit as the purpose, object, or means of committing a crime;

b) a method of committing a crime that consists in the illegal use of power, official position, or certain powers or influencing decision-making by a person with power, an official position, or certain powers (paragraph 18 of part 2 of Art. of the 1.3.1 draft) [7].

The analysis of this definition gives grounds to assert that only crimes related to unlawful benefit (as the purpose, subject or means of committing a crime) are recognised as corrupt, which can be committed in one of the following ways: by illegal use of power, official position, or certain powers, or by influencing decision-making by a person vested with power, an official position, or certain powers. Thus, a corruption crime has two mandatory features, each of which contains alternative elements.

The first sign is related to an unlawful benefit. However, in the General part of the draft Criminal Code of Ukraine, there is no definition of an unlawful benefit, which should be recognised as a disadvantage since this concept is important for the application of various legal provisions. It should be covered in Art. 1.3.1 “Meaning of the main terms of the Criminal Code of Ukraine”.

This is also a problem of the current Criminal Code of Ukraine, which contains several definitions

of unlawful benefits (in the note to Art. 160 of the Criminal Code of Ukraine, in part 2 of the note to Art. 354 of the Criminal Code of Ukraine, in the note to Art. 364-1 of the Criminal Code of Ukraine). The definitions, provided for in part 2 of the note to Art. 354 of the Criminal Code and the note to Art. 364-1 of the Criminal Code of Ukraine are identical, and therefore there was no need to duplicate the provisions of the criminal legislation.

The project concept provides that unlawful benefits as an element of a criminal corruption offence may exist within it in the form of the purpose, subject, or means of committing a crime.

The proponent of this concept is M.I. Khavronyuk [4] noted that in the use of official powers or related powers, the unlawful benefit is the goal of a corrupt act, and when this goal is achieved (for example, in the case of an official taking someone else's property under the circumstances set out in Art. 191 of the Criminal Code of Ukraine) – its subject.

If an official or other relevant person accepts an offer, promise, or requests or demands an unlawful benefit, then the latter is the purpose of their corrupt act, and the unlawful benefit that such a person receives is its subject. If an unlawful benefit is offered, promised, or provided (bribery), then it is mainly a means of committing a corrupt act.

Another unlawful benefit (“the commission or omission of any action in its favour or in the interests of third parties”, that is, providing services or benefits of an intangible nature) is the goal, which a person tries to achieve by promising or offering it, and if it receives it in return – then it is the subject; there may be another situation (remuneration), when first a person receives an unlawful benefit as an object, and in return transfers another unlawful benefit to the person concerned – just like the subject of a corrupt act” [8].

The analysis of this concept raises a logical question: How to apply it practically? If a person is preparing to use official powers or related powers for the acquisition of certain property or commits an attempt on such an act, then the unlawful benefit, according to this concept, should be considered as the goal of a corrupt act, and if the person took possession of the relevant property, then the unlawful benefit should be recognised as the subject. Consequently, within the same structure of a criminal offence, depending on the stages of its commission, an unlawful benefit can exist as a goal and as a subject.

According to this concept, an unlawful benefit is subject only if it is received (part 3, 4 of Art. 354, Art. 368, part 3, 4 of Art. 368-3, part 3, 4 of Art. 368-4, part 2, 3 of Art. 369-2 of the Criminal Code of Ukraine).

The unlawful benefit is a target for abuse of power, official position, or authority (Art. 364, 364-1, 365-2, 369-3 of the Criminal Code of Ukraine).

However, the purpose in the composition of these offences is to obtain (receive) such benefits. This refers to the illegal use of power, official position, or authority to obtain unlawful benefits. In these cases, it is easiest to establish it, since the word “goal” is directly indicated in the disposition of the article.

However, M.I. Khavronyuk's [4] position, according to which an unlawful benefit is the goal in cases where a person accepts an offer, a promise of an unlawful benefit, or requests or demands it, seems debatable. It is possible to partially agree with the approach of the researcher because the goal in these compositions is the will, the desire of a person to get an unlawful benefit. However, in this case, there is a competition between two conceptually different views on the interpretation of this feature of the corresponding elements of criminal offences: according to one, the unlawful benefit is the goal, and to the second – the subject of a criminal offence [8].

An unlawful benefit is a means if it is offered, promised or provided for committing or omitting certain actions (part 1, 2 of Art. 354, part 1, 2 of Art. 368-3, part 1, 2 of Art. 368-4, 369 of the Criminal Code of Ukraine). In these compositions, it is a means of inducing a person to commit certain acts.

The disadvantage of distributing unlawful benefits on the subject and means of a criminal offence is that it contradicts the established view of the subject of a crime as material values (which a person can perceive with their senses or record by special technical means), about which and by direct influence on which (or without such influence) a criminal act is committed (authors of the definition: A.A. Muzyka & E.V. Lashchuk) [7]. For example, considering an offer or promise to provide an unlawful benefit, there is no doubt that the offer and promise are socially dangerous actions in this case. The connection of socially dangerous actions with the subject of a criminal offence consists in the fact that the act is committed about the subject or by direct influence on it. In this case, the offer and promise are made regarding the subject of a criminal offence. However, the position that an unlawful benefit, in this case, facilitates the commission of a socially dangerous action – an offer or promise, that is, it is a means of a criminal offence, seems erroneous [9].

A three-way understanding of an unlawful benefit (as an object, purpose, means) can be transformed into a construction like “acts consisting in offering or promising to provide an unlawful benefit, providing it, accepting an offer or promise of such a benefit, receiving it, requesting or demanding to provide it”. In such circumstances, all possible aspects of unlawful benefits would be considered. Therewith, its advantage will be to simplify the understanding of

this characteristic of a criminal corrupt offence, and therefore, make it easier to apply in practice.

Interpreting the concept of unlawful benefits literally, it can include items for illegal actions with which (manufacture, storage, carrying, sale, etc.) criminal liability may occur, in particular firearms, military supplies, explosives, drugs, etc. Admittedly, an official can receive an unlawful benefit in the form of a firearm as it is property and is received without legal grounds. However, it should be considered that in the literal sense, unlawful benefit as a sign of relevant criminal offences concerns only those of their composition, in the dispositions of which it is provided. In these circumstances, is it possible to recognise as unlawful benefits the objects of crimes provided for in Art. 191, 262, 308, 312, 313, 320, 357, 410 of the Criminal Code of Ukraine, in case of acquisition of them by abusing an official's official position? An important argument in favour of a negative answer to this question is that the term “obtainment” is used in the definition of unlawful benefits, and these compositions regard “acquisition”, which is not identical.

The second sign of a corruption crime, which is proposed in the draft Criminal Code of 2020, is the presence of one of the following methods of committing a crime, which consists in:

- illegal use of power, official position, or certain powers;
- influence on decision-making by a person with power, official position, or certain powers.

Illegal use of power, official position, or certain powers covers the commission of relevant crimes through abuse of power, official position, or certain powers. However, not any illegal use of power, official position, or certain powers can be a way of corruption crime, since it is necessary to combine such a way with an unlawful benefit as the purpose, subject, or means of committing a crime. Illegal use of power, official position, or certain powers is the most common way to commit criminal corruption offences. It is typical, in particular, for Art. 191, 262, 308, 312, 313, 357, 364, 364-1, 365-2, 410 Criminal Code of Ukraine.

Such a method as “influencing decision-making by a person with power, official position, or certain powers” is inherent in cases of proposals, promises to provide unlawful benefits, and providing such benefits for committing or not committing certain actions (part 1, 2 of Art. 354, part 1, 2 of Art. 368-3, part 1, 2 of Art. 368-4, 369 of the Criminal Code of Ukraine).

Therewith, the situation regarding the acceptance of an offer, promise or acquisition of an unlawful benefit, and a request or demand to provide such a benefit, is not clear. What method can such cases be attributed to? Can this be illegal use of power, official position, or certain powers? It is impossible to

any, since the illegal use of power, official position, or certain powers, which consists in committing or omitting certain actions, is outside the objective side of such criminal offences. This is another flaw in the new concept of corruption crime, which shows that this project needs to be finalised.

Types of criminal corruption offences. The list of corruption offences presented in the note to Art. 45 of the Criminal Code has many shortcomings, related, on the one hand, to the fact that it does not cover all criminal offences that should be considered corruption, and on the other hand, it contains individual criminal offences that do not belong to corruption. It seems that one of the conditions for forming a scientifically substantiated list of criminal corruption offences should be the definition of a criminal corruption offence, and possibly the development of their classification since there are criminal offences that only partially belong to corruption. They can be either corrupt or non-corrupt. It is not entirely correct to consider them corrupt. However, it is also impractical not to recognise them as corrupt under certain circumstances. Therefore, it is necessary to determine the future concept of criminal corruption offences: to provide a definition of a criminal corruption offence without a clear list of such torts or to formulate a clear list of offences of this category, as in the note to Art. 45 of the Criminal Code.

Currently, 20 criminal offences are recognised as corruption. The list of criminal corruption offences is exhaustive. They can be divided into two groups. The first is criminal offences that are recognised as corrupt only if they are committed through abuse of official position (provided for in Art. 191, 262, 308, 312, 313, 320, 357, 410 of the Criminal Code of Ukraine).

Criminal corruption offences, according to the Criminal Code of Ukraine, are criminal offences provided for in art. 191, 262, 308, 312, 313, 320, 357, 410, in case of their commission by abuse of official position, and criminal offences provided for in art. 210, 354, 364, 364-1, 365-2, 368, 368-3-369, 369-2, 369-3 of this Code.

Mainly these are the main and qualified compositions of acquisition by abuse of an official's position of certain property: someone else's property (Art. 191 of the Criminal Code of Ukraine); firearms (except smoothbore hunting arms), military supplies, explosives, explosive devices, or radioactive materials (Art. 262 of the Criminal Code of Ukraine); drugs, psychotropic substances or their analogues (Art. 308 of the Criminal Code of Ukraine); precursors (Art. 312 of the Criminal Code of Ukraine); equipment intended for the manufacture of drugs (Art. 313 of the Criminal Code of Ukraine); documents, stamps, seals (Art. 357 of the Criminal Code of Ukraine); weapons, military supplies, explosives or

other military substances, means of transportation, military and special equipment, or other military property (Art. 410 of the Criminal Code of Ukraine).

The only exception is a crime under part 2 of Art. 320 of the Criminal Code of Ukraine, but it also, although it does not directly consist in taking possession of certain property by abusing an official's position, because it consists in violating the established rules for sowing or growing sleeping poppies or cannabis, and violating the rules for the production, manufacture, storage, accounting, release, distribution, trade, transportation, transfer, or use of drugs, psychotropic substances, their analogues, or precursors intended for the production or manufacture of these drugs or substances, which led to the acquisition of drugs, psychotropic substances, their analogues, or precursors by abusing an official's position.

If criminal offences of the first group are committed by any entity other than an official (general or other special entity, as, for example, in Art. 191 of the Criminal Code of Ukraine), they are not recognised as corrupt. The second group consists of criminal offences under Art. 210, 354, 364, 364-1, 365-2, 368, 368-3-369, 369-2, 369-3 of the Criminal Code of Ukraine, which in any case are recognised as corrupt, regardless of the subject and method of commission.

Classification of criminal corruption offences can be conducted according to various criteria. By **the method of committing the crime** conventionally, they are divided into: supplies, explosives, explosive devices, or radioactive materials (part 2 of Art. 262 of the Criminal Code of Ukraine); drugs, psychotropic substances or their analogues (part 2 of Art. 308 of the Criminal Code of Ukraine); precursors (part 2 of Art. 312 of the Criminal Code of Ukraine); equipment intended for the manufacture of drugs, psychotropic substances, or their analogues (part 2 of Art. 313 of the Criminal Code of Ukraine); documents, stamps, seals (Art. 357 of the Criminal Code of Ukraine); weapons, military supplies, explosives, or other military substances, means of transportation, military and special equipment, or other military property (part 2 of Art. 410 of the Criminal Code of Ukraine):

- abuse of power, official position, or authority: abuse of power or official position (Art. 364 of the Criminal Code of Ukraine); abuse of authority by an official of a private legal entity, regardless of its organizational and legal form (Art. 364-1 of the Criminal Code of Ukraine); abuse of authority by persons providing public services (Art. 365-2 of the Criminal Code of Ukraine);

- offer, promise to provide an unlawful benefit, and providing such a benefit for committing or omitting certain actions (part 1, 2 of Art. 354, part 1, 2 of Art. 368-3, part 1, 2 of Art. 368-4, Art. 369, part 1 of Art. 369-2, 369-3 of the Criminal Code of Ukraine)

(active bribery). It is the influence on decision-making by a person with power, official position, or certain powers. The peculiarity of this corruption offence is that it is committed by a general subject;

- acceptance of an offer or promise of such a benefit, its acquisition, request, or demand to provide (part 3, 4 of Art. 354, 368, part 3, 4 of Art. 368-3, part 3, 4 of Art. 368-4, part 2, 3 of Art. 369-2 of the Criminal Code of Ukraine) (passive bribery);

- other criminal and illegal corruption acts. These are conditionally corrupt, quasi-corrupt and criminal offences that were unreasonably included in the note of Art. 45 of the Criminal Code of Ukraine. These include: misuse of budget funds, implementation of budget expenditures or provision of loans from the budget without established budget assignments or with their excess (Art. 210 of the Criminal Code of Ukraine); violation of the established rules for the circulation of drugs, psychotropic substances, their analogues or precursors (Art. 320 of the Criminal Code of Ukraine); illegal enrichment (Art. 368-5 of the Criminal Code of Ukraine); illegal influence on the results of official sports competitions (Art. 369-3 of the Criminal Code of Ukraine).

By **subjects** of a criminal offence, they can be divided into:

- those committed by a general subject (part 1, 2 of Art. 354, part 1, 2 of Art. 368-3, part 1, 2 of Art. 368-4, Art. 369, part 1 of Art. 369-2, 369-3 of the Criminal Code of Ukraine);

- those committed by a special subject (other criminal corruption offences). Special subjects of criminal corruption offences are:

- a) an official (Art. 191, 262, 308, 312, 313, 320, 357 of the Criminal Code of Ukraine);

- b) an official of a private legal entity, regardless of its organizational and legal form (Art. 364-1, part 3, 4 of Art. 368-3 of the Criminal Code of Ukraine);

- c) an official of a legal entity under public law (Art. 364, 368 of the Criminal Code of Ukraine);

- d) military official;

- e) a person authorised to perform the functions of the state or local self-government (Art. 368-5 of the Criminal Code of Ukraine);

- f) an official of the administrator or recipient of budget funds (Art. 210 of the Criminal Code);

- g) an employee of an enterprise, institution, or organization who is not an official, or a person who works for the benefit of the enterprise, institution, or organization (part 3, 4 of Art. 354 of the Criminal Code of Ukraine);

- h) a person who is not a civil servant, or an official of local self-government, but conducts professional activities related to the provision of public services (Art. 365-2, 368-4 of the Criminal Code of Ukraine).

Criminal and legal consequences of a criminal corruption offence. The commission of a criminal

corruption offence has specific negative criminal-legal consequences for their subjects. A person who has committed a criminal corruption offence cannot be released from criminal liability in connection with active remorse (Art. 45 of the Criminal Code of Ukraine), reconciliation of the guilty person with the victim (Art. 46 of the Criminal Code of Ukraine), transfer of the person to bail (Art. 47 of the Criminal Code of Ukraine), change of circumstances (Art. 48 of the Criminal Code of Ukraine). The prerequisites for these types of exemption from criminal liability are criminal offences and negligent minor crimes (Art. 45, 46 of the Criminal Code of Ukraine) or criminal misconduct and minor crimes (Art. 47, 48 of the Criminal Code of Ukraine). Among criminal corruption offences, only the composition provided for in parts 1 and 3 of Art. 357 of the Criminal Code of Ukraine belongs to criminal misdeeds. Minor crimes are criminal corruption offences under part 2 of Art. 191, part 1 of Art. 210, part 2 of Art. 320, part 2 of Art. 357, Art. 354, part 1 of Art. 364, part 1 of Art. 364-1, part 1, 2 of Art. 365-2, part 1 of Art. 368, part 1, 2, 3 of Art. 368-3, part 1, 2, 3 of Art. 368-4, part 1 of Art. 369, part 1, 2 of Art. 369-2, 369-3 of the Criminal Code of Ukraine. Consequently, if they are committed, a person cannot be released from criminal liability on the specified grounds. Such a ban does not apply to exemption from criminal liability due to the expiration of the statute of limitations (Art. 49 of the Criminal Code of Ukraine), and to dismissal for offering, promising, or providing unlawful benefits (part 5 of Art. 354 of the Criminal Code of Ukraine). However, in the criminal legislation of some countries, these prohibitions also apply to exemption from criminal liability due to the expiration of the statute of limitations. For example, illegal acquisition by abuse of official position of certain property: someone else's property (part 2 of Art. 191 of the Criminal Code of Ukraine); firearms (except smoothbore hunting), combat in accordance with part 6 of Art. 62 of the Criminal Code of Kyrgyzstan, a person who committed certain corruption crimes, in particular under part 1, 2 of Art. 319 (corruption), part 4 of Art. 320 (abuse of official position), part 1, 2 of Art. 323 (illegal enrichment), it cannot be released from criminal liability due to the expiration of the statute of limitations for criminal prosecution [10]. Prohibition of imposing a more lenient sentence than is provided for by law (Art. 69 of the Criminal Code of Ukraine). For a person who has committed a criminal corruption offence, based on Art. 69 of the Criminal Code of Ukraine, the court may not:

- impose the main penalty below the lowest limit established in the sanction of the article (sanctions of part of the article) of the Special part of the Criminal Code of Ukraine;

– switch to another, more lenient type of main punishment, not specified in the sanction of the article (sanctions of part of the article) of the Special part of the Criminal Code of Ukraine for this criminal offence;

– not to impose an additional penalty, which is provided for in the sanction of the article (sanctions of part of the article) of the Special part of the Criminal Code of Ukraine as mandatory.

Prohibition **exemption from punishment** on certain grounds: exemption from punishment due to the loss of a person's public danger (part 4 of Art. 74 of the Criminal Code of Ukraine), exemption from serving a sentence with probation (Art. 75 of the Criminal Code of Ukraine); exemption from serving a sentence with probation for pregnant women and women with children under the age of seven (Art. 79 of the Criminal Code of Ukraine). In practice, there are cases when courts apply part 1 of Art. 75 of the Criminal Code of Ukraine regarding the release from serving a sentence with probation of persons who have committed a criminal corruption offence, which in turn leads to the incorrect application of the law of Ukraine on criminal liability by the court [11].

For persons who have committed corrupt criminal offences, there are also stricter requirements for parole (Art. 81 of the Criminal Code of Ukraine). They must factually serve a longer sentence than persons who have committed similar criminal offences, but non-corrupt ones. For example, according to part 3 of Art. 81 of the Criminal Code of Ukraine, parole can be applied after the convicted person has factually served at least two-thirds of the sentence imposed by the court for a corruption minor crime, intentional grievous crime or negligent extremely grievous crime, and also if the person has previously served a sentence of imprisonment for an intentional criminal offence and before the cancellation or removal of the conviction again committed an intentional criminal offence, for which they were sentenced to imprisonment.

The conditions for replacing the unserved part of the sentence with a more lenient one are stricter (Art. 82 of the Criminal Code of Ukraine). For example, according to part 4 of Art. 82 of the Criminal Code of Ukraine, the replacement of the unserved part of the sentence with a more lenient one is possible after the convicted person has factually served at least half of the sentence imposed by the court for a corruption minor crime, an intentional grievous crime, or a negligent extremely grievous crime, and if the person has previously served a sentence of imprisonment for an intentional criminal offence and before the cancellation or removal of the conviction again committed an intentional criminal offence for which they were sentenced to imprisonment.

The analysis of these provisions shows that the legislator equated a corruption minor crime with an intentional grievous crime or a negligent extremely grievous crime. For persons who have committed criminal corruption offences, additional conditions for release from serving a sentence are established based on the law of Ukraine on amnesty or the act of pardon. According to part 4 of Art. 86 of the Criminal Code of Ukraine, persons found guilty of committing criminal corruption offences, sentences against which have not entered into legal force, cannot be released from serving their sentence, and persons whose sentences have entered into legal force cannot be completely released by the law on amnesty from serving their sentence. These persons may be released from serving their sentence after they have factually served the terms established by part 3 of Art. 81 of the Criminal Code of Ukraine, that is, those established for parole.

According to part 3 of Art. 87 of the Criminal Code of Ukraine, persons convicted of committing corrupt criminal offences may be released from serving their sentence by clemency after they factually serve the terms established by part 3 of Art. 81 of the Criminal Code of Ukraine, that is, those established for parole.

Conviction removal before the expiration of the terms specified in Art. 89 of the Criminal Code of Ukraine is not allowed in cases of intentional grievous, extremely grievous, and criminal corruption offences (part 2 of Art. 91 of the Criminal Code of Ukraine).

Committing certain criminal corruption offences or socially dangerous acts that fall under the characteristics of an act provided for in the Special part of the Criminal Code of Ukraine (Art. 191, 262, 308, 312, 313, 320, 357, 410, 210, 354, 364, 364-1, 365-2, 368, 368-3-369, 369-2, 369-3), is the basis for applying special confiscation. Most of these articles are grounds for special confiscation if the main penalty for committing the acts described in them is imprisonment or a fine of over three thousand non-taxable minimum incomes of citizens. The exception is criminal offences under part 1 of Art. 210, 364-1, 365-2 of the Criminal Code of Ukraine, in the case of which special confiscation is applied regardless of their sanction.

The commission of a criminal corruption offence may be the basis for applying criminal law measures to a legal entity.

The grounds for applying criminal law measures to a legal entity are:

– commission by its authorised person on behalf of and in the interests of a legal entity of any of the criminal offences provided for in Art. 209 and 306, parts 1 and 2 of Art. 368-3, parts 1 and 2 of Art. 368-4, Art. 369 and 369-2 of the Criminal Code of Ukraine;

– failure to fulfil the obligations imposed on its authorised person by law or constituent documents of a legal entity to take measures to prevent corruption, which led to the commission of any of the criminal offences provided for in Art. 209 and 306, part 1, 2 of Art. 368-3, part 1, 2 of Art. 368-4, Art. 369 and 369-2 of the Criminal Code of Ukraine (paragraphs 1, 2 of part 1 of Art. 96-3 of the Criminal Code of Ukraine).

The study of such consequences of committing criminal corruption offences shows that the legislator substantially limited the possibilities of exemption from criminal liability of the relevant subjects and established stricter conditions for applying other measures of a criminal legal nature. Therewith, the criminal legislation of other countries mainly does not provide for such negative criminal-legal consequences.

In certain cases, the legislator equated the negative criminal-legal consequences of minor corruption crimes with similar consequences for grievous and extremely grievous crimes. In addition, the fact that legislator in certain cases does not differentiate the criminal-legal consequences for different types of criminal corruption offences in terms of severity does not correspond to the principle of fairness.

In this regard, O.O. Dudorov [3] notes that the goal of the legislator (reducing the scale of corrupt behaviour through increased criminal law repression) meets public expectations. In addition, it is a typical example of fragmentary, non-systemic changes in the Criminal Code. These changes can hardly be assessed otherwise than as a manifestation of distrust of the state represented by the parliament towards the judicial corps, which is not able to apply the norms of the General part of the Criminal Code in a qualified and balanced way for some reason only in relation to violators of anti-corruption legislation. The researcher considers such an increase in criminal law repression appropriate and fair, however, only in relation to the so-called grand corrupt officials and subject to a well-thought-out implementation of this idea in a legislative matter [12].

The results of the examination of the judicial practice of sentencing for criminal corruption offences give grounds to assert that for such acts the court mostly imposes a fine, much less often – imprisonment for a certain term with its factual serving. As an additional penalty, deprivation of the right to hold certain positions (related to the provision of public services, law enforcement agencies, local self-government bodies, institutions, organizations, and enterprises, regardless of the form of ownership, organizational, and legal form; related to the performance of administrative, economic, and organizational administrative functions, senior positions in military formations of the Armed

Forces of Ukraine, etc.) and confiscation of property are used. A plea agreement is often concluded.

Despite the insubstantial amounts of unlawful benefits in some cases, the courts do not close criminal proceedings due to insignificance. For example, for providing unlawful benefits to a police officer for 150 UAH, a convicted person was fined 17.000 UAH [13].

Therewith, in the new draft Criminal Code of Ukraine, a corruption crime is important only for:

– appointment of a fine as an additional penalty. According to part 5 of Art. 3.1.3 of the draft, a fine as an additional penalty is imposed only in certain cases, in particular in the case of committing a corruption crime;

– determination of the limits of the criminal law in relation to an act committed outside the territory of Ukraine. According to part 2 of Art. 1.4.5 of the draft, this code is subject to application to a foreigner or a stateless person who does not permanently reside in Ukraine, if they have committed an act outside the territory of Ukraine that, according to Art. 2.1.5 of the Criminal Code of Ukraine, is recognised as a corruption crime in complicity with a citizen of Ukraine.

Thus, in the draft Criminal Code of Ukraine, the legislator completely renounces restrictions on criminal corruption offences enshrined in the Criminal Code of Ukraine. Such a step cannot be evaluated unambiguously. On the one hand, the criminal-legal consequences of committing corrupt criminal offences violate the principles of criminal law, and therefore, it would probably be possible to predict that the Constitutional Court of Ukraine could eventually declare them unconstitutional. Although, on the other hand, they have a certain potential to deter from committing corrupt criminal offences.

Notably, in the context of reforming criminal legislation, other countries use other tools to counteract corrupt criminal offences.

Confiscation. Illegal assets acquired by a person as a result of committing corruption or other criminal offences are mainly confiscated. The Criminal Code of Ukraine also uses confiscation tools in the context of countering corrupt criminal offences: it is considered a punishment and a criminal-legal measure. Confiscation of property, the origin of which a person cannot explain, in a civil manner, without bringing them to criminal responsibility, seems promising. The advantages of such a tool, compared to other proof standards, are that the respondent will be required to explain the source of the excess wealth. Otherwise, such property is subject to confiscation. However, there are also certain shortcomings associated with the low level of guarantees for the protection of human rights, compared

to those used in criminal proceedings (in particular, the lack of presumption of innocence). Therewith, it is possible to solve this problem by raising the standards of proof, without reducing them to those used in criminal proceedings [14].

Given the existence of a number of options for confiscation of certain assets in connection with the commission of a criminal corruption offence, it is important that they do not contend with each other and are not used for the commission of the same act. The existence of different levels of sanctions against the same fact rightly notes P. Maggio [6], leads to problems of violation of the “ne bis in idem” rule [15].

Lifetime prohibition to hold certain positions or engage in certain activities. For persons who have committed corrupt criminal offences, lifetime bans on engaging in certain activities or holding certain positions can be applied as a punishment, or at least increase the minimum and maximum limits of this punishment provided for in part 1 of Art. 55 of the Criminal Code of Ukraine. An indefinite (lifetime) ban on holding positions in the civil service is provided, for example, in Art. 317 bis of the Criminal Code of Italy [16].

Criminalization of concealment of a criminal corruption offence. According to part 1 of Art. 396 of the Criminal Code of Ukraine, criminal liability is imposed for the concealment of a grievous or extremely grievous crime. However, the criminal legislation of certain countries highlights the concealment of a corruption crime. For example, Art. 432 of the Criminal Code of Kazakhstan establishes criminal liability for concealment of corruption, grievous or particularly grievous crime or a crime against the sexual integrity of a minor [17].

The scientific originality of the study is that it: 1) highlighted the problems of defining a criminal corruption offence and ways to solve them; 2) identified flaws in the definition of a corruption crime provided for in the draft General part of the Criminal Code of Ukraine 2020, formulated proposals for their elimination; 3) identified the main advantages and disadvantages of the list of corruption offences presented in the note to Art. 45 of the Criminal Code of Ukraine; 4) improved the classification of criminal corruption offences according to the method and subject of their commission; 5) considered the content, positive and negative aspects of the criminal legal consequences of a criminal corruption offence.

Conclusions

Based on the conducted research, the following conclusions were formulated.

1. The absence of a definition of “criminal corruption offence” in the Criminal Code of Ukraine

does not allow outlining the criminal legal content of this group of torts and establishing which criminal offences and crimes belong to them. When formulating this definition, it should be considered that it must be consistent with the definition of a criminal offence, corruption offence, and corruption. Therewith, it cannot be excluded that if the definition of a criminal corruption offence is constructed, it may be necessary to make appropriate changes to the definitions of corruption offence and corruption to coordinate these concepts.

2. The analysis of the definition of a corruption crime used in the draft General part of the Criminal Code of Ukraine 2020 (paragraph 18 of part 2 of Art. 1.3.1) allowed identifying the shortcomings of the trilateral understanding of unlawful benefits (as the subject, purpose, and means of committing a crime) and formulate a proposal to transform this feature into construction like “acts consisting in the offer or promise of providing an unlawful benefit, its provision, acceptance of the offer or promise of such benefits, its acquisition, request or demand to provide”. Another drawback of the definition of a corruption crime is that it does not cover such methods of committing illegal acts as accepting an offer or promise or receiving an unlawful benefit and requesting or demanding to provide such a benefit.

3. Set in the note to Art. 45 of the Criminal Code of Ukraine the list of corruption offences has a number of substantial drawbacks, related, on the one hand, to the fact that it does not cover all criminal offences that are classified as corruption, and on the other hand, it contains individual criminal offences that should not be considered corruption. It seems that one of the conditions for forming a scientifically substantiated list of criminal corruption offences should be the formulation of the definition of a criminal corruption offence, and possibly the development of their classification since there are criminal offences that only partially belong to corruption.

4. Criminal corruption offences according to the method of commission are proposed to be divided into: 1) illegal acquisition by abuse of an official's position of certain property; 2) abuse of power, official position, or authority;

3) offer, promise to provide an unlawful benefit, and providing such a benefit for committing or omitting certain actions (active bribery); 4) accepting an offer or promise of such a benefit, receiving it, requesting or demanding to provide (passive bribery); 5) other corrupt criminal illegal acts (conditionally corrupt, quasi-corrupt and criminal offences that fell under the note of Art. 45 of the Criminal Code of Ukraine unreasonably).

5. Analysis of the negative criminal and legal consequences of a criminal corruption offence shows that the legislator in certain cases equated these torts with grievous and extremely grievous crimes. In addition, the absence of differentiation of criminal-legal consequences for different types of criminal corruption offences in certain cases does not correspond to the principle of fairness.

The refusal in the draft Criminal Code of Ukraine from restrictions on criminal corruption offences, which are enshrined in the Criminal Code of Ukraine, cannot be assessed unambiguously. On the one hand, the criminal-legal consequences of committing these torts violate the principles of criminal law, and therefore, it would probably be possible to predict that the Constitutional Court of Ukraine could eventually declare them unconstitutional. Although, on the other hand, they have a certain po-

tential to deter from committing corrupt criminal offences.

6. In the context of criminal law reform, attention should be focused on improving the grounds for applying different types of confiscation, but it is important that they do not contend with each other and that they are not used for committing the same act, since this may lead to a violation of the “ne bis in idem” principle. For persons who have committed corrupt criminal offences, lifetime bans on engaging in certain activities or holding certain positions can be applied as a punishment, or at least increase the minimum and maximum limits of this punishment provided for in part 1 of Art. 55 of the Criminal Code of Ukraine. The criminalization of concealing a corrupt criminal offence within an independent form of the objective side of a criminal offence also requires attention.

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Корупційні кримінальні правопорушення: концептуальні проблеми в контексті реформування кримінального законодавства України

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Анотація

Метою статті є виявлення проблемних питань, пов'язаних із конструюванням кримінально-правових положень, що стосуються корупційних кримінальних правопорушень, як у Кримінальному кодексі України, так і в проєкті Загальної частини Кримінального кодексу України 2020 року, а також визначення шляхів їх розв'язання. У статті використано комплекс наукових методів, а саме: термінологічний, системно-структурний, формально-логічний, порівняльно-правовий. Теоретичне підґрунтя дослідження становлять праці українських та іноземних учених, положення Кримінального кодексу України, а також практика його застосування. Наукова новизна статті полягає в тому, що в ній: 1) висвітлено проблеми визначення корупційного кримінального правопорушення та шляхи їх розв'язання; 2) виявлено вади у визначенні корупційного злочину, передбаченого в проєкті Загальної частини Кримінального кодексу України 2020 року, сформульовано пропозиції щодо їх усунення; 3) з'ясовано основні переваги й недоліки переліку корупційних правопорушень, що міститься в примітці до ст. 45 Кримінального кодексу України; 4) удосконалено класифікацію корупційних кримінальних правопорушень за способом і суб'єктом їх учинення; 5) визначено зміст, позитивні та негативні аспекти кримінально-правових наслідків корупційного кримінального правопорушення. За результатами здійсненого дослідження сформульовано такі висновки: 1) відсутність у Кримінальному кодексі України визначення поняття «корупційне кримінальне правопорушення» не дає змоги окреслити кримінально-правовий зміст цієї групи деліктів і встановити, які кримінальні проступки та злочини до них належать; 2) під час формування цієї дефініції слід урахувати, що вона повинна узгоджуватися з визначенням кримінального правопорушення, корупційного правопорушення та корупції; 3) концепцію тристороннього розуміння неправомірної вигоди (як предмета, мети та засобу вчинення злочину) у визначенні корупційного злочину слід трансформувати в конструкцію на кшталт «діяння, що полягають у пропозиції чи обіцянці надання неправомірної вигоди, її наданні, прийнятті пропозиції або обіцянки такої вигоди, її одержанні, проханні чи вимаганні надати»; 4) запропонований у примітці до ст. 45 Кримінального кодексу України перелік корупційних правопорушень, з одного боку, не охоплює всіх кримінальних правопорушень, які належать до корупційних, а з іншого – містить окремі кримінальні правопорушення, які не слід відносити до корупційних; 5) корупційні кримінальні правопорушення за способом учинення запропоновано поділяти на: а) незаконне заволодіння шляхом зловживання службовою особою своїм службовим становищем певним майном; б) зловживання владою, службовим становищем чи повноваженнями; в) пропозицію, обіцянку надати неправомірну вигоду, а також надання такої вигоди за вчинення чи невчинення певних дій (активний підкуп); г) прийняття пропозиції або обіцянки такої вигоди, її одержання, прохання чи вимагання надати (пасивний підкуп); д) інші корупційні кримінально-протиправні діяння (умовно корупційні, квазікорупційні та кримінальні правопорушення, які включено до примітки ст. 45 Кримінального кодексу України необґрунтовано); 6) аналіз негативних кримінально-правових наслідків корупційного кримінального правопорушення засвідчує, що законодавець у певних випадках прирівняв ці делікти до тяжких та особливо тяжких злочинів; 7) у контексті реформування кримінального законодавства необхідно вдосконалити підстави різних видів конфіскації, заборони займатися певною діяльністю чи займати певні посади, а також розглянути доцільність криміналізації приховування корупційного кримінального правопорушення

Ключові слова:

корупція; корупційний злочин; корупційне правопорушення; протидія корупції; службова особа; конфіскація; неправомірна вигода