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CRIMINAL LIABILITY FOR CORRUPTION CRIMES IN UKRAINE AND CERTAIN FOREIGN COUNTRIES: COMPARATIVE-LEGAL RESEARCH

The problems of criminal responsibility for corruption crimes in Ukraine and certain foreign countries in the context of comparative-legal knowledge are considered. The peculiarities of the normative consolidation of the corresponding corruption crimes in different countries of the world, the specifics of the elements and signs of their corpora delicti, the types and limits of punishment for their commission and other criminal-legal characteristics are established.

Keywords: corruption crimes, criminal responsibility, comparative-legal research, criminal legislation, active and passive corruption, punishment.

An important way of development of the problem of criminal responsibility for corruption crimes is its comparative-legal research, because, on the one hand, it allows to identify the best positive experience that exists abroad, and on the other – to see deficiencies in the criminal legislation of our state, and vice versa. It should be noted that the methodology of comparative-legal research is based on the statement that social constructs of criminal responsibility and punishment, criminal offenses, etc., are understood not only as language and cultural phenomena, but as elements of objective reality that exist and perform certain functions in society, related to the security of the individual, society, state, world rule of law [1, p. 30]. The comparing of the provisions on criminal responsibility for corruption crimes in Ukraine and certain foreign countries entails acceleration of international integration processes in our state, harmonization and unification of various national legislations, deepening of scientific research and

dissemination of relevant theoretical knowledge, search of the most effective ways of counteracting corruption by criminal-legal means. Of course, within the scope of this article it is impossible to capture the experience of all without exception states of the world, and therefore we focus only on particular countries.

In the legal literature of Ukraine, the issues of criminal responsibility for corruption crimes in a comparative-legal context were investigated by a number of scholars such as Akram Trad Al-Fayiz, P. Andrushko, O. Busol, A. Vygovskaya, R. Grevtsova, O. Gubanov, O. Dudorov, D. Krupko, M. Melnyk, I. Morozov, R. Simekh, M. Khavronyuk and others, however, most of the researches did not take into account modern changes in foreign anti-corruption criminal legislation, the original sources were not studied in the original language, and the researches themselves were fragmentary or bearing unsystematic character.

The purpose of this article is a comparative-legal research of criminal responsibility for corruption crimes in Ukraine and certain foreign countries, as well as the formation of conclusions and proposals on this basis aimed at improving the provisions of the current Criminal Code (hereinafter – CC) of Ukraine.

It should be noted that the CC of Ukraine does not consider responsibility for corruption crimes within an independent section of its Special Part. Instead, the definition of corruption offenses is given in the Note to Art. 45 «Relief from criminal responsibility in connection with actual repentance» (Chapter IX «Relief from criminal responsibility» of the General Part of the CC of Ukraine) [2]. This is due to the fact that in this article, for the first time in the text of the CC of Ukraine, the term «corruption crimes» is mentioned, and therefore from the standpoint of legislative technique there is a need for its definition within the bounds of the note to the specified criminal-legal norm. Legislative definition of corruption crimes in the national CC appeared on the basis of the Law of Ukraine «On the National Anti-Corruption Bureau of Ukraine» from October 14, 2014 [3], but later (in 2015), the wording of this Note was legally revised [4].

At present, the corruption crimes under the CC of Ukraine should be considered crimes provided for in Art. 191, 262, 308, 312, 313, 320, 357, 410, in case they were committed through abuse of one's official position, as well as crimes provided for in Art. 210, 354, 364, 364^1, 365^2, 368–369^2 of this Code. Obviously, that the legal

definition of corruption crimes is not given in the context of their broad description with the disclosure of specific features, but by the listing of specific articles of the CC of Ukraine, which establishes responsibility for such socially dangerous infringements. The scope of corruption crimes comprise certain infringements, as envisaged by 19 (nineteen) articles of the CC of Ukraine, that is, the legislator provided an exhaustive list of the aforesaid infringements. The commission of a corruption crime entails a wide range of negative criminal consequences related to the relief from criminal responsibility, the assignment of a punishment, relief from punishment and serving thereof, the removal of record of conviction, as well as the grounds for the use of special confiscation and criminal-legal measures to legal persons. Basic penalties for corruption crimes in Ukraine are fines, public works, correctional works, arrest, limitation of freedom or deprivation of freedom for determined period (the latter is most often used and may not exceed 15 years), and additional penalties – deprivation of the right to hold determined posts or engage in determined activity, confiscation of property or without such. For the commission of many corruption crimes a special confiscation is applied [5, p. 9–53].

In today's context, the research of criminal responsibility for corruption crimes in Ukraine is gaining momentum, with emphasis on an integrated approach to their understanding, the problems of interpreting certain legislative terms, peculiarities of qualification, the assignment of punishment, etc. (herewith it is noted that corruption crimes are not limited only to crimes in the sphere of official activity and professional activity related to the provision of public services, that their list should be expanded and clarified; that the national and international systems of corruption crimes do not completely coincide; that the national anti-corruption criminal legislation lacks stability, while judicial practice – a common approach to its application) [6].

Regarding the criminal responsibility for corruption crimes in foreign countries, taking into account the geopolitical position of Ukraine, we should, first of all, to dwell on what is its specifics in the states of the European Union (hereinafter – the EU) and the states formed in the post-Soviet space. All of them represent the Romano-Germanic legal family. On the whole, most European countries brought their national anti-corruption legislation in line with the requirements of the Criminal Law Convention on Corruption from

January 27, 1999 (ETS 173) and the United Nations Convention against Corruption from October 31, 2003, taking into account the Program of Action against Corruption (1996), the Civil Law Convention on Corruption (1999), the Additional Protocol to the the Criminal Law Convention on Corruption (2003), and the United Nations Declaration against Corruption and Bribery in International Commercial Transactions (1996) [7].

The Model Criminal Code of the EU (original name – «Corpus Juris») also mentions corruption, defining: a) those who are a European official and a national official; b) what is meant under passive and active corruption that harms the EU's financial interests (Art. 5). In addition, the aforesaid Code provides for criminal prosecution for the following actions: misappropriation of funds (Art. 6); abuse of office Art. 7); dsclosure of secrets pertaining to one's office (Art. 8). For committing crimes stipulated by Art. 5–8 of this Code, it is proposed to establish such punishment: 1) basic: a) for individuals – a fine or imprisonment for up to 5 years (in aggravating circumstances – up to 7 years); b) for legal entities – a fine of up to 10 million euro (for aggravating circumstances – up to 15 million euros); 2) additional: publication of a verdict and a ban on holding a public or state post for a term of up to 5 years (in the case of crimes stipulated in Art. 5 and 6) [8].

The criminal legislation of certain EU states is also built in accordance with the pan-European and international anti-corruption standards, however it can have their specific characteristics. Thus, according to the CC of France, bribery and corruption are recognized as different criminal offenses. In accordance with the provisions of this Code, one should distinguish between: 1) domestic bribery, which includes passive (Art. 432^{11} (1) and active (Art. 433^{1} (1) corruption; 2) bribery of foreign public officials, which also includes passive (Art. 435^{1} and 435^{7}) and active (Art. 435^{3}) corruption; 3) trading in influence that includes domestic passive (Art. 432^{11} (2) and active (Art. 433^{1} (2) varieties; 4) commercial bribery, which provides for passive (Art. 445^{2}) and active (Art. 445^{1}) corruption; 5) similar legislation that could affect a foreign company doing business in France (conflict of interests – Art. 432^{12}, favoritism – Art. 432^{14}, money laundering – Art. 324^{1}, etc.). The punishments for such actions are: 1) for individuals – imprisonment for up to 10 years and a maximum fine of € 1 million or a fine of twice the amount of the proceeds (in addition, foreigners can be

banished from French territory for a period of up to 10 years, or permanently); 2) for legal entities – various penalties, including fines (up to € 5 million or a fine of up to 10 times the amount of the proceeds), confiscation of property and publication of a decision [9]. It should be noted that it is indicative for the French legislator to emphasize the following: first, an indication of active and passive corruption (bribery) as two basic forms of committing a number of corruption offenses; second, the classification as criminal acts of those which are recognized as administrative offenses in Ukraine (for example, violations of the requirements to prevent and resolve conflicts of interest); third, the differentiation of specific corruption acts (for example, favoritism – breaching the statutory or regulatory provisions designed to ensure freedom of access and equality for candidates in respect of tenders for public service and delegated public services), which in essence are nothing more than a type of bribery.

The German CC refers only to bribery, since the term «corruption» is not legal in this state [10, p. 163]. Currently, the basic provisions on responsibility for bribery in the German CC are: 1) bribery in the public sector (Sections 331, 332, 333, 334, 335, 335a and 336); 2) bribery in the private/commercial sector (business transactions) – Sections 299 and 300; 3) bribery in the healthcare sector (Sections 299a, 299b and 300); 4) bribing voters (Section 108b); 5) bribing delegates (Section 108e). Penalty for bribery is applied only to individuals (usually a fine or imprisonment for up to 3–5 years, and in aggravating circumstances – up to 10). Regarding corporate responsibility for committing corrupt acts, it comes under the Code on Regulatory Offenses (this law provides for fines of up to € 10 million for corporations where a representative of the corporation or any other executive employee is criminally responsible for any bribery offence under the CC) [11]. We would like to emphasize that by this time Germany has not ratified the Criminal Law Convention on Corruption (1999) and its Additional Protocol (2003). Therefore, the author should only refer to basic bribery offenses, not those that can be understood in the broader context of «corruption» (e.g., fraud, money laundering, embezzlement, etc.). Recently, the most comprehensive reforms of German anti-corruption legislation have led to the introduction of criminal responsibility for bribing delegates and doctors in private practice, as well as the extension of criminal liability for bribery in the private and public sectors.

Along with this, A. Vygovskaya specifies that the criminal legislation of foreign states: a) includes unequal corruption crimes, which differ in the peculiarities of the formation of the corresponding corpora delicti and punishment; b) a separate responsibility may be provided through bribery mediation, the feature absent in Ukraine's legislation, as well as for extortion of bribe or staging a bribe [12, p. 354–356]. For comparison: if in the CC of Poland, corruption crimes are primarily associated with crimes against the activities of state institutions and bodies of territorial self-government (Chapter XXIX), the Penal Code of Estonia on corruption crimes understands as the official guilty acts (Chapter 17) of three groups: abuse of power; violation of the duty to work honestly; corruption guilty offenses in the private sector (specific corruption crimes may include bribes, mediation in bribery, trade in influence, etc.) [13, p. 100].

I. Morozova, having thoroughly investigated the issues of criminal responsibility for corruption offenses in Denmark, Switzerland, the United Kingdom and Canada, has come to the important conclusions, in particular: 1) the analyzed states' experience in preventing and combating corruption by criminal-legal means is different and depends on legal, social, political conditions, level of economic development, improvement of public administration and stipulated for by the peculiarity of the criminal-legal family the aforesaid states belong to; 2) in the criminal legislation of the researched foreign states: a) there is a broad understanding of the subject of «corruption crime»; b) the term «official» is used instead of the term «officer» in this category of crimes; c) official crimes committed by public persons who occupy a responsible position in society are classified in separate articles; d) the responsibility for obtaining a bribe is differentiated depending on whether the act committed by the bribe-accepter in the interests of the bribe-giver or third parties is contrary to the law, or this act is committed in accordance with the law; e) criminal responsibility equates in the passive and active forms of the same corruption crime; f) exist trends in the introduction of the institution of responsibility of legal entities in case if employees of the legal entity (regardless of the position) resort to bribing any persons with the purpose to achieve business interests [14, p. 118].

Representatives of the Romano-Germanic legal family can be considered such independent states that were formed in the post-Soviet space. It is clear that at the time of the creation of the Model

CC for CIS states, most of the post-Soviet states did not raise the question of responsibility for corruption crimes at all, at least such crimes (as well as the concept of «corruption» or derivatives from it), in general, are not mentioned in this Code [15]. However, in recent years, the criminal legislation of the aforementioned states has undergone major changes in the fight against corruption.

Thus, under the CC of the Republic of Moldova corruption encroachments are recognized as follows: a) crimes against particular order of work in the public sphere (passive and active bribery, benefiting from influence, abuse of power or authority, etc.) – Chapter XV of the Special Part. It would be appropriate to note that, for example, qualified corpora delicti of active bribery, unlike in the CC of Ukraine, are associated not only with the status of an official, who is corrupted, but with the size of property, services, advantages or benefits in any form (large and especially large sizes). Qualified corpora delicti of abuse of power or official position provide for an indication in committing of such crime by a person occupying a responsible public position, and in the interests of an organized group or criminal organization, which is not part of a similar corpus delicti under the CC of Ukraine. The exceeding power or employment powers can be committed by a public person of any body, not just of law enforcement agency (as it is in the CC of Ukraine). In addition, under the Act from May 26, 2016, the separate responsibility is provided for fraudulent obtaining of finance from foreign funds and their appropriation. All of those, in our opinion, should be recognized as a positive foreign experience; b) corruption offenses in the private sector – Chapter XVI of the Special Part [16].

The CC of the Kyrgyz Republic directly recognizes corruption (Art. 303) as the kind of office crime (Chapter 30 of the Special Part), while (criminal) corruption means intentional acts that include creating of illegal stable connection of one or more officials having authority with individuals or groups for the purpose of obtaining illegal material, any other benefits and advantages as well as the provision of these benefits and advantages for natural and legal persons, which poses a threat to the interests of society or the state. Such separate crimes as extortion of bribe (Art. 313) and mediation in bribery (Art. 313^2) fall into official misconduct, among others [17].

Also, the CC of the Republic of Azerbaijan and the CC of the Republic of Kazakhstan directly use the term «corruption crime» in the titles of respective chapters of their Special Parts, although in

fact under such crimes are understood abuse of power and related to those acts. Instead, the CC of the Republic of Belarus does not differ having a traditional list of crimes against the interests of the service, most of which can be regarded as corruption, but, similar to the CC of the Kyrgyz Republic, stipulates for a separate criminalization of mediation in bribery (Art. 432). The specifics of the CC of the Russian Federation is that it distinguishes such an unusual form of bribery as «petty bribery» (Art. 291^2), which refers to taking of bribe, giving of bribe personally or indirectly through a mediator in an amount not exceeding ten thousand rubles (the Note to this article provides for encouraging norm under which a person can be released from criminal responsibility), however, such experience, in our conviction, cannot be treated as positive. As for the CC of Georgia, office crimes are considered crimes against the state, at that: a) the abuse of power or service position and the exceeding of power or service authority may be committed with violence or weapons, as well as insulting personal dignity of the victim; b) taking of bribe (Art. 338) is possible in «direct or indirect way», while a particular crime is considered «trading in influence» (Art. 339^1). Under the CC of the Republic of Armenia, for example, taking of bribe (Art. 311), among other things, is possible with «facilitation for the committing or non-committing of such act» or «patronage or connivance in the service», herewith in the specially qualified corpus delicti this crime can be committed separately by judge [18, p. 5]. The basic punishment for corruption crimes in independent states that have emerged in the post-Soviet area usually ranges from fines to deprivation of freedom for determined period (for example, under the CC of the Kyrgyz Republic – up to 20 years), while additional penalty provides for confiscation of property and deprivation of right to hold determined posts or engage in determined activity for a certain period.

The experience of criminal-legal counteraction to corruption in the representative countries of the Anglo-American legal family is also suitable. For example, Australian lawmaker understands the concept of corruption very widely. The Crime and Corruption Act of 2001, Queensland (Commonwealth of Australia), focuses on defining the content of «corruption behavior», which includes a wide range of actions and inactivity, starting with a disciplinary breach and ending with a criminal offense (in particular, abuse of public office, bribery, extortion) [19].

At the federal level in the U.S., the legal concept of corruption is also widely defined. The main body of rules on abuse of power or office, as well as bribery and conflicts of interest is concentrated in Chapter 11, Title 18, United States Code. In this case, criminal responsibility is differentiated depending on five main factors: 1) the item of the crime (bribe, compensation, gift, etc.); 2) the content of the objective side of the act (receiving or giving a bribe, an offer or promise to give a bribe, extortion of bribes, mediation in bribery, consent to bribe, etc.); 3) the specifics of the subject of the crime (public official, special government employee, member of the Congress, etc.); 4) direction and degree of realization of intent; 5) the scope of the commission of various unlawful acts (government, sports, financial, etc.). A punishment for corruption acts is a fine (or a fine of three times the monetary value of a valuable thing, whichever is greater) and/or imprisonment for up to 15 years (additional penalties may include civil penalties, a ban on engaging in certain activities, disqualification, etc.). Many ethical standards of conduct in the public service in the United States are defined by executive orders of the President of the United States and regulatory acts [6, p. 132–141].

In the United Kingdom the basic law containing criminal-legal norms on combating corruption is the Bribe Act of 2010. This Act has an extremely wide scope of application, since both individuals and organizations (British organizations committing acts abroad and foreign organizations committing acts in the United Kingdom) are being prosecuted. The following acts are criminalized: 1) offenses of bribing another person (active bribery) – offer, promise or giving a financial or other advantage etc.; 2) offenses relating to being bribed (passive bribery) – request, agree to receive or accept a financial or other advantage, etc.; 3) bribery of foreign public officials; 4) failure of commercial organisations to prevent bribery. The punishment for bribery is: for a fisical person – imprisonment (maximum – up to 10 years) and/or a fine (maximum – unlimited); for the organization – a fine (maximum – unlimited) [20]. In addition, property of individuals or organizations may be confiscated in accordance with the Proceeds of Crime Act 2002, and the director of the company that has been found guilty may be disqualified under the Company Directors Disqualification Act 1986. It should be noted that the specifics of the Bribe Act of 2010 are as follows: 1) the bribery can be committed directly or through a third party; 2) the sign of an

«official person» does not affect the qualification, since bribery can be committed by any person; 3) the unified concept of «improper performance» is used, which covers both illegal and lawful actions of an official person; 4) legislative definitions of many key terms related to bribery are given.

Some interest in criminal responsibility for corruption crimes poses the experience of some Far Eastern countries, in particular PRC. The Criminal Law of this state prohibits: 1) «official bribery», which applies to a «state functionary» or an «entity»; and 2) «commercial bribery», which applies to a «non-state functionary». The crimes are usually categorised as «bribe-giving» or «bribe-accepting» offences (all of them constitute serious criminal offenses). The PRC Criminal Law provides for the following crimes: offering of a bribe to a state functionary (Art. 389); offering of a bribe to a non-state functionary, foreign official or an officer of a public international organisation (Art. 164); offering of a bribe to an entity (Art. 391); offering of a bribe by an entity (Art. 393); offering of a bribe to a close relative of, or any person close to, a current or former state functionary (Art. 391); introduction to a state functionary of an opportunity to receive a bribe (Art. 392); acceptance of a bribe by a state functionary (Art. 385); acceptance of a bribe by a close relative of, or any person close to, a current or former state functionary (Art. 388); acceptance of a bribe by a non-state functionary (Art. 163); acceptance of a bribe by an entity (Art. 387). A punishment for committing bribery may be a fine, imprisonment (lifetime inclusive) or death penalty [21]. The Law highlights a lot of circumstances that aggravate the responsibility for bribery (for example, offering bribes to three or more persons, using illegal gains to offer bribes, seeking promotion or adjustment of positions through offering bribes, offering bribes to any judicial functionary to influence judicial justice, causing economic losses in the amount of no less than RMB 500 000 and less than RMB 1 million, etc.). In 2015, Chinese legislator replaced specific monetary thresholds for sentencing for bribery with more general standards of size (losses), such as «relatively large», «huge» and «especially huge» (Art. 383). In addition, on April 18, 2016, the Supreme People's Court and the Procurator-General of the Supreme People's Procuratorate jointly issued the 2016 Judicial Interpretation on bribery, corruption, and misappropriation of official funds, which contributes to the correct application of criminal-legal norms.

Consequently, based on the above provisions, the following conclusions should be made:

1) criminal responsibility for corruption crimes in many countries of the world is based on the provisions of international legislation (in particular, the UN and Council of Europe anti-corruption conventions), although some states have not yet ratified separate conventions (for example, Germany has not ratified the Criminal Law Convention on Corruption, 1999, and its Additional Protocol, 2003). Regarding the model criminal legislation, in some cases it can have a significant impact on the formation of anti-corruption norms in the respective states (for example, «Corpus Juris», if it refers to the EU states), while in others it is not (for example, the Model CC for CIS states does not mention corruption crimes, although it proposes to criminalize a number of crimes in the sphere of official activity);

2) corruption crimes are now mostly understood as offenses in the sphere of official activity and encroachments related to them (Germany, Poland, Estonia, Denmark, Switzerland, Republic of Belarus, Georgia, etc.). In just a few countries of the world, national CCs directly mention in their norms about «corruption crimes» (for example, Ukraine, Republic of Moldova, Azerbaijan Republic or Republic of Kazakhstan) or their derivative names (for example, «corruption» – the Kyrgyz Republic). First of all, corruption crimes cover two main groups (forms) of acts: a) active corruption (bribery); b) passive corruption (bribery). The range of corruption crimes (offenses) can be extremely wide and include even disciplinary offenses (for example, the Commonwealth of Australia). Moreover, if in Ukraine violations of the requirements for the prevention and settlement of conflicts of interest or violations of legal restrictions on the receipt of gifts lead to administrative responsibility, in some countries of the world (for example, France or the United States) they entail a criminal responsibility;

3) corruption crimes can cause harm to various spheres, including: internal and external (France or the United Kingdom); government, commercial, electoral and health care (Germany); activities of state institutions, as well as bodies of territorial self-government (Poland). The items of such crimes are above all an undue advantage and a bribe, although alien property, any other good things, benefits, services, compensations, gifts, etc. are also mentioned. Corruption crimes can be committed both through action or failure to act, envisage the consequences of an act or just the act

itself. Their particular typical manifestations may be the following: offer, promise or giving of undue advantage; consent to receive or accept such advantage; receiving of a bribe; extortion of undue advantage (bribe); mediation in bribery, etc. The subjects of the analyzed crimes can be individuals (not only state officials and persons equated to them, but also their close relatives, non-state functionaries, representatives of commercial enterprises, voters, delegates, medical workers, etc.) and organizations (corporations). From a subjective point of view, corruption offenses are usually intentional, although in some cases negligence may also occur (for example, the United Kingdom);

4) the basic punishment for committing corruption crimes for individuals is a fine and/or imprisonment for a specified period (in exceptional cases, life imprisonment or death penalty – PRC), and for legal entities – a fine. Additional penalties may be: for individuals – expulsion from the state, confiscation of property, deprivation of right to hold determined posts or engage in determined activity for a certain period, disqualification; for legal entities – confiscation of property, publication of a decision, civil penalties, etc.;

5) taking into account the positive foreign experience and striving to improve the provisions of the current CC of Ukraine, we consider it necessary: 1) to expand and clarify the list of corruption crimes, range of their items, the content of objective and subjective signs; 2) to reconcile the qualifying (especially qualifying) signs of corpora delicti in the relevant articles of Chapter XVII of the Special Part of the CC of Ukraine, which refers to the so-called «active» and «passive» bribery, given the status of the subjects of corruption crimes; 3) to interpret the concept of «request to provide undue advantage» and to distinguish it from «extortion of undue advantage»; 4) to link the crime provided for in Art. 364 of the CC of Ukraine, with a responsible and especially responsible position of an official person, and a crime stipulated by Art. 369 of the CC of Ukraine – not only with the position of an official person, but also with the amount of undue advantage; 5) to introduce new specific forms of criminal acts that would correspond to behavior that is common in practice such as «favoritism», «protectionism», «nepotism»; 6) to consider the possibility of criminalizing certain forms of corruption-related offenses for which administrative responsibility is currently being applied if they result in substantial harm or grave consequences; 7) to consider the possibility of

introduction of new types of additional penalties (for example, expulsion from the territory of the state or publication of a court verdict against a specific person); 8) for supreme judicial authorities to adopt a relevant resolution (informational letter), containing, first of all, common approaches to the correct qualification of corruption crimes.

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Кримінальна відповідальність за корупційні злочини в Україні та іноземних державах: порівняльно-правове дослідження

Визначено проблеми кримінальної відповідальності за корупційні злочини в Україні та окремих іноземних державах у контексті порівняльно-правового пізнання. Встановлено особливості нормативного закріплення відповідних корупційних злочинів у різних країнах світу, специфіку елементів та ознак їх складів, види і межі покарання за їх вчинення та інші кримінально-правові характеристики.

Ключові слова: корупційні злочини, кримінальна відповідальність, порівняльно-правове дослідження, кримінальне законодавство, активна та пасивна корупція, покарання.