

UDC 342.9

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ADMINISTRATIVE AND LEGAL ANALYSIS OF VIOLATING REQUIREMENTS FOR CONFLICT OF INTERESTS PREVENTION AND CONTROL

The article presents legal analysis of Art. 172⁷ of the Code of Ukraine on Administrative Offences (hereinafter the CAO) «Violation of requirements for the prevention and settlement of a conflict of interests». The features of the article disposition and types of penalties for this type of offense are revealed as well as the types of liability for breaching requirements for settling conflicts of interest in foreign countries.

Keywords: conflict of interests, potential and real conflict of interests, criminal, administrative and disciplinary responsibility.

Corruption counteraction does not stimulate the sanction imposing mechanisms but affects negatively socio-political and socio-economic life both in the criminal and in administrative area. The impact of foundations of transparency and honesty destruction acts due to the spread of criminal corruption offenses in general and administrative offenses related to corruption in particular forms a negative tendency of reducing the level of public confidence in the state power.

In its legal interpretation, a conflict of interests is not really a form of corruption, but it is a legal situation that can lead to corruption. To reduce the growth of such conflicts or the risk of its dissemination, certain means of prevention are used such as limitation of actions, obligation of self-repression, disclosure of interests, implementation of ethical codes, formation of independent commissions, etc.

A conflict of interests arises when certain actions are taken or certain decisions are made, as a rule, under such conditions as:

– use of state power or relevant authority concerning relatives or other persons, if a civil servant's private interest is on the agenda;

- combining jobs;
- possession of securities, bank deposits;
- performance of services and receiving gifts;
- property obligations and litigation;
- using information obtained for the period of work in state structures in favor of third parties or private benefit;
- explicit violation of established prohibitions (for example, use of official information, obtaining awards, honorary and special titles (with the exception of scientific ones) from foreign states, etc.).

To reveal objective and subjective signs of violation of requirements for prevention and settlement of a conflict of interest (Art. 172⁷ of the CAO).

In EU and CIS countries there are various ways of regulating conflicts of interests, in particular, leading ones relate to implementation mechanism through the law on public service: The Law «On Public Service», «On Restrictions on Participation in Entrepreneurial Activities of Persons Involved in Public Activities» (Poland), the Code of Public Service, the Criminal Code (Austria), «On Public Administration» (Iceland), the Code of Public Service (Greece).

In other countries, the Laws «On Conflict of Interests» (Serbia, the Czech Republic, Moldova), «On Prevention of a Conflict of Interests in Performance of Public Authorities» (Croatia), «On Preventing a Conflict of Interests in Activities of Officials» (Latvia), «On Public and Private Interests in Public Service» (Lithuania) [1].

The Model Code of Conduct for Civil Servants is equally important, because it sets out the rules of conduct of civil servants in a conflict of interests. A civil servant should not allow his or her personal interests to be in conflict with his or her official position. Avoiding such conflicts (real, potential or probable) is his or her duty (Art. 8) [2]. In Ukraine, a conflict of interests is regulated by the norms of the Law of Ukraine «On Corruption Prevention» (Section V) and the CAO (Art. 172⁷).

The objective side of violating requirements for prevention and settlement of a conflict of interests consists of such act (action or omission) as:

1) person's failure to report conflict of interests' occurrence in cases and procedure prescribed by law; 2) committing acts or taking decisions under a real conflict of interests; 3) failure to report a real conflict of interests or committing acts or taking decisions under a

real conflict of interests in case of actions, which have been committed by a person, who has been subjected to administrative punishment for the same violations for a period of a year.

Considering a conflict of interests, it should be noted that, first, it is the execution of a person of certain official powers; second, private non-property or property interest (potential conflict) can occur; third, contradiction between the exercise of official rights and responsibilities and private interest occurs; occurrence of a conflict of interests leads to bias and partiality in decision-making and affects committing or non-committing of certain actions for own benefit or in favor of third parties.

Failure to report a conflict of interests in established procedure and cases concerns in general not the failure to comply with person's duty to report no later than the next working day from the moment when he/she has learned or should have known of a real or potential conflict of interests to a supervisor, but in case of the presence of a person in a position that does not involve the presence of a direct supervisor, or the National Agency for the Corruption Prevention. In this case, one should pay attention to the need to change the disposition of Art. 172⁷ of the CAO on an untimely report of a real conflict of interests by a person.

Under a real conflict of interests, committing actions or making decisions consist of the presence of person's contradiction between the private interest of the person and his/her official or representative powers, which affects objectivity or impartiality of decision-making, or committing or non-committing of actions in performance of these powers.

Private interest can also relate to fulfillment of the state power functions of the entity of liability for offenses related to corruption. The most common situations, in which a conflict of interests may arise, include:

- performance of functions of public administration in relation to family members, close persons and those, with whom the personal interest of a civil servant is related;
- performance of work in combining jobs;
- receiving gifts and services;
- existence of financial obligations;
- use of bank accounts and valuable deposits;
- use of information received in the course of official duties performance after release;
- violation of corporate ethics in the private sector.

Furthermore, private interest must include certain characteristics, such as: 1) characterized both as property and non-material property; 2) due to personal, family, friendly or other out-of-duty relationships with individuals or legal entities; 3) arising from membership or activity in public, political, religious or other organizations.

Private interest is influenced with, firstly, the motivation of an official, since it is oriented towards meeting own needs and desires as well as interests of family members, relatives and third parties. For example, the widespread phenomena of nepotism, favoritism and patronage reveal its essence in the best way .

Private interest may be of material nature, that is an economic benefit in cash or in a form, which can be estimated and determined as income as well as the private interest of non-material nature, which is understood as a benefit that is not material but used in achievement of entity's obvious personal goals, even if such benefit has not led to receipt of material incomes.

A real conflict of interest is defined as contradiction between private interest of a person and his official or representative powers, which affects objectivity or impartiality of decision-making, or committing or non-committing acts during the execution of these powers.

In addition, a potential conflict of interests means the presence of a person's private interest in area where he/she carries out official or representative powers that may affect objectivity or impartiality of his/her decision-making, or committing or non-committing acts during the execution of these powers.

Therefore, a real conflict is a broader concept than a potential, due to relationship of the whole and the part. While a potential conflict is the presence of a person's private interest, a real one is a contradiction between existing private interest and fulfillment of state power functions. In fact, a potential conflict serves as a prerequisite for the emergence of a real one under favorable conditions.

A private interest generates occurrence of such phenomena as nepotism, favoritism and patronage. According to H. Laut, corruption in the manifestations of patronage, clientelism, mafia and autocratic cliques impede democratic development. These phenomena reflect the types of conflicts of interests. According to M. Kwon, they are the most common sources of conflict. In politics and management, they become the cause of ineffective decisions, loss of motivation and decrease of workers' productivity [3, p. 281].

The objective side consists of such main features as:

- 1) an act (action or inaction);
- 2) socially harmful consequences;
- 3) «cause-effect» relationship [4].

Violations of requirements to prevent and resolve a conflict of interests are manifested through both action and inaction. Inaction is manifested through not reporting a real conflict of interests, while action is manifested through actions or decisions under a real conflict of interests and commission of such actions within a year after the imposition of a penalty for the same kind of action. Failure to report a real conflict of interests is:

- 1) after the expiration of an established term;
- 2) at the time of the decision to impose a fine for this violation.

The legislator considers committing an objective part of the violation of requirements to prevent and resolve a conflict of interest only if there is a real conflict of interests that puts a potential conflict of interests beyond the scope of legal regulation.

Therefore, the disposition of the norm of violating financial control requirements is formulated in such a way that violation of requirements for the prevention and settlement of a conflict of interests in time is a complete form of offense.

The next feature of the objective side is socially harmful consequences, which determine a legal body of an administrative offense related to corruption, material or formal. Harmful effects of an unlawful act play an important role in determining liability for the police. Thus, a causal connection between violation and harmful consequences is of legal significance, since it determines occurrence of a violation of requirements for prevention and settlement of a conflict of interests [5].

Analyzing the legal body of violations of requirements for preventing and resolving conflict of interests, it becomes evident that harmful effects are not obligatory, that is the legal body is formal. Failure to report a real conflict of interests, performance of action or making decision under a real conflict of interests has no formulation of consequences in the disposition of the article, which suggests its formal character.

For violation of requirements for preventing and resolving conflict of interests, in particular:

– failure to report a real conflict of interests in cases and procedure established by law is provided for with imposition of a fine

of one hundred to two hundred non-taxable minimum incomes of citizens (from 1700 UAH to 3400 UAH);

- performance of actions or decisions under a real conflict of interests is provided for with imposition of a fine of two hundred to four hundred non-taxable minimum incomes of citizens (from 3400 UAH to 6800 UAH);

- failure to report a real conflict of interests or committing acts or taking decisions under a real conflict of interests in case of actions, which have been committed by a person, who has been subjected to administrative punishment for the same violations is provided for with imposition of a fine of four hundred to eight hundred non-taxable minimum incomes of citizens (from 3400 UAH to 13 600 UAH) with deprivation of the right to occupy certain positions or be engaged in certain activities for a period of one year.

In most countries of Western and Central Europe, there are three types of responsibility: criminal, administrative and disciplinary.

In Latvia, criminal responsibility is provided for in the form of deprivation of liberty for a term of up to five years in case of causing significant damage to public interests.

In Poland, for the declaration of false information, there is punishment in the form of deprivation of liberty for a term up to three years.

In the United Kingdom, criminal responsibility comes in case of failure to report private interests to members of the Scottish Parliament, the Assembly of Wales and Northern Ireland.

In Italy, members of the government may be held liable for failing to declare a private interest or filling inaccurate information in a declaration in accordance with requirements of the Competition Agency or the Communications Agency. In France, the «illegal search of interests» is punishable in a term of imprisonment of up to five years and a fine of € 75 000, as well as violation of restrictions for obtaining a financial benefit, for which is provided for imprisonment for a term of up to two years and a fine in the amount of € 30 000. In Germany, «acceptance of benefit» is a kind of conflict of interests, which includes money and cash benefits such as tokens and vouchers; jewelry; lower prices for private use; lower interest rates on loans; unjustifiably high fee-sharing; hiring relatives or close people; payment for different personal services; providing unjustifiably cheap accommodation; heritage; special fees; invitation for exclusive events; sexual services.

Disciplinary liability can be manifested in suspending wages for judges and members of parliament (Poland, France, Germany, Italy, Latvia, Spain, United Kingdom);

dismissal for civil servants, judges and members of parliament (France, Hungary, Latvia, Poland, Portugal and Spain).

Administrative liability such as fines, penalties, disclosure of information on violations in the official newspaper of the Parliament or the official bulletin of the state, reports in the Parliament, prohibition on holding public office for up to 10 years, return of illegally obtained property [6].

In Ukraine, an administrative responsibility in «Violation of the Procedure for the Prevention and Settlement of a Conflict of Interests» (Art. 172⁷ of the CAO), criminal responsibility in «Abuse of Power or Official Position» (Art. 364 of the CCU), «Excess Of Power or Official Authority by an Employee of a Law Enforcement Body» (Art. 365 of the CCU), «Abuse of Authority by Persons Providing Public Services» (Art. 365² of the CCU), «Declaration of Inaccurate Information» (Art. 366¹ of the CCU), «Adoption of a Proposal, Promise or Obtaining an Unlawful Benefit by an Official» (Art. 368 of the CCU), «Illegal Enrichment» (Art. 368² of the CCU), «Proposition, Promise or Provision of Unlawful Benefit to an Official» (Art. 369 of the CCU), «Abuse of Influence» (Art. 369² of the CCU) and disciplinary responsibility such as (part 2 Art. 65 of the Law of Ukraine «On Civil Service») are stipulated for violation of the order concerning prevention and resolution of a conflict of interests.

With regard to disciplinary responsibility, features of a conflict of interests can be found in paragraph 1 of part 2 of Art. 65 of the Law of Ukraine «On Civil Service» violation of the oath of a civil servant, paragraph 2 part 2 Art. 65 of the Law of Ukraine «On Civil Service» violation of the rules of ethical behavior of civil servants, paragraph 9 part 2 Art. 65 of the Law of Ukraine «On Civil Service» that provides for use of powers in private interests or in unlawful personal interests of other entities, as well as paragraph 11 part 2 Art. 65 of the Law of Ukraine «On Civil Service» failure to report to the head of a civil service on direct subordination relations between a civil servant and relatives within 15 days from the date of their occurrence.

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Стаття надійшла до редколегії 25.07.2017
