UDK 343.353

Andrii Savchenko – LLD, Professor, Head of Criminal Law Branch of National Academy of Internal Affairs

CORRUPTION CRIMES IN UKRAINE: PROBLEMS OF CRIMINAL LEGAL UNDERSTANDING

The article is dedicated to solving of the problems of criminal legal understanding of corruption crimes in Ukraine. Subject to the provisions of national criminal legal and the views of Ukrainian scientists were discovered the concept, features, consequences, types of corruption crimes and certain discussion points regarding their description highlighted. All this contributes to a comprehensive understanding of the criminal legal nature of corruption crimes.

Keywords: corruption crimes; their concept; their features; their types; criminal legal consequences of committing these crimes; criminal legislation of Ukraine.

In modern world corruption threatens the legal order, democracy and human rights, destroys public governance, fairness and social justice, hampers competition and economic development, impedes the stability of democratic institutions and the moral foundations of society. It is directly associated with enormous assets that can possibly make up a significant proportion of resources of states, and endanger the political stability and sustainable development of those states. In these circumstances, corruption is no longer a local matter, but a transnational phenomenon that requires the adoption of various measures to counter, prevent and monitor it.

For many countries in the world, including Ukraine, corruption has become major problem. 26 points out of a possible 100 and 142 rank out of 175 positions appears the performance of Ukraine in the current Corruption Perceptions Index from Transparency International [1]. Ukraine once again is together with Uganda and the Comoros on the list among the most corrupt countries in the world. According to the Ministry of justice of Ukraine, the material damage caused by corruption crimes is estimated as several hundred million hryvnias per annum (e.g., in 2013 – UAH 268.8) [2], although the figures can hardly reflect the real indicators of social harm corruption entails. The World Bank estimates annual losses from corruption in the world account for $ 1 trillion, which is a major economic burden [3]. Corruption is costing

EU countries € 323 billion annually, says a new report, defying Europe's image as a global front-runner in the fight against graft [4].

Especially dangerous manifestations of corruptionis is the committal of socially dangerous corruption acts (crimes). This issue acquires a special significance in connection with the fact that corruption is closely linked to other forms of crime, in particular organized crime and economic crime. Hence, there is a need to hold a thorough scientific development of a concept, features, consequences and types of corruption crimes under the criminal law of Ukraine, and their criminal-legal characteristics as well. Despite the fact that the issues of combating corruption and its varied manifestations were developed to some extent in the works of Ukrainian scientists-criminalists, such as P. P. Andrushko, Y. O. Busol, V. O. Glushkov, O. O. Dudorov, O. M. Dzhuzha, M. I. Khavronyuk, V. M. Kutz, M. O. Lytvak, O. K. Marin, M. I. Melnyk, B. V. Romanyuk, V. I. Tyutyugin, O. N. Yarmysh, O. M. Yurchenko etc., they are not exhausted and require new conceptual approaches and solutions. The relevance of this kind of scientific research is stipulated by constant updating of national anti-corruption legislation, the lack of a single approach to the criminal legal nature of corruption crimes, the complexity of numerous regulatory structures and their interpretation needs, requirements of the investigative and judicial practice on proper application of the law on criminal responsibility etc.

The purpose of this article is the analysis of the problems of criminal-legal understanding of corruption crimes in Ukraine.

We assume that a group of corruption crimes in the criminal legislation of Ukraine has been singled out as they are convention offences and their existence is recognized under international criminal law. For instance, such crimes, or more precisely *"corruption offenses"* are contained in Criminal Law Convention on Corruption (ETS 173), adopted on 27 January 1999 in Strasbourg and ratified by Ukraine on 18 October 2006 [5]. Moreover, Civil Law Convention on Corruption adopted on 4 November 1999 in Strasbourg and ratified by Ukraine on 16 March 2005 [6] describes *"acts of corruption"*. Also, the UN Convention against Corruption dated 31 October 2003 (ratified by Ukraine with declarations of 18 October 2006), notes *"the offences established in accordance with this Convention"* [7]. Apart from that, the corruption crime notion is recognized and widely applied in the legislation of many world countries, including those that occurred on the territory of the former USSR (the Kirghiz Republic, the Republic Moldova etc.) and whose legal system is close to the legal system of Ukraine [8, p. 77–89]. All the abovementioned draws to the conclusion that the implementation of the term "corruption crime" in national criminal legislation is a well-grounded and necessary step.

The criminal law theory provided different definitions of corruption crimes: offenses, which are determined as misuse (abuse) by the officials of government authorities or of local self-government bodies of the conferred powers or their official position in personal interests or interests of third parties (M. I. Melnyk) [9, p. 128]; any intentional crime that is being committed by an official of a public authority or local government using his official position for mercenary motives, other personal interest or interests of third persons (O. M. Dzhuzha) [10, p. 24–26]; provided for in the Special part of Criminal Code of Ukraine (hereinafter – the CCU) of a socially dangerous act containing signs of corruption and corruption offences (V. Kutz, Y. Trynyova) [11, p. 33]. This diversity of scientific definitions was due to the absence of a legislative definition "corruption crime". Here the author agrees with V. K. Marin, that in general corruption is a crime which is committed by an official who provides public services using his special status for the purpose of obtaining undue advantage and the CCU describes approximately 100 such infringements [12].

Regarding the CCU, it does not stipulate for responsibility for corruption crimes within any separate section of the Special part of it. Therefore, among the twenty sections of the Special part of this Code there is no particular section titled "Corruption Crimes". Instead, the legislator has used an unusual approach – the definition of corruption crimes can be found in the note to Article 45 "Relief from Criminal Responsibility in Connection with Active Repentance" in section IX "Relief from Criminal Responsibility" of the General Part of the CCU [13]. It is conditioned by the fact that this article first mentions the term "corruption crime" (in connection with solving issues of relief from criminal responsibility), and therefore from the point of legislative techniques there exists the need to provide a definition within the specified criminal legal provisions.

It should be noted that for the first time legislative definition of corruption crimes in the national Criminal Code appeared on the basis of the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine", dated 14 October 2014 [14]. The Law supplemented Article 45 of the CCU with the note of the corresponding contents, however, later version of this note was revised. On the basis of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine to Ensure the Activities of the National Anti-Corruption Bureau of Ukraine and the National Agency for the Prevention of Corruption" dated 12 February 2015 the note to Article 45 of the CCU was replaced by the new version [15].

Under the current CCU, **corruption crimes** are crimes provided for by Articles 191, 262, 308, 312, 313, 320, 357, 410, in case they were committed by abuse of official position, as well as crimes provided for by Articles 210, 354, 364, 364-1, 365-2, 368–369-2 of the present Code.

Obviously, the statutory definition of corruption crimes is provided not in the context of their broad description with disclosing specific signs, but by listing specific articles of the CCU, which stipulate for the responsibility for such socially dangerous encroachments. So, the range of corruption crimes includes certain violations that are provided for in 19 (nineteen) articles of the CCU, i.e. the legislator has brought an exhaustive list. Herein, we can talk about typical **signs of corruption crimes:** 1) public danger; 2) wrongfulness, that is, envisaging them in the CCU; 3) the acts that contain elements of corruption; 4) the fact of committing them by the peculiar subjects (perpetrators); 5) the presence of exceptionally intentional form of guilt; 6) the punishability. However, as it will be further noted, from the above provisions regarding the typical signs of the researched crimes there may be certain exceptions.

Given the correlation between national and international systems of corruption crimes we can draw the conclusion they do not completely coincide. In particular, in Article 23 of the UN Convention against Corruption of 31 October 2003, the laundering of proceeds of crime is considered a corruption crime, while in the CCU it is not. At the same time, the CCU includes into the category of corruption crimes, for example, stealing, appropriation, and extortion of firearm, ammunition, explosives, or radioactive materials, or taking possession thereof by means of fraud or abuse of official position (Article 262), or violation of established rules for turnover of narcotic means, psychotropic substances, analogues thereof, or precursors (Article 320), whereas the UN Convention against Corruption of 31 October 2003 has no recalls on such crimes.

Corruption crimes do not completely coincide with any of the group of crimes in the national Criminal Code. This is quite true of crimes in the sphere of official activity and professional activity related to the provision of public services, corruption crimes often have the connection with. It is evident, not all the so-called "official crimes" can be corruption crimes (name for instance exceeding power or official responsibilities by an employee of law enforcement body (Article 365 of the CCU) or official neglect (Article 367 of the CCU)). On the other hand, corruption crimes are not just limited to crimes in the sphere of official activity and professional activity related to the provision of public services.

It should be emphasized that an act of committing any corruption crime entails **a number of negative criminal legal consequences:**

in case of relief from criminal responsibility. In particular, such a person cannot be relieved from criminal responsibility: in connection with active repentance (Article 45 of the CCU); in connection with reconciliation of guilty person with victim (Article 46 of the CCU); in connection with

transfer of person on surety (Article 47 of the CCU); in connection with the change of situation (Article 48 of the CCU);

in case of sentencing. In particular, such person can not be assigned of milder punishment than provided for by law (Article 69 of the CCU);

in case of relief from punishment and serving thereof. In particular, certain restrictions on this matter are stipulated for in part 4 of Article 74, part 1 of Article 75, part 1 of Article 79, part 3 of Article 81, part 4 of Article 82, part 4 of Article 86, part 3 of Article 87 of the CCU;

in case of removal of record of conviction. In particular, removal of record of conviction before the expiry of the period specified in Article 89 of the present Code, shall not be allowed in cases of conviction for intentional grave and especially grave crimes, and corruption crimes as well (part 2 of Article 91 of the CCU).

In addition to the above provisions it should be noted that the commitment of corruption crime is considered as **the grounds to apply to a legal entity the measures of criminal legal nature**. In particular, the CCU (part 1 of Article 96-3) envisages the following grounds: first, the committing by the person authorized by it (legal entity) on behalf of and in interests of the legal entity of any of the crimes provided for, among other things, in parts 1 and 2 of Article 368-3, parts 1 and 2 of Article 368-4, Articles 369 and 369-2 of the present Code; second, the failure to fulfill by the authorized person according to the law or the constituent documents of the legal entity of responsibilities to take measures to prevent corruption, which led to the act of committing of any of the crimes provided for, among other things, in parts 1 and 2 of Article 368-3, parts 1 and 2 of Article 368-4, Articles 369 and 369-2 of the present Code.

If we talk about the **types of corruption crimes** under the current CCU, there are different classification approaches. In general, the classification of crimes (including corruption crimes) means their division into groups (categories) depending on a particular criterion [16, p. 59].

A national researcher of the problems of corruption O. Y. Busol offers to distinguish between **unconditional corruption crimes** and **conditional corruption crimes.** The former includes crimes, in which all signs point to their corrupt nature and are defined in the law or derive from its content, whereas the latter – the crimes, the bodies of which do not have all the signs of corruption [17, p. 120–121].

Depending on the sequence of grouping of corruption crimes in the note to Article 45 of the CCU and the fact of committing or failure to commit them by abuse of official position all corruption crimes can be divided into two types: a) corruption crimes committed by abuse of official position (Articles 191, 262, 308, 312, 313, 320, 357, 410 of the CCU); b) certain corruption crimes in the sphere of economic activity, against

authority of government bodies, of local self-government bodies and associations of citizens, as well as in the sphere of official activity and professional activity related to the provision of public services (Articles 210, 354, 364, 364-1, 365-2, 368–369-2 of the CCU).

To distinguish between the corruption crimes is possible following another criteria – **generic object of infringements:** 1) corruption crimes against property (Article 191 of the CCU); 2) corruption crimes in the sphere of economic activity (Article 210 of the CCU); 3) corruption crimes against public security (Article 262 of the CCU); 4) corruption crimes in sphere of turnover of narcotic means, psychotropic substances, their analogues or precursors (Article 308, 312, 313, 320 of the CCU); 5) corruption crimes against authority of government bodies, of local self-government bodies and associations of citizens (Articles 354 and 357 of the CCU); 6) corruption crimes in the sphere of official activity and professional activity related to the provision of public services (Articles 364, 364-1, 365-2, 368-369-2 of the Criminal Code); 7) corruption crimes against established order for performing of military service/corruption military crimes (Article 410 of the CCU).

Differentiating **with respect to the subject,** corruption crimes can be divided into those that are committed by: a) officials of legal entities of the public law (e.g., Article 364 of the CCU); b) officials of legal entities of the private law (e.g., Article 364-1 of the CCU); c) persons who are not civil servants, public officials of local self-government, but exercising professional activities related to the provision of public services (e.g., Article 365-2 of the CCU); d) employees of any enterprise, institution or organization who are not officials, or persons who work for such enterprise, institution or organization (e.g., parts 3 and 4 of Article 354 of the CCU); e) general subjects (e.g., parts 1 and 2 of Articles 354 or 369 of the CCU); f) military official (e.g., Article 410 of the CCU) etc.

Apart from that, we can differentiate corruption crimes following **other criteria,** in particular: the item (article) of corruption crimes (item is present or absent); the purpose of corruption crimes (e.g., those that provide for the purpose of obtaining any undue advantage, and those that do not involve it), and for any other signs of the bodies of corruption crimes etc.

It raises concern that a legislator used a limited approach to understanding of corruption crimes, because for some reason he did not include here those crimes that can be committed "by an official using his official position" (e.g., part 2 of Article 149, parts 3 and 4 of Article 157, part 4 of Article 158, part 2 of Article 169, part 3 of Article 176, part 2 of Article 189, part 2 of Article 201, part 3 of Article 206-2), as well as some other violations under section XVII of the Special part of the CCU.

However, from the theoretical and practical sides, it is possible that crimes committed "using of official position" could be committed also "by abuse of official position". And vice versa: to commit certain corruption crimes, the responsibility for which is provided by section XVII of the Special part of the CCU, is impossible without "the use official position" (in particular, this is stated in Articles 368, 368-3, 368-4). Moreover, just the term "use" (not "abuse") appears a key element in determining corruption (Article 1 of the Law of Ukraine "On Prevention of Corruption" dated 14 October 2014).

Interestingly, certain crimes that do not fall into the category of corruption crimes, already in its general composition can be committed by an official, whereas, in the disposition of articles providing for responsibility for such encroachments, the legislator does not point to either "abuse" or "use" of official position, but also classifies them in the category of criminal offences of the corruption nature, with the view to the provisions of part 5 of Article 216 of the Criminal Procedural Code of Ukraine, since the competence of their investigation belongs to the National Anti-Corruption Bureau of Ukraine (in particular, these are the crimes provided by Article 210 "Inappropriate Use of Budget Funds, Expenditure Budget or Loans from the Budget Without Established Budgetary Allocations or from Their Excess" and Article 211 "Publication of Normative Legal Acts that Reduce Budget Revenues or Increase Budget Expenses Contrary to the Law" of the CCU). Even such resonant crime, as a delivering by a judge (judges) of knowingly illegal judgment, decision, ruling or resolution (Article 375 of the CCU), including when it was committed by a judge (judges) from mercenary motives (with aggravating circumstances) is not considered a corruption crime.

A disputable issue is when acts that can be committed by negligence are ranked corruption crimes under law. An example is the act referred to in Article 320 "Violation of Established Rules for Turnover of Narcotic Means, Psychotropic Substances, Analogues Thereof, or Precursors" of the CCU, as in the criminal legal sources it is indicated that this crime, from the subjective side, is characterized by intent or negligence in respect of acts and always by negligence as to the consequences provided in its qualified body of crime (corpus delicti) [18, p. 931]. But the term "corruption" (as a fundamental component in the definition of "criminal offence", given the provisions of Article 1 of the Law of Ukraine "On Prevention of Corruption" dated 14 October 2014) envisages relevant purpose, and therefore solely intent in the act of the guilty person.

A lot of controversial issues cause the ambiguity of certain criminal legal norms. Here are just a few examples in this regard. So, in the note to Article 364 of the CCU the definitions "significant harm" (point 3) and

"grave consequences" (point 4), with the view to the fact that they are not differentiated in this Code, as it was before, to those which consist in causing material losses and those that are of non-material nature, we draw the conclusion that substantial harm has a property character exceptionally. Whereas, some scientists share the above formulated position and others do not, arguing that this does not mean that the relevant corruption crimes may not entail the consequences of non-material nature. Otherwise, for example, in the note to Article 369-2 "Abuse of Influence" of the CCU the definition of key subjects of this infringement – persons authorized to perform state functions, – is given taking into account points 1–3 of part 1 of Article 4 of the abolished Law of Ukraine "On Fundamentals of Prevention and Counteraction of Corruption". Not really justified is a punishment for certain corruption crimes (e.g., abuse of power by persons who provide public services, in the principal body of crime, among other things, is punished by deprivation of the right to occupy certain positions or engage in certain activities for a term up to ten years, while in qualified body of crime – up to three). It is likely that many issues of theoretical and applied character it would be possible to resolve if the High Specialized Court of Ukraine for Civil and Criminal Cases adopted a corresponding resolution.

In the future certain problems with terminology and classification may occur in the case of adoption of the draft Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine on Realization of Provisions of the Criminal Procedural Code of Ukraine", which envisages introduction of criminal infractions (misdemeanors), including "corruption infractions and infractions facilitating corruption", with simultaneous rejection from the category "corruption crime" [19].

To sum up the above mentioned, we draw the following **conclusions:**

1. Along with the legislative definition "corruption crimes", which is given in the note to Article 45 of the CCU, there is a need for in-depth theoretical understanding of it. The corruption crimes should be considered as framework components of corruption and have the typical traits of socially dangerous acts under the CCU. The list should be expanded and clarified, whereas they should be acknowledged corruption crimes if they are committed "by an official using his official position" (not just "through abuse of his official position"). It is also necessary to agree on a list of corruption crimes in the CCU with the list determined in international conventions (in particular, the infringements should be considered corruption when they are related to the legalization (laundering) of incomes received by criminal way, – Articles 209 and 209-1 of the CCU).

2. When a person commits the corruption crime, it entails a wide range of negative criminal legal consequences concerning the relief from criminal responsibility, sentencing, relief from punishment and serving

thereof, removal of record of conviction, and the reasons to apply to a legal entity of measures of criminal legal nature.

3. The suggested classification of corruption crimes is considered of significant theoretical and practical importance. In particular, all of them can be classified according to the following criteria: the presence or absence of overall signs of corruption (unconditional corruption crimes and conditional corruption crimes); a sequence of grouping of corruption crimes in the note to Article 45 of the CCU and the fact of committing or failure to commit them by abuse of official position; a generic object of infringements; subjects; the presence or absence of items (articles); the purpose, as well as other signs of the bodies of corruption crimes, or other criteria.

4. An important aspect is also the stability of the anti-corruption criminal legislation, the abandoning of constant adjustment of its norms, a clear interpretation of a number of important criminal legal terms ("bribery", "abuse", "use", "authority", "responsibilities", "official position", "proposal", "promise", "request", "acceptance", "undue advantage" etc.) both in theory and judicial practice, as well as the preservation of norms on responsibility for corruption crimes, provided the conceptual reforming of the national criminal legislation in the future.

REFERENCES

1. І через рік після Майдану Україна лишається найкорумпованішою країною Європи (Transparency International Україна) [Electronic resource]. – Access mode :
http://ti-ukraine.org/corruption-perceptions-index-2014.

2. Мін'юст оприлюднив звіт по боротьбі із корупцією [Electronic resource]. – Access mode :
http://www.vsk.kiev.ua/index.php?option=com_k2&view=item&id=464:min-yust-oprylyudnyv-zvit-po-borotbi-iz-koruptsiyeyu&Itemid=192&lang=ua.

3. The Costs of Corruption [Electronic resource]. – Access mode :
http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20190187~pagePK:64257043~piPK:437376~theSitePK:4607,00.html.

4. Graft costs EU states € 323 billion, 'three times' earlier estimates [Electronic resource]. – Access mode :
http://www.euractiv.com/general/eu-corruption-times-expected-323-news-518998.

5. Criminal Law Convention on Corruption (ETS no. 173) [Electronic resource]. – Access mode :
http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm.

6. United Nations Convention Against Corruption. – Vienna : United Nations Office on Drugs and Crime, 2004. – 56 p. [Electronic resource]. – Access mode :
https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

7. Civil Law Convention on Corruption (ETS no. 174) [Electronic resource]. – Access mode :
http://conventions.coe.int/Treaty/en/Treaties/Html/174.htm/.

8. Наумов А. В. Ответственность за коррупционные преступления по законодательству России, европейских стран и США (сравнительно-правовой анализ) / А. В. Наумов // Организованная преступность и коррупция Исследования, обзоры, информация. – 2000. – № 1. – С. 76–95.

9. Мельник М. І. Корупційні злочини: сутність і поняття / М. І. Мельник // Право України. – 2000. – № 11. – С. 126–130.

10. Курс кримінології : Особлива частина : [підруч.] : У 2 кн. / М. В. Корнієнко, Б. В. Романюк, І. М. Мельник та ін. ; за заг. ред. О. М. Джужи. – К. : Юрінком Інтер, 2001. – 480 с.

11. Куц В. Поняття корупційних злочинів та їх види / В. Куц, Я. Триньова // Вісник Національної академії прокуратури України. – 2012. – № 4. – С. 32–36.

12. Марін О. Антикорупційні новели кримінального законодавства / О. Марін // Громадський портал Львова [Electronic resource]. – Access mode :
http://www.gromada.lviv.ua/analytic/936.

13. Кримінальний кодекс України : Закон України від 5 квітня 2001 року № 2341-III [Electronic resource]. – Access mode :
http://zakon4.rada.gov.ua/laws/show/2341-14.

14. Про Національне антикорупційне бюро України: Закон України від 14 жовтня 2014 року № 1698-VII [Electronic resource]. – Access mode :
http://zakon4.rada.gov.ua/laws/show/1698-18/page.

15. Про внесення змін до деяких законодавчих актів України щодо забезпечення діяльності Національного антикорупційного бюро України та Національного агентства з питань запобігання корупції : Закон України від 12 лютого 2015 року № 198-VIII [Electronic resource]. – Access mode :
http://zakon4.rada.gov.ua/laws/show/198-19/paran27#n27.

16. Кримінальне право України. Загальна частина : [підруч.] / Ю. В. Александров, В. І. Антипов, М. В. Володько, О. О. Дудоров та ін. ; за ред. М. І. Мельника, В. А. Клименка. – 5-те вид., переробл. та допов. – К. : Атіка, 2009. – 744 с.

17. Бусол О. Ю. Протидія корупційній злочинності в Україні в контексті сучасної антикорупційної стратегії : дис. … доктора юрид. наук : 12.00.08 / Бусол Олена Юріївна. – К., 2015. – 479 с.

18. Науково-практичний коментар Кримінального кодексу України / за ред. М. І. Мельника, М. І. Хавронюка. – [9-те вид., переробл. та допов.]. – К. : Юридична думка, 2012. – 1316 с.

19. Про внесення змін до деяких законодавчих актів України щодо реалізації положень Кримінального процесуального кодексу України : проект Закону України від 16 квітня 2014 року № 4712 [Electronic resource]. – Access mode :
http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=50664.