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"PROPORTIONALITY TEST" AS A PREREQUISITE FOR THE EFFECTIVE USE OF THE RESOURCE OF "ANTI-CORRUPTION" LIMITATIONS

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INTRODUCTION

In the search for effective means of preventing corruption in all its manifestations in the activities of public administration entities, forming and regulating models of the relations of the latter with individuals with an emphasis on focusing the activities of the respective entities on the maximum concentration of efforts to exercise and protect rights, freedoms and the legitimate interests of the latter, increased confidence in the activities of persons authorized to perform the functions of the state or local government, the specific attention of the community concerned to pursue the introduction of "filters" that would make it impossible to use the benefits of the public service to satisfy private interests of public officials, to "divert" them from their core activities and to adversely affect the implementation and protection of public interests. The role of one of these "filters" is traditionally fulfilled by "anti-corruption" restrictions (otherwise called "special"), focused on the "external" activity of public servants, their "gift" relations, "ex-service" activities, etc. However, by introducing such "filters", one should not forget about the "private autonomy" of public servants, which is directly related to their personal rights, freedoms, legitimate interests, which necessitates the reasonable regulation of "special", "anti-corruption" restrictions on at the same time focusing on the satisfaction of public interests and ensuring the "private autonomy" of persons authorized to perform the functions of state or local self-government. So, it is an urgent need to introduce regulatory "filters" for efficient use and the limitations mentioned above.

One of these "filters" is the "proportionality test" ("the principle of proportionality", the "doctrine of proportionality"), the regulatory enactment and practical implementation of which allows to ensure that the "fair" balance between the private and public interests of all parties involved relations, maximum concentration of efforts of public servants in the performance of their professional duties, eliminating the prerequisites for "corrosion of power" and their "private autonomy", the exercise of their personal rights, freedoms, legal interests.

The "proportionality test" should "permeate" (play the role of "basic", "fundamental") all provisions of anti-corruption legislation, including "Provisions on "anti-corruption" restrictions", aimed at preventing any

prerequisites for using the benefits of public service to realize and protect public employees of their private interests (personal or close persons).

An in-depth analysis of the phenomenon of relevant "anti-corruption" restrictions is in the aspect of adherence to the "proportionality test" and allows for the formation of a new reliable scientific basis (adherence to the principle of scientific nature) for modern unified rulemaking and enforcement, focused on the effective, resource-efficient prevention of corruption in all its manifestations in public-service relations. Although many states have "anti-corruption" restrictions in their national legislation, the quality defects of the latter, unfortunately, cause problems in their practical implementation, creating preconditions for arbitrary subjective interpretation of normative legal provisions, as well as wide limits for subjective discretion in law enforcement. As a result, it significantly reduces the "value" of the relevant restrictions as an effective "filter" for the manifestation of correction in the activities of public officials.

It is the updated view, using the "proportionality test" as a constituent element of the rule of law, the resource of "anti-corruption" restrictions and will identify the gaps in their regulatory frameworks and practices, to formulate concrete proposals for their elimination and significantly improve the effectiveness of their application and that is the purpose of this research. The subject of the study is "test and proportionality" as a prerequisite for the effective use of the resource "anti-corruption" restrictions. The object of the study is the public relations that arise in the process of compliance with the "proportionality test" during the use of the resource "anti-corruption" restrictions. The methodology of research is formed by a set of general scientific and special methods of scientific knowledge. As a basic method – dialectical, additionally used methods of semantic analysis, logical, comparative, modeling, forecasting.

The analysis of available sources suggests that the attention of legal scholars mainly focuses on an in-depth study of the principle of proportionality as a component of the rule of law[1], its historical aspect and theoretical components[2], its role in shaping Ukrainian legal practice and practices of the ECtHR[3], places in the system of principles of regulation of administrative judicial relations[4,5,6,7], tax relations[8], etc.

[1] Yevtoshuk, Yu.O. The principle of proportionality as a necessary component of the rule of law. Kyiv, 2015. 18 p. (in Ukrainian).

[2] Totskyi, B.A. Proportionality principle: historical aspect and theoretical components. *Journal of the Kyiv University of Law*. 2013. № 3. P. 70–74. (in Ukrainian).

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At the same time, it can be argued that there is a steady tendency to study the resource of "anti-corruption" restrictions, such as: with emphasis on the specifics of regulatory fixing and application practices in individual countries[9,10,11], comparatively-legal analysis of the experience of several countries[12], generalized analysis of their resources in relation to individual subjects of public-legal relations [13], content and problematic aspects of the application of certain varieties "anti-corruption" restrictions[14], their relation with other means of preventing corruption[15], considering its as an integral part of the principle of protection of legitimate expectations of a person in their relations with public servants[16], etc. What undoubtedly, on the one hand, leads to the formation of a modern theory of proportionality in law, the isolation of the "constituent elements" of the corresponding "test" and the features of its manifestation in the regulation of different legal relationships. On the other hand, the variety of thematic scientific works testifies to the diversity of directions of researching the resource of "anti-corruption" restrictions, the desire to offer the "optimal" model of normalization of their principles and the unification of the practice of application.

At the same time, unfortunately, "anti-corruption" restrictions still do not serve as an effective means of counteracting corruption, which leads to the

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search for new approaches to the study of their resource, including and in the aspect of the "proportionate" ratio of public interests, to ensure the implementation and protection of which they are oriented, and the "private autonomy" of those persons in relation to whom they are implemented. Therefore, there are, unfortunately, no works directly devoted to the analysis of "anti-corruption" restrictions in the aspect of observance of the "proportionality test", which creates a corresponding gap in the modern, modern, consistent with the latest achievements of legal science, the foundation for norm-building and enforcement in the area of combating corruption, the restoration of which will contribute to the effective resolution of the latter's problems.

1. "Proportionality test": basic doctrinal approaches to its understanding

Traditionally, in legal science, the "test of non-proportionality" ("the theory of proportionality", "the principle of proportionality", "proportionality") is considered in its direct connection with the rule of law and the focus, first of all, on the "fair balance" of private and public interests, "The proportionality (balance) of the measure taken and the goal pursued"[17], "… the use of reasonable measures (suitable, proportionate, necessary) to achieve a legitimate public purpose"[18], "… reasonable in the balance of interests, according to which the purpose of restriction of rights, persons should be essential, and the means of their achievement – reasonable and minimally burdensome for the persons whose rights are restricted"[19], "… the balance of private and public interests… in cases of possible restriction of human rights by state bodies and conflict of relevant interests"[20]. Thus, there is a dominance of the "balance" of private and public interests, their proportionality, which is undoubtedly true even in view of the etymological analysis of the very name of the corresponding "test".

However, a literal interpretation of the above provisions nevertheless indicates that, in addition to the "balance", the "proportionality test" resource is associated with a legitimate purpose, the normalization of the restrictions on the rights of individuals, the validity of the application of measures by the state against individuals, etc. This, in turn, leads to the formulation of the proposition that the "proportionality test" is not only a "balance", "proportionality" of public and private interests, but also a combination of the corresponding "balance" with other constituent elements of its content. Which is in full agreement with the

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[19] Pogrebnyak, S.P. The principle of proportionality in Ukrainian jurisprudence and ECtHR practice. Legal support for the effective implementation of decisions and the application of ECtHR practices. Odesa: National University of Odessa Law Academy, 2012. P. 294–310. (in Ukrainian).

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"narrow" and "broad" understanding of the "proportionality test" in legal science, according to which: "narrow" understanding is associated solely with the "balance" of public and private interests, and "broad" implies a combination of the three "basic" elements that collectively form its resource. Among the last:

a) propriety, which, as a "collective" element, provides for the validity of the application for the achievement of a legitimate mother, legality and legal certainty:

b) the necessity, which also as a "collective" element includes minimizing interference with the so-called "private autonomy" of the person and priorities in the use of less "intrusive"[21] means;

c) a fair balance of private and public interest (otherwise called "proportionality"), a "negative result" for the individual and a "positive result" for the public interest, the possibility of appealing and compensating for the harm caused, which makes it impossible to "achieve the goal, the result at any cost"[22].

If "narrow" understanding is focused, first and foremost, on the proportionality of public and private interests, "broad" understanding allows to find out the whole uniqueness of the "proportionality test", the complexity ("aggregate") of its content, while recognizing the prerequisites for the effective use of this resource as a "filter" of possible unlawful actions on the part of persons authorized to perform the functions of the state or local self-government, related to the use of the benefits of their activity not for the realization and protection of public interests, but vice versa for – their private interests (personal or close persons), which causes "corrosion of power". At the same time as a "filter" to prevent the interference by public administration entities in the "private autonomy" of these persons in order to achieve a meaningfully public result at any cost. It is the "broad" understanding of the "proportionality test" that should play the role of a basic doctrinal approach to form the scientific basis for the anti-corruption direction of rulemaking and enforcement, including the use of the resource "anti-corruption" restrictions.

2. "Anti-corruption" restrictions as the scope of objectification of the "proportionality test"

Among all the variety of anti-corruption measures, "anti-corruption" restrictions take the forefront due to the specific nature of their content and the variety of external forms of expression. Analyzing the law and practice of its application in different countries, it can be stated that these restrictions are quite widespread, focused on the special subject, their purpose is to prevent the

[21] Lifestyle monitoring: an overview of international practice, possible use in Ukraine. Kyiv: United Nations Development Program in Ukraine, 2016. 36 p. (in Ukrainian).

[22] Totskyi, B.A. Proportionality principle: historical aspect and theoretical components. *Journal of the Kyiv University of Law*. 2013. № 3. P. 70–74. (in Ukrainian).

"diversion" of such persons from performing their activities and to take advantage of the latter to implement and protect their private interests (personal or close). Accepting the idea of introducing "anti-corruption" restrictions, the state, with an emphasis on the specifics of national rulemaking and law enforcement, take a different approach to the normalization of their principles (definitions, diversity of species, procedural aspect) and the unification of the practice of using their resource. It is possible to conditionally distinguish several "basic" aspects in clarifying this question.

The first is to perceive or ignore the relevant constraints. For the most part, states perceive appropriate restrictions as a "tool" to prevent corruption.

The second is the level of their normative regulation, which stipulates either normalization at the level of a separate "basic" anti-corruption legislative act (Ukraine, Republic of Kazakhstan, Republic of Georgia) or a separate section of a legislative act on public service (Federal Republic of Germany, Republic of Moldova) or tort legislation (People's Republic of China).

The third is the degree of regulation and the model of using their resource, which provides a detailed regulation of the foundations of each type of restriction (the Directorate of the Office of Ethics of US Government Code of Federal Regulations, Ethical Principles of Conduct of Civil Servants of the Kingdom of Norway) or mainly generalized regulation of their legislation at the same time preparation of interpretative acts by the subjects of corruption prevention (clarification of National Anti-Corruption Agency in Ukraine). Two "basic" models of regulatory framework for the use of the resource "anti-corruption" restrictions are dominant – "rigid", which provides for bans for public officials with certain exceptions, for which certain boundaries are set (for example, the experience of the People's Republic of China), or "soft" ("liberal") with a combination of bans and restrictions (actions that provide for certain "boundaries", "requirements", "limits"), which is accepted by most countries of the world.

And, finally, the fourth one is the degree of unification of law enforcement practices, and therefore the efficiency of using the resource of "anti-corruption" restrictions, which is confirmed both by legal positions, by generalizing the practice of the subjects of counteracting corruption, and by real indicators of detecting illegal actions that cause "corrosion", and prosecution of those responsible (from minimal manifestations to consistently high), tolerance coefficient – to the perception of corruption in society (from the maximum in the countries of Africa, the former Soviet Union and to the minimum in Europe, the USA, Singapore, Philippines, etc.).

"Anti-corruption" restrictions are traditionally considered to be: restrictions on receiving gifts ("gift relationships"), on combining or combining core

activities with other activities ("on external activities"), on the work of loved ones, on abuse of office or position, post-termination restrictions (ex-service). Despite the diversity of the names of these restrictions, the detailing of the normalization of their content in the laws of different countries, nevertheless approaches to their purpose, meaningful content and species diversity are the same. Even if the provisions of the laws of different countries governing "gift" relations in the public service sphere differ by the degree of detail (for example, in the USA, the Directorate of Ethics of US Government Bodies, in the Czech Republic – the Code of Ethics for Officials and Civil Servants, in Ukraine – Article 23-24 of the Law of Ukraine "On Prevention of Corruption"[23] and a number of by-laws, interpretative acts of National Anti-Corruption Agency), however, typical are the priorities of normalizing the principles of "gift" restrictions (securing the "basic" concept of this apparatus – "allowed" gifts, "gifts subject to limits", "prohibited gifts", "official (or business) gifts", rules for handling them, responsibility for violation of restrictions, etc.).

While forming the basis of restrictions on the "external" activity of public servants, the legislator in different countries still adheres to "basic" approaches to prevent the "growth" of public service and business, "distraction" from the core activities of persons authorized to perform the functions of state or local government, at the same time offers, though different in number and variety, exceptions for particular activities (in some cases, even detailing those exceptions for particular types of public servants, offering several the criteria for defining such exceptions (for example, not only is it important whether a certain type of activity is an exception to the general prohibited list, but also what will be the remuneration for performing that activity, and sometimes even with the variety of provisions for certain types of public servants – in the legislation[24].

While basing the use of the resource of restriction after the termination of service (restriction on "ex-service" activity), although with different direct forms of such fixing, still "basic" are the validity of the restriction, exceptions to the general rule and responsibility for non-compliance with established legal prescriptions. When formulating provisions that establish the principles of restriction on the work of close persons, approaches to determining the circle of persons who are "close persons" are typical, as well as exceptions to the established rule. Despite the general perception of "anti-corruption" restrictions as one of the means of preventing corruption, securing their foundations in the legislation, the use of their resources is still recognized as effective,

[23] Law of Ukraine "On Prevention of Corruption". (2014). Verkhovna rada Ukrayiny. URL: https://zakon.rada.gov.ua/laws/show/1700-18 (in Ukrainian).

[24] Parliamentary Ethics in Ukraine. Realities, needs, perspectives. According to the research from the Center for Army Research, Conversion and Development, and the Sociopolis Institute for Social Technologies. Geneva-Kiev, 2017. (in Ukrainian).

unfortunately, impossible due to the problems of law enforcement that are caused by the "defectiveness" of the legal basis of the latter.

3. "Proportionality test" as a tool for eliminating the "defectiveness" of the base of using the resource "anti-corruption" restrictions

Focusing on appropriateness as the first element of the "proportionality test" of the above-mentioned "anti-corruption" restrictions, it should be argued that the requirement to achieve a legitimate goal by the latter is fully perceived in different countries since the anti-corruption restrictions are imposed for the sake of use and functions of the state or local government, the benefits of the public service not for the realization and protection of public interests, but for private interests (personal or your loved ones). The corresponding limitation is legitimate in the aspect of its targeting.

At the same time, unfortunately, the laws of different countries are contradictory, generalized, and conflicting in terms of complying with the other elements of this element of the content of the "proportionality test". It is worth asserting the dispersion, variety of regulations that capture the basis of such restrictions, oversaturation of their valuation provisions ("universally accepted ideas about hospitality", "important events in a person's life", "other paid activity", etc.), banquets and absenteeism "open" lists, which sets wide limits for the manifestation of subjective discretion in interpreting and applying the relevant provisions. Unification of normative legal "anti-corruption" restrictions, concentration of them in the "basic" anti-corruption normative legal act, detailing the teaching of their content, normalization of the whole thematic conceptual apparatus will enhance the role and importance of legality and legal certainty as the other two components of the "test element" appropriateness, and therefore will promote the effectiveness of using "anti-corruption" restrictions as a tool to prevent corruption.

Focusing on the need for the «proportionality test" element to be bound by "anti-corruption" restrictions, the following should be noted. During setting certain limits on the activities of persons authorized to perform the functions of state or local government, it should be remembered that such "boundaries" should be objectively minimal concerning the "private autonomy" of the persons concerned. It is impossible to restrict a person in the exercise of his rights, freedoms, legitimate interests, and in the case of the introduction of certain boundaries, it is necessary to provide for the elimination of preconditions for "total", "excessive" interference in his life, the life of loved ones. Thus, in particular, setting restrictions on ex-service activity, it is nevertheless important to realize that it should not deny the person the opportunity to exercise the right to work, to receive remuneration for work, to decent working conditions, etc.

Assuming the principles of restriction on “external” activity, one cannot deny the possibility of realizing oneself as a creative person, engaging in scientific activities, etc. The relevant restrictions, normalized in the law, should be objectively conditioned, minimally intrusive (minimally “important”, “burdensome” for a person of all available variety of such).

And finally, the “proportionality” or “fair” balance of public and private interests in normalizing the principles of “anti-corruption” restrictions must find its direct manifestation in the objectively conditioned, fixed, allowed in relation to the private person “negative” result of interference with its private life by setting “boundaries”, “limits”, “boundaries” (with respect to certain types of active activity, the possibility of obtaining material services, objects, etc.) and a “positive” result to eliminate any corruption risks in such person's activities to ensure the realization and protection of public interests.

It is obligatory to standardize the grounds of appeal against possible manifestations of “excessive” interference with the privacy of a person authorized to perform the functions of state or local government, unlawful interference, and to compensate for the harm caused by such interference. Therefore, improving the regulatory framework for using the resource “anti-corruption” restrictions is in the aspect of compliance with all three elements of the “proportionality test” and eliminates those problematic (“defective”) aspects, which, unfortunately, take place today, significantly reducing the effectiveness of the relevant restrictions as an effective tool to prevent corruption in all its manifestations in the activities of persons authorized to perform the functions of the state or local self-government.

CONCLUSIONS

Among the variety of anti-corruption tools (in particular, corruption-related offenses), anti-corruption restrictions are effective, aimed directly at eliminating of any prerequisites for use by persons authorized to perform the tasks and functions of the state or local government for the realization and protection of their private interests or the private interests of close persons. However, the “defect” of the legal bases for the use of their resource (selectivity of fixing the «basic» terminological apparatus, oversaturation of evaluation provisions, «open» lists, the presence of banquet, withdrawal norms, the absence of clearly defined “limits”, erroneous identification of prohibitions and (prohibition), etc.) significantly complicates enforcement, and therefore reduces the efficiency of their resource use.

It is possible to eliminate the relevant problem by adhering to the “proportionality test” in its “broad” sense (elements of which are: relevance (legality, legal certainty, adherence to a legitimate aim), necessity (minimizing

interference with the “private autonomy” of a person, use of less intrusive means of interference), proportionality (a “fair” balance between public and private interests, appeal against “excessive” interference, compensation for harm) while improving the regulatory framework and unifying the practice of effective use of appropriate anti-corruption tools.

SUMMARY

Relevance. In search of optimal ways to improve the regulatory framework and unify the practice of using the resource “anti-corruption” restrictions as a tool to prevent corruption in its various external forms of manifestation to significantly improve the efficiency, effectiveness of such use is quite possible and advisable to form a completely new, consistent with the latter achievements of legal science, doctrinal basis for thematic rulemaking and law enforcement. The updated professional doctrinal provisions on the implementation of “filters” of defective regulatory frameworks for the use of “anti-corruption” restrictions may serve as an element of such foundation. One of mentioned above provisions is the “proportionality test”. The observance of its elements can eliminate the preconditions for “defect” of the normative aspect of the resource “anti-corruption” restrictions and significantly increase the efficiency of their use. ***Research results.*** Throughout the diversity of anti-corruption measures (such as corruption offenses), anti-corruption restrictions are effective, aimed directly at eliminating any prerequisites for use by persons authorized to perform the tasks and functions of the state or local government, for the realization and protection of their augmented interests or the private interests of loved ones. However, the “defect” of the legal framework for the use of their resource (selectivity of fixing the “basic“ terminological apparatus, oversaturation of evaluation provisions, “open” lists, the presence of banquet, withdrawal standards, the absence of clearly defined “limits”, erroneous identification of prohibitions and (prohibition), etc.) significantly complicates enforcement, and therefore reduces the efficiency of their resource use. It is quite possible to eliminate the corresponding problem by adhering to the “proportionality test” in its “broad” sense (elements of which are: relevance (legality, legal certainty, adherence to a legitimate aim), necessity (minimizing interference with a person’s “private autonomy”, use of less intrusive means of interference), proportionality (the “fair” balance of public and private interests, the appeal of “excessive” interference, compensation for harm) while improving the regulatory framework and unifying the practice effect and the proper use of appropriate tools to prevent corruption.

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