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ANTI-CORRUPTION REFORM OF UKRAINIAN CRIMINAL LAW IN THE CONTEXT OF EUROPEAN INTEGRATION: ISSUES OF CLASSIFICATION AND LAW ENFORCEMENT

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INTRODUCTION

Ukraine's process of European integration places unprecedented demands on the modernisation of its legal system, with the establishment of a robust anti-corruption framework serving as a key indicator of progress. The establishment and full launch of the National Anti-Corruption Bureau of Ukraine, the Specialised Anti-Corruption Prosecutor's Office and the High Anti-Corruption Court (HACC) have marked a transition to fundamentally new, European standards of criminal justice. In this context, the correct criminal classification of acts of corruption has ceased to be merely a doctrinal issue, becoming a fundamental factor in ensuring the rule of law and Ukraine's fulfilment of its international obligations.

Practical efforts to combat corruption-related crime reveal significant difficulties in the legal assessment of such socially harmful acts. Despite ongoing reforms of anti-corruption legislation, systemic difficulties continue to arise in law enforcement regarding the distinction between criminal offences that are similar in substance, the precise identification of the characteristics of a specific perpetrator, and the legal clarification of the limits of unlawful benefit. The correctness of the substantive legal classification at the initial stages of the investigation directly determines not only the prospects of securing a conviction, but also compliance with human rights guarantees and the high standards of evidence upheld by the European community.

The constant evolution of domestic anti-corruption legislation and the consistent tightening of standards for the assessment of evidence in the practice of the Supreme Court and the High Anti-Corruption Court have created an urgent need for further theoretical examination of issues relating to the classification of offences. As part of the transition towards European integration, the Ukrainian judiciary is compelled to move away from a formal, purely mechanical application of the provisions of the Criminal Code of Ukraine. Instead, a comprehensive, substantive analysis of the actual nature of official relations, the economic substance of the preferential treatment received, and the methods of exercising official powers is becoming essential, which determines the aim and structure of this study.

1. Doctrinal approaches and practical issues regarding the distinction between abuse of office and misappropriation of property (Articles 191 and 364 of the Criminal Code of Ukraine)

One of the most contentious and complex issues in the application of the law within the national anti-corruption justice system remains the clear distinction between the elements of criminal offences under Article 191 of the Criminal Code of Ukraine (misappropriation, embezzlement or acquisition of property through abuse of official position) and Article 364 of the Criminal Code of Ukraine (abuse of power or official position)[1]. In the day-to-day work of pre-trial investigation bodies, situations constantly arise where a public official, using their administrative resources or powers, causes significant financial damage to the state's interests or to legal entities governed by public law; however, accurately determining the legal nature of such an offence presents significant difficulties.

The key distinguishing feature in this context is the objective aspect and the specific nature of the perpetrator's intent. Whilst Article 191 of the Criminal Code of Ukraine requires the direct unlawful appropriation of another person's property or its unlawful conversion for the benefit of the perpetrator or third parties, Article 364 of the Criminal Code of Ukraine is of a more general nature and covers cases of abuse of official position contrary to the interests of the service, where the causing of harm is not 'related to the physical or direct transfer of ownership of assets to a specific beneficiary[2].

The difficulty in modern investigations lies in the fact that, in most large-scale anti-corruption schemes, the act of misappropriating assets is covert, multi-stage and indirect in nature. The conclusion of contracts that are knowingly detrimental to the state, the purchase of goods or services at artificially inflated prices through a chain of intermediaries, or the unjustified transfer of budget funds to the accounts of affiliated entities formally constitute abuse of office. However, in essence, such actions pursue a single ultimate goal – the illegal diversion of public assets and their subsequent distribution[3]. In such situations, the prosecution must prove not merely that there has been a breach of official duties or regulations, but that there was an

[1] Criminal Code of Ukraine: Code of Ukraine; Law No. 2341-III of 5 April 2001. 'Legislation of Ukraine' database / Verkhovna Rada of Ukraine. URL: https://zakon.rada.gov.ua/go/2341-14

[2] Тацій В. Я., Борисов В. І., Тютюгін В. І. Кримінальне право України. Особлива частина : підручник. 6-те вид. Харків : Право, 2020. 768 с.

[3] About the High Anti-Corruption Court: Law of Ukraine No. 2447-VIII of 7 June 2018. 'Legislation of Ukraine' database / Verkhovna Rada of Ukraine. URL: https://zakon.rada.gov.ua/go/2447-19

initial, direct intent specifically to appropriate the property, which is the most challenging aspect of the burden of proof[4].

Current case law of the Supreme Court shows a clear trend towards a narrow interpretation of the provisions of Article 191 of the Criminal Code of Ukraine. The courts of cassation consistently emphasise that the existence of adverse financial consequences or losses for an enterprise does not in itself automatically constitute evidence that the guilty party has taken possession of the property. The court requires law enforcement agencies to provide a detailed explanation of the actual mechanism by which control over the assets passed to the accused or to entities associated with him[5]. The consequence of this strict stance is that a significant proportion of criminal proceedings which, at the stage of entry into the Unified Register of Pre-trial Investigations, were classified as misappropriation or embezzlement, are reclassified during court proceedings before the High Anti-Corruption Court as abuse of office under Article 364 of the Criminal Code of Ukraine[6]. Such a transformation is crucial to the stability of the public prosecution, as it completely alters both the subject matter and the overall scope of the evidentiary process.

2. The evolution of the concept of a special legal entity and the classification of unlawful gains in the context of the modernisation of the administrative system

The reform of Ukraine's public sector in line with European standards of good governance is accompanied by a far-reaching modernisation of the administrative structure. The emergence of independent national regulators, the formation of collegial supervisory boards at state-owned enterprises involving foreign experts, and the active delegation of public functions to private entities have significantly complicated the traditional criminal law understanding of the category of 'public official'[7]. The current note to Article 364 of the Criminal Code of Ukraine requires that the individual hold organisational, managerial, administrative or operational responsibilities; however, the nature of modern management models often blurs these boundaries.

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[4] On the Prevention of Corruption: Law of Ukraine No. 1700-VII of 14 October 2014. 'Legislation of Ukraine' database / Verkhovna Rada of Ukraine. URL: https://zakon.rada.gov.ua/go/1700-18

[5] About the National Anti-Corruption Bureau of Ukraine: Law of Ukraine No. 1698-VII of 14 October 2014. 'Legislation of Ukraine' database / Verkhovna Rada of Ukraine. URL: https://zakon.rada.gov.ua/go/1698-18

[6] Борисов В. І., Тютюгін В. І. Кримінальна відповідальність за корупційні кримінальні правопорушення: монографія. Харків : Право, 2021. 256 с.

[7] Decision of the Grand Chamber of the Supreme Court of 16 January 2019 in Case No. 751/7557/15-k. Unified State Register of Court Decisions. URL: https://reyestr.court.gov.ua/Review/79298340

This issue became most acute when determining the legal status of members of the supervisory boards of large state-owned companies and strategic enterprises. Although, formally speaking, such individuals do not carry out day-to-day operational management of assets or staff, their actual influence on strategic decision-making, the approval of multi-million-pound contracts and the appointment of senior management is decisive[8]. For a long time, national case law has shown inconsistency regarding the recognition of members of supervisory boards as perpetrators of corruption offences. Similar difficulties in classification arise in relation to staff of the new anti-corruption bodies, specific categories of employees at enterprises with partial state ownership, and persons who provide public services but are funded by international grants[9].

In parallel with the transformation of the perpetrator, the objective aspect of corrupt acts is also evolving, particularly in the context of the subject matter of the offence under Article 368 of the Criminal Code of Ukraine. National legislation, adapting to the requirements of the UN Convention against Corruption and the Council of Europe Criminal Law Convention on Corruption, has officially replaced the concept of 'bribe' with a broader category – 'undue advantage' – which encompasses funds, other property, advantages, privileges, services or intangible assets that are promised, offered or provided without lawful grounds[10].

However, whilst the recording and documentation of the receipt of tangible assets or funds are technically well-established processes, the classification and proof of the provision of unlawful benefits of an intangible nature remain largely a matter of judgement. Such forms of preferential treatment as artificial assistance with career advancement, the provision of political support in elections, securing the loyalty of media outlets, or the creation of hidden monopoly conditions for business are extremely difficult to formalise and convert into a concrete body of evidence[11]. The absence of clear legal boundaries poses a serious risk of criminal prosecution being unduly broadened, where the lines between ordinary political agreements, elements

[8]Кальман О. Г. Корупція і протидія корупції: кримінально-правовий аспект : монографія. Київ : Юрінком Інтер, 2020. 348 с.

[9] Decision of the Criminal Cassation Court within the Supreme Court dated 15 February 2022 in Case No. 991/7558/20. Unified State Register of Court Decisions. URL: https://reyestr.court.gov.ua/Review/103477080

[10] Judgment of the High Anti-Corruption Court of 5 October 2021 in Case No. 991/3927/20. Unified State Register of Court Decisions. URL: https://reyestr.court.gov.ua/Review/100214516

[11] Баулін Ю. В. Кримінальне право України: Загальна частина : підручник. Харків : Право, 2019. 528 с.

of legitimate lobbying, corporate ethics and criminal acts of corruption become too fine and blurred[12].

3. Incorporating the ECHR's standards of practice into anti-corruption justice: the limits of proof and entrapment

The path towards European integration requires the Ukrainian judicial system to comply fully with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which guarantees the right to a fair trial. In the field of anti-corruption, this rule has become particularly relevant due to the need to resolve the acute problem of distinguishing between the lawful documentation of facts regarding the receipt of undue advantage and unlawful provocation of bribery by law enforcement agencies[13]. The specific nature of investigations into latent corruption offences involves the active use of covert investigative (detective) measures (CIDM), in particular the monitoring of the commission of an offence by simulating the circumstances of the offence or conducting a special investigative experiment[14].

The European Court of Human Rights (ECHR) has established a clear doctrine in a number of landmark judgments: during investigations, the state may not act as an agent provocateur; law enforcement agencies are entitled to capitalise on a person's existing criminal intent, but are not entitled to artificially create such intent in the absence of an initial initiative on the part of the subject of the investigation[15]. Modern anti-corruption justice in Ukraine, primarily in the form of the High Anti-Corruption Court, has fully incorporated these standards into its practice. Today, merely formally recording the transfer of money to a public official is insufficient for a court to deliver a guilty verdict. The entire set of circumstances must be examined by the court: who was the initial initiator of the corrupt contact (the complainant or the public official); whether there was objective evidence of the person's prior corrupt activities prior to the involvement of the informant; whether the actions of operational staff and informants were of a persistent,

[12] Дудоров О. О., Мовчан Р. О. Кримінально-правова протидія корупції в Україні: проблеми теорії та практики. *Юридичний науковий електронний журнал*. 2021. № 4. С. 298–302. URL: http://www.lsej.org.ua/4_2021/76.pdf

[13] Criminal Procedure Code of Ukraine: Code of Ukraine; Law No. 4651-VI of 13 April 2012. 'Legislation of Ukraine' database / Verkhovna Rada of Ukraine. URL: https://zakon.rada.gov.ua/go/4651-17

[14] Навроцький В. О. Основи кримінально-правової кваліфікації : навч. посіб. Київ : Юрінком Інтер, 2021. 512 с.

[15] Decision of the Criminal Cassation Court within the Supreme Court dated 7 October 2020 in Case No. 725/1199/19. Unified State Register of Court Decisions. URL: https://reyestr.court.gov.ua/Review/92198365

systematic or psychologically coercive nature, which effectively induced the person to commit an offence[16].

In many complex cases heard by the High Anti-Corruption Court, the defence builds its entire strategy around proving that the bribery was instigated. In the absence of clear and documented evidence that the public official demanded a benefit or expressed such an intention of their own accord, the prolonged passive behaviour of the investigators and the persistent offers made by the applicant provide direct grounds for acquittal or for declaring all results obtained by the National Security and Defence Council to be inadmissible evidence on the basis of the 'fruit of the poisonous tree' doctrine[17].

A further complication is that, in the practice of the High Anti-Corruption Court, the substantive legal classification of a corrupt act has proved to be inextricably linked to strict adherence to procedural form. Even in cases where the fact of a person's corrupt conduct is evident, systemic procedural violations – such as failure to observe the rules of subject-matter jurisdiction between the National Anti-Corruption Bureau of Ukraine (NABU) and other bodies, breaches of the time limits for declassifying materials of the covert investigative (search) actions (CISA) as set out in Article 290 of the Code of Criminal Procedure of Ukraine, or improper procedural formalisation of prosecutors' powers – result in the nullification of the investigation's findings[18]. Anti-corruption justice in Ukraine is evolving towards a European balance, where the effectiveness of criminal prosecution cannot be achieved at the expense of disregarding procedural human rights.

CONCLUSIONS

This study of current issues relating to the classification of corruption-related criminal offences in the context of the transition towards European integration leads to the following conclusions.

The transformation of Ukraine's legal system under the influence of European Union standards has led to a shift in the national anti-corruption justice system from a formal, purely mechanical approach to applying the provisions of the Criminal Code of Ukraine to a thorough, substantive analysis of the nature of official relationships and the actual economic substance of

[16] Хавронюк М. І. Корупційні злочини: сучасні проблеми кримінально-правової характеристики. *Вісник Асоціації кримінального права України*. 2020. № 1 (13). С. 45–59. URL: http://vakp.nlu.edu.ua/article/view/204462 (дата звернення: 18.05.2026).

[17] Хавронюк М. І. Науково-практичний коментар Кримінального кодексу України. Київ : ВД «Дакор», 2023. 1380 с.

[18] About the Public Prosecutor's Office: Law of Ukraine No. 1697-VII of 14 October 2014. 'Legislation of Ukraine' database / Verkhovna Rada of Ukraine. URL: https://zakon.rada.gov.ua/go/1697-18

offences. The requirements for unconditional adherence to high standards of evidence and procedural human rights have come to the fore.

The case law of the High Anti-Corruption Court and the Supreme Court currently serves as the primary stabilising and doctrinal factor defining the scope of application of criminal law. Thanks to the consistent implementation of the practice of the European Court of Human Rights, effective legal safeguards have been established against entrapment by law enforcement agencies, and the scope of formal charges under articles relating to the misappropriation of property (Article 191 of the Criminal Code) has been narrowed in the absence of proven intent to directly take possession of the assets.

The continued successful development of anti-corruption legislation requires urgent improvements to the legal drafting of substantive law. It is necessary to clarify the concept of 'public official' at the legislative level, taking into account the latest collegial and supervisory models of public sector management, and to develop unified, clear criteria for distinguishing between permissible operational documentation of a crime and unlawful incitement. Ensuring a high standard of procedural culture and legal certainty is a prerequisite for the formation of a uniform judicial practice and the successful integration of Ukraine into the European legal area.

SUMMARY

This study analyses the complex processes of transformation in Ukraine's substantive and procedural criminal law under the influence of the European integration vector. It examines the current practice of the High Anti-Corruption Court and the Supreme Court regarding the legal assessment of corruption-related criminal offences. Particular attention is paid to the doctrinal and practical issues of distinguishing between the elements of offences under Articles 191 and 364 of the Criminal Code of Ukraine in schemes involving the misappropriation of public assets. The study identifies key challenges in defining the characteristics of a special subject in the context of the modernisation of the administrative system and the emergence of new public sector infrastructure institutions. The specifics of incriminating intangible unlawful benefits and the criteria for distinguishing them from political or corporate preferences are analysed. Through the lens of the practice of the European Court of Human Rights, procedural and substantive safeguards protecting individuals from provocation to bribery by law enforcement agencies are summarised. Based on the analysis, specific proposals have been formulated regarding the unification of standards of proof and the improvement of current criminal legislation. The results of the study are aimed at improving the quality of the legal framework for pre-trial

investigations and ensuring the principle of legal certainty on Ukraine's path to EU membership.

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13. Criminal Procedure Code of Ukraine: Code of Ukraine; Law No. 4651-VI of 13 April 2012. 'Legislation of Ukraine' database / Verkhovna Rada of Ukraine. URL: https://zakon.rada.gov.ua/go/4651-17

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