ELECTRONIC SCIENTIFIC PUBLICATION
ISSN 2786-7900
https://doi.org/10.61417/2786-7900.2023.2

COLLECTION «COLLECTION OF SCIENTIFIC JOURNAL OF THE SCIENTIFIC RESEARCH INSTITUTE OF PRE-JUDICIAL INVESTIGATION PROBLEMS »

2023
№ 2

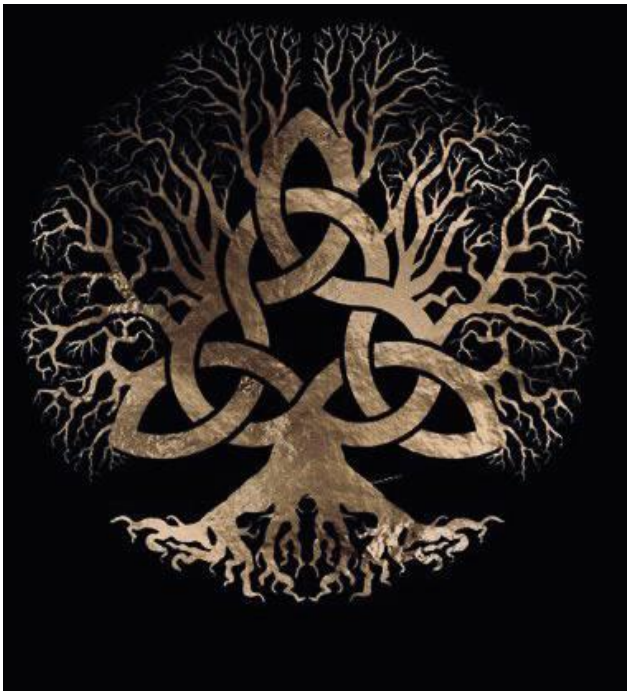
WE PROFESSIONALLY COVER THE RESULTS OF RESEARCH ON PRE-TRIAL INVESTIGATION

Founder:

1. Private scientific institution "Research Institute of Pretrial Investigation Problems"

2. "DEFENSORES" Bar Association

3. Research Institute of Public Law



institutetpdr@gmail.com

http :// ndipdr.com.u.a.

Collection "Collection of Scientific Journal of the Scientific Research Institute of Pre-judicial Problems investigation" - peer-reviewed electronic scientific professional open access edition that founded and published since June 2023.

Recommended by the Academic The Scientific Institute of Public Law Council for publication and distribution via the Internet protocol number 12 dated September 07, 2023

Signed for publication and distribution over the Internet **07.09.2023 p.**

UDC 343(051 .034) =161.2

The purpose of the journal: the development of theoretical and applied research in the field of law in Ukraine regarding the problems of pre-trial investigation; scientific approval and distribution of their results.

Subject: according to the industry **"legal sciences"** according to scientific specialties (12.00.0 8, 12.00.09) in accordance with the current list branches of science of the Ministry of Education and Science of Ukraine with specialties 081 Law, 262 Law enforcement activity/

Periodicity publication : 2 times a year
ISSN – 2786-7900 (ONLINE)

Responds to: National Standard of Ukraine DSTU 8302:2015 " Information and documentation . Edition electronic. The main one's types and weekends information »

Scientific publications : the international identifier of the digital object is assigned **DOI (digital object identifier)**

Minimal systemic requirements : MS Windows 98/2000/XP/2003 operating system, MS Internet Explorer browser version¨5 and higher , Adobe Acrobat (Adobe Reader).
Address of the editorial board of the journal:
01004 , Kyiv, 14, Antonovycha Str., office №3.
Version scientific journal: Collection "Collection of Scientific Journal of the Scientific Research Institute of Pre-judicial Problems investigation"
Tel . +38-095-080-84-17, +38-067-863-95-93

E-mail: institutpdr@gmail.com
Website of the magazine: http://ndipdr.com.ua/

Purpose of the magazine: achievements a qualitatively new level completeness and efficiency pleasure information needs of modern society knowledge in the field of law.

The authors articles˘carry the whole responsibility for content articles˘and for the very fact of them publications¨.
The editors of the magazine do not carry no liability to the authors and / or by third parties and organizations for possible damages caused by the publication articles˘.

COLLECTION
"COLLECTION OF SCIENTIFIC JOURNAL OF THE SCIENTIFIC RESEARCH INSTITUTE OF PRE-JUDICIAL INVESTIGATION PROBLEMS" 2023-2
ISSN 2786-7900
https://doi.org/10.61417/2786-7900.2023.2

CONTENT

COLLECTION "COLLECTION OF SCIENTIFIC JOURNAL OF THE SCIENTIFIC RESEARCH INSTITUTE OF PRE-JUDICIAL PROBLEMS INVESTIGATION " 2023-2
ISSN 2786-7900
https://doi.org/10.61417/2786-7900.2023.2.1

CRIMINAL OFFENSES AGAINST INFORMATION SECURITY: NOTES ON THE SHORES OF THE PROJECT OF THE NEW CRIMINAL CODE OF UKRAINE

UDC 343.2

Mykola Rubashchenko,
Doctor of Law,
Associate Professor of the
Department of Criminal Law
Yaroslav Mudryi National Law University

The article is devoted to the problems of improving the legal security of electronic communication systems, electronic networks and computer data, as part of information security. An analysis of the text of section 7.7 of the Project of the new Criminal Code of Ukraine was carried out in relation to the following aspects: systematic coordination with each other, coordination with other articles of the Project and regulatory legislation in the field of information security, as well as their compliance with existing doctrinal approaches.

The scope of the term «information security» used in the title of the section is much narrower than that traditionally defined in normative and doctrinal sources.

ISSN 2786-7900

Information security, however, is harmed or threatened by many information actions provided for in other sections of the Special Part of the Project, not only by computer crimes and misdemeanors.

It seems questionable to establish criminal liability for the dissemination of false news by the person responsible for the release of the news, due to the high risk of a chilling effect on freedom of expression. The weak differentiation of responsibility for both intentional and negligent crimes on the basis of harm (consequences of the act) and the complete absence of such differentiation for misdemeanors also gives rise to criticism. The article on dealing with malicious software or hardware, which is an analogue of conventional «misuse of devices», needs improvement.

«Action regarding computer data» has a complex structure (illegal interference + other action). There is a need to ensure the punishment of illegal interference in the work of information, electronic communication, information and communication systems and electronic communication network, which was committed with the aim of destroying, blocking or distorting computer data, violating the order of their routing or processing, but if such aim is not was achieved.

Keywords: criminal responsibility, criminal offense, information security, cybercrimes, criminal offenses against society, actions related to computer data

Formulation of the problem. In 2019, the Working Group on the Development of Criminal Law was created, the result of which was a complete document - the Project of the new Criminal Code of Ukraine (hereinafter - the Project) [12]. The text of the Project is perceived ambiguously by the legal community, different, often opposing assessments are expressed. Regardless of the future fate of this document, the following can be affirmatively noted for now. First, the Project became an event in the domestic science of criminal law,

ISSN 2786-7900

which renewed and revived scientific discussions, and became a significant impetus in its development. Secondly, it is unequivocally progressive, contains many novelties, overcomes a number of shortcomings of the current criminal law and offers original, unparalleled approaches to its construction. However, a number of its provisions cause critical judgments, including in relation to section 7.7 "Criminal offenses against information security".

This section provides for 14 articles: 1) an article with a mini-glossary - the meaning of the terms used in this Section (7.7.1), 2) two articles with (especially) qualifying features - features that increase the severity of the crime by two degrees (7.7.2) , signs that increase the severity of the crime by one degree (7.7.3), 3) eleven articles containing separate components of crimes and misdemeanors - actions related to computer data that caused property damage (7.7.4), actions related to computers of computer data that caused serious property damage due to negligence (7.7.5), actions in the field of telecommunications services (7.7.6), actions regarding information with limited access (7.7.7), violation of computer data security requirements due to negligence (7.7 .8), unauthorized use of someone else's digital image (7.7.9), dissemination of false news (7.7.10), actions related to computer data (7.7.11), actions related to computer data that negligently caused significant property damage (7.7.12), dealing with malicious software or hardware (7.7.13), violation of computer data security requirements, which negligently caused significant property damage (7.7.14).

This article analyzes the control text of the Project as of January 30, 2023.

Analysis of the latest research. Problems of legal provision of information security have been the subject of numerous scientific developments. The researchers of this issue were O.A. Baranov, O.O. Zolotar, A.I. Marushchak, A.Yu. Nashinets-Naumova, O.V. Oliynyk, V.M. Furashev, V. Tsymbalyuk and many others. The criminal law problems of improving the legislation on criminal responsibility are reflected in the writings of D.S. Azarova, P.P.

ISSN 2786-7900

Andrushka, V.S. Batyrgareeva, M.V. Karchevsky, A.A. Musicians, S.O. Orlova, N.A. Rosenfeld, K.V. Yurtaeva and others.

The purpose of the article is to analyze the provisions of section 7.7 of the Project for their systematic consistency with each other, with other provisions of the Project and regulatory legislation in the field of information security, as well as their compliance with existing doctrinal approaches.

Presenting main material. I. Conceptual aspects of the separation of the section on criminal offenses against information security. 1. Section 7.7 of the Project "Criminal offenses against information security" is contained in Book 7 "Criminal offenses against society". The place of the section in Book 7 suggests that it is about the information security of society.

The use of the concept of "information security" in such a fundamental act as the Criminal Code undoubtedly requires justification. As noted in scientific sources, one of the first problems in the field of information law, to which numerous publications are devoted, is the problem of defining the content of the concept of information security, and primarily the issue of its objects [6, p. 18]. This concept was the subject of research in many publications by scientists from various fields of law, but it can be argued that they formed a rather broad approach to its definition. Yes, O.V. Oleiynyk reduces the meaningful essence of information security in a simplified form to a complex of preventive actions aimed at ensuring the right to information and freedom of information activity, the protection of information and the right to ownership of information, protection from information and from informational influences [7, p. 135]. V. Tsymbalyuk defines information security as social relations regarding the creation and maintenance in proper condition of the normal mode of functioning of the relevant information system; a set of organizational, legal, and engineering-technological measures to protect, protect, prevent, and overcome natural, man-made, and sociogenic (anthropogenic)

ISSN 2786-7900

threats, the implementation of which can disrupt or stop the vital activity of a specific system [15, p. 33]. According to V.M. Furasheva, information security is a state of protection of the vital interests of a person, society and the state, in which harm is prevented due to negative informational influence with the help, first of all, of unauthorized creation, distribution, use of deliberately aimed with a specific purpose of incomplete, untimely, improbable and biased information information; negative consequences of using information their technologies; unauthorized violation of the regime of access to information with its subsequent distribution and use [14, p. 167-168].

Information security is defined as a constituent component of the general problem of information provision of people, the state and society [7, p. 133]. Being an immanent component of national security, according to the criterion of objects of national security of Ukraine in science, information security of the state, information security of society and information security of a person are fairly distinguished [3, p. 110]. The latter is defined, in particular, as the state and process of a person's protection from informational threats and challenges, which ensures the possibility of a person as a biological organism and a social being to function, develop, satisfy his needs and achieve the desired results in the information society [4, p. 77].

In this way, information security concerns the entire triad of objects of national security - man, society and the state, on the basis of which, in particular, the Special Part of the Project is built (the first sections provide for criminal offenses against a person, then - against society, the last - against the state) . Taking into account the fact that the criminal offenses provided for in section 7.7 of the Project by their content encroach not only on the interests of society, but also on people and the state, the placement of a section on crimes and misdemeanors against information security in the Book on criminal offenses against society does not seem successful.

ISSN 2786-7900

2. The analysis of the views of scientists on information security as such, as well as the information security of individual objects - the state, society and man, shows that section 7.7 of the Project provides for criminal offenses that relate only to a separate (single) aspect of information security - computer security computer data and related systems and networks. This determines the need to choose a section title narrower in terms of content. Information security is a state of protection not only of the information itself (information in a positive sense), but also a state of protection from information ("information with a minus sign"). Taking into account the second aspect of this concept, offenses against information security include virtually all informational acts that consist in the dissemination of information with a negative content - public appeals and distribution of materials with them, justification and recognition of the legitimacy of aggression and occupation, false reports about threats to the safety of citizens and etc.

Yes, K.V. Yurtayeva notes that the current Criminal Code of Ukraine contains a significant number of criminal offenses, the composition of which does not directly involve the use of information and telecommunication systems, which, however, should be recognized as cybercrimes, since they are related to harmful content, for example, violation of the equality of citizens on various grounds, appeals to committing illegal acts, distributing materials with such appeals, etc. [16, p. 164]. V.S. Batyrgareeva also rightly notes that in addition to computer crimes (Chapter XVI of the Special Part of the Criminal Code of Ukraine), in the current Criminal Code of Ukraine, violations of legislation in the information space are also provided for by several dozen other articles placed in other sections of the Special Part [2, p. 113].

Instead, section 7.7 of the Project de facto provides for liability only for encroachment on information security in the first (narrow, technical) aspect of its understanding. Such acts are also called cybercrimes in international conventions and the current legislation of Ukraine. Under the latter, according to Art. 1 of the Law of Ukraine "On the Basic Principles of Ensuring

ISSN 2786-7900

Cyber Security of Ukraine (dated 05.10.2017 No. 2163-VIII) [11], means socially dangerous criminal acts in cyberspace and/or with its use, responsibility for which is provided for by the Law of Ukraine on Criminal Liability and/or which are recognized as crimes by international treaties of Ukraine. The Convention of the Council of Europe on cybercrime dated November 23, 2001 No. ETSN185 (ratified by the VRU on September 7, 2005) is actually all specified in section 7.7. The project of the act (except according to Article 7.7.10) [5], however, in a more generalized format, refers to cybercrimes of the 1st group - offenses against the confidentiality, integrity and availability of computer data and systems. This narrow content of information security is laid down in the international standards of the ISO/IEC family 27000, dedicated to various issues of ensuring information security. According to ISO/IEC 27000:2014 (E), information security means preserving the confidentiality, integrity, and usability of information [1].

In this regard, it is not necessary to give "information security" in substantive criminal law the same limited (narrow) interpretation, covering only one of its aspects, but instead think about alternative, specified titles of this section, for example: "Criminal offenses against cyber security", "Criminal offenses against the confidentiality, integrity and availability of computer data and systems", "Criminal offenses against the security of computer data and electronic communications", etc.

II. Analysis of individual provisions of Section 7.7 of the Project. 1. In general, the provisions of Section 7.7 of the Project obviously differ in terminological progressivity compared to the provisions of Section XVI of the current Criminal Code of Ukraine. At the same time, there are terms that raise questions about the expediency of their allocation or compliance with current regulatory legislation.

ISSN 2786-7900

In Part 1 of Art. 1.4.1 The Project formulates a general rule regarding giving one or another meaning to the terms used in the Project: "the terms used in this Code, which have a definition in another law, an international treaty or an act of the European Union, are applied in accordance with their normative definition, except cases provided for in part 2 of this article and other articles of this Code". As you can see, the need to define non-branch terms used in the Project within a separate article of the criminal law may be due to the fact that this term is not defined in other normative acts, or it has different definitions in normative acts, or if for the purposes of criminal law such a definition should acquire a different (special) meaning. However, there is obviously no need to give meaning in the Code to terms that are clearly (unequivocally) defined in regulatory legal acts (for example, there is no need to define the concepts of "property", "information", "securities" in the Criminal Code etc.). So it is not clear why in Art. 7.7.1 To the project, give meaning to the terms "computer data" (paragraph 1), "unauthorized act regarding information" (paragraph 2) and "socially necessary information" (paragraph 4), if these terms are defined in regulatory acts and conventions and/ or do not create confusion in law enforcement.

Thus, the definition of computer data is obviously borrowed from the Convention of the Council of Europe on cybercrime, according to Article b. 1 of which, computer data is any representation of facts, information or concepts in a form that is suitable for processing by a computer system, including a program that is suitable for causing the computer system to perform a specific function [5]. The definition in the Law of Ukraine "On Electronic Communications" (clause 20, article 2) [8] is simpler, but actually about the same thing.

The concept of "unauthorized act regarding information" is also borrowed from the regulatory Law of Ukraine "On the protection of information in information and communication systems" [9], according to Art. 1 of which, unauthorized actions regarding information in the system are actions carried out in violation of the procedure for accessing

ISSN 2786-7900

this information, established in accordance with the law, and the procedure for access, in turn, according to the same Law, means the conditions for the user to be able to process information in the system (i.e. , collect, enter, record, transform, read, store, destroy, register, receive, receive, transmit), and the rules for processing this information. The fact that authorization is connected with the permission of the owner of the information or with other cases provided for by law directly follows from Art. 4 of the same Law.

The scope of the concept of "socially necessary information" derives from another regulatory law, which directly concerns the analyzed area. In Art. 29 of the Law of Ukraine "On Information" regulates the distribution of socially necessary information. According to this article, information is socially necessary if it is a subject of public interest, and the latter includes information that indicates a threat to the state sovereignty and territorial integrity of Ukraine; ensures the implementation of constitutional rights, freedoms and obligations; indicates the possibility of violation of human rights, misleading the public, harmful environmental and other negative consequences of activities (inaction) of individuals or legal entities, etc. [10].

In this connection, the use of the term "telecommunications service" in articles 7.7.1, 7.7.3 and 7.7.6 of the Project is criticized. The Law of Ukraine "On Telecommunications" dated 11/18/2003 No. 1280-IV became invalid with the entry into force of the Law of Ukraine "On Electronic Communications" dated 12/16/2020 No. 1089-IX [8]. Together with the loss of validity of the aforementioned de-jure law, the normative definitions of the concepts "telecommunication service" and "telecommunication network" disappeared from the legislation. Moreover, the new law also amended a number of other laws, in which the terms "telecommunication network" and "telecommunication service" were replaced by more modern and broader terms "electronic communication network" and "electronic communication service", the content of which is determined by the new law.

ISSN 2786-7900

2. The central type of criminal behavior provided for in this section is the act regarding computer data. This act is devoted to 4 out of 11 articles, which provide for the main elements of a criminal offense. According to the content of the dispositions of articles 7.7.4, 7.7.5, 7.7.11 and 7.7.12 of the Project, the act is formulated according to one model and consists in illegal interference in the work of an information (automated), electronic communication, information and communication system, electronic communication of the network, which was combined with a) destruction of computer data, b) their blocking, c) violation of their integrity, d) violation of their routing order, or e) distortion of the process of their processing. That is, it is a complex (complex) act that has the structure of "illegal interference + at least one of the five types of acts regarding computer data."

It follows from this construction that only illegal interference in the operation of the relevant system/network is not punishable. Moreover, given the fact that all intentional crimes against information security are considered only crimes of the 1st degree of severity, and taking into account the fact that an attempt to commit a crime of the 1st-2nd degree of severity according to the provisions of the Project is not considered a criminal offense (Article 2.6.1) , illegal interference committed with the purpose of destruction, blocking of data, violation of their integrity, etc., will not be punished, if the goals were not achieved for reasons independent of the individual. It is unlikely that such a provision will contribute to strengthening the security of computer data. So, as you can see, it is worth thinking about increasing the severity of these crimes or changing the provisions on the impunity of attempted crimes for certain types of crimes.

3. The approach laid down in the Project, according to which each article can contain only one (main) component of a criminal offense, and the differentiating (qualifying, especially qualifying and privileging) features are set out in separate articles at the beginning of each section, leads to an artificial duplication of one and the same the same action within several

ISSN 2786-7900

articles of the same section. According to the approach used in the current Criminal Code (differentiation of responsibility, as a rule, within one article), instead of four articles, it would be possible to construct one with several parts: part 1 – actions related to computer data (formal composition, misdemeanor, Art. 7.7.11), part 2 – the same act that negligently caused significant property damage (misdemeanor, Art. 7.7.12), part 3 – the same act that intentionally caused significant property damage (crime of the 1st degree, Article 7.7.4), Part 4 – the same act that caused serious property damage due to carelessness (crime of the 3rd degree, Article 7.7.5).

4. As can be seen, a systemic problem in the Project is the weak differentiation of responsibility for both intentional and negligent crimes based on damage (consequences of the act) and the complete absence of such differentiation for misdemeanors. It also manifests itself in relation to criminal offenses against information security. One gets the impression that only property damage deserves criminal legal attention, and only direct damage, based on the definition of this damage in the general glossary (item 63, article 1.4.1); lost profit and moral damage will not be taken into account in this case. Therefore, numerous cases of violations of constitutional human rights and freedoms, as well as violations of the legitimate interests of the state, territorial community, legal entities, and individuals, which cannot be assessed in money or cannot be adequately evaluated, are left out of the criminal law's attention. Thanks to this, the role of criminal law and the possibilities of law in the protection of social values in general are significantly weakened.

The use of classical concepts such as "significant damage", "significant damage", "severe damage", etc., but specifying their content in such a way that they cover not only property damage, will allow the weakening of the law enforcement function of criminal law. Here it is worth agreeing with V.I. Tyutyugin, who believes that the clarification of the content and delineation of the scope of such concepts as "substantial damage" and "serious consequences"

ISSN 2786-7900

should be carried out not for all norms of the Criminal Code as a whole, but in each separate section of the Special Part of the Criminal Code, where the norms on responsibility are concentrated for relevant crimes (eg, by clarifying this or that concept (term) in one of the first articles of this section) [13, p. 162].

5. According to the content of articles 7.7.4 and 7.7.5, we are talking about "interference" in the operation of the relevant systems or network as such, that is, without specifying whether it is legal or illegal, authorized or unauthorized. At the same time, in similar articles of the same section, which provide for responsibility for corresponding misdemeanors, the term "illegal interference" is already used (see articles 7.7.1 and 7.7.12). Moreover, in the articles of other sections of the Special Part, where the action consists of interference, we also find different variants - simply "interference" (for example, Articles 8.1.5 or 8.2.3), "illegal interference" (for example, Article 4.10 .5) or "unauthorized interference" (eg, Article 4.10.7). Such terminological ambiguity is also characteristic of the current Criminal Code of Ukraine.

This problem can be solved in different ways. Two of them seem to be the best: a) to define the term interference in the general glossary, indicating the illegality or unauthorizedness of such an act, or b) in each case of using this word to denote an act in the Special Part, to indicate its illegality / unauthorizedness.

6. According to Art. 7.7.10 The project, the person who, being responsible for the release of the news, allowed the airing, circulation or editorial post on the social network to be known to be false socially necessary information - committed a crime of the 1st degree. In fact, this is the only article from section 7.7 that encroaches on information security in its broadest sense, in particular in the aspect of protecting society from disinformation. There is no doubt that media people often use their ability to influence a wide range of people for selfish or other personal interests or the interests of third parties, in particular, on orders. As a result, instead

ISSN 2786-7900

of unbiased coverage of facts, the media become a tool in the anti-competitive struggle of politicians, business entities, etc. Therefore, the desire to criminalize the release of known false news, which is recognized as socially necessary information, can be understood.

However, from the first reading it becomes clear that this article will primarily be a tool for influencing the media and will inevitably lead to a chilling effect on freedom of expression ("chilling effect on freedom of expression"), because the editor (or other person responsible for the issue) every time will be conditionally speaking "at risk of punishment" and in order not to have problems with law enforcement agencies, will try to bypass an acute problem, avoid highlighting socially necessary information that is not sufficiently verified or that is obtained from sources that cannot be disclosed, etc. d. In other words, this article can be regarded as the introduction of censorship in Ukraine, not without reason.

7. According to Art. 7.7.13 Project, a person who created, moved, or failed - committed a misdemeanor. This article, as can be assumed, is an attempt to implement Art. 6 of the Council of Europe Convention on Cybercrime ("Misuse of Devices"), according to which: "Each Party shall take such legislative and other measures as may be necessary to establish criminal liability in accordance with its domestic law for the intentional commission, without the right to:

a. manufacture, sale, purchase for use, distribution or otherwise making available for use: i) devices, including computer programs, created or adapted primarily for the purpose of committing any of the crimes listed in Articles 2 to 5 above ; ii) computer passwords, access codes or similar data, with the help of which it is possible to gain access to all or part of the computer system with the intention of using it to commit any of the crimes listed in articles 2 - 5; and

ISSN 2786-7900

b. possession of the item listed in subparagraphs a. i) or ii) above, with the intention of using it to commit any of the crimes listed in articles 2 - 5..." [5].

The implementation of this article of the Convention is definitely welcomed, at the same time, the provisions of the Project that reflect it need to be improved. First, with regard to the subjects provided for in this article, in clauses 6 and 7 of Art. 7.7.1 The project (glossary to the section) defines the terms "malicious software" and "malicious hardware" respectively as a computer program or device designed to cause damage to computer data, information systems and/or telecommunications networks. In other words, in Art. 7.7.13 only sub-item a is displayed. and), while instead of one universal definition, two separate ones are provided (redundant duplication).

Second, the Convention indicates that these programs/devices have the purpose, first of all, of committing crimes under the previous articles of the Convention, which deal with system and data interference, illegal interception and illegal access. That is, when determining the subject of this offense, it should not be about the purpose of causing damage, but about the purpose of committing the relevant criminal offenses.

In the same connection, the question arises, is it so fundamental that the program or device was created with a criminal purpose? And if they were created without such a purpose (and even vice versa - to protect against similar programs or devices), but used for a criminal purpose? Instead, the Convention states that the relevant means may not only be created, but also adapted for the purpose of committing the relevant illegal acts.

Thirdly, subparagraph a remains unaccounted for. ii), which also includes computer passwords, access codes or similar data that can be used to gain access to all or part of a computer system.

ISSN 2786-7900

With this in mind, in the glossary to Section 7.7, the following meanings of the terms can be given: 1) "malicious software or technical means is a computer program or device created or adapted to commit a criminal offense provided for in this Section", 2) "access data – computer passwords, access codes or similar data that can be used to gain access to all or part of a computer system for the purpose of committing a criminal offense provided by this Section".

Fourth, the Convention recommends criminalizing not only the creation, movement and sale, but also the acquisition and possession of the relevant items. On this occasion, K.V. already expressed her own critical judgments. Yurtaeva [16, p. 165]. Therefore, it is necessary to supplement the article with acquisition for the purpose of illegal use, distribution or sale of an object and possession for the purpose of its use for the commission of criminal offenses provided for in this Section.

Conclusions. On the basis of the above, it can be stated that despite progressiveness and innovative approaches, a number of provisions of Section 7.7 of the Project are debatable and need improvement. Taking into account the content of the acts provided for in this section, the scope of the term "information security" used in the title of the section is much narrower than that which is traditionally defined in normative and doctrinal sources. Security of computer data, information (automated), electronic communication, information communication system and electronic communication network is only part of information security. The latter, however, harm is caused or the threat of it is caused by many information actions provided for by other sections of the Special Part of the Project, and not only by computer crimes and misdemeanors.

Certain provisions of section 7.7 require improvement: 1) the definitions in the glossary of the terms "computer data", "unauthorized act regarding information" and "socially necessary

ISSN 2786-7900

information" appear redundant, as they duplicate normative (including conventional) provisions; 2) the term "telecommunication network" in the regulatory legislation is replaced by "electronic communication network"; 3) taking into account the complex structure of "action against computer data", it is necessary to ensure the punishment of illegal interference in the work of information, electronic communication, information and communication systems and electronic communication network with the aim of destroying, blocking or distorting computer data, violation of the order of their routing or the processing process, if such a purpose was not achieved for reasons beyond the control of the individual; 4) causes criticism of the establishment of criminal liability for the dissemination of false news by the person responsible for the release of news, due to the high risk of a chilling effect on freedom of expression; 5) gives rise to criticism and a weak differentiation of responsibility for both intentional and careless crimes based on causing damage and the complete absence of such differentiation for misdemeanors; 6) the article on actions with malicious software or technical means, which is an analogue of the conventional "device abuse", needs improvement.

Literature:

1. International standard ISO/IEC 27000:2014: Information technology. Security techniques. Information security management systems. Overview and vocabulary. URL: https://www.iso.org/standard/63411./

2. Batyrgareeva V.S. Conceptual model of protection of the information space of Ukraine by means of criminal law. Information and law. 2020. No. 1 (32). P. 110-119.

3. Zolotar O.O. Classification of information security. Information and law. 2011. No. 2 (2). P. 109-113.

ISSN 2786-7900

4. Zolotar O.O. The concept and content of the "human information security" category. Information and law. 2021. No. 1 (36). P. 73-78.

5. Council of Europe Convention on Cybercrime dated November 23, 2001 No.ETSN185.

URL: https://zakon.rada.gov.ua/laws/show/994_575./

6. Marushchak A.I. Study of information security problems in legal science. Legal informatics. 2010. No. 3 (27). P. 17-21.

7. Oliinyk O.V. Regulatory and legal provision of information security in Ukraine. Law and society. 2012. No. 3. P. 132-137.

8. On electronic communications: Law of Ukraine dated December 16, 2020 No. 1089-IX. URL: https://zakon.rada.gov.ua/laws/show/1089-20./

9. On the protection of information in information and communication systems: Law of Ukraine dated July 5, 1994 No. 80/94-VR.

URL: https://zakon.rada.gov.ua/laws/show/80/94-vr./

10. About information: Law of Ukraine dated 02.10.1992 No. 2657-XII.

URL: https://zakon.rada.gov.ua/laws/show/2657-12./

11. On the main principles of ensuring cyber security of Ukraine: Law of Ukraine dated October 5, 2017 No. 2163-VIII.

URL: https://zakon.rada.gov.ua/laws/show/2163-19./

ISSN 2786-7900

12. Draft Criminal Code of Ukraine (as of January 30, 2023). URL: https://newcriminalcode.org.ua/criminal-code.

13. Tyutyugin V.I. Some ways of improving the provisions of the Criminal Code of Ukraine. Conceptual principles of the new version of the Criminal Code of Ukraine: materials of the international of science conference, Kharkiv, October 17-19 2019. Kharkiv: Pravo, 2019. P. 161-165.

14. Furashev V.M. Cyberspace and information space, cyber security and information security: essence, definition, differences. Information and law. 2012. No. 2 (5). P. 162-175.

15. Tsymbalyuk V. Separate questions regarding the definition of the category "information security" in the normative and legal aspect. Legal, normative and metrological support of the information protection system in Ukraine.

2004. Issue 8. P. 30-33.

16. Yurtaeva K.V. Responsibility for crimes and misdemeanors against information security in the project of the Criminal Code of Ukraine through the prism of the principle of the rule of law. The draft of the new Criminal Code of Ukraine in terms of the rule of law: satellite materials. of the V Hark event. international law forum (Kharkov, September 21, 2021). Kharkiv: Pravo, 2022. S. 164-166.

COLLECTION "COLLECTION OF SCIENTIFIC JOURNAL OF THE SCIENTIFIC RESEARCH INSTITUTE OF PRE-JUDICIAL PROBLEMS INVESTIGATION» 2023-2
ISSN 2786-7900
https://doi.org/10.61417/2786-7900.2023.2.2

CRIMINAL OFFENSES IN THE INFORMATION SPHERE AFFECTING THE NATIONAL SECURITY OF UKRAINE

UDC 343.1

Lykhova Sofia,
Doctor of Law, professor,
National Aviation University
Faculty of Law
Head of Department
criminal law and proceeding,

The article is aimed at conducting a criminal legal analysis of the legal elements of crimes that encroach on the information security of Ukraine in wartime. The article notes that information security of Ukraine is a component of the national security of our state. Since the beginning of Russian Federation attack on Ukraine, the domestic legislator has criminalized a number of acts that harm Ukraine information security.

The methodological basis of the study was the general scientific methods of cognition, with the help of which the author analyzes the legal elements of crimes and attempts to distinguish between them, as well as to consider their features, taking into account martial law.

Results: the author emphasizes that the criminal legislation of Ukraine as a regulatory phenomenon of criminal law is inextricably linked with the requirements of today and provides

ISSN 2786-7900

criminal and legal protection of Ukraine security in the information sphere. Information security should be understood as the state of protection of the individual, society and the state in the information sphere, regardless of internal and external threats. Regarding national interests, information security means such a state of protection of information resources of an individual, society and the state, which ensures the realization and progressive development of vital interests. As for the possible negative impacts of various types of information security, this is the protection of information and supporting infrastructure from accidental or intentional natural or artificial influences that may harm their owners or users. In the early days of the war, the legislature passed a number of laws aimed at protecting information security. Some provisions of these regulations were subsequently enshrined in the Criminal Code of Ukraine as criminal offenses.

Discussion: the author states that criminal legislation fully complies with the requirements of information security protection that have arisen in connection with the outbreak of a large-scale war of the Russian Federation against Ukraine.

Statement of the problem and its relevance. A peculiarity of the criminal legislation of modern Ukraine is that the Law of Ukraine dated November 22, 2018 No. 2617-VIII "On Amendments to Certain Legislative Acts of Ukraine Regarding Simplification of Pretrial Investigation of Certain Categories of Criminal Offenses" introduced a new concept into the Criminal Code of Ukraine, namely criminal offenses, which are divided into criminal misdemeanors and crimes (Articles 11, 12 of the Criminal Code of Ukraine) [1].

At the same time, the peculiarity of Section I of the Special Part of the Criminal Code of Ukraine is that the terminological phrase "criminal offenses" is not used in its title. This section of the Criminal Code of Ukraine is entitled "Crimes against the foundations of the national security of Ukraine". Such a name is extremely informative. It testifies to the great importance of such a generic object as the national security of Ukraine, because any encroachment on national security is considered a crime and among socially dangerous acts, the legal structures of which are contained in the provisions of Art. 109-114-2 of the Criminal

ISSN 2786-7900

Code of Ukraine, there was no criminal offense until March 3, 2023 [2]. All of these offenses have an increased degree of public danger and are considered crimes, except for two criminal misdemeanors in the field of collaborative activity (parts 1 and 2 of Article 111-1 of the Criminal Code of Ukraine). Issues of national security of Ukraine are regulated in the Law of Ukraine dated June 21, 2018 No. 2469-VIII "On the National Security of Ukraine" [3].

In accordance with clause 9, part 1 of Art. 1 of this Law, the protection of state sovereignty, territorial integrity, democratic constitutional system and other national interests of Ukraine from real and potential threats is recognized as the national security of Ukraine. The national interests of Ukraine, in turn, are understood as the vital interests of a person, society and the state, the implementation of which ensures the state sovereignty of Ukraine, its progressive democratic development, as well as safe conditions of life and well-being of its citizens (clause 10, part 1, article 1 of this Law).

Presenting main material. It should be noted that the concept of "national security" is extremely broad in meaning. Its components should include such a phenomenon as information security.

Information security should be understood as the state of protection of the individual, society and the state in the information sphere, regardless of internal and external threats. Regarding national interests, information security means such a state of protection of information resources of the individual, society and the state, which ensures the realization and progressive development of vital interests. Regarding the possible negative effects of various types of information security, it is the protection of information and supporting infrastructure from accidental or intentional natural or artificial influences that may harm their owners or users.

In the first days of the war, the legislature passed a number of laws aimed at protecting information security. Separate provisions of these normative acts were later enshrined in the Criminal Code of Ukraine as criminal offenses.

ISSN 2786-7900

Thus, on March 3, 2022, the Law of Ukraine "On Amendments to Certain Laws of Ukraine Regarding the Prohibition of Production and Distribution of Information Products Aimed at Promoting the Actions of the Aggressor State" was adopted (Law of Ukraine No. 2109-IX). In particular, amendments were made to the Law of Ukraine "On Printed Media (Press) in Ukraine" dated November 16, 1992 No. 2782-XII. This Law introduced a new terminological phrase "glorification of persons who carried out armed aggression of the Russian Federation against Ukraine." This terminological turn was reflected in the disposition of Part 2 of Art. 436-2 of the Criminal Code of Ukraine. It should be noted that the changes made to the Law of Ukraine "On Printed Mass Media (Press) in Ukraine" were almost verbatim provided as signs of the legal composition of crimes in the information sphere.

Amendments were made to the Law of Ukraine dated April 5, 2001 No. 2365-III "On Political Parties in Ukraine", as well as to the Law of Ukraine dated November 20, 2003 No. 1296-IV "On the Protection of Public Morals", to the Law of Ukraine dated 12/21/1993 No. 3759-XII "About television and radio broadcasting". All the changes made to these laws are aimed at protecting the information field in Ukraine in the conditions of military aggression by the Russian Federation.

First of all, crimes against national security in the information sphere should include socially dangerous acts, the components of which are provided for in the provisions of part. 2, 3 Art. 109 of the Criminal Code of Ukraine. Criminal liability is provided for public calls for violent change or overthrow of the constitutional order or seizure of state power, as well as distribution of materials calling for such actions.

A more severe punishment is established for the qualified type of this crime, namely for the specified actions committed by a person who is a representative of the authorities, or committed repeatedly, or by an organized group, or with the use of mass media.

Public appeals involve at least one address to an undefined but significant circle of individuals in which ideas, views or demands are expressed, aimed at their distribution among

ISSN 2786-7900

the population or its separate categories (representatives of the government, military personnel, etc.) to induce a certain number of people to take certain actions.

Publicity is an evaluative feature, and the issue of its presence must be decided in each specific case separately, taking into account the time, place, circumstances of the appeals, etc. The method of public appeals and distribution of materials is important for the qualification of the crime. This modern way should include posts on social networks (in particular, Facebook, Telegram, Twitter, etc.), sending letters to certain groups of recipients, in particular, through messengers or e-mail, etc.

A qualifying feature is public appeals and distribution of materials using mass media. Mass media (mass media) are understood as printed media, as well as electronic, audiovisual media - radio, television appearances, etc. Using them to perform the above-mentioned actions means speaking in them with articles, reports, messages, interviews, if they contain false information or information that harms the national security of Ukraine.

In connection with the military aggression of the Russian Federation against Ukraine, the President of Ukraine issued a number of normative acts aimed at protecting the national security of Ukraine. This also applies to encroachments on the information security of our state.

On February 24, 2022, the Verkhovna Rada of Ukraine adopted Law of Ukraine No. 2102 - IX "On Approval of the Decree of the President of Ukraine "On the Introduction of Martial Law in Ukraine" [4]. In particular, in this Law, the State Service for Special Communications and Information Protection of Ukraine was instructed to implement and implement the provisions of the Law of Ukraine dated May 12, 2015 No. 389-VIII "On the Legal Regime of Martial Law" (as amended on December 13, 2022) [5] measures and powers necessary to ensure the defense of Ukraine, protect the safety of the population and the interests of the defense of the state.

To strengthen the protection of public safety and the interests of the state in the information sphere, a number of laws were adopted, by which the Criminal Code of Ukraine was supplemented with articles on criminal offenses in the sphere of information security.

ISSN 2786-7900

In particular, Section I of the Special Part of the Criminal Code of Ukraine was supplemented by Art. 114-2 "Unauthorized dissemination of information about the sending, movement of weapons, armaments and war supplies to Ukraine, the movement, movement or placement of the Armed Forces of Ukraine or other military formations formed in accordance with the laws of Ukraine, committed in conditions of war or a state of emergency" (Law of Ukraine from 03/24/2022 No. 2160-IX "On Amendments to the Criminal and Criminal Procedure Codes of Ukraine to ensure counteraction to the unauthorized dissemination of information on the sending, movement of weapons, armaments and military supplies to Ukraine, the movement, movement or placement of the Armed Forces of Ukraine or other formed in accordance with the laws of Ukraine of military formations, committed under conditions of war or a state of emergency") [6].

This norm provides for responsibility for the distribution of special information related to armaments, weapons and military supplies, if such information is closed and was not published in official sources by the General Staff of the Armed Forces of Ukraine, the Ministry of Defense of Ukraine or in official sources of the relevant departments of partner countries.

We agree with the opinion of R.O. Movchana, who believes that there is every reason to consider such information under the conditions provided for in the disposition of Part 1 of Article 114-2 of the Criminal Code of Ukraine as secret, and if there are relevant grounds, to qualify such an act as treason (Article 111 of the Criminal Code of Ukraine) [7, p. 107]. Next, we will consider the crime, the responsibility for which is provided for in Art. 114-2 of the Criminal Code of Ukraine in more detail.

The legislator paid special attention to criminal liability for collaborative activity. We will consider collaborative activities in the field of information security.

Collaborative activity is a relatively new concept in the criminal law of Ukraine. Those who publicly deny armed aggression or occupation bear criminal responsibility for collaborative activity; supports the actions of the aggressor or occupier; supports illegal

ISSN 2786-7900

elections and referenda in the occupied territories; voluntarily holds positions in illegal authorities; organizes and conducts illegal elections and referenda; transfers material resources to the occupiers; promotes in educational institutions; conducts economic activities in cooperation with the occupiers.

In general, collaborationism is defined as the cooperation of the population or citizens of a state with the enemy in the interests of the enemy-aggressor to the detriment of the state itself or its allies and participation in the persecution of the patriots of the country of which the collaborator is a citizen.

Responsibility for collaborative activity is provided for in Art. 111-1 of the Criminal Code of Ukraine, by which the Criminal Code of Ukraine was supplemented by the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Establishing Criminal Liability for Collaborative Activities" dated March 3, 2022 No. 2108-IX [2].

This article has a rather complex structure and in it are combined in okr in our parts, both misdemeanors and felonies. It depends on the degree of social danger of various types of collaborative activity, on their subjects and other features of the legal composition of criminal offenses.

For example, in Part 1 of Art. 111-1 of the Criminal Code of Ukraine provides for responsibility for public denial by a citizen of Ukraine of armed aggression against Ukraine, public appeals to support the decisions and actions of the aggressor state, etc. All actions that make up the objective side of collaborationism of this type are clearly and consistently written out in the disposition of Part 1 of Art. 111-1 of the Criminal Code of Ukraine. But this socially dangerous type of collaborationism is considered a criminal misdemeanor, not a crime, because such an act is punishable by deprivation of the right to hold certain positions or engage in certain activities for a period of ten to fifteen years. This criminal offense should be considered committed in the information field, because in the footnote to Art. 111-1 of the Criminal Code of Ukraine states that the dissemination of appeals or expressions of objection to an unspecified

ISSN 2786-7900

circle of persons, in particular on the Internet or with the help of mass media, is considered public.

Considering the theory of speech acts, it is important to establish such properties in any of them as: locution is an aspect of a speech act in which something is voiced; illocution is the informational aspect of a speech act; percussion is an aspect of the speech act that contains the expectation of a certain reaction to the transmitted information. Thus, the appeal as an informational act consists in voicing certain information of an illegal nature in the form of phonetic sounds, displaying an image, etc. [8, p. 21].

It should be noted that criminal misdemeanors include such types of collaborative activity as the occupation by a citizen of Ukraine of positions not related to the performance of organizational-administrative or administrative-economic functions in illegal authorities created in temporarily occupied territories, including in the occupation administration of the state - the aggressor

Criminal misdemeanors, the composition of which is provided for in the provisions of Part 1 and Part 2 of Art. 111-1 of the Criminal Code of Ukraine are punishable by deprivation of the right to hold certain positions or engage in certain activities for a period of ten to fifteen years with or without confiscation of property. Therefore, we believe that the title of Section 1 of the Special Part of the Criminal Code of Ukraine does not correspond to its content, and in the title of this Section, the term "crimes" should be changed to the terminological phrase "criminal offenses".

Types of collaborative activities for which responsibility is provided in part. 3-8 st. 111-1 of the Criminal Code of Ukraine are crimes, because in the sanctions of these parts of Art. 111-1 of the Criminal Code of Ukraine provides for imprisonment. Some of these crimes should be classified as crimes in the field of information security of Ukraine.

Information in the form of propaganda is especially dangerous in wartime.

ISSN 2786-7900

Let's consider the legal composition of the crime, the responsibility for which is provided for in Part 3 of Art. 111-1 of the Criminal Code of Ukraine. In the disposition of this part, responsibility is provided for such actions as the implementation by a citizen of Ukraine of propaganda in educational institutions, regardless of the types and forms of ownership, with the aim of facilitating the implementation of armed aggression against Ukraine, establishing and confirming the temporary occupation of part of the territory of Ukraine, avoiding responsibility for the implementation of armed aggression by the aggressor state against Ukraine, as well as the actions of Ukrainian citizens aimed at implementing education standards of the aggressor state.

This type of collaborative activity is punishable by correctional labor for a term of up to two years or arrest for a term of up to six months, or imprisonment for a term of up to three years with deprivation of the right to hold certain positions or engage in certain activities for a term of ten to fifteen years.

Article 111-1 "Collaborative activity" is contained in Section I of the Special Part of the Criminal Code of Ukraine. All crimes, the legal structures of which are contained in this Section, are aimed at harming such a generic object as the national security of Ukraine. The direct object of the crime, the legal composition of which is provided for in the disposition of Part 3 of Art. 111-1 of the Criminal Code of Ukraine is information security in the field of educational activity.

The crime is committed through active actions. The objective side of this legal structure of the crime consists of the following actions:

1. Propaganda in educational institutions regardless of the types and forms of ownership;

2. Actions aimed at implementing education standards of the aggressor state in educational institutions.

The concept of propaganda by the Russian Nazi totalitarian regime of armed aggression as a terrorist state against Ukraine is revealed in the Law of Ukraine "On the prohibition of propaganda of the Russian Nazi totalitarian regime, armed aggression of the Russian

ISSN 2786-7900

Federation as a terrorist state against Ukraine, symbols of the military invasion of the Russian Nazi totalitarian regime in Ukraine" dated May 22 2022 No. 2265-IX.

In the context of collaborative activity in the sense of criminal responsibility for a crime, the legal composition of which is provided for in the disposition of Part 3 of Art. 111-1 of the Criminal Code of Ukraine, propaganda should be understood broadly providing information aimed at supporting or justifying the criminal nature of the activities of the Russian Federation, bodies of the terrorist state (aggressor state), their officials, employees, employees (including military personnel and (or) representatives who openly or covertly act on behalf of the Russian Federation the territory of Ukraine or from the territories of other states against Ukraine; public denial, including through the mass media or using the Internet, of the criminal nature of the armed aggression of the Russian Federation against Ukraine).

The second form of action is actions aimed at implementing the education standards of the aggressor state in educational institutions. First of all, this is the transition to the language of the aggressor state, the use of textbooks, manuals and other educational materials published in the Russian Federation or in Ukraine in cooperation with and with the support and leadership of the authorities and officials of the aggressor state.

The objective side of this legal component of the crime, in addition to the act, which is a mandatory feature of any component of the crime, includes the consequences, causal relationship, time, place, and method of committing the crime.

The analyzed composition of the crime is formal by its construction, therefore the consequences and the causal relationship are not considered as its mandatory elements.

Instead, the place of the crime in this legal composition plays the role of a mandatory feature, because there is a direct indication of this in the disposition of Part 3 of Article 111-1 of the Criminal Code of Ukraine - "in educational institutions".

Educational institutions include legal entities under public or private law, the main type of activity of which is educational activity.

ISSN 2786-7900

In this case, the time of the crime also acts as a mandatory feature - wartime or a state of emergency, which is directly caused by the armed aggression of the Russian Federation in Ukraine.

The method of committing the crime is also a mandatory feature in this legal structure. This is the distribution of a certain type of propaganda materials that have certain characteristics that harm the national interests of Ukraine.

The subject of this legal structure of the crime is indicated as a "citizen of Ukraine", but the subject can be not only a citizen of Ukraine, but a person who works in educational institutions, conducts conversations with pupils and students, and has the opportunity to conduct propaganda among them. Also, if the crime is committed in the form of the implementation of education standards, such subjects are officials who carry out managerial activities in the field of education. In particular, this is evidenced by such punishment as deprivation of the right to hold certain positions or engage in certain activities. In our opinion, there is a direct reference to the field of education.

The subjective side of this legal structure of the crime consists of such features as guilt, motive and goals. Among them, guilt is a mandatory feature in any composition of a criminal offense, motive and purpose are optional features.

The analyzed crime is committed only with direct intent. The person realizes that the Russian Federation has carried out military aggression against Ukraine, which is causing real damage to the national security and sovereignty of our state. The person assumes that his actions, namely, propaganda among schoolchildren and students does not contribute to their upbringing in a patriotic spirit, may become the basis for forming a false impression in them about what is happening in Ukraine, about the damage that the Nazi totalitarian regime is causing to the interests of Ukraine. A person wants to perform exactly such actions or achieve a certain consequence, although the consequence is not a mandatory feature in this legal composition of the crime.

ISSN 2786-7900

As for the motive and purpose, the following should be indicated. Purpose is a mandatory feature in this legal composition of the crime. It is directly indicated in the disposition of Part 3 of Art. 111-1 of the Criminal Code of Ukraine - "with the purpose of facilitating the implementation of armed aggression against Ukraine, the establishment and formation of a temporary occupation."

The motive certainly has a place, especially in intentional crimes, but in the analyzed legal composition of the crime it plays the role of an optional feature. The motive can be any, self-serving, the desire to provide assistance to the aggressor state, personal, etc. But it does not affect the qualification.

Collaborative activity in the field of information should include a crime for which responsibility is established in Part 6 of Article 111-1 of the Criminal Code of Ukraine. This crime consists in organizing and conducting events of a political nature, carrying out information activities in cooperation with the aggressor state, etc. The text of Part 2 and Part 4 of the footnote to Art. 111-1 of the Criminal Code of Ukraine, which states that events of a political nature include congresses, meetings, rallies, marches, demonstrations, conferences, round tables, etc., i.e. events aimed at exchanging information. The note also states that the implementation of information activity means the creation, collection, receipt, storage, use and distribution of relevant information, that is, information that is anti-Ukrainian in nature.

This crime is considered particularly serious, because the main penalty for it is imprisonment from ten to twelve years.

The problem of criminal liability for collaborative activity has been considered in sufficient detail uli in his works O.O. Buryak, O.I. Bukreev, D.O. Oleynikov and M.V. Chlenov [8], O.O. Kravchuk, M.S. Bondarenko [9, p. 198-204], V.V. Kuznetsov, M.V. Siyploki [10, p. 381-388].

Main threats to the information security of Ukraine should be considered, first of all, external threats. These threats are especially dangerous during Russia's aggression against Ukraine and false information spread by the aggressor state and those countries that support it.

ISSN 2786-7900

This is the illegal activity of various foreign formations and groups in the sphere of Ukraine's interests. The internal threats to the information security of Ukraine should include the leakage of information that is a state secret or a secret provided by law, as well as confidential information that is the property of the state, the imperfection of the state structure for ensuring information security of Ukraine, illegal actions of state bodies, political and economic structures, individual citizens in in the information sphere, collaborationism, the occurrence of unusual situations not provided for by law in systems, processes based on the use of information technologies, as a result of which the degree of risk of causing losses increases, as well as their size, imperfection or lack of technical means of ensuring information security.

Information security of Ukraine involves the legal definition of information as a strategically important resource for the state, the creation of an interconnected system of state information arrays of various levels and purposes, as well as state bodies responsible for the formation, storage, use and protection of these arrays, definition of rights and obligations , guarantees of ensuring the rights and responsibilities of subjects of information relations in various applied spheres, a rational combination of monopoly and non-monopoly in the information sphere, licensing and certification of certain types of information activities and products, creation based on the concepts of intellectual property of copyright and property rights protection systems for various information products, on means of processing information with limited access, procedures for assigning such information and removing restrictions, rights, obligations and responsibilities of subjects of information relations regarding the division and categorization of such information, its use, creation of a general system for ensuring information security.

According to the degree of secrecy, information is distinguished as particularly important, absolutely secret, secret, for official use, and non-secret. The legality of the classification of information consists in its implementation within the limits of current laws and other subordinate regulatory acts. Deviation from this principle can cause significant damage to the interests of information protection.

ISSN 2786-7900

Particular attention should be paid to the disposition of 1 and 2, 3 Art. 114-2 of the Criminal Code of Ukraine and their sanctions. After all, the only way of criminalization is the formation of the appropriate criminal law norm, which consists of two mandatory, interrelated parts - disposition and sanction. It is the sanction that indicates the severity of the crime and, in general, is a way of distinguishing between criminal misdemeanors and crimes. In Part 1 of Art. 114-2 of the Criminal Code of Ukraine, the sanction provides for imprisonment for a term of three to five years. This shows that in the disposition of part 1 of Art. 114-2 of the Criminal Code of Ukraine provides for the legal composition of a serious crime.

Sanction, part 2 of Art. 114-2 of the Criminal Code of Ukraine provides for punishment in the form of imprisonment for a term of five to eight years. This indicates that in the disposition of Part 2 of Art. 114-2 of the Criminal Code of Ukraine provides for the legal composition of a more serious crime. The internal structure of the legal composition of the crime provided for in the disposition of Part 2 of Art. 114-2 of the Criminal Code of Ukraine includes features of the general structure of the legal composition of the crime provided for in Part 1 of Article 114-2 of the Criminal Code of Ukraine. But in the disposition of part 2 of Art. 114-2 of the Criminal Code of Ukraine provides additional features that make the construction part 2 of Art. 114-2 of the Criminal Code of Ukraine is unique, and based on these characteristics, we can distinguish between the legal categories of crimes provided for in the first two parts of this article. Both in part 1 and in part 2 of Art. 114-2 of the Criminal Code of Ukraine provides for criminal liability for the same actions - dissemination of information about the transfer, movement of weapons, armaments and military supplies to Ukraine, including their movement through the territory of Ukraine, if such information was not made publicly available by the General Staff of the Armed Forces of Ukraine or by the Ministry of Defense of Ukraine or in official sources of relevant departments of partner countries.

At the disposition of part 2 of Art. 114-2 of the Criminal Code of Ukraine, the objective side of this legal structure of the crime is formulated somewhat differently, but this does not change the essence of the socially dangerous act. In Part 2 of Art. 114-2 of the Criminal Code

ISSN 2786-7900

of Ukraine is responsible for disseminating information about the movement, movement or location of the Armed Forces of Ukraine or other military formations formed in accordance with the laws of Ukraine, if such information was not made publicly available by the General Staff of Ukraine. Thus, these two parts refer to information that is secret and concerns both the armament and the location of the Armed Forces of Ukraine or others formed in accordance with the law levels of Ukrainian military formations.

It should also be noted that criminal liability for such socially dangerous acts is established for a certain time - in conditions of war or emergency.

But the peculiarity of the legal composition of the crime provided for in the disposition of Part 2 of Art. 114-2 of the Criminal Code of Ukraine is that criminal liability arises if it is possible to identify the location or movement of the Armed Forces of Ukraine or other military formations formed in accordance with the laws of Ukraine. This significantly increases the degree of social danger of such a spread, because it provides the aggressor with information that can lead to the attack and destruction of the Armed Forces of Ukraine located in a certain area. That is, the legal compositions of the crimes are practically the same. But in part 2 of Art. 114-2 of the Criminal Code of Ukraine added a certain condition - the possibility of identification, which makes the crime more socially dangerous. Therefore, in the sanction of Part 2 of Art. 114-2 of the Criminal Code of Ukraine provides for a more severe punishment. The type of punishment is the same - deprivation of liberty, but both the lower limit of punishment and the upper limit are significantly increased. Such an act is punishable by imprisonment for five to eight years.

Thus, in Part 2 of Art. 114-2 of the Criminal Code of Ukraine provides for the so-called specific part of the crime. In Part 3 of Art. 114-2 of the Criminal Code of Ukraine provides:

1. Relevant provisions of the General Part of the Criminal Code of Ukraine, which are necessarily included in this legal structure in a specific form. These are special components of the legal composition of the crime. In this case, these are such special components as complicity and motive and purpose.

ISSN 2786-7900

In Part 3 of Art. 114-2 of the Criminal Code of Ukraine criminal liability is provided for the distribution of the information specified in Part 1 and Part 2 of Art. 114-2 of the Criminal Code of Ukraine, information based on a prior conspiracy by a group of persons, for selfish reasons or for the purpose of providing such information to a state carrying out armed aggression against Ukraine or an illegal armed formation.

Particular attention should be paid to this feature of the legal composition of the crime provided for in the disposition of Part 3 of Art. 114-2 of the Criminal Code of Ukraine, namely the occurrence of grave consequences. This means that if the distribution specified in Part 1 and Part 2 of Art. 114-2 of the Criminal Code of Ukraine led to serious consequences, the subject's actions should be qualified under Part 3 of Art. 114-2 of the Criminal Code of Ukraine. Therefore, based on the content of the disposition of Part 3 of Art. 114-2 of the Criminal Code of Ukraine, the composition of crimes provided for in three parts of Art. 114-2 of the Criminal Code of Ukraine should be considered formal and material.

Not all crimes against information security are provided for in Section I of the Special Part of the Criminal Code of Ukraine. Such a generic object as the national security of Ukraine is complex and broad in content. It is protected by almost all articles of the Criminal Code of Ukraine.

Let us dwell on the analysis of the crime, the legal composition of which is provided for in the disposition of Art. 436-2 of the Criminal Code of Ukraine "Justification, recognition as legitimate, denial of armed aggression of the Russian Federation against Ukraine, glorification of its participants." The Criminal Code of Ukraine was supplemented with this article by the Law of Ukraine "On Amendments to Certain Legislative Acts on Strengthening Criminal Liability for the Production and Distribution of Prohibited Information Products" dated March 3, 2022 No. 2110-IX [11].

In fact, the disposition of Art. 436-2 of the Criminal Code of Ukraine should be considered blanket, because it establishes criminal liability for actions that are recognized as prohibited, as well as defines the types and content of information products aimed at promoting

ISSN 2786-7900

the actions of the aggressor state. Art. 436-2 of the Criminal Code of Ukraine reproduces practically verbatim the provisions of the Law of Ukraine dated March 3, 2022 No. 2110-IX. Art. 436-2 of the Criminal Code of Ukraine is placed in section XIX of the Criminal Code of Ukraine, and the crime for which it provides liability is considered a military criminal offense based on the title of the section (title of section XIX of the Criminal Code of Ukraine "Criminal offenses against the established order of military service"). It should be recognized that the crime, the composition of which is provided for in the disposition of Art. 436-2 of the Criminal Code of Ukraine will be more correctly classified as crimes against national security in the information sphere, because crimes against the established order of military service are considered such because of the subject of their commission (see Article 401 of the Criminal Code of Ukraine). At the same time, special attention should be paid to the provisions of part 3 of Art. 401 of the Criminal Code of Ukraine, which expressly states that persons not specified in this article (that is, special subjects listed in part 2 of Article 401 of the Criminal Code of Ukraine) are liable for complicity in military criminal offenses under the relevant articles of this Section .

Consider the structure of Art. 436-2 of the Criminal Code of Ukraine. It consists of three parts, which provide for the legal composition of crimes, and not criminal misdemeanors, because the sanctions of all three parts provide for punishment in the form of deprivation of liberty.

In Part 1 of Art. 436-2 of the Criminal Code of Ukraine stipulates responsibility for such actions as justifying, recognizing as legitimate, denying the armed aggression of the Russian Federation against Ukraine, which began in 2014. Such actions can be carried out in any way, but, undoubtedly, they must be of a public nature. At the disposition of part 1 of Art. 436-2 of the Criminal Code of Ukraine specified one of the methods of committing this crime - by presenting the armed aggression of the Russian Federation against Ukraine as a yesterday's civil conflict. The objective side of this legal structure of the crime is also formed by such actions as justification, recognition as legitimate, denial of the temporary occupation of part of

ISSN 2786-7900

the territory of Ukraine. A separate act consists in the glorification of persons who carried out the armed aggression of the Russian Federation against Ukraine, which began in 2014, representatives of the armed forces of the Russian Federation and regular illegal armed forces, armed gangs and groups of mercenaries created, subordinated, managed and financed by the Russian Federation, as well as representatives of the occupation administration the Russian Federation, which consists of its state bodies and structures, functionally responsible for the management of the temporarily occupied territories of Ukraine, and representatives of self-proclaimed bodies controlled by the Russian Federation, which usurped the performance of power functions in the temporarily occupied territories of Ukraine.

In the dispositions of this article, we meet for the first time with such a term, which in this case acquires a criminal-legal character as glorification.

Glorification means glorifying someone or something. For example, Latvia banned Russian TV presenter Volodymyr Solovyov from entering the country for glorifying Nazism.

According to the legislation of Ukraine, it is prohibited to glorify specific persons who performed actions and carried out relevant activities, the types of which are exclusively listed in the disposition of Part 1 of Art. 436-2 of the Criminal Code of Ukraine. Thus, the meaning of the term "glorification" in its criminal legal meaning should be interpreted based on the text of the disposition of part 1 and part 2 of Article 436-2 of the Criminal Code of Ukraine.

The crime, responsibility for which is provided for in Part 1 of Art. 436-2 of the Criminal Code of Ukraine has a formal composition. Mandatory features in it are the actions listed in the disposition of Part 1 of Art. 436-2 of the Criminal Code of Ukraine.

This crime is considered completed from the moment the act itself is committed. But this act must be committed publicly, that is, the words containing justification, recognition of armed aggression as legitimate, glorification of the listed persons and groups must be brought to a certain number of persons. Here, obviously, we can use the note to Art. 111-1 of the Criminal Code of Ukraine "Collaborative activity". It is about an indefinite circle of people, the Internet, etc. Liability for the crime, the legal composition of which is provided for in the

ISSN 2786-7900

disposition of Part 1 of Article 436-2 of the Criminal Code of Ukraine occurs if such actions are committed at congresses, rallies, demonstrations, etc.

Since this crime is committed with direct intent, there is definitely a motive and a purpose here. But they do not affect the qualification.

The structure of Art. 436-2 of the Criminal Code of Ukraine resembles the structure of the crime, the responsibility for which is provided for in Art. 109 of the Criminal Code of Ukraine "Actions aimed at the violent change or overthrow of the constitutional order or at the seizure of state power." In part 1 of Art. 109 of the Criminal Code of Ukraine and in Part 2 of Art. 109 of the Criminal Code of Ukraine contains two different types of crimes and a crime for which liability is provided for in Part 2 of Art. 109 of the Criminal Code of Ukraine has a truncated composition, when the moment of the end of the crime is transferred to the stage of preparation for it. The same situation occurs in Part 1 of Art. 109 of the Criminal Code of Ukraine. The disposition of this article contains the finished composition of the crime with the formal composition and the truncated composition of the crime, namely conspiracy to commit such actions. Conspiracy itself is a stage of preparation for committing actions, as well as a crime, the responsibility for which is provided for in part 2 of Art. 109 of the Criminal Code of Ukraine.

Let's consider the composition of the crime provided for in the disposition of Part 2 of Art. 436-2 of the Criminal Code of Ukraine. Responsibility for the production and distribution of a specific item is already provided for here. These are materials that contain information, the signs of the content of which are disclosed in Part 1 of Art. 436-2 of the Criminal Code of Ukraine.

This crime is considered completed from the moment of committing one of the two alternative actions - production or distribution. A person can both produce and distribute the specified information. But, in fact, this act in the form of producing materials of appropriate content from the standpoint of qualification represents preparation for distribution. That is, the crime, the legal structure of which is provided for in the disposition of Part 2 of Art. 436-2 of

ISSN 2786-7900

the Criminal Code of Ukraine is considered completed already at the stage of preparation, if it is carried out by the production of materials.

A feature of the qualification of the act, the composition of which is provided for in Art. 436-2 of the Criminal Code of Ukraine, there is the fact that qualification is possible by a combination of crimes - both under Part 1 and Part 2 of Art. 436-2 of the Criminal Code of Ukraine. For example, a person has produced materials with relevant content, and then distributes them among an unspecified circle of people. If a person simply expresses his thoughts, the character of which has the characteristics of a crime, the legal composition of which is provided for in the disposition of Part 1 of Art. 436-2 of the Criminal Code of Ukraine, then qualification takes place only according to this part of the article.

In Part 3 of Art. 436-2 of the Criminal Code of Ukraine provides qualifying features that are used in the qualification of both crimes - and the one whose legal structure is provided for in the disposition of Part 1 of Art. 436-2 of the Criminal Code of Ukraine, and the second, the legal composition of which is provided for in the disposition of Part 2 of Art. 436-2 of the Criminal Code of Ukraine.

The following institutions of the General part of the Criminal Code of Ukraine as a special subject - an official, as well as the institution of multiplicity of crimes are provided as qualifying signs criminal offenses - repetition and the institution of complicity - an organized group. Committing these crimes with the use of mass media is also considered an aggravating circumstance.

Conclusions. Summing up the above, there are reasons to state that the wartime criminal legislation of Ukraine, which is aimed at protecting information security, is generally such that it fulfills its task. At the same time, it should be emphasized that the norms were adopted immediately after the attack of the Russian Federation on Ukraine and therefore in certain moments are conflicting and require additional understanding and refinement. In the opinion of the author, certain shortcomings should be eliminated both in the terminology used in the

ISSN 2786-7900

provisions of individual articles, and attention should be paid to sanctions and types of punishment, which are sometimes formulated in such a way that they are difficult to apply.

Literature:

1. On amendments to some legislative acts of Ukraine regarding the simplification of pretrial investigation of certain categories of criminal offenses: Law of Ukraine dated November 22, 2018 No. 2617-VIII.

URL: https://zakon.rada.gov.ua/laws/show/2617-19#Text

2. On amendments to some legislative acts of Ukraine regarding the establishment of criminal liability for collaborative activity: Law of Ukraine dated March 3, 2022 No. 2108-IX. URL: https://zakon.rada.gov.ua/laws/show/2108-20#n12

3. On the national security of Ukraine: Law of Ukraine dated June 21, 2018 No. 2469-VIII. URL: https://zakon.rada.gov.ua/laws/show/2469-19#Text

4. "On approval of the Decree of the President of Ukraine "On the introduction of martial law in Ukraine": Law of Ukraine dated February 24, 2022 No. 2102-IX. URL: https://zakon.rada.gov.ua/laws/show/2102-20#Text

5. On the legal regime of martial law: Law of Ukraine dated May 12, 2015 No. 389-VIII. URL: https://zakon.rada.gov.ua/laws/show/389-19#Text

6. On the introduction of amendments to the Criminal and Criminal Procedure Codes of Ukraine to ensure counteraction to the unauthorized dissemination of information about the sending, transfer of weapons, armaments and military supplies to Ukraine, the movement, transfer or placement of the Armed Forces of Ukraine or other military formations formed in accordance with the laws of Ukraine, committed in conditions of martial law or a state of emergency: Law of Ukraine dated March 24, 2022 No. 2160-IX. URL: https://zakon.rada.gov.ua/laws/show/2160-20#Text

ISSN 2786-7900

7. R.O. Movchan "Military" novels of the Criminal Code of Ukraine: law-making and law-enforcement problems: monograph. Kyiv: Norma prava, 2022. 244 p.

8. Collaborative activity: general principles of criminal law qualification: practical. advisor / Buryak O.O. , Bukreev O.I. , Oleynikov D.O. , Chlenov M.V. / for general ed. adv. Ukrainian lawyer A.Z. Shvetsia. Kharkiv: Pravo, 2022. 98 p.

9. Kravchuk O.O., Bondarenko M.S. Collaborative activity: a scientific and practical commentary on the new Article 111-1 of the Criminal Code. Legal scientific electronic journal. 2022. Issue 3. P. 198-204

10. Kuznetsov V.V., Siyploki M.V. Criminal liability for collaborative activity as a challenge of today. Scientific Bulletin of the Uzhhorod National University. Series: Law. 2022. Issue 70. P. 381-388.

11. On making changes to some legislative acts regarding the strengthening of criminal liability for the production and distribution of prohibited information products: Law of Ukraine dated March 3, 2022 No. 2110-IX. URL: https://zakon.rada.gov.ua/laws/show/2110-20#Text

COLLECTION "COLLECTION OF SCIENTIFIC JOURNAL OF THE SCIENTIFIC RESEARCH INSTITUTE OF PRE-JUDICIAL PROBLEMS INVESTIGATION 2023-2
ISSN 2786-7900
https://doi.org/10.61417/2786-7900.2023.2.3

CERTAIN ASPECTS OF THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS REGARDING ENSURE OF THE RIGHTS OF THE ACCUSED IN CRIMINAL PROCEEDINGS

UDC 343.1

Omelchenko Oleksandr,
candidate of legal sciences,
associate professor, practicing lawyer

The article examines some issues related to the application and interpretation of the Convention on the Protection of Human Rights and Fundamental Freedoms in the context of Art. 6, which regulate the right to a fair trial.

The study outlines the decisions of the European Court regarding the observance of European standards for the observance of the rights of persons who are held criminally liable. Issues of compliance were considered: presumption of innocence, awareness of the nature and reasons of the accusation, compliance with the conditions necessary for preparation for the defense, provision of qualified legal assistance.

It has been established that the practice of the European Court clearly defines the principle of the presumption of innocence as a provision that ensures the right of a person to

ISSN 2786-7900

be informed immediately and in detail about the nature and reason of the accusation, and most importantly to have enough time and opportunities to prepare his defense.

It was emphasized that the defenders are obliged to analyze the indictment in detail and to monitor compliance with the procedural order of serving the indictment in order to prevent the violation of the rights and freedoms of the person, which may be caused by the unprofessionalism and negligence of the prosecutors.

The need to provide adequate time and legal means to prepare for the trial in order to present all the necessary arguments to achieve a legal and fair decision has been proved.

It is emphasized that the main provisions enshrined in the Convention on the Protection of Human Rights and Fundamental Freedoms and in the decisions of the European Court of Human Rights create obligations for national authorities to ensure the rights of the accused in criminal proceedings, with the aim of observing and ensuring rights and fundamental freedoms on their territory a person

Keywords: Conventions on the protection of human rights and fundamental freedoms, the European Court of Human Rights, the accused, the right to defense.

Introduction. The European Court of Human Rights is an international judicial body, as the last hope for the restoration of violated rights by national bodies based on complaints by individuals. The competence of the court includes the recognition of facts of violation of the applicant's rights through the application and interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter - the Convention).

After ratifying the Convention, Ukraine fully recognized the jurisdiction of the European Court of Human Rights on its territory in all matters related to its interpretation and application.

In turn, the improvement of the national criminal procedural legislation took place and continues to be improved, taking into account European standards of human rights. Any

ISSN 2786-7900

restrictions on the rights of a person who is involved in the field of criminal procedural relations must be consistent with the decisions of the European Court, which reveal deficiencies in the observance of human procedural rights.

Analysis of recent publications and research. Implementation and implementation by the state of international legal norms regarding ensuring the rights of the accused in criminal proceedings were the subject of research by: S. A. Alpert, T. V. Varfolomeeva, Y. M. Groshevoi, O. V. Kaplina, O. P. Kuchynska, L. M. Loboyka, E. D. Lukyanchikova, A. V. Moldovana, V. T. Nora, M. S. Strogovych, V. M. Tertyshnyk, L. D. Udalova, V. Yu. Shepitko, O. H. Yanovska and many other scientists, which testifies to the relevance of the issue of compliance with the right to defense.

Setting objectives. In view of the above, the purpose of the publication is to study the Convention on the Protection of Human Rights and Fundamental Freedoms in the context of Art. 6, which regulate the right to a fair trial.

Research results. Representatives of pre-trial investigation bodies, the prosecutor's office, the court, and lawyers always refer to the relevant practice of the European Court in their decisions, complaints, and petitions in order to ensure the achievement of human rights and freedoms.

The right to a fair trial must be attributed to the main European standards of human rights, which are most often applied in the criminal process of Ukraine (Article 6 of the Convention).

In the context of these standards, it is necessary to highlight issues related to persons who are brought to criminal liability. It is definitely necessary to start with the presumption of innocence.

As the Chairman of the European Court of Human Rights noted at one time, the presumption of innocence is one of the key guarantees of fair trials, because the judiciary must

ISSN 2786-7900

act on the basis of innocence until a person has acquired the status of a suspect, and if he is guilty, then law enforcement agencies must prove it [2] .

The presumption of innocence is a legal provision according to which the accused (defendant) is considered innocent until his guilt is proven in accordance with the procedure established by law, and the person may be found guilty in a guilty verdict of a court that has entered into force [3].

In accordance with Part 2 of Art. 6 of the Convention, everyone accused of committing a criminal offense is presumed innocent until proven guilty in a legal manner. The European Court of Human Rights in its decision on the case "Deweer (Deweer) v. Belgium" dated February 27, 1980 subjects this norm to a thorough interpretation, namely, it defines:

- the limits of the presumption of innocence (within the proceedings regarding the committed criminal offense);

- the moment when a person is recognized as guilty of committing such an offense (when guilt is proven in a legal manner);

- the inadmissibility of a different procedure for finding a person guilty than is provided for in the law, i.e. the presumption is recognized as one of the elements of a fair trial [1].

The legal content of the presumption of innocence is defined by the Constitution of Ukraine in Article 62, which stipulates: "A person is considered innocent of committing a crime and cannot be subjected to criminal punishment until his guilt has been proven in a legal manner and established by a guilty verdict of the court" [4].

This principle is reflected in Art. 17 of the Criminal Procedure Code of Ukraine, which specifies the need to treat a person as innocent until his guilt in committing a criminal offense is established by a court verdict that has entered into force.

The peculiarity of the principle is to oppose in criminal proceedings against accusatory bias, subjectivism, tendency or even arbitrariness, everything that turns criminal proceedings

ISSN 2786-7900

into a tool of execution against the accused, identifies the accused with the guilty, makes him virtually lawless [5, p. 390].

This thesis corresponds to the clarifications in the case "Daktaras (Daktaras) v. Lithuania" dated 10.10.2000, in which the court reminds that the presumption of innocence, proclaimed in clause 2 of Art. 6 of the Convention, is one of the components of the requirement of a fair trial, which is contained in clause 1 of Art. 6. This requirement will be violated if the statement of a public official regarding a person accused of a criminal offense constitutes an opinion that he is guilty, despite the fact that it has not yet been proven according to law. Even in the absence of any official ing conclusion, such an opinion is sufficient for the assumption that the official has certain grounds to consider the accused guilty.

In this regard, the Court emphasizes the importance of what words a public official chooses for his motivation, when the case has not yet been considered by the court and when the person has not yet been found guilty.

In addition, the presumption of innocence may be violated not only by a judge or court, but also by other state authorities, including the prosecutor's office. This happens especially when the prosecutor, as was the case in this case, performs a quasi-judicial function, because he decides on the petitioner's motions to dismiss charges at the stage of the pre-trial investigation, the procedure of which is under his full control [1].

Therefore, the Convention directly indicates the obligation for the court to decide on the validity of the accusation brought against the person. The court must find out not only the validity of the indictment, but also the legality of the subject of its preparation and delivery.

It is necessary to pay attention to the conclusion of the Constitutional Court of Ukraine, which, with reference to the practice of the European Court, emphasized that the procedure for gathering evidence provided for by national law must correspond to the fundamental rights recognized by the Convention, and also noted that the accusation of a person for committing a crime cannot be based on evidence obtained as a result of violation or limitation of its

ISSN 2786-7900

constitutional rights and freedoms, except for cases in which the Basic Law of Ukraine allows such limitations [6].

According to Art. 87 of the Criminal Code of Ukraine, if the evidence is obtained as a result of a significant violation of human rights and freedoms, it is considered inadmissible and its further use is unacceptable. Therefore, if the indictment is based on inadmissible evidence, then the further prospect of bringing a person to criminal responsibility becomes a big question for the prosecuting authorities.

This is emphasized in the case of Barbera, Messegue and Jabardo (Barbera, Messegue and Jabardo) v. Spain dated 06.12.1998, which states that the duty of the prosecution is to inform the person of the charges so that he can prepare and properly present his arguments in his defense, and the evidence that forms the basis of the court's conclusion about the guilt of the accused must meet the requirements of sufficiency and persuasiveness [7].

From the above, we can conclude that the practice of the European Court clearly defines the principle of the presumption of innocence as a provision that ensures the right of a person to be informed immediately and in detail about the nature and reason of the accusation, and most importantly to have enough time and opportunities to prepare his defense.

This provision is enshrined in Clause 3 (a) of Art. 6 of the Convention: "a person must be informed immediately and in detail about the nature and reasons of the charge brought against him." It is the detailed explanation of the accusation that is indicated in this provision of the Convention.

The legislator did not clearly specify the procedure for the detailed explanation of the accused. If we analyze the norms of the CPC of Ukraine, we will not see systematicity. According to Art. 293 of the Criminal Procedure Code of Ukraine, the prosecutor is obliged to deliver a copy of the indictment and a copy of the register of materials of the pre-trial investigation to the suspect under receipt. Under this requirement, the person charged is directly present at the time of service. However, in practice, prosecutors formally approach the

ISSN 2786-7900

process of such delivery, without a detailed explanation of the essence of the accusation. There are cases when the prosecutor, citing employment, evades the exercise of his powers and entrusts the delivery of the indictment to the investigator. Subsequently, this procedural violation during the delivery of the indictment leads to its return to fulfill the requirements of Art. 291-293 of the Criminal Code of Ukraine in an appropriate manner, which prevents the court from making a legal and well-founded decision.

In turn, the provisions of Part 2 of Art. 302 of the Criminal Procedure Code impose on the investigator, the inquirer, the duty to explain to the suspect the content of the circumstances established by the pre-trial investigation in case of consent to the consideration of the indictment in the simplified procedure.

Therefore, in the general procedure of criminal proceedings, such an obligation is not indicated, in connection with this, in the criminal procedural law, it is necessary to agree on the procedural powers of the prosecutor regarding the clarification of the essence of the accusation.

The practice of the European Court in the interpretation of clause 3 (a) of Art. 6 of the Convention indicates the need to especially carefully communicate the "accusation" to the person concerned. The indictment plays a decisive role in the criminal prosecution: from its presentation, the person against whom the criminal case is initiated is officially notified of the legal and factual basis of the charges formulated against him (Theodore Kamasinski v. Austria dated November 6, 1981 .; Pélissier and Sassi (Pélissier and Sassi) against France dated March 25, 1999 [1].

In the decisions of the Convention, Mattoccia v. Italy dated 25.07.2000 and Penev v. Bulgaria dated 07.01.2010 recognize the right of the accused to be informed not only about the "cause" of the accusation, that is, about the material facts brought against him and on which the accusation is based, but also about the "character" of the accusation, that is, about the legal qualification of these facts [1].

ISSN 2786-7900

The duty to inform the accused rests entirely with the prosecution, and it cannot be observed in a passive way, distorting the information and not informing the defense (Chichlian and Ekindjian (Chichlian and Ekindjian) v. France of 16.03.1989) [1].

In this regard, the defenders are obliged to analyze this procedural decision in detail and constantly monitor compliance with the procedural order of serving the indictment in order to prevent the violation of the rights and freedoms of the person, which may be caused by the unprofessionalism and negligence of the prosecutors.

The amount of information included in the indictment depends on the specific circumstances of the case. The accused must receive all the details in order to: firstly, fully understand the charge brought against him, and secondly, to properly prepare his defense. This provision corresponds to Clause 3 (b) of Art. 6 of the Convention on the creation of conditions (providing time and opportunities) to the accused, necessary for the preparation of his defense.

The proper nature of the information must be assessed in connection with Clause 3 (b) of Art. 6, which recognizes the right of every person to have the time and opportunity necessary to prepare his defense, as well as in the light of the more general right to a fair trial guaranteed by Article 6 (Bäckström and Andersson (Bäckström and Andersson v. Sweden of 05.09.2006) [1].

In another case, Pélissier and Sassi (Pélissier and Sassi) v. France of 25.03.1999, the European Court concluded that the right of the applicants to receive detailed information about the nature and cause of the accusation against them and the right to receive sufficient time and opportunities to prepare his defense In this case, it was allowed to violate the requirements of subparagraphs (a) and (b) of Article 3. 6 of the Convention together with paragraph 1 of this article [1].

The prerequisite for recognizing the constituents of the constitutional right to defense regarding receiving information about the end of the pre-trial investigation was the decision of the European Court in the case of Kornev and Karpenko (Kornev and Karpenko) v. Ukraine

ISSN 2786-7900

dated October 21, 2010, which states that the accused must have the opportunity to organize his defense properly in such a way and without limitation of the opportunity to provide the court considering the case with all relevant defense arguments and, thus, to influence the outcome of the proceedings. In addition, the opportunities available to anyone accused of committing a criminal offense should include familiarization - for the purposes of preparing his defense - with the results of investigations conducted throughout the proceedings [1].

In this regard, the Constitutional Court of Ukraine made a fateful decision for the defense in the case based on the constitutional submissions of 47 and 50 People's Deputies of Ukraine regarding the conformity of the Constitution of Ukraine (constitutionality) with parts of the sixth and seventh articles. 218 of the Criminal Procedure Code of Ukraine (case on familiarization of the accused and the defense attorney with the materials of the criminal case) No. 1-рп/2012 dated January 18, 2012. Yes, the terms for the acquaintance of the accused and his defense attorney with all the materials of the case must be determined in each case depending on the volume of the case materials and their complexity, number of accused, actions or inaction (behavior) of the accused or his defense counsel and factors independent of the will of the accused or his defense counsel (for example, illness), etc. [8].

Providing appropriate information to the accused about the nature and cause of the accusation creates opportunities for preparing his defense, regardless of whether he will defend himself independently or with the help of a lawyer. The convention states that the accused may use the professional assistance of a defense counsel chosen at his own discretion, or, in the absence of sufficient funds to pay for legal assistance, receive it free of charge at the expense of the State.

Therefore, the issue of adequacy of time and legal means for preparing his defense gives the accused an opportunity to present all the necessary arguments to the court hearing the case and thus influence the outcome of the proceedings.

ISSN 2786-7900

The above is directly related to ensuring the accused's right to defense. This principle provides for the right to choose:

- to protect oneself personally;
- to use the legal assistance of a defender chosen at his own discretion;
- for free legal assistance.

A systematic analysis of the practice of the European Court in terms of providing effective legal assistance provides an opportunity to highlight the main points regarding the further creation of uniform judicial activity.

In the case of Campbell and Fell (Campbell and Fell) v. the United Kingdom dated 28.06.1984, the accused has an absolute right to defense by applying for legal aid to a lawyer of his own choice, if he has the necessary funds [1].

In turn, in the case of Zagorodniy (Zagorodniy) v. Ukraine dated March 20, 2012, the European Court recognized that the applicant's right to free choice his defense was limited, because the defender of his choice was a lawyer, but did not have a certificate of the right to practice law. In the opinion of the Court, such a limitation of the right to freely choose a defense counsel does not in itself raise the issue under subparagraph "c" of paragraph 3 of Article 6 of the Convention, since a certain legal qualification may be required to ensure effective protection of a person. But, by leaving the issue of limiting the right to free choice of counsel unresolved for a long time, the state authorities created a situation that is incompatible with the principle of legal certainty established by the Convention, and which is one of the main elements of the rule of law [1].

In another decision, the European Court indicated that if the accused has the right to free legal aid, the competent authorities are obliged not only to appoint him a lawyer, since he has the right to legal "practical and effective" and not "theoretical and illusory" assistance. However, the state is not responsible for shortcomings in the work of the appointed defender, but the competent national authorities are obliged to react if it is brought to their attention that

ISSN 2786-7900

the appointed defender failed to provide effective protection of the person and this fact is obvious (in the case of Artico v. of Italy dated May 13, 1980) [1].

Therefore, the right of every person accused of committing a criminal offense to an effective defense provided by a lawyer is one of the main features of a legal and fair trial.

Conclusion. Summarizing the above, it is necessary to emphasize that the main provisions enshrined in the Convention on the Protection of Human Rights and Fundamental Freedoms and in the decisions of the European Court of Human Rights create new international and domestic legal obligations to ensure the rights of the accused in criminal proceedings, with the aim of observing and ensuring rights and fundamental human freedoms in its territory.

Literature:

1. Handbook on the application of Art. 6 of the Convention – Right to a fair trial (criminal procedural aspect). 2017

URL: https://apladm.dn.court.gov.ua/userfiles/dovidnik_st6.pdf

2. Presumption of innocence and the Criminal Code of Ukraine. Radio Svoboda. URL: http://www.radiosvoboda.org/articleprintview/24262517.html.

3. Presumption of innocence. League–Law.

URL: http://search.ligazakon.ua/l_doc2.nsf/link1/TS000665.html.

4. Constitution of Ukraine. Information of the Verkhovna Rada of Ukraine. 1996. No. 30. Art. 41.

5. Nor V. Presumption of innocence as a principle of criminal justice and its interpretation by the European Court of Human Rights. Bulletin of Lviv University. 2011. Issue 53. P. 389-401.

6. The decision of the Constitutional Court of Ukraine in the case on the constitutional submission of the Security Service of Ukraine regarding the official interpretation of the

ISSN 2786-7900

provisions of Part 3 of Art. 62 of the Constitution of Ukraine dated October 20, 2011, No. 12-рп/2011.

URL: http://zakon1.rada.gov.ua/laws/show/v012p710-11/paran54#n54

7. Scientific and legal conclusion on the issue of violation of conventional norms at sentencing. URL: http://www.neps.ru/node/1698

8. Decision of the Constitutional Court of Ukraine in the case based on the constitutional submissions of 47 and 50 People's Deputies of Ukraine regarding compliance with the Constitution of Ukraine (constitutionality) of parts 6 and 7 of Art. 218 of the Criminal Procedure Code of Ukraine (the case on acquainting the accused and the defense with the materials of the criminal case) dated January 18, 2012, No. 1-рп/2012. URL: http://zakon2.rada.gov.ua/laws/show/v001p710-12.

COLLECTION "COLLECTION OF SCIENTIFIC JOURNAL OF THE SCIENTIFIC RESEARCH INSTITUTE OF PRE-JUDICIAL PROBLEMS INVESTIGATION 2023-2
ISSN 2786-7900
https://doi.org/10.61417/2786-7900.2023.2.4

STRENGTHENING CRIMINAL LIABILITY FOR WAR CRIMES: CONDITIONS, CAUSES, CONSEQUENCES

Babikova Olena
Director of the Research Institute of problems of pre-trial investigation, Professor of the Department of Criminal Law National Academy of Internal Affairs, DS (Law), Professor,
Kyiv, Ukraine

UDC 343.14

The article is devoted to the study of the issue of the definition of a war crime in the aspect of making changes to the law on criminal responsibility, which relate to the strengthening of criminal responsibility for the specified category of criminal offenses. The author investigates the question of the conditionality of the legislator's review of punishments and the conditions of their application for this category of criminal offenses, studies the theoretical and practical aspects of the consequences of the amendments adopted by the legislator to the Criminal Code of Ukraine.

Key words: war crimes, criminal punishment, special subject, causes, conditions, consequences

ISSN 2786-7900

Introduction. On January 24, 2023, the President of Ukraine signed the Draft Law on Amendments to the Criminal Code of Ukraine, the Code of Ukraine on Administrative Offenses, and other legislative acts of Ukraine regarding the specifics of military service under martial law or combat conditions [1].

The purpose of the draft law, as stated in the explanatory note to it, is "to improve the state of military discipline and the specifics of military service in conditions of martial law or in a combat situation, as well as to empower the Military Law and Order Service in the Armed Forces of Ukraine to combat the illegal circulation of narcotics, alcoholism in military units, combating the spread of drug addiction in military teams, maintaining the proper level of military discipline and law and order, increasing the combat readiness of military units and the ability to perform specified tasks for the protection of the Motherland."

In order to achieve this goal, the draft law proposes to add to the Criminal Code of Ukraine (hereinafter - the Criminal Code), the Code of Ukraine on Administrative Offenses (hereinafter - the Criminal Code of Ukraine), the Labor Code of Ukraine (hereinafter - the Labor Code of Ukraine) and the Law of Ukraine "On the Military Service of Law and Order in the Armed Forces of Ukraine" a number of changes, which: 1) establish stricter liability for voluntarily leaving a military unit or place of service, as well as failure to report for duty on time without valid reasons, committed by a serviceman under martial law or in a combat situation (amendments to Article 407 CC, 172-11 of the Code of Criminal Procedure); 2) the term of imprisonment for failure to comply with an order is increased (Article 403 of the Criminal Code); 3) the amount of the fine as an administrative penalty is increased in Art. Art. 172-10 – 172-12, 172-14-172-20 KUpAP, etc. [2]. The specified draft law also proposes to make changes to the Code of Labor Laws, the Code of Ukraine on Administrative Offenses, the Law of Ukraine "On the Military Service of Law and Order in the Armed Forces of Ukraine", which may complicate the process of implementation (execution) of the specified provisions.

ISSN 2786-7900

Analysis of the results of recent studies. Such domestic and foreign scientists as: P.S. Berzin, M.M. Hnatovskyi, O.O. Dudorov, O.V. Zadorozhnyi, M.V. Poddubna, M. Rubashchenko, V.Ya. Tatsii, V.I. Tyutyugin, Yu.S. Shemshuchenko and many others.

The mentioned scientists studied war crimes and provided a criminological characterization of war criminals, investigated the conditions and reasons for the commission of military criminal offenses, the issue of application and non-application of the statute of limitations of the criminal law, investigated the objective and subjective characteristics of individual war crimes, etc. The issue of increasing criminal liability for the commission of the considered category of criminal offenses was not investigated by the mentioned scientists.

The purpose of this article is to investigate the existence of grounds for strengthening criminal liability for military criminal offenses and predict the impact of the consequences of such a decision of the legislator on the state of implementation of the law on criminal liability.

Presenting main material. At the beginning of the study, I would like to note that the article will focus specifically on the group of criminal offenses contained in Chapter 19 of the Criminal Code of Ukraine "Criminal offenses against the established order of military service (military criminal offenses)". In accordance with the provisions of Art. 401 of the Criminal Code of Ukraine "Criminal offenses provided for in this section against the procedure for military service established by law, committed by military personnel, as well as conscripts and reservists during military service" [3].

In the literature, you can find such a definition - "War crime (eng. war crime) is a deliberate gross violation of the laws and customs of war.

A collective concept in international law that unites a group of serious violations of the rules of hostilities ("law of war") and the norms and principles of international humanitarian law, committed deliberately or due to gross negligence.

A war crime is one of the crimes under international law (crimes under general international law), which also include the crime of genocide, crimes against humanity, and the

ISSN 2786-7900

crime of aggression" [4]. At the same time, the mentioned definitions refer more to the crimes referred to in Chapter 20 of the Criminal Code of Ukraine "Criminal Offenses Against Peace, Human Security and International Legal Order", and not to war crimes within the meaning of Art. 401 of the Criminal Code.

As for the issue raised by us, first of all, military service in the Armed Forces of Ukraine is regulated by the Law of Ukraine "On Military Duty and Military Service" and consists in the professional activity of citizens of Ukraine suitable for it due to their health and age. associated with the protection of the Motherland, -secondly, the subjects of war crimes can be soldiers, sailors, sergeants, foremen, ensigns, midshipmen, officers, cadets and trainees of military educational institutions and conscripts during training (or inspection) or special meetings (articles 5, 29 of the Law of Ukraine "On Military Duty and Military Service" of March 25, 1992, as amended by the Law of April 4, 2006 // VVRU. - 2006. - No. 38. - Article 34).

Thirdly, conscripts are not subjects of war crimes; rank and file police officers; conscripts; senior staff of institutions for the execution of criminal punishments; non-military conscripts - persons not included in the military register or removed from it; a special staff of the state security service, persons working under an employment contract (contract) - workers and employees of the Armed Forces; employees of departmental paramilitary security; persons serving in international UN peacekeeping forces who are not part of the Armed Forces of Ukraine; students of military lyceums, schools, persons undergoing alternative (non-military) service [5].

Therefore, in accordance with the amendments made to the law on criminal liability, courts are prohibited from reducing punishments or giving suspended terms to military personnel convicted of certain types of crimes:

- disobedience (Article 402)
- failure to comply with an order (Article 403)

ISSN 2786-7900

- threats or violence against the boss (Article 405)
- voluntary abandonment of a military unit (Article 407)
- desertion (Article 408)
- voluntary abandonment of the battlefield (Article 429)

According to this law, military personnel are placed in a separate group of citizens, who are not subject to a whole series of criminal law norms that can mitigate criminal liability.

From the point of view of the theory of domestic criminal law, the law defines certain groups of citizens (persons) for whom stricter measures of a criminal-legal nature are provided for in the event of their committing criminal offenses (for example, for persons in positions of responsibility, civil servants, law enforcement officers, etc.) or, on the contrary, more lenient conditions of bringing to criminal responsibility or serving a sentence (pregnant women, elderly persons, minors, etc.). War crimes are separated into a separate section, which means that in addition to the special subject for which this section is intended, the legislator, when establishing criminal responsibility, also took into account: the subject of the commission of the criminal offense, and the specifics and types of criminal offenses, which are committed by military personnel and the punishments that may be imposed on them, and the circumstances of the commission of the criminal offense, and the place, etc.

For example, the law provides for the commission of criminal offenses in the conditions of a special period, martial law, in a combat situation (Articles 401-405 of the Criminal Code of Ukraine). Martial law is a special legal regime introduced in Ukraine or in some of its localities in the event of armed aggression or a threat of attack, a threat to the state independence of Ukraine, its territorial integrity, and provides for the granting of the necessary powers to the relevant state authorities, military command and local self-government bodies to avert a threat and ensure national security, as well as a temporary threat-induced restriction of the constitutional rights and freedoms of a person and a citizen and the rights and legal interests of legal entities with an indication of the period of validity of these restrictions (Article 1 of

ISSN 2786-7900

the Law of Ukraine "On the Defense of Ukraine" dated December 6, 1991 .). That is, this is the period when Ukraine was actually at war with a foreign state. The beginning of martial law is the day and time of declaring a state of war or an attack (aggression) on Ukraine. The end of martial law is considered the day and time of the announcement of the cessation of hostilities. If military actions actually continue after the announcement of their termination, then the actual end of such actions should be considered the end of martial law.

Combat situation - the period of stay of a military unit, unit, individual servicemen in direct contact with the enemy, preparation or conduct of battle (combat operation). A combat situation can arise both in wartime and in peacetime, for example, when repelling an attack on the state border of Ukraine.

The battlefield, as the place where a criminal offense was committed, is a part of the territory of the land, air or water space on which an armed conflict with the enemy takes place, took place or should take place.

The area of military operations includes the territory occupied by the troops during hostilities within the limits from the front edge of the front to the location of the rear units of the front.

Then a legitimate question arises: what reasons befell the legislator before making the specified decision? Indeed, the introduction of martial law in Ukraine is decisive. At the same time, according to the dispositions of the articles placed in the section under consideration, this condition, as we see, is taken into account as a circumstance that burdens responsibility (a qualifying feature). In addition, numerous regulatory acts, in connection with the fact that the norms of the specified section have a blanket character, defined all terms ty, which are used to describe the objective side of the criminal offenses under consideration, take into account all points related to the conditions and grounds for bringing persons to justice for committing the criminal offenses under consideration.

ISSN 2786-7900

Despite the information-rich space about the military events taking place in Ukraine today, about the difficult conditions for the survival of the population and directly those who defend our state from invaders, human rights cannot be forgotten and neglected, especially given the fact that most of them are otherwise limited by declared martial law. But it is obvious that within a year from the moment of its announcement in the country, changes of this kind must be justified, substantiated, urgent, necessary for society and the state. In our opinion, for the successful entry of Ukraine into the European commonwealth (community), the proposed legislative changes should bring undeniable benefits to society and inspire confidence in the future. That is, the norms under consideration must contain the expected mechanism of their implementation. This is due to the fact that legal subjects (law enforcement agencies and ordinary citizens) must anticipate their lawful behavior and count on the stability of legal regulation and perceive such changes in the current legislation as expected and extremely necessary. At the same time, in judicial practice, in court decisions, it is noted that such a situation (position) "does not prohibit making changes to legislative acts, but at the same time, the state must maintain a reasonable balance between the confidence of individuals in the existing legal order and the interests of public policy, to ensure which changes are made . Thus, according to the practice of the ECtHR, a person can count on "legitimate expectations" if they have a substantial basis in national law (paragraph 35 of the decision in the case "N.K.M. v. Hungary of November 4, 2013") [6]. Also, in the decision of the ECtHR in the case "Soldatenko v. Ukraine" (Soldatenko v. Ukraine) dated October 23, 2008, which is often cited by national courts and refers to the fact that: "The court must find out whether the national law itself complies with the Convention and, in particular, whether the general principles formulated in it or derived from it correspond to it. With regard to such principles, the Court emphasizes that when it comes to punishment, and in particular its type as deprivation of liberty, an extremely important condition is to ensure the general principle of legal certainty.

ISSN 2786-7900

Conclusions. So, in our opinion, if we proceed from the position of the principles of legality and the rule of law, which are defined not only theoretically, but also fixed at the legislative level, namely directly in the Basic Law and in the norms of the CPC (Articles 8, 9) [7] , the Criminal Code of Ukraine (Articles 1, 2) [3], etc., then neglecting the fundamental principles even during the period of martial law declared in the country is dangerous and may have unforeseen consequences. Addressing the legislator, I would like to point out that not always the strengthening of criminal liability or the application of a more severe punishment to persons will have the desired effect or achieve the set goal. In our opinion, the indication in the explanatory note to the draft in the form of: "taking into account the ongoing phase of the war and the declared state of war in Ukraine" as the reason for increasing criminal responsibility and punishment is an insufficiently substantiated position, even in view of all the events that are taking place today in country. In order to achieve a positive result in this direction, the legislator needs to approach the solution of individual issues more carefully, especially considering the specifics of the reaction of the vulnerable stratum of our society, on the provision of whose activities today depends: will Ukraine exist as a state tomorrow? At the same time, the understanding and attitude to solving this issue should be as balanced, understandable and acceptable as possible for everyone who considers or wants to consider himself a member of such a society.

Literature:

1. Draft Law on Amendments to the Criminal Code of Ukraine, the Code of Ukraine on Administrative Offenses and other legislative acts of Ukraine regarding the specifics of military service under martial law or combat conditions https://www.ukrinform.ua/rubric-society/3658648 - president-pidpisav-zakon-pro-posilenna-vidpovidalnosti-dla-vijskovih.html.

ISSN 2786-7900

2. Conclusion on the draft Law of Ukraine "On Amendments to the Criminal Code of Ukraine, the Code of Ukraine on Administrative Offenses and other legislative acts of Ukraine regarding the peculiarities of military service in conditions of martial law or in a combat environment" https://itd.rada.gov. ua/billInfo/Bills/pubFile/1575398

3. Criminal Code of Ukraine Bulletin of the Verkhovna Rada of Ukraine (VVR), 2001, No. 25-26, Article 131 https://zakon.rada.gov.ua/laws/show/2341-14#Text

4. Wikipedia https://uk.wikipedia.org/wiki/War_crime

5. Mego-Info Legal Portal No. 1 http://mego.info/ http://mego.info/material/article-401-concept-of-military-crime

6. Separate opinion of the judge of the Constitutional Court of Ukraine Kasminin O.V. regarding the Decision of the Constitutional Court of Ukraine and in the case of constitutional submissions of the Supreme Court of Ukraine regarding the conformity of the Constitution of Ukraine (constitutionality) with the provisions of part three, paragraphs one, two, four, six of part five of Article 141 of the Law of Ukraine "On the Judiciary and the Status of Judges" and the provisions of Clause 5 of Section III" Final Provisions" of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine Regarding Pension Insurance" (the case of monthly lifetime stipend for retired judges). Verkhovna Rada of Ukraine: [site]. URL: https://zakon.rada.gov.ua/go/na04d710-16

7. Criminal Procedure Code of Ukraine, Bulletin of the Verkhovna Rada of Ukraine (VVR), 2013, No. 9-10, No. 11-12, No. 13, Article 88 https://zakon.rada.gov.ua/laws/show/4651- 17#Text

COLLECTION "COLLECTION OF SCIENTIFIC JOURNAL OF THE SCIENTIFIC RESEARCH INSTITUTE OF PRE-JUDICIAL PROBLEMS INVESTIGATION 2023-2
ISSN 2786-7900
https://doi.org/10.61417/2786-7900.2023.2.5

METHODS OF PROVOCATION OF BRIBERY AND THE SUBJECT OF THE OFFENSE (ART. 370 OF THE CRIMINAL CODE OF UKRAINE)

UDC 343.9

Fedorenko Igor,
Ph.D in law,
lawyer of DEFENSORES Law Firm

The article addresses the issues of typical methods of provocation of bribery and specifics the subject of the offence with determination of essence and importance in forensic science the terms of methods of commission the offence, the subject of the offence, and then with the help of the analysis of specifics of mechanism of provocation of bribery allocate the typical methods of its commission and the subject of provocation of bribery under the Article 370 of the Criminal Code of Ukraine.

Different approaches of scientists about interpretation of the term of method of commission the offence have been researched into. The author focuses on fact that most of scientists try to represent connection between the action of offender and other elements of mechanism of offence like purpose, motive and other characteristics of offender, situation, instruments and tools which are used to achieve criminal intent.

ISSN 2786-7900

The author also emphasizes the forensic aspect of researching of methods of commission offences because this knowledge allows to build typical model of act, imagine content of subject's act, mechanism of formation of traces and as a result to determine the ways and method of investigation.

The most common methods of preparation to commit the preparation of bribery have been established. The author focuses on necessity to distinguish between the methods of provocation of bribery and adjacent criminal offences. Certain action can be treated as to bring knowingly innocent to criminal responsibility combined with artificial creation of evidence of prosecution.

Special attention is given to methods of concealment of provocation of bribery. The author agrees that they can commit both on preparatory phase and during directly its commission or immediately after commission. Moreover, such actions pursue one goal – to hide the fact of commission the crime, to hide the criminal nature of committed actions, to hide involvement of criminal person in commission offence, to hide the traces of crime.

The author comes to the conclusion that the methods of direct commission provocation of bribery appear in active form of offender's conduct and are connected with using authority and opportunities of officials.

Keywords: provocation of bribery, methods of provocation, subject of offence, mechanism of provocation of bribery

Introduction. According to the statistical data of the Office of the Prosecutor General, in 2013, 6 criminal offenses were registered under Art. 370 of the Criminal Code of Ukraine (of which a notice of suspicion was not served in any criminal proceedings); in 2014, respectively, 8 (0); in 2015 – 10 (0); in 2016 – 23(1); in 2017 – 39 (1); in 2018 – 52 (2); in 2019 – 55 (0); in 2020 – 42 (0); in January–May 2021 – 18 (0). The given statistical information emphasizes that, unfortunately, the activity of pre-trial investigation of provocations of bribery

ISSN 2786-7900

is ineffective, because in 247 criminal proceedings, only 4 reports of suspicion were served. The outline clearly indicates the need for a forensic analysis of provocations of bribery and the development of forensic recommendations for their detection and investigation in order to optimize the activities of law enforcement and judicial bodies.

Analysis of the results of recent studies. The theoretical basis of the study is the work of domestic and foreign scientists in the field of criminology, criminal process and the theory of operational and investigative activity, who considered the conceptual issues of detection and investigation of crimes in general. Among them: O.P. Babikov, R. S. Belkin, P. D. Bilenchuk, D. A. Bondarenko, A. F. Volobuev, A. E. Golubov, M. V. Danshin, V. A. Zhuravel, A. V. Ishchenko, L. M. Kazanskoa, N. I. Klymenko, I. I. Kogutych, A. V. Kurman, and others.

The mentioned authors did not deal with the issue of clarifying the content of typical methods of provocation of bribery and the specifics of the subject of the considered criminal offense.

The purpose of this article is to research the content of typical methods of provocation of bribery and to clarify the specifics of the subject of the criminal offense provided for in Art. 370 of the Criminal Code of Ukraine.

Presenting main material. There is no doubt that such an element of the forensic characterization of provocation of bribery as methods of its commission is informative and important in an applied sense. At the same time, based on the content of Part 1 of Art. 370 of the Criminal Code of Ukraine, methods of incitement to commit bribery are directly related to an offer, promise or provision of an unlawful benefit, which means the existence of a close relationship between the methods of committing the crime and the object of the offense. That

ISSN 2786-7900

is why we consider it necessary to consider the specified elements of forensic characteristics together.

We will begin by clarifying the content of typical methods of provocation of bribery and the features of the subject of the offense by establishing the essence and meaning in forensic science of the concepts "methods of committing a criminal offense", "subject of offense", and later, with the help of an analysis of the specifics of the mechanism of provocation of bribery, we will distinguish the typical methods of its commission and the subject encroachment.

The methods of committing a criminal offense are a kind of external manifestation of the skills and knowledge of the criminal, which leads to leaving traces in the environment. Being the core of the crime mechanism, it shows the qualitative side of the criminal act, its essence, which is the main action aimed at achieving a criminal result [1, p.172], because, as O. O. Posashkov notes, "an illegal act cannot to be committed by itself, it always manifests itself in certain actions or, on the contrary, inaction of the subject who commits it. Therefore, the nature, content and sequence of such behavioral acts arouses keen interest in forensic science" [2, p. 57]. This emphasizes the forensic aspect of studying the methods of committing illegal acts, since their knowledge allows you to build a typical model of the act, to imagine the content of the subject's actions, the mechanism of the formation of traces, and as a result to determine the ways and methods of investigation [3, p. 110]. That is why it is important for criminology, based on the obtained information about the way the crime was committed, to determine the trace picture of this event, to obtain data about the identity of the criminal, about the object of the criminal offense, about the circumstances of the crime, etc. [4, p. 250], because this will allow for the formation of recommendations for the prevention, detection and investigation of criminal offenses [5, p. 149], to develop tactical recommendations regarding the conduct of investigative (search) actions, to predict the mechanism of committing a specific type of criminal offense, to distinguish similar compositions of criminal offenses [6, p. 84].

ISSN 2786-7900

When defining the concept of the method of committing a criminal offense, one should be aware that it not only reflects to the greatest extent the form of the external manifestation of the act, but also indicates individual features inherent only to it [7, p.36]. As noted in the scientific literature, information about the methods of committing an illegal act is a source of patterns of evidence, reflecting the process of achieving the goal [8, p. 12]. It is not for nothing that O. V. Pchelina notes that the method of committing a crime as a reflection of an illegal act in the external environment gives an idea of the process of preparation, direct commission and concealment of the crime [9, p. 291].

M. I. Yenikeev interprets the method of committing the crime as a system of modes, actions, operational complexes determined by the purpose and motives of actions, mental and physical qualities of a person, in which the psychophysiological and characterological features of a person, his knowledge, skills, skills, habits and attitude to various manifestations of reality are revealed [10, p. 105]. A. N. Khalikov also proposes to understand the methods of committing a criminal offense as a system, which, in his opinion, includes individual techniques and methods of illegal actions, enshrined in criminal law and aimed at achieving a criminal result with the use of selected tools and means in the conditions of a specific material situation and subject environment. In fact, in the given interpretations of the method of committing a criminal offense, scientists tried to depict the relationship between the actions of the criminal and other elements of the mechanism of the offense, namely: with the goals, motives and other features of the criminal's personality, the environment, tools and means used to achieve the criminal intent. Moreover, A. N. Khalikov limits the offender's system of actions exclusively to the objective side of the criminal offense defined in the law on criminal liability [11, p. 48]. However, from the point of view of criminology, methods of illegal action, including provocation of bribery, include not only actions (inaction) that are necessary and sufficient for their criminal qualification, but all actions that reflect the process of making a

ISSN 2786-7900

decision to commit an offense, preparation to him and the implementation of measures aimed at the implementation of the assigned tasks, as well as indicate the attitude of the person to the committed actions throughout the entire process of their commission. Quite often, they try to reveal the essence of the methods of a criminal offense by pointing out that they are acts of behavior, techniques, operations, etc., united for a certain purpose, which determine the order, methods, and process of their application [12, p. 225]. At the same time, some scientists clarify the nature of such actions, such as those that are legally defined and structured [7, p. 37]. In our opinion, it is correct to distinguish two approaches to the interpretation of the concept and content of the methods of committing a criminal offense - in a narrow and broad sense. In the first case, the specified term is reduced exclusively to how a socially dangerous act is committed [13, p. 71], and in its essence fully corresponds to the criminal law definition of methods. In the second case, we are talking about a set of actions aimed at preparation, direct execution and concealment [14, p. 39]. The last approach to the interpretation of the method of commission is the most informative in the forensic aspect. After all, "by the method of committing a crime in the forensic sense, it is expedient to understand the objectively and subjectively determined system of behavior of the subject before, at the time and after the commission of the crime, which leaves various kinds of characteristic traces on the outside and with the help of forensic means and techniques allows you to get an idea about the essence of the event that took place, the peculiarity of the criminal behavior of the offender, his individual personal data and, accordingly, to determine the most optimal methods of solving the tasks of solving the crime" [15, p. 68].

Taking into account the above, we believe that typical methods of provocation of bribery are a set of actions united by a common plan and determined by the status of the criminal, the powers and capabilities of the official and his motivation, preparatory actions, direct incitement

ISSN 2786-7900

to an offer (acceptance of an offer), a promise or providing (receiving) an illegal benefit and exposing a person, as well as concealing the specified acts.

Indeed, in order to ensure the achievement of a positive result, any activity must be carefully prepared. Illegal activity, in particular related to the provocation of bribery, is no exception. The immediate commission of a criminal offense is preceded by a decision to commit a provocation of bribery and the taking of all measures aimed at ensuring the possibility of realizing one's illegal plan.

Based on empirical data on the investigation of bribery provocations, it was established that in 91.9% of cases, the commission of the specified criminal offenses involves preliminary preparation. In particular, the most widespread methods of preparation for committing bribery provocation are the selection of victims (100%); determination of methods, tools and means of incitement to offer, promise or provide an unlawful benefit or accept an offer, promise or receive such a benefit (100%); collecting the necessary information, in particular compromising information for blackmailing a person (92%); entering into a conspiracy with other persons to commit acts aimed at inciting a person to commit offenses related to the offer, promise or provision (receipt) of an unlawful benefit, and its exposure (87.5%); planning of illegal activity (51.8%). As for the methods of direct provocation of bribery, it is important to note that they are somewhat similar to of related actions, such as inciting other criminal offenses or legitimate actions of law enforcement officials. In the scientific literature, there are still lively discussions about the expediency of decriminalizing the provocation of bribery, focusing on the fact that this is a way of fighting criminal wrongdoing, especially corruption. At the same time, opponents of such a position emphasize the inadmissibility of using previously illegal levers of influence when confronting criminal offenses, such as creating favorable conditions for committing illegal acts. After all, a person who incites another to commit a crime in order to capture him at the time of commission and bring him to justice

ISSN 2786-7900

commits an act that is not only incompatible with the idea of the normal functions of authorities, but also contains all the signs of the concept of incitement to a crime [16, p. .349]. In this context, the following statement deserves attention - "fighting crime with criminal methods does not befit a democratic legal state" [17, p. 484].

It is necessary to distinguish methods of provocation of bribery from related criminal offenses. In particular, as O. O. Dudorov points out, the disposition of Art. 370 of the Criminal Code of Ukraine does not cover cases of throwing an object allegedly as an illegal benefit into a person's office or car, handing over this object to a person by deception, transferring money to a person's bank account without notifying him of this, underestimating the value of the service provided, as reported by the person to whom it was provided , does not know, etc. Such actions can be regarded as bringing a known innocent person to criminal responsibility, combined with the artificial creation of evidence for the prosecution, or as a knowingly false report of the commission of a crime, combined with the artificial creation of evidence for the prosecution, and qualify, accordingly, under Part 2 of Article 372 and Part 2 of Art. 383 of the Criminal Code of Ukraine [18, p. 81].

The methods of directly perpetrating provocation of bribery find their expression in the active form of the criminal's behavior and are associated with the use of the powers and capabilities of an official. In other words, as O. V. Us points out, "it is necessary to identify the connection between the act of an official and his official activity, which is manifested in the fact that such an act: a) is always determined by the official position or official powers of the subject and b) are committed contrary to the interests of the service, the interests of a legal entity under private law [19, p. 67]. The specified feature in the method of direct commission distinguishes provocation of bribery from other criminal offenses.

ISSN 2786-7900

Since provocation of bribery is a type of criminal offense in the field of official activity, the methods of committing it are somewhat similar to the methods of committing official crimes. For example, we are talking about such methods as open disregard of normative legal acts that regulate the activity of an official; use of official position to obtain benefits (both material and moral); use of official powers contrary to the interests of the service; violation of the rights and legitimate interests of citizens and the state by failing to fulfill their official obligations [20, p.7]. The above fully reflects the essence of the methods of direct provocation of bribery, because, by committing the specified act, an official uses his powers and opportunities determined by the status and authority of the position held, violates the requirements of the law, acts against the interests of the service, in particular in law enforcement agencies, and violates the rights of persons who incites bribery.

Typical ways of directly perpetrating the provocation of bribery, according to the generalized results of the survey of law enforcement officers, are: 1) persuasion of a person to make an offer (accept an offer), promise or provide (obtain) an undue benefit by persuasion (2.7%), insinuation (57.1 %), giving advice and recommendations (70.5%) or 2) coercion by giving instructions (12.5%), deception (22.3%), blackmail (10.7%), threats (7.1%) .

In some cases, incitement to bribery occurs with the help of the commission of another criminal offense, in particular, bringing a known innocent person to criminal responsibility (Article 372 of the Criminal Code of Ukraine), which is expressed, as an example, in the artificial creation of prosecution evidence, other falsification. For example, on February 8, 2021, the applicant turned to the prosecutor's office with a statement about the crimes provided for in Part 2 of Art. 370, Part 2 of Art. 372 of the Criminal Code of Ukraine, committed in the opinion of the applicant against him by PERSON_2 and law enforcement officers, due to the provocation of bribery by the specified persons and the prosecution of an innocent person in connection with this, combined with the accusation of committing a serious crime and the

ISSN 2786-7900

artificial creation of evidence [Case No. 591/965/21. Proceedings No. 1-ks/591/483/21. Materials of the Summer District Court of Sumy].

Influence on a person with the aim of persuading him to commit a criminal offense related to offering (accepting an offer), promising or providing (receiving) an unlawful benefit, may be carried out directly during personal meetings or indirectly by means of correspondence using messengers from social networks, in mobile applications, forwarding messages to e-mail addresses, etc.

The methods of exposing the actions of a person who offered, promised or gave an illegal benefit or accepted an offer, promise or received such a benefit are their recording using technical means (75.9%), applying to law enforcement agencies with a corresponding statement (86.6%) , conducting investigative (search), covert investigative (search) actions, other procedural actions (98.2%).

Regarding the methods of concealing the provocation of bribery, it is worth agreeing that they "... can be committed both at the stage of preparation and during their immediate commission or immediately after their commission. At the same time, such actions pursue a single goal - to hide the fact of committing a crime; to hide the criminal nature of the committed acts; to hide the involvement of the criminal in the commission of a criminal offense; to hide the traces of the crime" [21, p. 215]. In fact, the implementation of actions to conceal the provocation of bribery is one of the ways of countering the investigation of the specified criminal offenses, since in this way "concealment, destruction, masking or falsification of the traces of the crime and the criminal and their carriers" takes place.

The analysis of the materials of the studied category of criminal proceedings shows that in 45.3% of cases, actions to hide the provocation of bribery are not used, because the criminals

ISSN 2786-7900

are convinced that the title of an official, official powers and related opportunities give them a certain inviolability, security and allow them to avoid criminal prosecution. The main ways of concealing the provocation of bribery are the use of corrupt connections (7%), disguised as legitimate actions (47.7%).

Along with the typical methods of provocation of bribery, the subject of the offense must also be considered, since the specified criminal offenses consist in inciting a person to commit illegal acts related to an offer, promise or provision (receipt) of an unlawful benefit, followed by its exposure. This is explained by the fact that "the subject of the offense and legislative regulation in criminalistic characteristics are important, since it reflects the essence of crimes and makes up the features of their commission" [22, p. 203].

The object of encroachment (the object of the crime) usually means materialized objects with which the commission of illegal acts is connected. In particular, in criminal law, one can find the interpretation of the subject of the crime as any things of the material world, with certain properties of which the law on criminal responsibility associates the presence in the actions of a person of signs of a specific composition of the crime [23, p. 93]. At the same time, the subject of the crime includes things of the material world, due to the influence of which the guilty person causes damage to certain social relations. However, taking into account the changes in criminal illegality, including the corruption orientation, increasingly among scientists there are positions on the need to include not only material objects in the subject of crime, but also other, non-material objects. The latter have an external appearance or can acquire it, and are also perceived by human senses or with the help of special technical means. That is, "the subject of criminal trespass can be both any material object and that which is characterized as intangible and constitutes a criminal interest" [24, p. 412].

ISSN 2786-7900

As for the subject of the offense of bribery provocation, it can be both a materialized and an immaterial object. This follows from the content of the norms of the law on criminal liability.

Thus, the subject of encroachment for acts of corruption, as indicated by O.V. Us, is according to the note to Art. 3641 of the Criminal Code of Ukraine "illegal benefit - money or other property, advantages, benefits, services, intangible assets, any other benefits of an intangible or non-monetary nature that are offered, promised, given or received without legal grounds" [19, p. . 67; 172]. Accordingly, in accordance with the legal definition, the following signs of improper benefit can be distinguished: 1) improper benefit can be: a) money, b) benefits, c) privileges, d) services, e) intangible assets, e) other property; 2) these items are promised, offered, given or received without legal grounds.

At the same time, as K. G. Bykov emphasizes, a systematically forming feature of corruption crimes, as well as the provocation of bribery, is that such items are obtained by an official without legal grounds [25, p. 11]. Moreover, in the law on criminal liability, the content of unlawful benefit is indicated by listing the values (benefits) that are types of such benefit; a list of possible actions with these values; illegality of such actions; emphasizing its property nature (its value in all cases can be expressed in monetary terms). IN in the context of the above, it can be seen that the methods of provocation of bribery should be considered in an inextricable connection with the object of the offense, in particular, unlawful gain, since "in addition to clarifying the essence of the crime, it is difficult to correctly establish all those social relations to which the criminal offense is aimed. After all, the effect of the criminal act on the subject, the method of this act, as well as the physical (or intellectual) change of the subject along with other signs of the act allow in many cases to draw a conclusion about the nature of the crime, its social danger."

ISSN 2786-7900

Separately, it should be emphasized that the unlawful benefit, being the object of the offense, is at the same time a means of committing the mentioned criminal offenses. In particular, as Yu. O. Chernega points out, "illegal benefit is not the subject of bribery in the proper sense of the term, since under active bribery it is a means of committing a crime, and under passive bribery it is the product of a person's criminal activity" [26, p. 116].

Conclusions. So, according to the results of summarizing the materials of criminal proceedings on the provocation of bribery, in 94.2% of cases, the unlawful benefit is money in cash, 3.5% - other property, 2.3% - advantages, benefits and services. The object of encroachment (illegal benefit) is a means of perpetrating provocation of bribery, which indicates its connection with the methods of perpetration.

Typical methods of bribery provocation can be defined as a set of things united by a common plan and determined by the status of the criminal, the powers and capabilities of the official and his motivation, preparatory actions, direct incitement to offer (acceptance of an offer), promise or giving (receiving) illegal benefits and exposure of the person, as well as concealment of the specified acts.

The specified methods of provocation of bribery are presented with information on the methods of preparation, direct commission (incitement to offer (acceptance of an offer), promise or giving (receiving) an undue benefit and exposing a person) and concealment of the specified actions. The methods of direct provocation of bribery find their expression in the active form of the criminal's behavior and are associated with the use of the powers and capabilities of an official. The methods of provocation of bribery are inextricably linked with the object of the offense. In particular, unlawful gain, being the object of encroachment, is at the same time a means of committing the mentioned criminal offenses. In 94.2% of cases, the

ISSN 2786-7900

unlawful benefit is money in cash, 3.5% - other property, 2.3% - advantages, benefits and services.

Literature:

1. Kazanska L.M. Forensic characteristics of crimes related to corruption. Scientific Bulletin of the International Humanitarian University. Ser.: Jurisprudence. 2014. No. 10-2. Volume 2. P. 169–172.

2. Posashkov O.O. Methodology of investigation of interventions in the activity of a forensic expert: diss. ... candidate law Sciences: 12.00.09. Kharkiv, 2020. 200 p.

3. Zh. V. Udovenko Forensic science: a summary of lectures / by general ed. Galagana V. I. Kyiv: Center for Educational Literature, 2016. 320 p.

4. Title I. Yu. Establishing the method of committing a criminal offense during a pre-trial investigation. Scientific and informative bulletin. RIGHT. 2016. No. 1 (13). P. 247–252.

5. Voychishena M. V. Forensic characteristics as a scientific category of the methodology of investigation of criminal offenses. Legal journal of Donbass. 2018. No. 3 (64). P. 146–152. DOI:10.32366/2523-4269-2018-64-3-146-152.

6. Danshin M. V. Classification of methods of concealing crimes in criminalistics: dissertation. ... candidate law Sciences: 12.00.09. Kh., 2000. 210 p.

7. Pyaskovsky V.V. The method of committing the crime as an element of the forensic characteristics of violent crimes against the sexual integrity of minors. Scientific Bulletin of the National Academy of Internal Affairs. 2016. No. 1 (98). P. 36–46.

ISSN 2786-7900

8. Shaver B. M. Criminology. Methods of investigation of certain types of criminals. M., 1939. 948 p.

9. Pchelina O. V. Concept and characteristics of criminal technologies in the sphere of official activity. Bulletin of E. O. Didorenko Luhansk State University of Internal Affairs. 2018. Issue 2 (82). P. 290–297.

10. Enikeev M. I. Legal psychology: textbook. Moscow: NORMA, 2001. 624 p.

11. Khalikov A.N. Obligatory crimes: characteristics, investigation, prevention (criminological aspect): monograph / sub. ed. Honored Lawyer of the Russian Federation, Dr. law Sciences, Prof. V. I. Komissarova. M.: Yurlytinform, 2012. 312 p.

12. Dubno T. V. Correlation between the method of committing a crime and the criminal act. Law forum. 2011. No. 4. P. 224–228. URL: http://www.nbuv.gov.ua/old_jrn/e-journals/FP/2011-4/11dtvtzd.pdf.

13. Kudryavtsev V.N. The objective side of the crime: monograph. M.: Gosyurizdat, 1960. 244 p.

14. Vasiliev A.N., Mudyugin G.N., Yakubovych N.A. Planning the investigation of a crime / under the editorship. A. S. Golunsky. M.: Gosyurizdat, 1957. 199 p.

15. Criminology: a textbook / Ed. N. P. Yablokova. 4th ed., revised. and additional M.: Norma: I NFRA-M, 2013. 752 p.

16. Tagantsev N.S. Russian criminal law. Lectures. Common part: in 2 vols. M.: Nauka, 1994. Vol. 1. 380 p.

17. Fries P. L. Selected works. Ivano-Frankivsk: Foliant, 2014. 652p.

ISSN 2786-7900

18. Dudorov O. O. Criminal and legal aspects of bribery provocation. Legal scientific electronic journal. 2016. No. 1. P. 79–85.

19. Us O. V. Provocation of bribery: analysis of the composition of the crime and the issue of qualification. Scientific Bulletin of the International Humanitarian University. Ser.: Jurisprudence. 2015. No. 16. Volume 2. P. 66–70.

20. Hanko A. V. Methodology of the investigation of criminals committed with the use of official persons of their service powers in the conditions of information uncertainty: author's review. diss. ... candidate law Sciences: specialist 12.00.09. Irkutsk, 2006. 23 p.

21. Pchelina O. V. Theoretical principles of formation and implementation of crime investigation methods in the sphere of official activity: diss. ... Doctor of Law. Sciences: 12.00.09. Kharkiv, 2017. 571 p.

22. Luzhetska O. R. The subject of criminal trespass in the system of forensic characteristics of extortion. Scientific bulletin of the National University of the State of Ukraine (economics, law). 2014. No. 2 (65). P. 202–207.

23. Criminal law of Ukraine. The general part: textbook / Bazhanov M.I. etc. 2nd ed., revision. and additional K.: Yurinkom Inter, 2005. 480p.

24. V. M., Yurkiv R. R. The subject of encroachment on bribery of medical workers. Legal scientific electronic journal. 2020. No. 2. P. 410–415. DOI https://doi.org/10.32782/2524-0374/2020-2/107.

URL: http://lsej.org.ua/2_2020/109.pdf

ISSN 2786-7900

25. Bykov K. G. To determine the subject of a corruption crime. Law forum. 2017. No. 2. P. 10–15.

URL: https://dspace.univd.edu.ua/xmlui/handle/123456789/2097

26. Chernega Yu. O. Liability for bribery under the criminal law of Ukraine: dissertation. ... candidate law Sciences: 12.00.08. Lviv, 2019. 223 p.