

Release from criminal liability for corruption-related offences: concepts, grounds and conditions



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Abstract. This article examines the essence and meaning of the basic concepts of the institute of the exemption from criminal liability for corruption crimes are revealed. The three-pronged essence of the grounds for such exemption is highlighted. The approaches to the analysis of goals, objectives and grounds for the use of special types of exemption from criminal liability as one of the areas of implementation of state anti-corruption policy are also substantiated. The results of such research are consistent with the principles of criminal law and generally accepted norms of international law and confirmation of the implementation of the anti-corruption strategy of Ukraine.

Keywords: *corruption crimes, criminal liability, "grounds", "conditions", the three-pronged essence of the grounds for exemption (normative, factual and procedural).*

Introduction

The relevance of the theme of the study is related to the change in the direction of world and national criminal policy in the direction of the primary protection of the rights, freedom and interests of the victim, individualization of criminal responsibility and punishment.

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and interests of the victim, individualization of criminal responsibility and punishment.

New forms and methods of state response to a crime committed to prevent or reduce the

consequences of a crime are looked for. Considerable attention has been paid to changes and additions to the institute of release from criminal liability in the new criminal legislation. The existence in the CC of Ukraine of special cases of release from criminal liability is substantiated by the desire to compromise with the offender in order to achieve a more significant result than bringing the criminal responsibility of the perpetrator.

Wider scope of factors, which are taken into account in determining the legal consequences of a crime, is comprised in the modern practice. It includes the expression of will and the personal qualities of the offender, manifested not only during the commission of the crime, but also after it. The economic and legal situation prior to the commission of the crime and other factors are taken into account. The rules of law, which encourage citizens to be active in the prevention, disclosure and investigation of crimes, improves.

The purpose of the article.

In these circumstances, the most actual is the formation of reliable theoretical and methodological foundations of such an encouraging institute as special types of exemptions from criminal liability for corruption crimes. The solving of this question is necessary to assess the meaning of these provisions to be an element of the national criminal-legal justice system, clarifying the directions of development of the criminal anticorruption policy of the country.

Of course, the grounds and conditions have utmost importance for the exemption from criminal liability for corruption crimes, since the direct application of these norms directly depends on these basic categories.

Analysis of recent research and publications.

The problems in determining the grounds and conditions for exemption from criminal liability were paid attention by domestic and foreign scholars such as Kh. Alikperov, Yu. Baulin, V. Horzhey, E. Dadakayev, V. Yegorov, O. Zhytnyi, V. Kyshnaryov, I. Petrukhin, V. Tertyshnyk, D. Filin, P. Khryapynskyi and etc.

One of the forms of counteraction to crime was the application of not only measures that change or supplement the punishment, but also those that absolutely exclude criminal prosecution at the beginning of the XX century and at the beginning of the XXI century. For example, the alternative is to release a person

who committed a crime from criminal liability for this crime.

Presentation of the main research material.

There are different views on the definition of exemption from criminal liability in the theory of criminal law. So, O. O. Dudorov defines it as a refusal of the state in the person of the competent authorities from the conviction of the person who committed the crime without using criminal-law means of compulsory nature, regulated by criminal and criminal-procedural law.

S. S. Yatsenko formulates the concept of exemption from criminal liability to be an implemented in accordance with the criminal and criminal procedure law denial of the state in the person of the relevant court from the application of criminal law measures to those people who committed crimes.

Yu. V. Baulin's opinion is that, the refusal of the state, which is provided by the law, from the person's appliance who committed a crime, restrictions on certain rights and freedoms determined by the CC of Ukraine. O. F. Kovitidi understands the legal consequences of a crime envisaged by law, which consists of the country's refusal to condemn the person who committed the crime and without using criminal-law measures that may be imposed on her in connection with her conviction.

The exemption from criminal liability is dismissal of a person from a negative assessment of his conduct in the form of a conviction by S. H. Kelina.

N. F. Kuznetsova explains this legal appellation as the release of a person who committed a crime, but then lost his public danger due to a number of circumstances specified in the criminal law.

The objective necessity of the existence of this institution in legal science is explained in different ways. The basis of exemption from legal liability is its humanization in the general theory of law; institute of dismissal from liability see as a means of implementing the principle of individualization in the legal mechanism.

As a manifestation of the principle of humanism, the Institute for the exemption from criminal liability is also considered in the science of criminal law.

It seems to be the humanism as one of the principles of criminal law and to be individualization as a component of the

principle of justice, given the variety of forms of expression, cannot be her explanation for the refusal of the country to condemn a person for the crime committed by this person.

Kh. D. Alikperov notes that all the norms of the investigated institute are a normative reflection of the idea of a compromise in the concept of modern criminal-legal struggle against crime.

It is difficult to argue with it, but the idea of a compromise in the fight against crime is also being implemented in other criminal law institutes (for example, in special rules for the imposition of a punishment when entering into a pre-trial agreement about cooperation, in the institute of exemption from punishment). In addition, the compromise, dictated not by material, but by other (processual, operational-searchetive, etc.) reasons, does not always give a positive effect.

In addition, the compromise, dictated not by material, but by other (processual, operational-searchetive, etc.) reasons, does not always give a positive effect.

Therefore, each of the analyzed concepts of exemption from criminal liability for crimes in general has its rational basis, but there is a need to define this concept directly for corruption crimes. The difference in understanding is related to the changes that have already been made to the CC of Ukraine for the implementation of international obligations to combat corruption (in particular, the fixing of the list of articles related to corruption crimes and the definition of restrictions on the application of encouraging norms for them of the general part and foreseeing criminal-law measures concerning legal entities, etc.).

So, the exemption from criminal liability for corruption crimes is regulated by criminal and criminal-procedure legislation, the refusal of the state through the competent authorities from the appointment of a person who committed a corruption offense, punishment and the imposition of criminal legal measures against legal entities.

The considerable experience is already accumulated considerable experience in the application of the norms that provide for the release of a person from criminal responsibility in the science of criminal law, but significant changes in anti-corruption legislation have made many innovations in the norms of the Criminal Code of Ukraine.

The considerable experience in applying the norms that provide for the exemption of a person from criminal liability has already been accumulated in the science of criminal law, but significant changes in anti-corruption legislation have made many innovations in the norms of the CC of Ukraine.

The above changes are related to the fact that since October 2014 a number of extremely important laws have been passed which can be considered the largest legislative reform in the field of combating corruption during the existence of a new independent Ukrainian state, such as: Laws of Ukraine "On Amendments to the Criminal and Criminal Procedural Codes of Ukraine Regarding the Inevitability of Punishment for Certain Crimes Against the Basics of National Security and Corruption Crimes (the Law on conviction in absentia)" (dated 07.10.2014), "On the Principles of State Anti-Corruption Policy in Ukraine (Anti Corruption Strategy) for 2014–2017"; "On the National Anti-Corruption Bureau of Ukraine"; "On Prevention of Corruption"; "On Amending Certain Legislative Acts of Ukraine Concerning the Definition of Final Beneficiaries of Legal Persons and Public Figures"; "On Prevention and Counteraction to the Legalization (Laundering) of the Income derived by Terrorism, Financing of Terrorism and Financing the Proliferation of Weapons of Mass Destruction" (dated 14.10.2014), "On Amendments to Certain Legislative Acts of Ukraine to Ensure the Activities of the National Anti-Corruption Bureau of Ukraine and the National Agency for the Prevention of Corruption" (dated 02.02.2015).

These laws introduced radical changes to some articles of the Criminal Code of Ukraine; in particular, the concept of "corruption crimes" was introduced at the legislative level in the note to Art. 45 of the CC of Ukraine.

The opportunities to investigate at their levels special types of exemption from criminal liability for corruption crimes appeared for scientists and practitioners for the first time.

Of course, the very scientific and practical analysis is the most valuable and significant, however, taking into account the insignificant time elapsed since the introduction of most of the proposed changes to the law in effect and the law coming into force (in particular, the term "corruption crimes" dated 02.02.2015) similar results and generalizations are only in

perspective. However, now a scientifically substantiated study of such basic categories of exemption from criminal liability as the grounds and conditions will allow us to determine the main aspects of which the application of these norms depends.

It states that corruption crimes in accordance with this Code are crimes provided by articles 191, 262, 308, 312, 313, 320, 357, 410; in the case of their commission by misuse of official position, as well as crimes provided for in articles 210, 354, 364, 364-1, 365-2, 368-369-2 of this Code, in the note to Art. 45 of the CC of Ukraine "Exemption from criminal liability in connection with effective repentance".

Most of the above-mentioned articles of the CC of Ukraine don't provide for special grounds and conditions for exemption from criminal liability. Such articles of the Criminal Code of Ukraine are art. 191 "The misappropriation, embezzlement or possession of property by way of abuse of office"; art. 262 "The abduction, misappropriation, extortion of firearms, ammunition, explosives or radioactive materials or possession of them by fraud or abuse of office"; art. 308 "The abduction, misappropriation, extortion of narcotic drugs, psychotropic substances or their analogues or taking them by possession by fraud or abuse of office"; art. 312 "The abduction, misappropriation, extortion of pre-cursors or possession of them by fraud or abuse of office"; art. 313 "The abduction, misappropriation, extortion of equipment intended for the manufacture of narcotic drugs, psychotropic substances or their analogues, or taking possession by fraud or abuse of office and other unlawful actions with such equipment"; art. 320 "The violation of established rules of circulation of narcotic drugs, psychotropic substances, their analogues or precursors"; art. 357 "The abduction, misappropriation, extortion of documents, stamps, seals, seizure by fraud or abuse of office, or damage to them"; art. 410 "The abduction, misappropriation, extortion by a servicemen of weapons, ammunition, explosives or other military assets, means of transportation, military and special equipment or other military property, as well as possession of them by means of fraud or abuse of office."

Part two of the note of art. 45 of the CC of Ukraine contains the majority of articles,

which also don't provide for special grounds and conditions for the above-mentioned exemption the guilty, in particular: art. 210 "The misuse of public funds, incurring the expenditure of budget or providing loans from the budget without established budget appointments or exceeding of them"; art. 364 "The abuse of power or office"; art. 364-1 "The abuse of powers by a public official of a legal entity of private law irrespective of the organizational and legal form"; art. 365-2 "The abuse of powers by an official who provides public services"; art. 368 "The adoption of an official offer, promise or obtaining unlawful benefit by an office"; art. 368-2 "The illicit enrichment".

Art. 354 "The bribing a worker at enterprises, organizations and institutions" which is specified in the note of Art. 45 CC of Ukraine (in fact), directly contains the grounds and conditions for exemption from criminal liability for corruption crimes.

Thus, in part 5 of Art. 354 of the Criminal Code of Ukraine states that a person who has offered, promised or obtained unlawful benefit is exempted from criminal liability for crimes stipulated by articles 354, 368-3 "The bribing an office of a legal entity of private law irrespective of the organizational and legal form"; 368-4 "The bribing an official who provides public services"; 369 "The offer, promise or obtaining unlawful benefit given to an office"; 369-2 "Abuse of influence" of this Code, if after offering, promising or obtaining unlawful benefit, the person voluntarily informed the law enforcement agency (before receiving other sources of information) about this crime and actively contributed to the disclosure of an offense committed by a person who obtained unlawful benefits or accepted her offer or promise.

The specified exemption does not apply if the offer, promise or unlawful benefit were committed in relation to persons specified in part 4 of art. 18 of this Code.

So a person cannot be exempted from criminal liability if the offer, promise or unlawful gain has been committed against officials who are officials of foreign countries ((persons who occupy positions in the legislative, executive or judicial branches of a foreign state, including jurors, other persons who carry out the functions of the state for a foreign state, in particular for a state body or state enterprise), by foreign arbitration judges, persons authorized to resolve civil,

commercial or labor disputes in foreign countries in an order, alternative judicial, officials of international organizations (by employees of an international organization or by any other persons authorized by such organization to act on its behalf), as well as by members of international parliamentary assemblies, to which Ukraine is a member, and by judges and officers of international courts.

Speaking about the general characteristics of the exemption from criminal liability for corruption crimes, the grounds and conditions of application of this legal institution are subjects to study, first of all. In view of this, let's dwell on the formulation of the essence of the concepts of "ground" and "condition".

An academic explanatory dictionary defines the basis as the main thing, based on what is based on something; a scientific basis as something that explains, justifies actions, behavior, etc. somebody.

Note that in the legal sense, in relation to legal liability, the basis has a triune essence: normative, factual and procedural.

The simultaneous presence of all these components is a prerequisite for the application of the exemption of a person from legal (in our case, criminal) liability.

The normative basis – is the presence of a rule of law, which provides for the possibility of exemption from criminal liability.

The actual basis – is the availability of conditions for exemption from the offense (actually committed deed).

The procedural basis – is the availability of implementing law, which specifies the general requirements of incentives into the legal rules of criminal law (contains conditions), determines the procedure for exemption from criminal liability.

The condition is inextricably linked with the essence of the grounds for exemption from criminal liability. The condition is a thing, which forms the cause or creates the possibility of its action, and this connection is conditioned with the consequence; the condition is a requirement, a proposal put forward by one party, negotiating about something, as well as when entering into an agreement, a contract, by an academic explanatory dictionary.

Under the notion of "cause" understand the thing that determines directly, generates another thing – the consequence.

Taking into account the clarified interpretation of these basic concepts of "grounds" and "conditions" for exemption from criminal liability for corruption crimes, we can outline their general characteristics:

- the normative basis is availability, where the incentive legal rules of criminal law is contained in art. 354 of the CC of Ukraine;

- the factual basis is the presence taken together provided for conditions for exemption from criminal liability in Part 5 of Art. 354 of the Criminal Code of Ukraine 1) after a proposal, a promise or an unlawful benefit; 2) before obtaining information about this crime from other sources by the relevant body; 3) a voluntary of crime report; 4) active assistance in disclosing a crime;

- the procedural basis is the norms of law, in particular the CPC of Ukraine, which determine the procedure for exemption from criminal liability.

Speaking about the grounds for exemption from criminal liability, there are many controversial views about the conditionality of their existence in criminal law among scientists. Yu. V. Baranov considers the general ground for exemption from criminal liability "something positive that happened in the subject, which is enshrined in the legal formulation".

In this, the author specifies that the general basis for all types of exemption from criminal liability is the loss former public danger of the person committed the crime, although it is only mentioned in Art. 48 of the CC of Ukraine (exemption from criminal liability in connection with the change in the situation).

N. F. Kuznetsova notes, that the general basis for all types of exemption from criminal liability is the loss former public danger of the person committed the crime. In connection with this fact, there is no need to apply criminal liability measures to person. Indeed, the public danger of a person is the objective quality, a category that, under the influence of objective or subjective circumstances, can identify a certain change. So, if the person who committed the crime, after that, made a certain positive post-criminal behavior on restoring the primary (criminal) status of the objects of the criminal law (paid wages, scholarships, pensions or other payments; paid taxes, fees, other obligatory payments, and also compensated the damage inflicted by the state on their untimely payment; handed

in weapons to the authorities, military supplies or explosive devices, etc.), then obviously the public danger of this person is changing.

Most scholars are looking for the basis of exemption in a public dangerous act committed or in the person who committed it, and they see the person of an act in a small public danger or person. Thus, K. K. Vavilov, investigating this problem, believes that such grounds (common to all types of exemption) consist of a small public danger of the crime or the person who committed it. He proposes to divide the grounds for exemption from criminal liability for the formal (legal) (the norms of substantive law, which provide for the exemption) and material (those legal facts, the existence of which involves the application of the rules on dismissal, that is, the circumstances that most characterize the committed criminal act or the person who committed it, make it appropriate that type of release and indicate a small degree of social danger of the act or the person who committed it).

S. G. Kelin substantiates the concept of two general (universal) grounds for exemption from criminal liability, which can only be applied in aggregate. She includes to them: 1) a small public danger of the committed crime; 2) the absence or small public danger of a person who, as a result, does not need remedying at all, or can be remedied without the use of a punishment. N. A. Yegorova notes that the basis for exemption from criminal liability for most of its types may be both the named grounds in aggregate and each separately.

V. V. Svyerchkov, believing that, supports this position the general basis for exemption from criminal liability "alternatively consists of the following subjective and objective features: a) subjective – the absence, loss or reduction of danger (harm) of a person for society, b) objective – the loss or reduction of harm (public danger) of the committed act on the time of exemption".

O. Zhitnyi, investigating the problem of exemption from criminal liability in connection with the repentance, argues the position of the existence of a general ground for exemption from criminal liability. In his opinion, the grounds for exemption from criminal liability should be established taking into account the formal and criminal-political parties. In this regard, the formal (legal)

grounds for exemption are the norms of substantive law governing the exemption from criminal liability. They are the legal form of the factual (material) basis for exemption from criminal liability, which is inappropriate to extend the criminal legal relationship between the state and the person who committed the crime and the implementation of the criminal liability of this person in connection with the achievement of certain desired results for society.

Given the scope of our research, the essence of the existence of a general ground for exemption from criminal liability for corruption crimes is proposed to be precisely such a solution to the problem of corruption in our state.

Since for those people who committed corruptive crimes, it should be exempted from liability and punishment, in particular with the bail bond, in connection with the effective repentance, trial, etc. (Law of Ukraine "On the framework of state anti-corruption policy in Ukraine (Anticorruption Strategy) for 2014–2017" of 14.10.2014). Only special types of exemption from criminal liability for corruption crimes remain as the only measure to combat corruption with the help of such special incentive norms of criminal law.

It is worth noting that none of the special types of exemption from criminal liability for corruption crimes is not an effective repent in its pure form. In this case, a particularly careful research needs any of the conditions that, in the complex, may be the actual basis for the application of such exemption to the guilty person.

Analyzing the above considerations, we share the opinion of A. A. Yashchenko that the small public danger of the committed act and the person who committed it is not a general (universal) basis for exemption from criminal liability. Because of the application of special types of exemption provided for in the articles of the special part of the CC, neither a person nor the acts committed by him do not lose their public danger.

The accent should be shifted from the characteristics of the criminal act to assess the post-criminal behavior of the individual. The basis for exemption is not the commission socially dangerous acts, and certain socially useful actions of a person. Therefore, we agree with the statement that the commission of an act, which does not constitute a major public danger, can't be the basis for the

exemption from criminal liability, neither in combination with the small public danger of the person who committed the act and separately, since the law allows for exemption not because the person committed an act that does not represent a major public danger, but only under the condition of a positive post-criminal behavior of a person.

This approach corresponds to the content of the concept of a universal basis for special types of exemption from criminal liability for corruption crimes. Accordingly, such a universal reason is a positive post-criminal behavior of the individual.

Particular attention deserves an exclusion from the list of necessary conditions for exemption from criminal liability for corruption crimes. It is the availability of extortion of unlawful benefit. Until recently, such a condition was traditional for domestic incentives into rules of criminal law, so to speak. The refusal of the legislator from its foresight in the future is evidence of a counteraction by the state not only by the passive adoption of unlawful benefits, but also by active bribery.

Conclusion

Consequently, the essence and meaning of the basic concepts of the institute of the exemption from criminal liability for corruption crimes are revealed. They are "grounds" and "conditions". The three-pronged essence of the grounds for such exemption (normative, factual and procedural) is highlighted. The approaches to the analysis of goals, objectives and grounds for the use of special types of exemption from criminal liability as one of the areas of implementation of state anti-corruption policy are also substantiated. The results of such research are consistent with the principles of criminal law (the benefits of mitigating circumstances, the saving of criminal repression, etc.) and generally accepted norms of international law and confirmation of the implementation of the anti-corruption strategy of Ukraine.

References

1. Baulin Yu. V. Zvinnennia vid kryminalnoi vidpovidalnosti / Yu. V. Baulin // Visnyk Asotsiatsii kryminalnoho prava Ukrainy. – 2013. – № 1 (1). – S. 185.
2. Kryminalne pravo Ukrainy. Zahalna chastyna : pidruchnyk / Yu. V. Aleksandrov [ta in.] ; red. Ya. Yu. Kondratiev. – Kyiv : Pravovi dzherela, 2002. – S. 254–255.
3. Yatsenko S. Chy vidpovidaie Konstytutsii Ukrainy instytut zvinnennia vid kryminalnoi vidpovidalnosti / S. Yatsenko // Pravo Ukrainy. – 2011. – № 9–10. – S. 167–168.
4. Baulin Yu. V. Zvinnennia vid kryminalnoi vidpovidalnosti / Yu. V. Baulin // Visnyk Asotsiatsii kryminalnoho prava Ukrainy. – 2013. – № 1 (1). – S. 187.
5. Kovitidi O. F. Okremi problemy kryminalno-pravovoho rehuliuвання zvinnennia vid kryminalnoi vidpovidalnosti nepovnolitnikh / O. F. Kovitidi // Pidpriumnytstvo, hospodarstvo i pravo. – 2004. – № 3. – S. 97.
6. Kelyna S. H. Teoretycheskye voprosy osvobozhdeniya ot uholovnoi otvetstvennosti / S. H. Kelyna. – Moskva : [b. y.], 1974. – S. 90.
7. Kurs uholovnoho prava. Obshchaia chast. T. 2. Uchenye o nakazanyy : uchebnyk dlia vuzov / pod red. d-ra yuryd. nauk, prof. N. F. Kuznetsovoi y dr. – Moskva : ZERTSALO, 1999. – S. 147.
8. Troytskaia M. Yu. Ynstytut osvobozhdeniya ot yurydycheskoi otvetstvennosti y mekhanyzm eho realizatsyy v rossiiskom zakonodatelstve : avtoref. dys. ... kand. yuryd. nauk / Troytskaia M. Yu. – Moskva, 2012. – S. 7.
9. Maltsev V. V. Problemy osvobozhdeniya ot uholovnoi otvetstvennosti y nakazanyia v uholovnom prave / V. V. Maltsev. – Volhohrad : [b. y.], 2004. – S. 79.
10. Velykyi tlumachnyi slovnyk suchasnoi ukrainskoi movy / uklad. i holov. red. V. T. Busel. – Kyiv ; Irpin : VTF "Perun", 2005. – S. 20.
11. Skakun O. F. Teoriia derzhavy i prava : pidruchnyk : per. z ros. / O. F. Skakun. – Kharkiv : Konsum, 2001. – S. 472.
12. Velykyi tlumachnyi slovnyk suchasnoi ukrainskoi movy / uklad. i holov. red. V. T. Busel. – Kyiv ; Irpin : VTF "Perun", 2005. – S. 20.

13. Kryminalne pravo Ukrainy. Zahalna chastyna : pidruchnyk / Yu. V. Aleksandrov [ta in.] ; red. Ya. Yu. Kondratiev. – Kyiv : Pravovi dzherela, 2002. – S. 381.
14. Entsyklopedyia uholovnoho prava. T. 10. Osvobozhdenye ot uholovnoi otvetstvennosti y nakazanyia. – SPb. : [b. y.], 2008. – S. 19.
15. Kurs uholovnoho prava. Obshchaia chast. T. 2. Uchenye o nakazanyy : uchebnyk dlia vuzov / pod red. d-ra yuryd. nauk, prof. N. F. Kuznetsovoi y dr. – Moskva : ZERTsALO, 1999. – S. 154–155.
16. Vavylov K. K. Osnovanyia osvobozhdenyia ot uholovnoi otvetstvennosti po sovetskomu pravu : avtoref. dys. ... kand. yuryd. nauk / Vavylov K. K. – Leningrad, 1964. – S. 14.
17. Iashchenko A. M. Prymyrennia z poterpilym u mekhanizmi kryminalno-pravovoho rehuliuвання : avtoref. dys. ... kand. yuryd. nauk [Elektronnyi resurs] / Yashchenko A. M. – Kyiv, 2006. – Rezhym dostupu : <http://inter.criminology.onua.edu.ua/?p=2052>