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Lawyer as a special subject of crime (a person providing public service) under the Criminal Code of Ukraine

Abstract: It is studied the problems of recognition of a lawyer as a person providing public service, as a special subject of crime, on the Criminal Code of Ukraine. It is determined and described the following features of the subject of crime provided by the articles of 365-2 and 368-4 of the CC of Ukraine: a person is not a public servant, official person of local government; carries out professional activity; provides public service.

Keywords: lawyer; public service; professional activity; special subject of crime.

The Criminal Code of Ukraine subject to crimes such as abuse of authority (Article 365-2) and bribery (Article 368-4) named auditor, notary, appraiser, another person who is not a public servant, official local government, but exercising professional activities related to the provision of public services, including the services of an expert, the arbitration manager, an independent mediator, member of the labor arbitration, the arbitrator in the performance of these functions. According to paragraph b Part 2 of Article 4 of the Law of Ukraine "On Principles of Prevention and Combating Corruption", such persons are subject to liability for corruption offenses and equated to persons authorized to perform the functions of the state or local governments [1].

The criminal liability of lawyers and to classify them into those providing public

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is a new theory of criminal law in Ukraine, because the acts were criminalized by the Act of April 7, 2011 [2]. Therefore, the corresponding problem in the theory of criminal law is virtually unexplored. Questions about liability lawyers (disciplinary, civil, and criminal) were the subject of study of N.A. Baeva, Y.P. Garmaeva, A.S. Kolosova, T.E. Kolosovoy, R.B. Namzalova, A.N. Prosvirkina, G.V. Surdina, A.V. Tashkinova, Y. Tsvetkova and others. Certain aspects of the problem of criminal responsibility of persons providing public services under the Criminal Code of Ukraine, treated P.P. Andrushko, A.V. Galakhova, A.A. Dudorov, M.A. Magda, R.L. Maksimovitsh and other researchers. But in the writings of the above scientists no integrated approach relative to who should reckon to such persons and in what cases a lawyer is the person providing public services that is the subject of offenses covered by articles 365-2 and 368-4 of the Criminal Code of Ukraine.

This problem is very important in modern conditions. Indeed, as aptly pointed Y. Tsvetkov, “hardly anyone starts to dispute the fact that, along with unscrupulous investigators and judges there are also unscrupulous lawyers. Unfortunately, while the knights of justice, or as Spasovich, Plevako, gone for good, and are increasingly found lawyers who complete lack of legal culture and basic skills are trying to compensate by unscrupulous methods of work” [3, p. 50].

As stated above, the subject crimes stipulated in Articles 365-2 and 368-4 of the Criminal Code, provided in the first part of dispositions of these articles. The corresponding formulation is presented in the form of so-called open list. After analyzing it, we can conclude that the subject of these crimes in addition to general characteristics (individual, responsibility and achievement of the age at which criminal responsibility) should further characterize these special features: first, a subject not a civil servant, an official of the local self-government, and secondly, carries out professional activities, and thirdly, to provide public services. That is, in order to determine whether the person may be held criminally responsible for the crimes stipulated in Articles 365-2 and 368-4 of the Criminal Code, it is necessary to establish a set of such special features. We point out that the legislator has formulated

them differently. The first sign is as a negative, and the second and third – as a positive. That is, to bring the person to criminal liability for the above crimes, it is necessary to establish the existence of the last two features at the same time the absence of the first. V.V. Ustimenko the time noted that the special features of the perpetrator, formulated in a negative way, used in the law in the event that the indication in the disposition of articles on these signs in a positive form would make it cumbersome and inconvenient for use [4, p. 17]. We believe that the use of negative signs in the legislation they need to formulate so that it was possible to determine the content of such signs. In addition, the legislator should be used in the disposition of articles no more than one negative sign, because otherwise it may lead to varying interpretations of the criminal law. Because the content is determined by the sign of the negative correlation with the positive, the legislator must use them only with a positive sign, understood clearly.

Thus, the first sign (negative) is that the subject of offenses covered by articles 365-2 and 368-4 of the Criminal Code, not a civil servant, an official of the local government. In accordance with Part 1 of Art. 1 of the Law of Ukraine “On Civil Service” public service in Ukraine – a professional activity of persons holding public office and apparatus for the practical implementation of the tasks and functions of the state and are paid with public funds. These persons are public servants and have the appropriate official authority [5]. The Law of Ukraine “On Civil Service” dated 17 November 2011, which will come into force from January 1, 2014 offered such a definition of “public servant” – a citizen of Ukraine, the incumbent public service in state bodies, bodies of the Autonomous Republic of Crimea or apparatus receives a salary from the state budget, except in cases determined by law, and shall set the authority for this position, directly related to the implementation of the objectives and functions of the public body or authority of the Autonomous Republic of Crimea: preparing proposals for the formation of public policy in relevant field; development, expertise and / or editing of draft legal acts, administrative services, state supervision (control), management of public property or property belonging to the Autonomous

Republic of Crimea, state corporate rights, personnel management of public bodies, authorities of the Autonomous Republic of Crimea or apparatus; implement other powers of the relevant authority (Section 2 Part 1 of Art. 1) [6]. In accordance with Article 2 of the Law of Ukraine “On service in local government”, “an official of the local government is a person employed by the local government, the officials having authority to implement organizational and administrative and consultative and advisory functions and receives a salary from the local budget”. To officials of the local government does not include technical staff and service staff of local governments [7].

The second feature is the special subject (positive) is that it carries out professional activities. This phrase consists of two words “professional” and “activity”. “Professional” has several meanings related to the profession, “engaged in what some chores as a profession” [8, p. 9]. The word “profession” means “species, nature of work, serving as the source of existence”, “main occupation, work” [8, p. 9]. A “work” means “work, systematic use of its forces in any area” [8]. Structure of professional activity are: first, the professional actors, professionals – media related activities, and secondly, the implementation of their professional duties, their work, the expenditure of physical and intellectual activity, and thirdly, a status which entitles the professionals and in – fourth, the regulatory basis of values of a given activity, as embodied in the relevant professional industry and professional ethics [10, p. 27, 44, 57-61, 114-119]. Who is a professional? In accordance with the classification of occupations they are persons with a high level of knowledge in the industry of physical, mathematical, technical, biological, agronomic, or medical humanities, and the necessary qualifications (including range and complexity of certain professional jobs), as documented: a diploma of higher education, which corresponds to the specialist, master, diploma awarding scientific degree of candidate or doctor of science; certificate approving the academic title of senior researcher, Associate Professor [11]. Thus, the activity of professionals characterized by such features: a special line of professional activity level jobs that a professional takes

over; special qualifications of persons engaged in professional activities, high business competence, specialized education, especially professional ethics [12, p. 129]. Any professional activity must have its content, which is the fulfillment of their professional duties and professional behavior associated with the execution of the respective orders, work, or on the provision of professional services.

Summarizing, we can conclude that the professional activities - this type of work professionals with a set of special theoretical knowledge and practical skills acquired through training and experience working with high reputation and owning professional ethics, the content of which is performed by assigned they have a specific professional responsibilities and given to them for the implementation of the rights of [12, p. 130].

The third sign of the special subject (positive) is that it provides public services. Let us point out that the legislation of Ukraine, using such a term, however, did not establish a definition of this concept. Only in the Concept of Development of administrative services executive authorities indicated that the services provided by public authorities, local authorities, enterprises, institutions and organizations are in their control, make up the sphere of public services. Depending on the entity providing public services, distinguish state and municipal services. Public services provided by public authorities (mainly the executive) and public enterprises, institutions, organizations, and local authorities in order to fulfill the delegated state powers at the expense of the state budget. Municipal services are provided by local authorities, as well as the executive authorities and enterprises, institutions and organizations in order to fulfill delegated to local authorities at the expense of the local budget [13]. However, this definition is only a guideline for subsequent legislative definition of “public service” in taking the Law of Ukraine, which will regulate this sphere of public life of our country. Given this definition, N.I. Havronyuk offers a definition of “public service” - is a service provided by the public sector (i.e., government bodies, local authorities, enterprises, institutions and organizations of state and communal ownership), and in some cases - and the private

sector under responsibility of the public sector (public authorities) and from public funds (i.e., state and local budgets)” [14, p. 43]. With this definition, we fully agree, because it takes into account all the essential features of the concept.

As mentioned above, the legislator listed some persons belonging to providing public services, but he used the open list, pointing to another person. This is a self-employed person. In accordance with Article 14 of the Tax Code of Ukraine is the taxpayer who is a natural person – entrepreneur or carrying out independent professional activities, provided that such person is not an employee within a business or independent professional activity. Independent professional activities - is part of a natural person in the scientific, literary, artistic, artistic, educational or teaching activities, activities of physicians, private notaries, lawyers, auditors, accountants, appraisers, engineers or architects, a person in a religious (missionary) activities other such activities, provided that such person is not an employee or an individual entrepreneur and uses hired labor is not more than four individuals [15]. That is, the lawyer added to this category of persons who are called self-employed and engaged independent professional activity.

In accordance with paragraph 1 of Part 1 of Article 1 of the Law of Ukraine “On Advocacy Activities” lawyer is a natural person to practice law on the grounds and in the manner provided in this Act. And Advocacy is an independent professional activity of advocates for the implementation of protection, representation and providing other forms of legal assistance to the client. It is carried out on a contractual basis between lawyer and client and paid in accordance with the agreement on the provision of legal aid. Given this, as well as the provisions of Article 14 of the Tax Code of Ukraine that the lawyer is a self-employed person to choose their own customers themselves independently from government, local governments and their officials and officers (Part. 1 of Art. 5 of the Law of Ukraine “On Advocacy Activities”) [16].

Professional activity of lawyers is regulated by the Law of Ukraine “On free legal aid”. In this Act, legal aid is defined as the legal assistance guaranteed by the

state and fully or partially represents the expense of the State Budget of Ukraine and local budgets and other sources (Section 1 Part 1, Art. 1). The law defines the following types of legal aid – primary and secondary. Free primary legal aid is a kind of a state guarantee, is to inform the person of his rights and freedoms, the order of their implementation, recovery in case of violations and how to appeal the decisions, acts or omissions of public authorities, local government officials and employees (Part 1 of Art. 7), including the provision of legal information, advice and clarification on legal issues, drafting of applications, complaints and other legal documents (except for procedural documents), assistance in providing access to the secondary face legal assistance and mediation (Part. 2 of Art. 7). A free secondary legal aid is a kind of a state guarantee, which is to create equal opportunities for access to justice for persons (Part 1 of Art. 13), including protection from prosecution, the implementation representation of the interests of persons entitled to free secondary legal aid in courts, other state agencies, local governments, to other persons; drafting procedural (Part. 2 of Art. 13) [17].

Lawyers may be involved to provide both primary and secondary legal aid. According to Article 7 paragraph 12 of the Law “On Free Legal Aid” local governments may involve the provision of free primary legal aid lawyers or other professionals in the field of law (in this case with them is an agreement on the provision of primary legal aid). In Article 15 of the Act subjects the provision of free secondary legal aid lawyers called on the Roster of lawyers provide free secondary legal aid on a permanent basis under the contract (Section 2, Part. 1), lawyers included in the Register of lawyers provide free secondary legal aid on a temporary based on a contractual basis (paragraph 3 h. 1). Powers of the center to provide free secondary legal aid is, in particular, the conclusion of contracts with attorneys on the Roster of lawyers provide free secondary legal aid for such assistance on an ongoing basis (Section 6 Part. 1 of Art. 17) contracts with attorneys on the Roster of lawyers provide free secondary legal aid for such assistance on a temporary basis (on the basis of separate contracts for the provision of services) (§ 7 Part. 1 of Art. 17) [17].

In accordance with Article 29 of the Law “On Free Legal Aid” financing free primary legal assistance at the expense of the State Budget of Ukraine for the content of the relevant executive authorities, local budgets and other sources. Funding for free secondary legal aid is provided by the State Budget of Ukraine.

Thus, given the definition of public services stipulated in the Concept of providing administrative services by the executive, it can be concluded that the lawyer is the person providing public services, only in the case of the provision of free primary and secondary legal aid, with whom a contract (contract) to provide such assistance. And in this case, lawyers are subject to the offenses covered by articles 365-2 and 368-4 of the Criminal Code of Ukraine.

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