

PENALTIES FOR DECLARING FALSE INFORMATION

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Annotation. *Since the declaration of false information entails criminal liability, such an act is also punishable. However, given that Art. 366-2 of the Criminal Code of Ukraine is relatively new in the criminal law, then there is a need to study the punishment for declaring false information, in particular, the analysis of the sanctions of the specified criminal offense, the rules for imposing punishment, as well as the possibility of exemption from criminal liability, punishment or serving it for the investigated act. In addition, the relevance of the topic of the study is evidenced by the decision of the Constitutional Court of Ukraine dated October 27, 2020 No. 13-r/2020 in the case based on the constitutional submission of 47 People's Deputies of Ukraine regarding the conformity with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code of Ukraine regarding recognition as unconstitutional Art. 366-1 of the Criminal Code of Ukraine precisely because of the incompatibility of the punishment with the public danger of the act. The purpose of the article is to study the sanctions of the criminal offense provided for in Art. 366-2 of the Criminal Code of Ukraine, the rules for imposing punishment, as well as the possibility of exemption from criminal responsibility, punishment or serving it for the investigated act. Methodology of problem analysis. During the study of punishment for declaring false information, it is advisable to use the following methods of scientific knowledge: dialectical, historical-legal, dogmatic (logical-legal), logical-semantic, system-structural analysis, modeling, idealization, statistical, morphological, comparative-legal, abstraction, cybernetic, sociological, analysis, synthesis, induction, deduction, etc. Research results. It is proposed to supplement Art. 366 of the Criminal Code of Ukraine, parts 3–5. On the basis of the content of the dispositions, in particular, their public danger, proposals were formulated regarding the sanctions of the specified criminal law norms.*

Key words: *corruption, declaration, criminal liability, punishment, unreliable information.*

1. Introduction.

Punishment is the most severe measure of state coercion, which is essential in combating crime. The application of criminal punishment is the main and most common form of implementation of criminal responsibility. Punishment for a committed criminal offense must comply with the general principles of sentencing. Punishment, according to Art. 50 of the Criminal Code of Ukraine, is a coercive measure applied on behalf of the state by a court verdict to a person found guilty of a criminal offense, and consists in limiting the rights and freedoms of the convicted person as provided by law. Punishment is aimed not only at punishment, but also at the correction of convicts, as well as at the prevention of new criminal offenses by both convicts and other persons [1; 5, p. 178–179; 6, p. 171–172].

Since declaring false information entails criminal liability, punishment is also provided for such an act. However, given that Art. 366-2 of the Criminal Code of Ukraine is relatively new in the criminal law, so there is a need to study the punishment for declaring false information, in particular, the analysis of the sanctions of the specified criminal offense, the rules for assigning punishment, as well as the possibility of exemption from criminal liability, punishment or serving it for the investigated act. In addition, the relevance of the topic of the study is evidenced by the decision of the Constitutional Court of Ukraine dated October 27, 2020 No. 13-r/2020 in the case based on the constitutional submission of 47 People's Deputies of Ukraine regarding the conformity with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine "On Prevention of Corruption", the Criminal Code of Ukraine regarding recognition as unconstitutional Art. 366-1 of the Criminal Code of Ukraine precisely because of the inconsistency of the punishment with the public danger of the act.

2. Analysis of scientific publications.

Some aspects of criminal responsibility for declaring false information were investigated A.V. Aheienko, N.O. Antoniuk, V.V. Babanina, O.C. Bondarenko, A.A. Vozniuk, D.F. Volonets, I.B. Hazdaika-Vasylyshyn, V.V. Hordiienko, O.O. Dudorov, V.V. Ivanytska, S.O. Ivanytskyi, V.O. Ivashchenko, L.V. Krupnova, N.A. Lytvyn, D.H. Mykhailenko, D.M. Miskiv, R.O. Movchan, O.M. Rieznik, V.H. Senyk, O.Yu. Tatarov, Z.M. Toporetska, V.V. Franchuk, A.M. Cherenkov, V.V. Cherniei, S.S. Cherniavskyi, O.O. Yurikov and other.

In the article by O.O. Yurikov "Release from serving a sentence with probation for committing corruption criminal offenses and criminal offenses related to corruption, based on agreements" (2021) analyzed the problematic issues of release from serving a sentence with probation for committing corruption criminal offenses and criminal offenses related to corruption, on the basis of a settlement or plea agreement. In view of the orientation of the anti-corruption policy of the state, O.O. Yurikov proposed changes to the Criminal Code of Ukraine and the Criminal Procedure Code of Ukraine in order to resolve the issue of unambiguous interpretation of Article 75 of the Criminal Code of Ukraine, as well as the correct application of the provisions of the criminal and criminal procedural legislation of Ukraine with the aim of countering corruption manifestations by establishing an absolute ban on the release of a person who has committed a corruption criminal offense or a criminal offense related to corruption from criminal liability, punishment or its happening [13, p. 146].

In the dissertation research of D.M. Miskiv "Responsibility for the declaration of false information in the criminal law of Ukraine" (2021) as a result of the analysis of the sanctions of Art. 366-2, 366-3 of the Criminal Code of Ukraine clarified the following: 1) sanctions of the specified articles are usually consistent with sanctions for committing criminal offenses similar in nature and degree of public danger; 2) the most optimal option of the most severe punishment in the analyzed sanction is arrest for a period of one to six months; 3) intentional failure to submit a declaration by a person who ceases activities related to the performance of state or local self-government functions, and intentional failure to report the opening of a currency account in a non-resident bank institution or significant changes in property status, are similar in terms of the degree of public danger, because in all cases, the possibility of financial control using last year's declarations remains, therefore, although this contradicts the sectoral division of responsibility itself, the courts should be able to assign measures of responsibility of similar severity for the commission of such acts; 4) the limits of the amount of the fine provided for in the sanctions of Art. 366-2, 366-3 of the Criminal Code of Ukraine, are too narrow and do not allow for a fair punishment; 5) deprivation of the right to hold certain positions or engage in certain activities as an additional punishment should be provided as an optional [3, p. 4-5].

Despite the significant contribution of these scientists to the development of issues of criminal liability for declaring false information, certain issues regarding the punishment for such an act remain not fully investigated.

3. The aim of the work.

The purpose of the article is to study the sanctions of the criminal offense provided for in Art. 366-2 of the Criminal Code of Ukraine, the rules for imposing punishment, as well as the possibility of exemption from criminal liability, punishment or serving it for the investigated act.

4. Review and discussion.

M.I. Havroniuk notes that one of the main problems of the modern theory of criminal law should be the problem of the scientific validity of criminal law sanctions. However, the scientist points out, due attention is not paid to this problem in the literature, and especially in legislative practice [3, p. 178; 4, p. 193; 12, p. 102].

As some scientists note, there are several significant reasons that prevent the creation of a single methodology for determining and forming criminal sanctions at the legislative level, namely: 1) it is very

difficult to determine the real value of social relations protected by criminal law. All assessments or rankings of criminal law objects are somewhat conditional; 2) currently there is no single scale of measurement of both the criminal offense and the punishment; 3) at the legislative level, it is not possible to write out all the circumstances of committing a criminal offense, to formalize countless life situations (as suggested by some authors). Such an attempt can lead to the transformation of the Criminal Code into a huge list of possible life situations and circumstances under which a criminal offense may be committed, which, in principle, is not possible and does not correspond to the formally defined approach of the Criminal Code [2, p. 102–103; 3, p. 178–179; 4, p. 194].

D.M. Miskiv, on the basis of the analyzed developments, summarized the rules for the construction of sanctions suitable for establishing criminal liability for declaring false information, in particular: 1) the sanction should objectively reflect the degree of public danger, or the degree of gravity of the committed offense (the higher the degree of public danger criminal offense, the more severe the punishment for it should be); 2) the sanction must be consistent with sanctions for committing criminal offenses similar in nature and degree of public danger; 3) the qualified composition of the criminal offense must have a more severe sanction than the main one; 4) the provision of the sanction should provide an opportunity to individualize the punishment taking into account the possible options for committing the criminal offense; 5) the less serious the criminal offense is, the greater number of types of punishments can be provided in the sanction, but they should not be too many; 6) in the sanctions of the articles of the Special Part, only those types of punishments that are contained in the system of punishments can be provided for, and the size of the punishments in the sanctions cannot exceed the limits established in the articles of the General Part; 7) the penalties specified in the sanction must be close to each other in terms of severity. It is impractical to combine punishments that are at opposite “poles” in the punishment system in one sanction; 8) excessive limits between the minimum and maximum punishment are inappropriate. The gap between the minimum and maximum punishment should depend on the level of formalization of the disposition; 9) separate punishments in the sanctions should be established taking into account the circle of persons to whom they can/cannot be applied, the nature and content of the restrictions defined in the General Part of the Criminal Code of Ukraine. Additional penalties must be consistent with the main penalties. The main penalty must always be more severe than the additional penalty attached to it; 10) placement of punishments in the order in which they are located in the system of punishments [3, p. 183-184; 4, p. 199-200].

Currently, part 1 of Art. 366-2 of the Criminal Code of Ukraine stipulates that the subject of the declaration knowingly introduces false information to the declaration of a person authorized to perform the functions of the state or local self-government, provided for by the Law of Ukraine “On Prevention of Corruption”, if such information differs from reliable information by an amount from 500 to 2,000 subsistence minimums for able-bodied persons, shall be punished by a fine of three thousand to four thousand non-taxable minimum incomes of citizens or community service for a period of one hundred and fifty to two hundred and forty hours or restriction of freedom for a period of up to two years, with deprivation of the right to hold certain positions or engage in certain activities for a period of up to three years [1]. At the same time, part 2 – the subject of the declaration knowingly enters unreliable information into the declaration of a person authorized to perform the functions of the state or local self-government, provided for by the Law of Ukraine “On Prevention of Corruption”, if such information differs from the reliable information in the amount of more than 2,000 subsistence minimums for able-bodied persons, – shall be punished by a fine of four thousand to five thousand non-taxable minimum incomes of citizens or by community service for a period of one hundred and fifty to two hundred and forty hours, or by restriction of liberty for a period of up to two years, or by deprivation of liberty for the same period, with deprivation of the right to hold certain positions or engage in certain activities for a period of up to three years [1].

Analysis of the sanctions of Art. 366-2 of the Law of Ukraine should be implemented taking into account the provisions of the decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of 47 people’s deputies of Ukraine regarding the conformity with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine “On Prevention of Corruption”, Criminal Code of Ukraine dated October 27, 2020 No. 13-r/2020. This is explained by the fact that the previous norm provided for by Art. 366-1 of the Criminal Code of Ukraine was declared unconstitutional by the decision mentioned above, and subsequently decriminalized. Resolving the issue of the unconstitutionality of declaring false information, the Constitutional Court of Ukraine noted that a separate manifestation of

justice is the question of the appropriateness of the punishment for the committed criminal offense; the category of justice provides that the punishment for a criminal offense should be commensurate with the criminal offense... the punishment should be in fair proportion to the severity and circumstances of the offense and the person of the guilty party; the rule of law, considering punishment primarily as a corrective and preventive measure, should not use excessive, but only necessary and purpose-driven measures [8; 9].

The Constitutional Court of Ukraine also stressed that restrictions on the realization of constitutional rights and freedoms cannot be arbitrary and unfair, they must be established exclusively by the Constitution and laws of Ukraine, pursue a legitimate goal, be conditioned by the social need to achieve this goal, be proportionate and justified, in the case of limiting the constitutional right or freedom, the legislator is obliged to introduce such legal regulation that will make it possible to optimally achieve a legitimate goal with minimal interference in the realization of this right or freedom and not to violate the essential content of such right [10]. Criminalization of a specific act of a person is possible provided that it meets, in particular, a set of the following criteria: significant (substantial) social danger of the act; spread of similar acts in society; ineffectiveness of other branch legal means of influence on the said acts; the impossibility of successfully combating the act with less repressive methods [8].

In case of non-observance of the criteria of criminalization specified by the legislator, a situation may arise when an act will be recognized as a criminal offense, which does not have the character and degree of social harm sufficient for criminalization. In such a case, criminalization is carried out in the absence of grounds for this, and as a result, an act that is objectively not such is recognized as a crime. As a result, legal grounds are created for unjustified criminal liability for an act for which less strict legal liability arises. This violates the constitutional principle of the rule of law [8; 14, p. 352]. Compliance with the requirement of clarity and unambiguity of the norms that establish criminal responsibility is particularly important in view of the specifics of the criminal law and the consequences of bringing to criminal responsibility, because bringing to this type of legal responsibility is associated with possible significant restrictions on human rights and freedoms [8; 11].

According to the position of the European Court of Human Rights, when it comes to deprivation of liberty, it is extremely important to ensure the general principle of legal certainty; the requirement of "quality of legal prescriptions" within the meaning of clause 1 of Art. 5 of the Convention means that if national law allows the possibility of deprivation of liberty, such law must be sufficiently accessible, clearly formulated and predictable in its application to eliminate any risk of arbitrariness [7; 8]. By its legal nature, the submission by the subject of the declaration of knowingly inaccurate information in the declaration, as well as the deliberate non-submission of the declaration, although they testify to the violation of the requirements of anti-corruption legislation, however, such actions are not capable of causing significant damage to a natural or legal person, society or the state in the amounts necessary for recognizing them as socially dangerous in accordance with the requirements of Art. 11 of the Criminal Code of Ukraine [8; 15, p. 427; 17, p. 95].

We remind that Art. 366-1 of the Criminal Code of Ukraine (now decriminalized) had the following wording:

"Article 366-1. Declaring false information

Submission by the subject of the declaration of knowingly inaccurate information in the declaration of a person authorized to perform the functions of the state or local self-government, provided for by the Law of Ukraine "On Prevention of Corruption", or intentional non-submission by the subject of the declaration of the specified declaration –

shall be punished by a fine from two thousand five hundred to three thousand non-taxable minimum incomes of citizens or by community service for a period of one hundred and fifty to two hundred and forty hours, or by imprisonment for a term of up to two years, with deprivation of the right to hold certain positions or engage in certain activities for term up to three years.

Note. The subjects of the declaration are persons who, in accordance with the first and second parts of Article 45 of the Law of Ukraine "On Prevention of Corruption", are required to submit a declaration of a person authorized to perform the functions of the state or local self-government.

Liability under this article for the submission by the subject of the declaration of knowingly inaccurate information in the declaration regarding property or another object of declaration that has a value arises in the event that such information differs from the reliable information in the amount of more than 250 subsistence minimums for able-bodied persons [1; 16].

On the basis of the above, as well as taking into account the content of the decriminalized Art. 366-1 of the Criminal Code of Ukraine, it can be noted that the new norm, which provides for criminal liability for declaring false information, has a clear definition and a sanction that corresponds to the public danger of the act. In this regard, in our opinion, to change the sanctions of Art. 366-2 of the Criminal Code of Ukraine is not necessary. However, we propose to make changes to the specified article, in particular to supplement its parts 3–5. In this regard, we consider it expedient to formulate proposals regarding sanctions in parts 3, 4 and 5 of the project of Art. 366-2 of the Criminal Code of Ukraine.

Yes, we propose that Part 3 be worded as follows: “Deliberately entering by the subject of the declaration knowingly inaccurate information in the notification of significant changes in the property status of the subject of the declaration, if such information differs from the reliable information in the amount of 500 subsistence minimums for able-bodied persons “. In view of its content, as well as the sanctions of the previous parts of the article under study, in our opinion, it is appropriate to provide for the following types and amounts of the main punishments for the specified offense: 1) restriction of freedom for a period of up to two years; 2) imprisonment for up to two years; and additional: deprivation of the right to hold certain positions or engage in certain activities for a period of up to three years. Thus, we propose the sanction of part 3 of Art. 366 of the Criminal Code of Ukraine shall be worded as follows: “shall be punished by restriction of liberty for a term of up to two years or deprivation of liberty for the same term, with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years.”

Such types and amounts of punishments are due to the fact that, firstly, the specified act can be committed exclusively by officials who occupy a responsible or particularly responsible position, as well as persons whose positions are associated with a high corruption risk, defined by the Law of Ukraine “On Prevention corruption”; secondly, the act provided for in the next part of the same article constitutes a greater public danger, and therefore the punishment should be more severe.

Part 4 of the draft Art. 366-2 of the Criminal Code of Ukraine provides for responsibility for the actions provided for in parts 1 and 2 of this article, committed by an official who occupies a responsible position. In view of the fact that this act concerns the entry by the subject of the declaration of knowingly inaccurate information into the declaration in the amount of 500 subsistence minimums for able-bodied persons by officials in a responsible position, in particular, the persons specified in paragraph 1 of the note to Art. 364 of the Criminal Code of Ukraine, the positions of which according to Art. 6 of the Law of Ukraine “On Civil Service” belong to category “B”, judges, prosecutors, investigators and inquirers, as well as others, except those specified in paragraph 2 of the note to Art. 366-2 of the Criminal Code of Ukraine (taking into account the proposed changes), by heads and deputy heads of state authorities, local self-government bodies, their structural subdivisions and units, then, in our opinion, it should be punished by restriction of liberty for a term of up to three years, or deprivation of liberty for the same period, with deprivation of the right to hold certain positions or engage in certain activities for a period of up to three years.

The specified sanction provides for a more severe punishment than the sanction of part 3 of this article, but it fully corresponds to the public danger of the act, since it is committed by officials who hold a responsible position. Sanction, part 4 of Art. 366-2 of the Criminal Code of Ukraine (taking into account the proposed changes) is an alternative, which gives flexibility to the criminal law and variability when imposing punishment.

Part 5 of the draft Art. 366-2 of the Criminal Code of Ukraine provides for responsibility for the actions provided for in parts 1 and 2 of this article, committed by an official who occupies a particularly responsible position, in particular: 1) the President of Ukraine, the Prime Minister of Ukraine, a member of the Cabinet of Ministers of Ukraine, the first deputy and deputy ministers, the Chairman and members of the National Council of Ukraine on Television and Radio Broadcasting, the Chairman and members of the National Commission for State Regulation of Financial Services Markets, the Chairman and members of the National Securities and Stock Market Commission, the Chairman and state representative of the Antimonopoly Committee of

Ukraine, Chairman of the State Television and Radio Broadcasting Committee of Ukraine, Chairman of the State Property Fund of Ukraine, his first deputy and deputies, Chairman and members of the Central Election Commission, people's deputies of Ukraine, Commissioner of the Verkhovna Rada of Ukraine for human rights, Director of the National Anti-Corruption Bureau of Ukraine, Director of the Bureau of Economic Security of Ukraine, the Director of the State Bureau of Investigation, the Prosecutor General, his first deputy and deputies, the Chairman of the Constitutional Court of Ukraine, his deputies and judges of the Constitutional Court of Ukraine, the Chairman of the Supreme Court, his deputies and judges of the Supreme Court, the heads of higher specialized courts, their deputies and judges of higher specialized courts, the Chairman of the National Bank of Ukraine, his first deputy and deputies, the Secretary of the National Security and Defense Council of Ukraine, his first deputy and deputies, the Permanent Representative of the President of Ukraine in the Autonomous Republic of Crimea, his first deputy and deputies, advisers and assistants to the President of Ukraine, Chairman of the Verkhovna Rada of Ukraine, Prime Minister of Ukraine; 2) persons whose positions in accordance with Art. 6 of the Law of Ukraine "On Civil Service" belong to category "A"; 3) persons whose positions according to Art. 14 of the Law of Ukraine "On service in local self-government bodies" are assigned to the first and second categories of positions in local self-government bodies.

In connection with the increased public danger of such an act, we consider it appropriate to provide in Part 5 of Art. 366-2 of the Criminal Code of Ukraine (taking into account the proposed changes) a stricter sanction, which should be set out in the following version: "shall be punished by restriction of liberty for a term of up to five years, or deprivation of liberty for the same term, with deprivation of the right to hold certain positions or engage in a certain activity for a period of up to three years".

The introduction of such changes will contribute to the strengthening of criminal law protection of social relations regarding the declaration of income and expenses by persons authorized to perform the functions of the state and local self-government.

In addition, the legislator established a ban on exemption from criminal liability, punishment and its serving for committing corruption criminal offenses and criminal offenses related to corruption, in particular for declaring false information.

Despite the prohibition established by the legislator to exempt from criminal liability or from punishment or its serving persons who have committed corruption criminal offenses or criminal offenses related to corruption, Part 2 of Art. 75 of the Criminal Code of Ukraine provides such an opportunity by concluding an agreement on reconciliation or on admission of guilt. Therefore, persons who are suspected (accused) of committing the above-mentioned criminal offenses have the opportunity to "negotiate" with law enforcement agencies to be released from serving a probationary sentence. This is often abused by law enforcement officers, using the provisions of Part 2 of Art. 75 of the Criminal Code of Ukraine as "redemption" from "real" punishment [13, p. 149].

We fully share the position of O. O. Yurikov, who notes that the following changes must be made to resolve the above-mentioned issue: 1) part 2 of Art. 75 of the Criminal Code of Ukraine should be read as follows: "The court, taking into account the requirements of the first part of this article, makes a decision on exemption from serving a sentence with probation in the event of approval of a reconciliation agreement or an admission of guilt, if the parties to the agreement have agreed on a punishment in the form of correctional work, service restrictions for military personnel, restriction of liberty, deprivation of liberty for a term of no more than five years, as well as agreed exemption from serving a sentence with probation"; 2) Art. 471 of the Criminal Code of Ukraine to add part 2 with the following content: "Agreement on conciliation in criminal proceedings on suspicion or accusation of committing a criminal offense that belongs to corruption criminal offenses or criminal offenses related to corruption, according to the note to Art. 45 of the Criminal Code of Ukraine, cannot provide for exemption from serving a probationary sentence"; 3) Art. 472 of the Criminal Procedure Code of Ukraine to add part 2 with the following content: "Agreement on admission of guilt in criminal proceedings on suspicion or accusation of committing a criminal offense that belongs to corruption criminal offenses or criminal offenses related to corruption, according to the note to Art. 45 of the Criminal Code of Ukraine, cannot provide for exemption from serving a probationary sentence" [13, p. 150].

The specified changes will establish a ban on the release of persons from serving a probationary sentence for declaring false information.

5. Conclusions.

It is argued that the formulation of proposals for changing the sanctions of a criminal offense provided for in Art. 366-2 of the Criminal Code of Ukraine, must be carried out taking into account the provisions of the decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of 47 people's deputies of Ukraine regarding the conformity with the Constitution of Ukraine (constitutionality) of certain provisions of the Law of Ukraine "On Prevention of Corruption", Criminal Code of Ukraine dated October 27, 2020 No. 13/2020.

It was determined that the new norm (Article 366-2 of the Criminal Code of Ukraine), which provides for criminal liability for declaring false information, has a clear definition and a sanction that corresponds to the public danger of the act.

It is proposed to make the following changes to Art. 366-2 of the Criminal Code of Ukraine:

- 1) the sanction of Part 3 shall be worded as follows: "punishable by restriction of liberty for a term of up to two years or deprivation of liberty for the same term, with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years";
- 2) the sanction of Part 4 shall be worded as follows: "shall be punished by restriction of liberty for a term of up to three years, or deprivation of liberty for the same term, with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years;
- 3) the sanction of Part 5 shall be worded as follows: "punishable by restriction of liberty for a term of up to five years, or deprivation of liberty for the same term, with deprivation of the right to hold certain positions or engage in certain activities for a term of up to three years".

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