

# ESPIONAGE: THEORETICAL AND APPLIED ASPECTS OF THE CHARACTERISTICS OF THE OBJECTIVE SIDE OF TREASON (PART 1 OF ARTICLE 111 OF THE CRIMINAL CODE OF UKRAINE)

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**Annotation.** The article is devoted to the study of the features of the objective side of the composition of high treason, committed in the form of espionage (part 1 of Article 111 of the Criminal Code of Ukraine), the mandatory features of which are a socially dangerous act – this is espionage itself, the essence of which is the transfer or collection for the purpose of transfer to a foreign state, a foreign organization or their representatives information, that constitutes a state secret.

Based on the results of the conducted scientific research, the author concluded that the collection for the purpose of transferring to a foreign state, a foreign organization or their representatives, information constituting a state secret, can be done only in the form of an action (active criminal illegal behavior of a person), and the transfer of this information to a foreign state, a foreign organization or their representatives – both in the form of action (active criminally illegal behavior of a person) and in the form of inaction (passive criminally illegal behavior of a person). At the same time, the methods of transmission or collection of such information may be different and do not affect the qualification of the crime.

Transfer or collection for the purpose of transfer to a foreign state, a foreign organization or their representatives of information constituting a state secret may be carried out by a citizen of Ukraine both on his own initiative and on the initiative of a foreign state, a foreign organization or their representatives, but with the awareness that specific actions are carried out to the detriment of the sovereignty, territorial integrity and inviolability, defense capability, state, economic or informational security of Ukraine.

And at the end of the scientific study, it was specified that treason in the form of espionage is generally a crime with a mixed construction (with a truncated formal composition), since espionage in the form of gathering for the purpose of transferring to a foreign state, a foreign organization or their representatives information that constitutes a state secret, has signs of a crime with a truncated composition, and in the form of transfer of the above-mentioned information to a foreign state, foreign organization or their representatives – signs of a crime with a formal composition.

**Key words:** national security of Ukraine, state secret, citizen of Ukraine, foreign state, foreign organization.

## 1. Introduction.

Treason is one of the particularly dangerous crimes against the foundations of Ukraine's national security, namely its sovereignty, territorial integrity and inviolability, defense capability, state, economic or informational security [1]. As noted by N. Antoniuk, unfortunately, it is a natural phenomenon that the treasonous, collaborative activities of some citizens of Ukraine, who for years

cooperated with the enemy, became the basis for the organization and invasion of Ukraine by the Armed Forces of the Russian Federation. It is counting on exiled spies or internal traitors that helps the enemy to implement their plans to try to capture and destroy Ukraine as a sovereign independent state [2, p. 38].

According to the results of the analysis of statistical data published on the official website of the Prosecutor General's Office, it can be seen that this crime has gained special intensification since the open full-scale military attack of the Russian Federation on the territory of Ukraine, which took place on February 24, 2022 and, unfortunately, is still relevant. In particular, a record number of facts of state treason were recorded precisely during January-December 2022 – 1957, of which: notices of suspicion were served – 609, proceedings were sent to court – 309 [3].

All this indicates that in the modern period, treason as a crime against the foundations of national security of Ukraine requires a special analysis in order to ensure the proper criminal-legal characteristics of its composition and to carry out the correct qualification in practice in the future.

## 2. Analysis of scientific publications.

The theoretical basis for the study of the objective side of the composition of state treason, committed in the form of espionage (Part 1 of Article 111 of the Criminal Code of Ukraine), became the scientific works of such scientists as: N. Antoniuk, O. Bantyshev, Yu. Baulin, V. Borysov, S. Havrysh, V. Hizhevskiy, O. Dudorov, V. Kartavtsev, N. Konchuk, V. Kuznietsov, S. Lebid, R. Lemekha, O. Lytvynov, P. Matyshevskiy, M. Melnyk, V. Navrotskyi, T. Nikolaienko, V. Omelchuk, E. Pysmenskyi, D. Popykhach, V. Rubtsov, I. Servetskyi, D. Sergieieva, V. Stashys, M. Strelbytskyi, V. Sukhonos, V. Tatsii, V. Tiutiuhin, P. Fris, M. Khavroniuk, O. Shamara, V. Shlapachenko, which directly relate to the researched issue or are partially devoted to the consideration of important conceptual problems of treason as a crime against the foundations of national security of Ukraine.

## 3. Purpose of the study.

The purpose of the article is to characterize the objective side of the composition of state treason committed in the form of espionage (part 1 of Article 111 of the Criminal Code of Ukraine), and to draw appropriate conclusions on its basis.

## 4. Review and discussion.

Criminal liability for treason in the current Criminal Code of Ukraine is regulated by Article 111 of the Criminal Code of Ukraine ("Treason"), by which the legislator understands "an act intentionally committed by a citizen of Ukraine to the detriment of the sovereignty, territorial integrity and inviolability, defense capability, state, economic or informational security of Ukraine: switching to the enemy's side during an armed conflict, espionage, providing assistance to a foreign state, a foreign organization or their representatives in carrying out subversive activities against Ukraine" [1].

It should be noted that liability for this crime was also provided for in the Criminal Code of Ukraine dated December 28, 1960 No 2001-05, which was in force on the territory of Ukraine until the entry into force of the Criminal Code of Ukraine dated April 5, 2001 No 2341-III, – Article 56 ("Treason") of Chapter I of its special part "Crimes against the state" and was referred by the legislator to a group of particularly dangerous crimes against the state [4]. But if we compare the definition of "treason", given in the current Criminal Code of Ukraine, with its understanding in the Criminal Code of Ukraine No 2001-05 of December 28, 1960, it allows us to conclude that in both legislative acts on criminal liability socially dangerous acts are identical in content and are expressed in: a) moving to the side of the enemy; b) espionage; c) rendering assistance to a foreign state, foreign organization or their representatives in carrying out subversive activities against Ukraine [1; 4].

And now in more detail about the features of the objective side of the composition of state treason, committed in the form of espionage, liability for which is provided for in part 1 of Article 111 of the current Criminal Code of Ukraine.

Analyzing the content of the criminal law set out in part 1 Article 111 of the Criminal Code of Ukraine ("Treason"), it follows that a mandatory feature of the objective side of the composition of state treason in the form of espionage is an exclusively socially dangerous act, which is actually espionage. It is necessary to pay attention to the fact that in the very Article 111 of the Criminal Code of Ukraine ("Treason"), the legislator does not define the concept of "espionage", but its normative interpretation is in Article 114 of the Criminal Code of Ukraine ("Espionage"). Therefore, based on it, under espionage in Article 111 of the Criminal Code of Ukraine should also be understood:

a) collection for the purpose of transfer to a foreign state, a foreign organization or their representatives, information constituting a state secret;

b) transfer of information constituting a state secret to a foreign state, a foreign organization or their representatives.

It is worth emphasizing that today in the theory of criminal law, when characterizing the objective side of the composition of state treason in the form of espionage, issues related to the definition are debatable:

1) forms of collection for the purpose of transfer to a foreign state, a foreign organization or their representatives of information constituting a state secret, and their transfer to a foreign state, a foreign organization or their representatives;

2) the moment of the end of the investigated crime.

**1. Form of collection for the purpose of transfer to a foreign state, a foreign organization or their representatives of information constituting a state secret, and their transfer to a foreign state, a foreign organization or their representatives.** Collecting for the purpose of transferring to a foreign state, a foreign organization or their representatives information, that constitutes a state secret, is the search and acquisition by a citizen of Ukraine on his own initiative or at the prior proposal of a foreign state, a foreign organization or their representatives [5, p. 207; 6, p. 219; 7, p. 112] by any means (photographing, copying, eavesdropping on telephone conversations, interrogating persons, kidnapping, fraud, extortion, etc.) of information constituting a state secret, with subsequent concentration in one or more places [8, p. 75; 9, p. 25; 10, p. 87; 11, p. 244] and the awareness that this is done to the detriment of the sovereignty, territorial integrity and inviolability, defense capability, state, economic or informational security of Ukraine.

Although the legislator in Article 111 of the Criminal Code of Ukraine interprets treason through the term "action" [1], which, as is known in the theory of criminal law, can have two forms – action (active criminally illegal behavior of a person) and inaction (passive criminally illegal behavior of a person) [12, p. 89; 13, p. 102; 14, p. 164; 15, p. 95; 16, p. 130], but from a theoretical point of view and taking into account the legal positions of the Supreme Court, the form in which gatherings can be made for the purpose of transferring information constituting a state secret to a foreign state, a foreign organization or their representatives, and their transfer to the relevant entities, needs additional clarification. So, regarding the form of collection for the purpose of transferring information constituting a state secret to a foreign state, foreign organization or their representatives, it can be carried out exclusively by committing an action (active criminal illegal behavior of a person). This is further reinforced somewhere, including by the wording itself in the Academic Explanatory Dictionary of the Ukrainian language "gathering" as "the act of gathering and gathering" [17].

The transfer of information constituting a state secret to a foreign state, a foreign organization or their representatives is a handover by a citizen of Ukraine to a foreign state, a foreign organization or their representatives on their own initiative or at the latter's prior proposal [5, p. 207; 6, p. 219; 7, p. 112] by any means (using the services of postal operators, sending by e-mail, "from hand to hand", by radio, by telephone, creating conditions for the direct familiarization of the recipient of the information with its content, etc.) of information, that constitutes a state secret, and the awareness

that this is done to the detriment of the sovereignty, territorial integrity and inviolability, defense capability, state, economic or informational security of Ukraine.

As for the form of transfer of information constituting a state secret to a foreign state, a foreign organization or their representatives, the opinion of O. Bantyshev, T. Nikolaenko, V. Omelchuk and O. Shamara, who claim that it can be committed both in the form of action (active criminally illegal behavior of a person) and in the form of inaction (passive criminally illegal behavior of a person) [6, p. 219; 8, p. 109]. Because there may indeed be cases when, for example, a citizen of Ukraine, working at the workplace with information, that constitutes a state secret, deliberately does not hide it from a representative of a foreign state or a foreign organization who entered his office in order to allow the latter to familiarize himself with the content of such information.

**2. The moment of the end of treason in the form of espionage.** When determining the moment of the end of treason in the form of espionage, it is advisable to separately determine the moment of the end of espionage in the form of gathering for the purpose of transferring information constituting a state secret to a foreign state, a foreign organization or their representatives, and separately – the moment of the end of espionage in the form of transferring this information to a foreign state, a foreign organization or their representatives, which ultimately will allow us to draw a conclusion about the end of treason in the form of espionage as a whole. So, with regard to the moment of the end of espionage in the form of collection for the purpose of transferring information constituting a state secret to a foreign state, a foreign organization or their representatives, this issue is resolved in different ways in the criminal law literature. As a result, two groups of scientists can be tentatively distinguished, who express themselves in a special way on this matter. So, some scientists (O. Bantyshev, V. Hizhevskiy, V. Kartavtsev, V. Kusnietsov, M. Melnyk, D. Popykhach, D. Sergieieva, M. Strelbytskyi, M. Khavroniuk, O. Shamara, V. Shlapachenko) associate the moment of the end of espionage in the form of collection for the purpose of transferring information constituting a state secret to a foreign state, foreign organization or their representatives, with the moment when the subject of the crime acquires a certain amount of it (concentration in any place: near a person, in his home, in a hiding place, etc. at least part of the relevant information) [8, p. 75; 11, p. 283; 18, p. 50; 19, p. 104; 20, p. 79; 21, p. 92].

Representatives of the second group (Yu. Baulin, V. Borysov, S. Havrysh, O. Dudorov, N. Konchuk, R. Lemekha, V. Navrotskyi, E. Pysmenskyi, V. Rubtsov, V. Stashys, V. Tatsyi), whose ideas are more convincing, note that espionage in the form of collection for the purpose of transfer to a foreign state, foreign organization or their representatives of information constituting a state secret is terminated from the moment of the beginning of the collection of such information [10, p. 87; 22, p. 361; 23, p. 60; 24, p. 90; 25, p. 100], regardless of whether or not the subject of the crime ultimately managed to collect any information that is a state secret, and even if it was possible to collect some amount of it – regardless of whether it was delivered to the addressee or not. Therefore, in the context of this, the accent of O. Dudorov, N. Konchuk, R. Lemekha, V. Navrotskyi, E. Pysmenskyi and V. Rubtsov is absolutely correct on classifying the collection of secret information not as a formal, but rather as a truncated crime, due to the fact that such collection should be interpreted as a process [10, p. 87; 23, p. 60; 24, p. 90; 25, p. 100].

The definition of the moment of end of espionage is also ambiguous in the form of transfer of information constituting a state secret to a foreign state, a foreign organization or their representatives. Thus, the Supreme Court in one of the Rulings of the Criminal Court of Cassation notes that espionage in general is a crime with a formal structure, therefore, in terms of the transfer of information constituting a state secret to a foreign state, foreign organization or their representatives, it is considered completed from the moment of such transfer [26], without specifying at the same time when the onset of this moment should be recorded. However, at the scientific level, more attention has been paid to this issue, and such a point is already being specified based on the recommendations of individual scientists. For example, O. Bantyshev and O. Shamara, the moment of the end of the transfer to a foreign state, a foreign organization or their representatives of information constituting a state secret is connected with the moment of its handing over to the relevant subjects, regardless of how much the content and essence of this information were perceived by the addressee or not at all [8, p. 110-111].

In contrast to the above, the position, expressed by O. Dudorov, N. Konchuk, R. Lemekha, V. Navrotskyi, E. Pysmenskyi and V. Rubtsov, deserves special support, who note that espionage in the form of transferring to a foreign state, a foreign organization or their representatives information, that constitutes a state secret, in contrast to their collection, is a crime with a formal composition and is recognized as completed from the moment, when the addressee had an actual opportunity to dispose of the information he received [10, p. 87; 23, p. 60; 24, p. 84; 25, p. 97], regardless of whether its entire volume or only some part of it was transferred to the latter.

All this allows us to note that treason in the form of espionage is generally a crime with a mixed composition (with a truncated formal composition), since espionage in the form of gathering for the purpose of transferring to a foreign state, a foreign organization or their representatives information, that constitutes a state secret, it has the characteristics of a crime with a truncated composition, and in the form of transfer of the above-mentioned information to a foreign state, a foreign organization or their representatives – signs of a crime with a formal composition.

## 5. Conclusions.

Thus, summarizing all of the above, it should be stated that the features of the objective side of the composition of state treason, committed in the form of espionage (Part 1 of Article 111 of the Criminal Code of Ukraine), are expressed as follows:

1) its mandatory feature is a socially dangerous act – this is espionage itself, which can be committed in the form of:

a) collection for the purpose of transfer to a foreign state, a foreign organization or their representatives, information constituting a state secret;

b) transfer of information constituting a state secret to a foreign state, a foreign organization or their representatives.

2) such socially dangerous acts can be committed by the subject of the crime both on his own initiative and on the initiative of a foreign state, foreign organization or their representatives, but with the awareness that they are being carried out to the detriment of the sovereignty, territorial integrity and inviolability, defense capability, state, economic or information security of Ukraine.

3) collection for the purpose of transfer to a foreign state, a foreign organization or their representatives of information constituting a state secret can be committed exclusively in the form of an action (active criminally illegal behavior of a person), and their transfer to a foreign state, a foreign organization or their representatives – both in the form of an action (active criminally illegal behavior of a person) and in the form of inaction (passive criminally illegal behavior of a person).

4) treason in the form of espionage is generally a crime with a mixed composition (with a truncated formal composition). This is explained by the fact that the commission of espionage in the form of gathering for the purpose of transferring to a foreign state, a foreign organization or their representatives information constituting a state secret is a crime with a truncated composition (is considered completed from the moment of collection (as a process) for the purpose of transferring information constituting a state secret to a foreign state, a foreign organization or their representatives, regardless of whether or not the subject of the crime ultimately managed to collect any information that is a state secret, and even if it was possible to collect some amount of it – regardless of whether it has been delivered to its addressee or not), and in the form of transfer to a foreign state, a foreign organization or their representatives of the above-mentioned information – a crime with a formal composition (is considered completed from the moment of transfer to a foreign state, foreign organization or their representatives at least part of the information constituting a state secret, namely from the moment when the addressee had an actual (real) opportunity to dispose of the information he received).

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