

# DIVERSION AS A CRIMINAL OFFENSE AGAINST THE FOUNDATIONS OF NATIONAL SECURITY OF UKRAINE: DISCUSSION QUESTIONS REGARDING VICTIMS AND THE SUBJECT OF THE CRIME

Shpiliarevych Viktoriia

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**Annotation.** The article is devoted to the study of certain aspects of the criminal-legal characteristics of the objective signs of diversion (Article 113 of the Criminal Code of Ukraine), which encroaches on public relations that arise in connection with ensuring the national security of Ukraine. In particular, the focus is on debatable issues related to the victims and the subject of this crime.

Based on the results of the conducted scientific research, the author concluded that when criminally characterizing the composition of diversion, depending on the type of socially dangerous act committed, it is necessary to speak about the presence of victims and/or the subject as two independent objective signs of the composition of this crime. This is explained by the fact that, unlike a material object, a person is a bearer of rights and is endowed with consciousness, which determines his ability to social interaction and defines him as an active subject of social relations.

The article proves that the concept of «national economy» is not used in modern valid regulatory documents of Ukraine, since this term is characteristic of the Soviet era, and in the modern period it has been replaced by more relevant terms, such as «economic activity» or «branch of the economy». Therefore, it is not entirely rational to use the wording «objects that have important national economic or defense significance» in the current criminal law of Ukraine. As a result, the author justifies the need to bring the criminal law norm set out in Article 113 of the Criminal Code of Ukraine into line with the modern legislative field of Ukraine by replacing the terminological phrase «objects that have important national economic or defense significance» with «critical infrastructure facilities or other state-owned facilities that are of strategic importance for the economy and security of the state». This will contribute to the unification of legal norms and increase the effectiveness of law enforcement activities when qualifying diversion.

**Key words:** national security of Ukraine, weakening of the state, mass destruction of people, radioactive contamination, spread of epidemics, epizootics, epiphytotics.

## 1. Introduction.

Diversion is one of the criminal offenses that encroaches on public relations that arise in connection with ensuring the national security of Ukraine. Countering subversive activities has become particularly relevant since the full-scale invasion of the Russian Federation into the territory of Ukraine, which took place on February 24, 2022, and, apparently, continues to this day. For example, as P. Kravchuk and Ya. Potapov note, with the beginning of the full-scale invasion of the Russian Federation into the territory of our state, the impact of diversion on the security of society has increased, which is often directed at critically important objects, such as energy installations, transport systems or communication networks [1, c. 590].

In this regard, diversion poses a significant threat to the national security of Ukraine, as it is aimed at weakening the state. This is manifested in causing economic and environmental damage, as well as in the moral and psychological destabilization of society – intimidation of the population and undermining trust in both the state as a whole and its individual institutions.

The above factors confirm the relevance of studying this component of the criminal offense and the expediency of the legislator's classification of it into the category of especially serious crimes, which follows from the correlation of the sanction of the criminal law norm set out in Part 1 of Article 113 of the Criminal Code of Ukraine and the provisions of Article 12 of the Criminal Code of Ukraine.

## 2. Analysis of scientific publications.

The theoretical basis for the study of individual issues of the criminal-legal characteristics of the objective signs of diversion was the scientific works of such scientists as: O. Zvonarev, P. Kravchuk, D. Melnyk, M. Melnyk, D. Oleinykov, Ya. Potapov, V. Sychevsky, Ye. Skulysh, T. Sozansky, M. Khavroniuk, Ye. Kharitonov, R. Chorny, O. Shamsutdinov etc., which are to one degree or another devoted to the study of important conceptual problems of the relevant criminal offense against the foundations of national security of Ukraine, which indicates a significant scientific interest in the formation of a holistic scientific concept of countering subversive activities in Ukraine.

## 3. Purpose of the study.

The purpose of the scientific article is to outline the features of individual objective signs of diversion (victims, object), which is a criminal offense against the foundations of national security of Ukraine, and to formulate relevant conclusions regarding the current state and prospects for the development of this problem.

## 4. Review and discussion.

In the current Criminal Code of Ukraine, responsibility for diversion is regulated by Article 113, under which the legislator understands «committing, with the aim of weakening the state, explosions, arsons or other actions aimed at the mass destruction of people, causing bodily harm or other harm to their health, or at the destruction or damage of objects that have an important national economic or defense significance, as well as committing actions with the same purpose aimed at radioactive contamination, mass poisoning, the spread of epidemics, epizootics or epiphytotics» (Part 1, Article 113 of the Criminal Code of Ukraine) [3].

It is worth noting that criminal liability for diversion was also provided for in the Criminal Code of Ukraine dated December 28, 1960 No. 2001-05 (Article 60). At that time, this crime belonged to the group of especially dangerous crimes against the state and was punished more severely than under the current version of Article 113 of the Criminal Code of Ukraine – imprisonment for a term of ten to fifteen years with confiscation of property or life imprisonment with confiscation of property [2], without establishing any circumstances that would aggravate criminal liability for its commission.

Instead, in Article 113 of the current Criminal Code of Ukraine, the legislator differentiates criminal liability for diversion, establishing different types and amounts of punishment depending on the circumstances of the commission of the offense. Thus, Part 1 of this article for «committing, with the aim of weakening the state, explosions, arsons or other actions aimed at the mass destruction of people, causing bodily harm or other harm to their health, or at the destruction or damage of objects that have an important national economic or defense significance, as well as the commission of actions aimed at radioactive contamination, mass poisoning, the spread of epidemics, epizootics or epiphytotics with the same purpose, is punishable by imprisonment for a term of ten to fifteen years with or without confiscation of property». Whereas Part 2 of Article 113 of the Criminal Code of Ukraine for «the same acts committed under martial law or during

an armed conflict” contains a much harsher punishment – «imprisonment for a term of fifteen years or life imprisonment with confiscation of property» [3].

The modern doctrine of criminal law has a number of debatable issues regarding the objective signs of diversion, among which those that relate to the victims and the subject of this crime are highlighted. In particular, P. Kravchuk and Ya. Potapov argue that people can also be the subject of diversion, namely when actions are taken aimed at their mass destruction, causing bodily harm or other harm to their health, as well as mass poisoning or the spread of epidemics [1, c. 591]. However, this view of scientists is not acceptable, which is justified by the provisions of the Fundamental Law of Ukraine, according to which «a person, his life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value (Article 3)» [4]. Therefore, a person should not be identified with a material object, because as a bearer of rights and possessor of consciousness, he is capable of social interaction, that is, he is someone who can be a subject of social relations. As a result, when criminally characterizing the elements of diversion, it is necessary to talk about the presence of victims and/or an object (depending on the type of socially dangerous act committed) as two independent objective signs of the elements of this crime.

The next aspect that needs to be clarified concerns the content of the concept of «objects of important national economic or defense significance» that are the subject of diversion, based on the provisions of Part 1 of Article 113 of the Criminal Code of Ukraine («committing explosions, arsons or other actions aimed at ... destruction or damage to objects of important national economic or defense importance ...») [3].

The problem is that Article 113 of the Criminal Code of Ukraine actually reproduced the disposition of Article 60 of the Criminal Code of Ukraine dated December 28, 1960 No. 2001-05, in which the phrase «objects that have important national economic or defense significance» was then quite correct, because, as R. Chorny notes, the term «national economy» was inherent in the socio-economic relations of the USSR period, where there was an exclusive monopoly of the state on social production, and state property was recognized as the common property of all Soviet people [5, c. 93]. At the legislative level, the correspondence of this term to the then existing system of social production was confirmed by the functioning of the All-Union Classifier «Sectors of the National Economy», which was approved by the Resolution of the State Committee of the Council of Ministers of the USSR for Planning dated January 1, 1976 No. 175018 and provided a cross-cutting classification of industries, both productive and non-productive, including industry, agriculture, construction and other sectors, for their planning, accounting and statistics.

Later, after the declaration of independence and the transition to its own statistical accounting system, the General Classifier «Sectors of the National Economy» began to operate in Ukraine, approved by the order of the Ministry of Statistics of Ukraine dated January 24, 1994 No. 21 [6], which since 1996 has been replaced by the National Classifier of Ukraine «Classification of Economic Activities» (DK 009:96 [7], DK 009:2005) [8], DK 009:2010 [9]), and is a standard harmonized with the European NACE standards. In addition, since January 1, 2012, Ukraine has also applied the National Classifier of Ukraine «State Classifier of Products and Services DK 016:2010», approved by the order of the State Committee of Ukraine for Technical Regulation and Consumer Policy dated October 11, 2010 No. 457 [10], which refers to the «branch of the economy».

This indicates that the term «national economy» is not used in current regulatory documents of Ukraine – it has been replaced by more relevant terms, such as «economic activity» or «branch of the economy». That is, as O. Shamsutdinov and D. Melnyk point out, the concept of «national economy», which was inherent in the Soviet socio-political system, has lost its relevance today [11, c. 175].

At the same time, despite this situation, in the theory of criminal law there are some scholars (O. Zvonarev, M. Melnyk, D. Oleinikov, V. Sychevsky, Ye. Skulysh, M. Khavronyuk, Ye. Kharitonov) who do not deny the expediency of using the terminological turn in Part 1 of Article 113 of the Criminal Code of Ukraine «objects that have important national economic or defense significance», giving its own interpretation of this concept. For example, V. Sychevsky, Ye. Kharitonov and D. Oleinikov understand

by objects that have important economic or defense significance the important economic and defense significance of objects of diversion, to which they include enterprises, buildings, roads and means of communication, means of communication and facilities for the life support of the population [12, c. 141].

From the point of view of M. Melnyk and M. Khavronyuk, objects that have important economic or defense significance – these are buildings, structures and other objects that have important economic or defense significance, on whose activities the life of certain regions depends or other large territories, proper functioning of certain sectors of the economy, public administration structures (power plants, water, oil, gas, petroleum product pipelines, bridges, dams, dams, information communication systems, railway stations, airports, sea or river ports, metros, enterprises producing Ukrainian banknotes or other important enterprises, regardless of the form of ownership, military units, etc.), including enterprises, the destruction or damage of which in itself is a danger factor (chemical, biological enterprises, enterprises for the production of poisonous, explosive materials, substances and products, fire-hazardous production or storage facilities, production with continuous technological processes in the chemical, microbiological industry etc.) [13, c. 277].

According to Ye. Skulysh and O. Zvonarev, objects that have important national economic or defense significance – these are the most important objects, on whose functioning depends the coordinated and uninterrupted operation of individual sectors of the economy as a single economic complex and the state's ability to defend itself in the event of armed aggression or armed conflict. The authors then reveal their content, specifying that objects of important national economic importance are buildings, structures, roads and means of communication, information communication systems, computer networks, facilities for the life support of the population and other facilities on whose activities the vital activity of certain regions or other large territories, the proper functioning of certain sectors of the economy, public administration structures, and objects of important defense importance are buildings, structures, warehouses and other objects, the destruction or damage of which negatively affects the state of combat readiness and combat capability of the Armed Forces and other military formations of Ukraine, which include enterprises of the military-industrial complex, food, weapons and ammunition depots, command posts, fortifications, engineering barriers, fire control equipment, communications equipment, special equipment of engineering troops and radiation, chemical and biological protection troops, special electronic, armored, protective equipment, special means of protection against weapons of mass destruction, toxic substances, fuels and lubricants etc. [14, c. 177].

Other scientists (D. Melnyk, T. Sozansky, R. Chorny, O. Shamsutdinov) express certain comments on this matter. In particular, T. Sozansky argues that objects that have important economic or defense significance are, in essence, objects of critical infrastructure, but the terminology used in the current disposition of Article 113 of the Criminal Code of Ukraine does not actually make it possible to distinguish them from simply objects of the national economy or objects used for defense purposes [15, c. 210].

O. Shamsutdinov and D. Melnyk generally propose in the disposition of the criminal law provision provided for in Article 113 of the Criminal Code of Ukraine to replace the words «objects that have important national economic or defense significance» with the words «objects of critical infrastructure». The legislator's acceptance of the above proposal, according to scientists, will bring clarity and unambiguity to the interpretation by criminal law doctrine and law enforcement agencies of this constitutive objective feature of diversion [11, c. 177].

R. Chorny recommends changes to Article 113 of the Criminal Code of Ukraine in a slightly different way – replace the words «important national economic ... significance» with «important economic ... or other significance». The scientist's additional argument in favor of this thesis was the provisions of the Resolution of the Cabinet of Ministers of Ukraine No. 1734 of December 23, 2004, which was in force at that time «On approval of the List of enterprises of strategic importance for the economy and security of the state», which determined an approximate list of such enterprises, which, on the one hand, belonged to various forms of ownership, and on the other hand, their importance for the state was considered not only economic. At the same time, under the economic significance for the state, the scientist understands the economic activity of the relevant objects, the main characteristics of which are production costs, the production process

and output, and it itself consists in the process of production of products (goods and services), which is carried out using certain resources: raw materials, materials, equipment, labor, technological processes, etc. Objects of other importance, – these are media and other objects of the material world, which, depending on the specific manifestation of the specified crime and the conditions of its commission, may be of great importance to the state (any information, critical objects of the national information infrastructure etc.) [5, c. 94-95].

Given the current legal norms in the field of protection of strategic industries of Ukraine, this position is seen as the optimal basis for providing one's own vision of the essence of «objects that have important national economic or defense significance» and the appropriateness of using this terminological phrase in Part 1 of Article 113 of the Criminal Code of Ukraine.

It is logical to start the argument with the fact that current regulatory legal acts provide for a conditional division of objects that ensure the functioning of strategic industries of Ukraine into two groups:

1. critical infrastructure facilities;
2. state-owned facilities that are of strategic importance for the economy and security of the state.

### **I. Critical infrastructure facilities.**

In accordance with the provisions of the Law of Ukraine «On Critical Infrastructure» dated November 16, 2021 No. 1882-IX, critical infrastructure facilities – these are infrastructure facilities, systems, their parts and their aggregates, which are important for the economy, national security and defense, the disruption of which could harm vital national interests [16].

The list of critical infrastructure sectors was approved by Resolution of the Cabinet of Ministers of Ukraine No. 1109 of October 9, 2020, which, in particular, include: fuel and energy sector; digital technologies; information protection; food industry and agro-industrial complex; state material reserve; healthcare; capital markets and organized commodity markets; financial sector; transport and post; life support systems; local government; industry; public security sector; civil protection of the population and territories; environmental protection; defense sector; justice; execution of criminal sentences, detention and holding of prisoners of war; state registration; scientific research and development; financial sector; elections and referendums; social protection; information sector; state power [17].

All facilities that meet the criteria for critical infrastructure are necessarily included in the Register of Critical Infrastructure Facilities, the procedure for maintaining which is determined by the Resolution of the Cabinet of Ministers of April 28, 2023 No. 415 [18].

### **II. State-owned objects of strategic importance for the economy and security of the state.**

In addition to the above-mentioned regulatory legal acts regarding critical infrastructure facilities, the Resolution of the Cabinet of Ministers of Ukraine dated March 4, 2015 No. 83 is also in force, which provides an exhaustive list of state-owned facilities that are of strategic importance for the economy and security of the state, regarding: activities in the field of defense; fuel and energy complex; transport industry; facilities that provide placement and storage of material assets of state reserves; agro-industrial complex; telecommunications and communications; aviation and rocket and space industry; machine-building industry; metallurgical complex; chemical complex; scientific activity; standardization, metrology and certification; hydrometeorological activity; building materials industry; financial and budgetary sphere; food industry; light industry; printing; geological exploration industry; enterprises whose products and services are of important socio-economic importance [19].

Based on the results of the analysis of the above-mentioned regulatory legal acts of Ukraine, it was established that there is no complete identity between the list of critical infrastructure facilities and the list of state-owned facilities that are of strategic importance for the economy and security of the state, since:

a) not all critical infrastructure facilities are on the List of state-owned facilities of strategic importance for the economy and security of the state. This is explained by the fact that critical infrastructure includes objects of various forms of ownership (private, municipal, state). Whereas objects that are of strategic importance for the economy and security of the state are objects of exclusive state ownership.

b) not all state-owned objects of strategic importance for the economy and security of the state are critical infrastructure objects, since not all strategic objects meet the criteria for critical infrastructure and, accordingly, are not included in the Register of Critical Infrastructure Objects.

Considering that the term «national economy» is outdated and in modern Ukrainian legislation has been replaced by «economic activity» or «branches of the economy», and also taking into account the availability of official lists of critical infrastructure facilities and state-owned facilities that are of strategic importance for the economy and security of the state, the wording in Part 1 of Article 113 of the Criminal Code of Ukraine needs to be updated. In this regard, the terminological phrase «objects of important national economic or defense significance» should be rationally replaced with «objects of critical infrastructure or other objects of strategic importance for the economy and security of the state», which will ensure:

1) harmonization of the criminal law provision set out in Article 113 of the Criminal Code of Ukraine with the provisions of the Law of Ukraine «On Critical Infrastructure» dated November 16, 2021 No. 1882-IX [16], Resolution of the Cabinet of Ministers of Ukraine «Some Issues of Critical Infrastructure Facilities» dated October 9, 2020 No. 1109 [17], Resolution of the Cabinet of Ministers «On Approval of the Procedure for Maintaining the Register of Critical Infrastructure Facilities, Including Such Facilities in the Register, Accessing and Providing Information from It» dated April 28, 2023 No. 415 [18], Resolution of the Cabinet of Ministers of Ukraine «On Approval of the List of State Property Objects of Strategic Importance for the Economy and Security of the State» dated March 4, 2015 No. 83 [19], which define critical infrastructure facilities and state-owned facilities that are of strategic importance for the economy and security of the state;

2) the correct qualification of diversion in the practical activities of law enforcement and judicial bodies due to the presence of an exhaustive list of critical infrastructure facilities and state-owned objects that are of strategic importance for the economy and security of the state.

## 5. Conclusions.

Thus, summarizing all of the above, the following should be stated:

1. Diversion as a criminal offense against the foundations of national security of Ukraine has, as part of its objective features, victims and/or the subject (depending on the type of socially dangerous act committed) as two independent objective features of the composition of this crime. This is explained by the fact that, based on the provisions of the Constitution of Ukraine, a person cannot be identified with a material object, because as a bearer of rights and possessor of consciousness, he is capable of social interaction, that is, he is someone who can be a subject of social relations.

2. In Part 1 of Article 113 of the Criminal Code of Ukraine, the terminological phrase «objects that have important national economic or defense significance» is proposed to be replaced with «objects of critical infrastructure or other state-owned objects that have strategic importance for the economy and security of the state». This will lead to the correlation of the criminal law norm with the provisions of the current regulatory legal acts of Ukraine, which define critical infrastructure facilities and state-owned objects that are of strategic importance for the economy and security of the state, and will ensure the correct qualification of diversion in the practical activities of law enforcement and judicial bodies.

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**Viktoriiia Shpiliarevych,**

*Candidate of Legal Sciences (PhD), Docent, Associate Professor of the Department of Politics in the Field of Fighting Crime and Criminal Law*

*Vasyl Stefanyk Carpathian National University*

*E-mail: viktoriiia.shpiliarevych@cnu.edu.ua*

*ORCID: 0000-0002-1761-9892*