

# Circumstances Which are the Basis Of Exemption of a Person From Criminal Liability for Corruption Offences in the Field of Professional Activities Related to Public Service

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**Abstract.** *The article examines the peculiarities of proving circumstances, which are the basis for the release of a person from criminal responsibility for corruption offences in the field of service activities related to the provision of public services. Substantive and procedural legal basis for such release has been found and the peculiarities of proving circumstances which are the grounds for the release of a person from criminal responsibility on the basis of article 49 and part 5 of article 354 of the Criminal Code of Ukraine have been analysed.*

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**Keywords:** proving, exemption from criminal responsibility, corruption offences in the field of service activities related to the provision of public services.

**Formulation of the problem.** Until recently, the criminal law of Ukraine provided for the possibility of applying the institution of exemption from criminal liability regarding persons who committed corruption offences. However, the legislator, demonstrating his desire to curb corruption, which is one of the main threats to national security and political stability in Ukraine, has banned such exemption in order to strengthen the criminal legal response to its manifestation.

In particular, the Law of Ukraine 'On the National Anti-Corruption Bureau of Ukraine' dated October 14, 2014, N 1698-VII<sup>1</sup>, to the Criminal Code of Ukraine, were amended the part, concerning the exclusion of the possibility of the release of persons who committed corruption offences from criminal liability in connection with effective repentance (article 45 of the Criminal Code of Ukraine), the reconciliation of the perpetrator with the victim (article 46 of the Criminal Code of Ukraine), admission to bail (article 47 of the Criminal Code of Ukraine) and the change of circumstances (article 48 of the Criminal Code of Ukraine).

Obviously, introducing the relevant changes, the legislator proceeded from the famous aphorism that 'not the severity of punishment keeps people away from the crime, but its inevitability' and the legislator meant that these changes will be a long-running mechanism to prevent corrupt officials from evading the real

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<sup>1</sup> About the National Anti-Corruption Bureau of Ukraine: Law of Ukraine dated October 14, 2014, No. 1698-VII. *Electronic source:* <http://zakon3.rada.gov.ua/laws/show/1698-18/page2>, accessed: 12.09.2018.

responsibility. However, such an approach of the domestic legislator is unlikely to be considered an effective means of counteracting corruption, as the prohibition of the use of the institution of exemption from criminal liability has not diminished the corruptional offences.

In addition, the lack of the possibility of exemption from criminal responsibility of officials on a general basis complicates the process of proving their guilt, exposing other accomplices, finding the property acquired by criminal means, the possibility of true repentance, actively promoting the disclosure of other corruption offences, etc.

This is explained by the fact that the accused in committing a crime of corruption, the only chance to avoid punishment is the objection of the accusation, the pressure on witnesses, on victims, distortions and concealment of the traces of the crime, since in the case of proving the guilty he will receive real punishment. In other words, in the case where the corruption-taking person had the opportunity to apply the institution of exemption from criminal responsibility on general grounds, they would more willingly 'go for cooperation' with law enforcement agencies and facilitated disclosure of crime, exposing other accomplices, etc.

**State of research.** Some aspects of proof of circumstances, which are the basis for exemption from criminal liability, were considered in the works of A.S. Barabash, O.A. Gubskaya, L.M. Volodina, L.V. Nikitina, G.V. Ostafiychuka, N.Z. Rogatinskaya, D.S. Slynka, M.S. Strogovich and others. At the same time, proving the circumstances that are the basis for release from criminal liability for corruption offences in the field of professional and professional activity, related to the provision of public services was not the object of the study in the criminal procedural literature.

In this regard, they still remain unexplored or require further analysis in terms of proving the material and legal and procedural legal grounds for exemption of a person from criminal liability for committing corruption offences.

**The purpose** of this article is to study the features of proving the circumstances that are the basis for exemption from criminal liability for corruptional offenses in service and professional activities related to the provision of public services.

**Statement of the main provisions.** Prohibition of the use of the institution of the release from criminal responsibility for the commission of corruption offenses is not universal, since the Criminal Code of Ukraine nevertheless provides for such a possibility in connection with the expiration of the limitation period (Article 49 of the Criminal Code of Ukraine). In addition, in the Special Part of the Criminal Code of Ukraine special type release from criminal responsibility for corruption offences is provided

However, such an exemption may only take place in relation to persons who have engaged in active bribery. In particular, in part 5 of article 354 of the Criminal Code of Ukraine states that a person who has offered, promised or rendered unlawful benefits shall be exempted from criminal liability for crimes provided for in articles 354, 368-3, 368-4, 369, 369-2 of the Criminal Code of Ukraine, if after the offer, promise or when it is unlawful for the benefit of it to receive from other sources information about this crime by a body whose official is entitled under the law to report suspicion — voluntarily declared that it has happened to such an authority and actively contributed to the disclosure of an offense committed by a person who has received profit or accepted their offer or promise.

However, the release from criminal liability on the basis of part 5 of article 354 of the Criminal Code of Ukraine is not possible in all cases. In particular, it does not

apply if the offer or the promise of unlawful benefits were committed against officials within the scope of which is defined in part 4 of article 18 of the Criminal Code of Ukraine. O.O. Dudorov and Ya.V. Rizak note that such a basis for the release of a person from criminal responsibility is intended to stimulate the socially beneficial behavior of persons who have violated the criminal law and is aimed at breaking the mutual guarantee, which unites the participants of corruption offences.<sup>2</sup>

This position is appropriate since the promotion of a person to positive socially beneficial behavior — is the main task of a special type of exemption from criminal liability.

In addition, a voluntary statement to law enforcement authorities about the fact of a proposal, a promise or an unlawful gain in the future gives them the opportunity, when carrying out the control over the commission of a crime, to document the facts of receipt by an official or a person, who provides public services of unlawful profit and bring it to criminal liability.

In accordance with paragraph 1 part 2 of article 284 of the Criminal Procedure Code of Ukraine exemption from criminal liability serves as the basis for the closure of criminal proceedings. The grounds for exemption from criminal liability can be found both at pre-trial and in the criminal stages of criminal proceedings, but the decision to close criminal proceedings with the release of a person from criminal responsibility is always taken by the court in accordance with the rules of substantive law<sup>3</sup>.

Thereby, in case when there is the question of exemption from criminal liability of the person who committed a crime, including corruption, the circumstances which are the reason for such dismissal should be proved. These circumstances are different and inherent in a particular type of exemption from criminal liability. Therefore, let us dwell specifically on each of them.

The article 49 of the Criminal Code of Ukraine states that a person is exempted from criminal liability in connection with the expiration of the limitation periods, which vary depending on the severity of the crime. In this case, proving the circumstances which are the basis for exemption from criminal liability for corruption offences in the field of service activity and professional activities related to the provision of public services on the basis of article 49 of the Criminal Code of Ukraine, includes clarification of material grounds for exemption from criminal liability (expiration of limitation periods provided for in Article 49 of the Criminal Code of Ukraine and the absence of circumstances that violate their course) and procedural and legal grounds of such dismissal (bringing a person to criminal liability for committing the crime, consent of the accused to release from criminal liability).

In turn, in cases of exemption of a person from criminal liability for committing crimes, including corruption, it is necessary for the court to provide evidence proving the fact that this person committed a criminal offense and to carry out the state condemnation of the person who committed the crime (to admit guilty) (procedural legal basis).

In addition, exemption from criminal liability on the basis of article 49 of the Criminal Code of Ukraine for the commission of a corruption crime is possible

<sup>2</sup> Dudorov O.O, Problematic Issues of Extortion of Unlawful Benefits in the Case of Bribing, [in:]. Dudorov O.O, Rizak Ya.V (Eds). *Bulletin of Criminal Proceedings*, 2016, No. 1, p. 187.

<sup>3</sup> Kobernyuk V, Institute for the Closure of Criminal Proceedings with the Dismissal of the Prosecuted from Criminal Liability: Current Status and Prospects. *Bulletin of the Prosecutor's Office*, 2012, No. 10, p. 67.

only if the suspect or the accused does not object to this, since the criminal procedural law gives him the right to object to the closure of criminal proceedings on this ground (part 3 of article 285 of the CPC of Ukraine). In this case, the pre-trial investigation and judicial proceedings are conducted in full in the general order. Such a position of the legislator is justified, as not exclusive cases when the person is illegally prosecuted for allegedly committing a corrupt crime.

Therefore, if such a person is confident in his innocence, it is important for him on what basis criminal proceedings will be closed, in particular, on the grounds of the absence of a criminal offense in its act (part 2 of article 284 of the CPC of Ukraine) or not establishing sufficient evidence to prove their guilt in court and exhausted opportunities for obtaining them (part 3 of article 284 of the CPC of Ukraine) or on the basis of the release from criminal liability, when it is believed that their guilt is fully proved (part 1, part 2, article 284 of the Criminal Code of Ukraine). Thus, the clarification of these circumstances leads to the form of procedural decision of the investigator, the prosecutor.

After all, in case of obtaining written consent for the release of a person from criminal liability in connection with the expiration of the limitation period of prosecution, a request for release of a person from criminal responsibility is sent to the court. In the case of objection to the suspect of exemption on this ground, the prosecution and other materials of criminal proceedings are sent to the court for consideration.

It should be noted, that proving the substantive grounds for exempting a person from criminal responsibility in connection with the expiration of the limitation period includes the clarification of the following issues: 1) whether the period of limitation of the crime committed by a person applies; 2) whether the limitation period expired after committing the crime of a corresponding degree of gravity; 3) whether the limitation period after the crime was interrupted or stopped.

It should be noted, that finding the first question is not a problem and is only a formality, since corruption offences are not included in the list of those crimes for the commission of which the limitation period is not applied.

For the release of a person from criminal responsibility on the basis of Art. 49 of the Criminal Code of Ukraine it must also be proved that after a crime of corruption a specific period of time has passed. Of course, the limitation periods for crimes in the field of service activities and professional activities related to the provision of public services, are different and depend on the degree of gravity of the crime (for example, part 1 of article 354 — 3 years, part 4 of article 368 — 15 years, part 3 of article 368 — 2–10 years, part 3 of article 368 — 4–5 years, etc.).

In order to find out whether the limitation period has expired after committing a corrupt crime by a pre-trial investigation body it is necessary to determine the time when a person committed a crime, which according to part 3 of art. 4 of the Criminal Code of Ukraine is the time when a person makes a criminal offense stipulated by law for action or omission. Limitation periods are calculated from the date of the commission of the crime until the day when the verdict of legal force is enforced (part 1 of article 49 of the Criminal Code of Ukraine).

This legislator's approach is successful, since the definition of the ultimate moment of limitation is important for the practice of enforcement, because any legal terms must have the limits in the legislation. This helps to unify the approach

when they are applied and the court decides on the release of a person from criminal responsibility.<sup>4</sup>

At the same time, it has to be noted that in the current criminal and criminal procedure legislation there is no legislative definition of 'day of crime' which leads to difficulties in law enforcement activities in determining the beginning of the limitation period.

On this occasion, two positions can be distinguished. In particular, representatives of the first position believe that the starting point of the limitation is the day when the crime was committed.<sup>5</sup> For example, if a person has bribed an official of a legal entity of private law (part 1, article 368-3 of the Criminal Code of Ukraine) on May 2, 2016, then the expiration of the limitation period should begin exactly from this day, that is, on May 2, 2016.

Instead, the representatives of the second approach are convinced that the initial moment of the limitation period is calculated from the first second of the day that occurs after the commission of the crime.<sup>6</sup> If the official has committed a crime, as provided in part 1 of art. 368 of the Criminal Code of Ukraine on October 18, 2013, then the expiry date begins with the first second on October 19, 2013. Analysis of judicial practice on exemption from criminal liability for corruption offenses on the basis of art. 49 of the Criminal Code of Ukraine, does not answer the question.

In relevant decisions, the court refers only to the day the crime was committed, without identifying the initial and final moments of the limitation period.<sup>7</sup> As an example, by the decision of the Desniansky district court of Kyiv on May 17, 2013 is satisfied the petition of the barrister on the closure of criminal proceedings in respect of Mr M. on charges of committing an offense set forth in part 1 of art. 368 of the Criminal Code of Ukraine in connection with the expiration of the limitation period for prosecution in view of the fact that the limitation period for prosecution for the commission of the corresponding crime has expired, because the crime was committed on March 13, 2008.<sup>8</sup>

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<sup>4</sup> Golovchak M.M, Limitations in Criminal Legislation of Ukraine and Individual Foreign Countries. *Journal of the Kyiv University of Law*, 2013, No. 2, p. 320.

<sup>5</sup> Goroh O.P, Concerning the definition of the boundaries of the limitation period for prosecution, [in:] Pea O.P (Ed.), *Questions to fight crime*, 2014, Issue 27, p. 54; Kelina S.G, Theoretical Issues of Exemption from Criminal Responsibility: Monograph. Moscow, 1974, p. 208–209; Golovchak M.M, Limitations ..., *op. cit.*, p. 320; Encyclopedia of criminal law. T. 10: Exemption from Criminal Liability and Punishment. Baranov Yu. V and others, 2008, p. 350.

<sup>6</sup> Krutevich M.M, Features of the release from criminal liability in connection with the expiration of the limitation period. *Bulletin of the Criminal Law Association of Ukraine*, 2016, No. 1 (6), pp. 179; Baulin Yu.V, Borisov V.I, Ttiuginin V.I and others (Eds), *The Criminal Code of Ukraine. Scientific and Practical Comment*, 2013. p. 195; Melnyk M.I, Khavronyuk M.I (Eds), *Scientific and Practical Commentary of the Criminal Code of Ukraine. 9th species*, 2012, p. 149.

<sup>7</sup> Resolution of the Svyatoshinsky District Court of Kyiv dated September 28, 2016. Case number 759/16727/14–k. *Electronic source*: <http://www.reyestr.court.gov.ua/Review/61675603>, accessed: 12.10.2018; Resolution of the Dniprovsky District Court of Kyiv dated April 18, 2013 Case number 1–212/2011, *Electronic source*: <http://www.reyestr.court.gov.ua/Review/35460807>, accessed: 12.10.2018; The resolution of the Monastirishche district court of Cherkasy region dated March 11, 2014. Case number 702/207/14 *Electronic source*: <http://www.reyestr.court.gov.ua/Review/37543828>, accessed: 11.10.2018.

<sup>8</sup> Decree of the Desniansky District Court of Kyiv dated May 17, 2013. Case number 2603/10722/12. *Electronic source*: [mode:http://www.reyestr.court.gov.ua/Review/61493937](http://www.reyestr.court.gov.ua/Review/61493937), accessed: 8.10.2018.

However, the corresponding decision does not define the limit of validity of time limits bringing to criminal liability for the commission of a crime, stipulated in Part 1 of Art. 368 of the Criminal Code of Ukraine. Obviously, this issue was not of fundamental importance to the court, since at that time the limitation period for prosecution for the crime was two years.

The crime was committed on March 13, 2008, and the decision to release from criminal liability was taken on May 17, 2013, which means that more than five years passed, which clearly testifies to the expiration of the limitation period for the application of a criminal law for obtaining an unlawful benefit. At the same time, the clarification of this issue is extremely important in cases where the initial and final moment of the period of prescription 'goes into the ghost' with the limitation period, which is noteworthy in part 1 of art. 49 of the Criminal Code of Ukraine concerning a crime of a corresponding severity.

Therefore, the author shares the view that the initial moment of the limitation period is calculated from the first second of the day that occurs after the crime. This position complies with the provisions of the CPC of Ukraine, which states that during the calculation of terms of days and months it does not take into account the day from which the term begins (part 5 of article 115).

In this case, the prosecutor must provide the court with admissible and indisputable evidence that the crime was committed at a particular time. Such evidence of committing a corruption crime may be protocols of investigators and secret investigators' actions, in which the specific time of the commission of a criminal offense was recorded or other information that at the time of conducting the investigation the corruptive offense was committed (for example, the protocol for monitoring the crime, the protocol for the implementation of audio, video control of the person, protocol with audio and video control of the place, an overview of the place of the event, a search protocol and their respective annexes). The end point of the expiration of the limitation periods in the legal literature suggests recognition of the last 24 hours of the last day of the corresponding year.<sup>9</sup> For example, if the starting point of the expiration of the receipt of an unlawful benefit by an official (part 1 of article 368 of the Criminal Code of Ukraine) was determined on October 18, 2013, then the final moment of the expiration of the five-year limitation period is 24 hours on October 17, 2018.

It is necessary to find out whether the limitation period after the commission of the corruption crime was interrupted, i.e. whether a new crime of moderate, grave or especially grave character was committed. In accordance with part 3 of art. 49 of the Criminal Code of Ukraine, the calculation of limitation periods in this case begins from the date of the commission of a new crime. In this case, their calculation is carried out separately for each crime. Therefore, the investigator, the prosecutor or other subjects of proof must provide the court with evidence that confirms or refutes the fact that a person committed a new crime.

Such evidence is information (certificate of conviction) from specialized units of the Ministry of Internal Affairs, which keep relevant records of the perpetrators; a court decision which person is found guilty of committing a crime; procedural decisions of the investigator, prosecutor, in which the fact of commission

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<sup>9</sup> Goroh O.P, Concerning ..., *op. cit.*, p. 54; Krutevich M.M, Features ..., *op. cit.*, p. 180.

of a corruption offence or other offences is established, etc. In order to use the institution of exemption from criminal liability on the basis of art. 49 of the Criminal Code of Ukraine, it must also be established whether the person who committed the corruption offense was evaded from the investigation and in the court. The fact of such evasion shows that the public danger of a person remains, and therefore it remains necessary to bring it to criminal responsibility.<sup>10</sup>

Such evidence can be the decision of the investigator, the prosecutor, the court to declare the suspect (accused) in search and stop of the pre-trial investigation or legal proceedings in connection with their search, procedural decisions of the investigator, prosecutor, court on restoration of pre-trial investigation (court proceedings), information from special units of the Ministry of Internal Affairs which contains information on the presence of the wanted person, as well as interrogations of the suspects' relatives, information about the crossing of the border, etc.

The issue of proving the circumstances that are the basis for a special type of exemption from criminal liability for committing corruption crimes requires a separate consideration. Such an exemption is possible in the presence of a set of two conditions:

- 1) the person before receiving the information from other sources about this crime by a body whose official is in accordance with the law endowed with the right to report suspicion, volunteered to declare what happened to such a body;
- 2) the person actively contributed to the disclosure of the crime of the person who received the wrongful benefit or accepted her proposal or promise.

Criticizing such an approach legislator V.M. Chirichko observes that such a legislative decision is a gross mistake which may have negative consequences in practice in the form of violation of the rights of persons who, as a result of extortion, offered, promised or provided unlawful benefits. That is, according to the author, the legislator recognizes the actions of individuals who, as a result of extortion, offered, provided or transferred unlawful benefits, criminal.<sup>11</sup> Legislator, having excluded the extortion of unlawful benefits as one of the conditions for exemption from criminal liability, thereby expanding the ability of individuals who offered, promised or provided unlawful benefits to be exempted from such liability.

In particular, exemption from criminal liability is now possible not only in case of an extortion by an official or a person who renders public service an unlawful requirement, but also when a person voluntarily offered, promised or rendered unlawful profits.

Without going into the discussion on this subject, it should be noted that the legislator's approach seems not to be successful, since it makes it impossible to bring a person to criminal responsibility for the provocation of bribery and complicity in the commission of this crime, and may also be a punishment element. Proving the first condition for exemption from criminal responsibility for committing a crime of corruption is to establish the fact, that a person on his own accord, however, not

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<sup>10</sup> Rogatinskaya N.Z, The subject of evidence in cases closed by the proceeding for unreasonable reasons: Candidate Sciences: 12.00.09. Kyiv, 2008 15, p. 152.

<sup>11</sup> Kirchko V.M, The absence of public danger in the actions of a person who offered, promised or gave illicit profit as a result of extortion of such benefits, and the need to improve part 2 of article 11 and p. 5 of the note to the article 354 of the Criminal Code of Ukraine. *Bulletin of the Association of Criminal Law of Ukraine*, 2015, No. 2 (5), pp. 280–281.

necessarily on its own initiative, informed the law enforcement agencies about a proposal, a promise or an unlawful benefit to an official or a person providing public services. Such a notification may be made by writing an application, a direct appearance to the law enforcement agency in connection with the commission of unlawful actions (proposals, promises or unlawful benefits), testimony in criminal proceedings initiated by another fact.

In this case, 'voluntary' means that the person has realized the crime of his act and, without being exposed by the law enforcement agencies, has informed about actions committed by them. The main documentary evidence of a voluntary notification of a proposal, promise or unlawful gain is a statement, protocol of oral statement, as well as the interrogation protocol, or a document confirming the implementation of a telephone message to the law enforcement agency.

The indicated documents should contain information about the date and time of the notification. The presence of such information is very important, since cases of prior information about the commission of a corruption crime from other sources can not be ruled out (for example, from the media, the beneficiary's notice, etc.). However, even under such conditions the specified person will be released from criminal liability, if the fact is proved that they were not aware of the fact that a law enforcement agency received information about commission of a corruption offence from other sources.

This fact can be proved by conducting interrogations of individuals, with whom a person communicated after committing a crime (including by means of communication) until the moment of voluntary notification of a proposal, promise or provision of unlawful benefit; questioning the beneficiary and so on.

Conducting appropriate investigative (search) actions is necessary in order to exclude the possibility that the information was known to such person by the time of submission of her application that the law enforcement agency had received information about their commission of a corruption criminal offense from other sources. In the statement, the minutes of the oral declaration, as well as the minutes of the interrogation, it is necessary to indicate the information that prompted the applicant to commit the crime (for example, the desire to avoid criminal responsibility, reproach of conscience, etc.) or on his own initiative, he declared the fact of a proposal, a promise or an unlawful benefit to him, and the reason for such an appeal, or the willing applicant to help to challenge the beneficiary.

Formulation of the first condition for exemption from criminal liability for committing a corrupt crime, raises some comments. In particular, from the analysis of part 5 of art. 354 of the Criminal Code of Ukraine it is not clear to which body or official one is obliged to inform the person who offered, promised or gave unlawful benefit, as it is unlikely that the average citizen knows who is authorized to notify the suspicion according to the law. In this case, it seems that it is necessary to specify in part 5 of art. 354 of the Criminal Code of Ukraine a list of law enforcement agencies (prosecutor's offices, national police, the Security Service of Ukraine, the National Anti-Corruption Bureau, the State Bureau of Investigations, bodies supervising the observance of tax legislation), which one may inform about the crime committed by them.

For the release of a person from criminal responsibility for the commission of a crime of corruption it is also subject to proof that the person actively contributed



to the disclosure of an offense committed by an official or a person who renders public services that has received an unlawful benefit or accepted its offer or promise. Active assistance in disclosing a crime consists in the participation of the person (the applicant) in the conduct of investigative (search) activities aimed at providing any assistance in establishing by the law enforcement agencies the circumstances of criminal proceedings, in particular, exposing the accomplices of the crime, providing information about the time, place and method of transfer of unlawful benefits.

Direct involvement in the conduct of investigative (search) activities is aimed at exposing the beneficiary and documenting their criminal activity. Indeed, the proof of 'active assistance' as the basis for exemption from criminal responsibility is to obtain and subsequently provide documents, which would indicate in what manner the applicant has shown such assistance. In the case of committing corruption criminal offenses, such evidence may include information provided during investigations (investigatory) actions (interrogation of a person, investigative experiment), which contains information on the participation of other persons in the commission of this or other criminal offenses, information about the location of funds (or other benefits), reports on the control of the crime with the participation of the specified person, etc.

## Conclusions

Thereby, summarizing the above, one can conclude that proving the circumstances which are the basis for the release of persons who committed corrupt crimes from criminal responsibility, is to provide the subjects of criminal proceedings with a set of evidence, which confirm, that the correction of the person concerned is possible without isolation from society or that the legally defined terms of bringing to criminal liability have passed.

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**Streszczenie.** W artykule zbadano specyfikę okoliczności dowodowych, które są podstawą do zwolnienia osoby z odpowiedzialności karnej za przestępstwa korupcyjne w zakresie działalności usługowej związanej ze świadczeniem usług publicznych. Ustalono merytoryczne i proceduralne podstawy prawne takiego zwolnienia oraz przeanalizowano specyfikę okoliczności dowodowych, które są podstawą do zwolnienia osoby z odpowiedzialności karnej na podstawie art. 49 i części 5 art. 354 Kodeksu Karnego Ukrainy.

**Резюме.** В статье рассматривается специфика доказательственных обстоятельств, которые являются основанием для освобождения лица от уголовной ответственности за совершение коррупционных преступлений в сфере предоставления публичных услуг. Установлены материально-правовые и процессуальные основы такого освобождения и дается анализ особенностей доказательственных обстоятельств, которые являются основанием для освобождения лица от уголовной ответственности по ст. 49 и ч. 5 ст. 354 Уголовного кодекса Украины.