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FORMS OF COMPLICITY IN A CRIMINAL OFFENSE UNDER THE CRIMINAL LAW OF UKRAINE

The concept of "forms of complicity in a criminal offense" is not explicitly used by the legislator in Ukraine. Scholars and practitioners mostly rely on Article 28 of the Criminal Code of Ukraine (hereinafter referred to as the CC), although the title of this article does not specifically mention the forms of complicity. The title of Article 28 CC is "Committing a Criminal Offense by a Group of Persons, a Group of Persons by Prior Agreement, an Organized Group, or a Criminal Organization".

There are at least two reasons why the legislator did not directly indicate the forms of complicity in the title. The first and main reason is that Article 28 CC does not cover all forms of complicity. Some of these forms are identified based on the analysis of Article 27 CC. If the title of Article 28 CC were formulated as "Forms of Complicity," it would imply that all forms of complicity are exclusively provided for in this article, which is not the case.

The second reason is that the legislator was uncertain about the desirability of introducing the new phrase "forms of complicity" into the Ukrainian criminal legislation. The provisions concentrated in Article 28 CC have a relatively short history. They first appeared in the Criminal Code in 2001. At that time, the issue of forms of complicity in the CC was not fully resolved. There were different approaches to dividing complicity into forms, based on various criteria.

The most common classifications of forms of complicity in the science of criminal law are as follows.

1. The distinction of only two forms: 1) complicity without prior agreement among accomplices of the criminal offense; 2) complicity by prior agreement. The criterion for such division is the presence or absence of prior agreement among the accomplices.

2. The distinction of three forms is as follows: 1) simple complicity; 2) complicity qualified by prior agreement among the accomplices; 3) complicity of a special nature, which refers to complicity in the form of a criminal association. The criterion in this classification is mixed, as it considers not only the presence or absence of prior agreement among the accomplices but also the specific nature of the relationships between the accomplices in the criminal association.

3. Another classification, consisting of three forms of complicity, is as follows: 1) co-perpetration; 2) complicity with a division of roles among the accomplices; 3) complicity of a special nature. Here, a mixed criterion of classification is also applied.

4. The classification consisting of four forms of complicity is as follows: 1) complicity without prior agreement among the accomplices; 2) complicity by prior agreement; 3) organized group; 4) complicity of a special nature – criminal organization.

The last classification was adopted by the legislator as the basis for formulating provisions in Article 28 of the Criminal Code (CC). However, it has been noted that not all forms of complicity are covered in Article 28 CC. Therefore, due to the ongoing nature of this issue in the science of criminal law, the legislator has not yet introduced the concept of "forms of complicity" into the CC.

Currently, two criteria are primarily used to classify forms of complicity: 1) the nature of roles performed by accomplices (objective criterion); 2) the stability of subjective connections between accomplices (subjective criterion).

These two criteria serve as the basis for defining the concept of forms of complicity. Therefore, forms of complicity refer to the association of accomplices

in a criminal offense that differ from one another in terms of the nature of roles performed and the stability of subjective connections between accomplices.

Forms of complicity are significant for determining the level of societal danger of a criminal offense and for assigning appropriate punishment to the accomplices. According to paragraph 2 of Part 1 of Article 67 of the Criminal Code (CC), committing a criminal offense by a group of persons by prior agreement (second or third part of Article 28 CC) is one of the circumstances that aggravate the punishment.

Additionally, committing a criminal offense by a group of persons, by prior agreement of a group of persons, or by an organized group is used as qualifying characteristics in the articles of the Special Part of the Criminal Code.

Thus, forms of complicity are used in differentiating criminal liability at the legislative stage and in individualizing criminal responsibility during the stage of legal application.

Forms of complicity are considered within the framework of two classifications, each utilizing its own dividing criterion.

The division of complicity into forms based on objective signs (according to the objective criterion - the nature of roles performed)

In Part 1 of Article 27 of the Criminal Code (CC), it is stipulated that accomplices include perpetrators, organizers, instigators, and accessories. However, in Part 2 of the same article, it also mentions co-perpetrators. From this, the following conclusions can be drawn:

1) It is possible to have complicity where all accomplices of the criminal offense act as perpetrators, i.e., they are co-perpetrators.

2) It is also possible to have complicity with a division of roles, where accomplices assume different roles in the criminal offense, such as one being the perpetrator, another being an accessory, a third being an instigator, and so on.

Thus, Article 27 of the Criminal Code provides for complicity in the form of co-perpetration and complicity with a division of roles. This division separates

complicity into two forms based on the roles performed by the accomplices in the criminal offense, i.e., according to objective criteria.

1. Simple complicity occurs when all accomplices are co-perpetrators of the criminal offense, and therefore, they all assume a homogeneous role.

It is important to note that it should be a legal, rather than factual, homogeneity. In other words, their actions may have different factual characteristics. For example, one of the perpetrators threatens the victim with a knife, another holds their hands, and a third takes valuable belongings. However, from the perspective of the form of complicity, their roles are homogeneous – they all directly perform actions described in the provision of a specific offense in the Special Part of the Criminal Code, in this case, robbery (Article 187 of the Criminal Code).

2. Complicated complicity occurs when accomplices assume diverse roles, involving a division of roles where one or several of them act as perpetrators, while others act as organizers, instigators, or accessories. In other words, in this form of complicity, not all accomplices are perpetrators of the criminal offense.

The division of complicity into forms based on subjective signs (according to the subjective criterion - the stability of subjective connections between accomplices)

Based on subjective signs (the stability of subjective connections between accomplices), Article 28 of the Criminal Code distinguishes the commission of a criminal offense by different criminal groups:

1) Part 1 of Article 28 of the Criminal Code - the commission of a criminal offense by a group of persons. This refers to a group of individuals without prior agreement, but the legislator used a simplified title without specifying the absence of prior agreement.

2) Part 2 of Article 28 of the Criminal Code - the commission of a criminal offense by a group of persons by prior agreement.

3) Part 3 of Article 28 of the Criminal Code - the commission of a criminal offense by an organized group.

4) Part 4 of Article 28 of the Criminal Code - the commission of a criminal offense by a criminal organization.

It is important to note the following features:

1) The forms of complicity do not refer to the type of group (group without prior agreement, group by prior agreement, organized group, and criminal organization), but rather to the commission of a criminal offense by these groups.

2) The third and fourth forms of complicity (commission of a criminal offense by an organized group and commission of a criminal offense by a criminal organization) are essentially variations of the commission of a criminal offense by a group of persons by prior agreement. As a result, the logic of structuring complicity into forms based on subjective signs becomes complex. One can argue that there are two main forms: commission of a criminal offense by a group of persons without prior agreement and commission of a criminal offense by a group of persons by prior agreement. This latter form then has two subtypes, which are specified in the third and fourth parts of Article 28 of the Criminal Code.

The signs of the forms of complicity provided for in Article 28 of the Criminal Code

1. A criminal offense is recognized as being committed by a group of persons if it involves the participation of several (two or more) perpetrators without prior agreement among themselves.

Objective signs:

- *quantitative sign* – several persons (two or more);
- *type of accomplices* – perpetrators. It should be noted that such legislative limitation cannot be justified. This approach creates situations that fall outside the scope of any form of participation as provided for in Article 28 of the Criminal Code.

Let's consider a case where an accomplice joins the perpetrator during the commission of the objective elements of the offense. For example, a perpetrator intending to commit theft enters the cash office of a company and attempts to open a safe but fails. At this point, the accountant notices the perpetrator and offers assistance by providing the safe's access code (providing advice). Such joint activity should be recognized as complicity in the criminal offense since it exhibits all the characteristics outlined in Article 26 of the Criminal Code. However, this particular case is not covered by any of the forms described in Article 28 of the Criminal Code. Considering that the agreement arose during the commission of the objective elements of the theft, it can only be regarded as complicity without prior agreement among a group of individuals, but it lacks the obligatory characteristic of the presence of co-perpetrators. In the case under investigation, there is a collaboration between the perpetrator and the intellectual accomplice.

Such gaps should not exist, as the classification of forms of complicity should encompass all variations of complicit conduct.

Subjective signs:

– absence of prior agreement among the accomplices.

2. The second form of complicity in this classification: a criminal offense is considered committed by a group of individuals by prior agreement if it is jointly committed by several persons (two or more) who, in advance, prior to the commencement of the criminal offense, have conspired to commit it together.

Objective signs:

– *quantitative sign* – several persons (two or more);

– *type of accomplices* – a combination of any types of accomplices, but there must be at least one perpetrator among them. The perpetrator may join the group not immediately, but after its formation.

Subjective signs:

– *existence of prior agreement.*

Part 2 of Article 28 of the Criminal Code indicates this with the words "in advance, that is, before the beginning of the criminal offense, agreed on its joint commission." Another inaccuracy. The words "before the beginning of a criminal offense" mean - until the moment when the commission of any criminal offense begins, including preparation for a criminal offense. However, according to Part 1 of Article 14 of the Criminal Code, conspiracy to commit a criminal offense is one of the types of preparation. A contradiction arises – a conspiracy between accomplices indicates preparation for a criminal offense, but it must occur before it, which is impossible.

The legislator had a different intention - before the commencement of the commission of the objective elements of the criminal offense. Resolving this issue requires clarification of Part 2 of Article 28 of the Criminal Code, but this has not yet occurred, so it is necessary to proceed from a specific interpretation of the content of this provision.

3. The third form: the criminal offense is considered to be committed by an organized group if several individuals (three or more) participated in its preparation or commission and previously organized themselves into a stable association to commit this and other (s) criminal offenses, united by a single plan with a division of functions among the group members aimed at achieving this plan, known to all group participants.

The examination of the characteristics of the third and fourth forms of complicity should be conducted taking into account the provisions of the Resolution of the Plenum of the Supreme Court of Ukraine "On the practice of courts in considering criminal cases of crimes committed by stable criminal associations" dated December 23, 2005, No. 13.

Objective signs:

- *quantitative sign* – three or more persons;
- *type of accomplices* – union of any types of accomplices.

At the same time, it is sometimes argued that the presence of an organizer is a characteristic feature of this form of complicity. Indeed, there are common cases of joining the efforts of an executor, an organizer, and other types of accomplices. However, it cannot be denied that criminal offenses can be committed by an organized group through the coordination of actions among co-perpetrators. Such situations are typical in cases of organized crime, where a gang or a group of co-perpetrators exists, characterized by a high level of stability in the subjective relationships among them. In determining this form of complicity in Part 3 of Article 28 of the Criminal Code, the phrase "with a division of functions among group participants" is used, but it should not be interpreted as a division of roles, as roles and functions of accomplices have different meanings. The role indicates the type of accomplice, while the function refers to the specific activities performed by the accomplice. Different accomplices within the same role can perform different functions;

– *a feature of the structural ties of accomplices.*

This sign manifests itself in two aspects:

1. Organized nature of the group - the activity of the accomplices that leads to the establishment of a stable association.
2. Division of functions among the group participants.

Subjective signs:

– *internal stability of the association.*

Before explaining the content of this characteristic, some clarifications should be made. It is important to remember that all forms of complicity in this classification differ in the level of stability of subjective connections between the participants. This is the most important characteristic of each form of complicity, which should have its own distinct meaning in each form. Thus, the lowest level of stability is found in the first form - the commission of a criminal offense by a group of individuals without prior

conspiracy among the participants. It is then strengthened in the second form - the commission of a criminal offense by a group of individuals with prior conspiracy among the participants, although it is not yet established as a separate characteristic of stability in Article 28, Part 2 of the Criminal Code. The indication of stability first appears in Part 3 of Article 28 when defining the commission of a criminal offense by an organized group. According to the logic of this classification of forms of complicity, the next form should demonstrate the highest degree of stability, which should be reflected in the corresponding formulation. However, in Part 4 of Article 28, the legislator used the same term "stability." This created a problem in distinguishing the characteristic of stability between the third and fourth forms of complicity, as provided for in Article 28 of the Criminal Code. In the science of criminal law, the characteristic of "cohesiveness" was traditionally used for the fourth form of complicity, while "stability" was used for the third form. However, the legislator did not make this differentiation, even though it is traditional and understandable.

On practice, there was a need to establish additional characteristics for distinguishing between the third and fourth forms. Such differentiation was proposed in the Resolution of the Plenum of the Supreme Court of Ukraine "On the Practice of Courts in Considering Criminal Cases on Crimes Committed by Stable Criminal Associations" dated December 23, 2005, No. 13, through different interpretations of the characteristic of stability in the commission of a criminal offense by an organized group and the commission of a criminal offense by a criminal organization.

This approach is not conventional since the same term "stability" in Part 3 of Article 28 of the Criminal Code is proposed to be understood differently than in Part 4 of Article 28 of the Criminal Code. In other words, the same textually fixed characteristic "stability" has different meanings in different provisions, which violates one of the principles of legislative technique,

according to which the same concept should have a consistent meaning in all cases of its use in any provision. I believe that such illogical methods should not be used to rectify legislative errors, but at present, this approach is utilized in legal practice.

Paragraph 1 of Clause 11 of the mentioned resolution of the Plenum of the Supreme Court of Ukraine provides a general definition of stability. The stability of an organized group and a criminal organization lies in their ability to ensure the stability and security of their functioning, effectively counteracting factors that can disrupt them, both internally (such as non-recognition of authority or orders of the leader, attempts by individual members to separate or withdraw from the group) and externally (failure to comply with safety rules regarding actions of law enforcement agencies, activities of competitors within the criminal environment, and so on).

Furthermore, stability is divided into two types: 1) internal stability and 2) external stability.

It is suggested that the commission of a criminal offense by an organized group is possible only in the presence of internal stability, while the commission of a criminal offense by a criminal organization requires both internal and external stability.

Therefore, returning to the internal stability of the association as a subjective characteristic of the third form of complicity, its essence should be clarified. Internal stability of the association refers to its ability to resist internal destabilizing factors. This ability is indicated by such features as a stable composition, close relationships among its participants, centralized subordination, uniform rules of conduct for all, as well as the presence of a plan for criminal activities and a clear distribution of functions among the participants for its achievement (paragraph 1 of point 11 of the mentioned resolution of the Plenum of the Supreme Court of Ukraine).

– *the presence of prior conspiracy among the accomplices;*

- *the purpose of the organized group's activity* should be the commission of the specified criminal offenses and/or other criminal offenses as stated in the Criminal Code.

Not quite a good wording, from which it follows that the legislator probably had in mind the commission of several criminal offenses. However, in the field of criminal law and practice, there are known cases where an organized group was formed for the commission of only one, albeit complex, criminal offense. The participants of such a group would prepare for years leading up to the commission of this offense, and after its completion, the organized group would cease to exist. Throughout these years, the group acquired signs of stability, providing sufficient grounds to recognize it as an organized group. However, according to Part 3 of Article 28 of the Criminal Code, it is difficult to classify it as such.

- *a feature of the consent of accomplices* – they must be united by a single plan known to all group members.

Furthermore, in paragraph 9 of the mentioned resolution of the Plenum of the Supreme Court of Ukraine, it is stated that an organized group should be considered formed from the moment its participants reach an agreement to commit the first criminal offense, provided that there are plans for further joint criminal activities.

4. The fourth form: the criminal offense is considered to be committed by a criminal organization if it is committed by a stable hierarchical association of several persons (five or more), whose members or structural components have organized themselves by prior agreement for joint activities aimed at directly committing serious or particularly serious crimes by the participants of this organization, or for leading or coordinating the criminal activities of other persons, or for ensuring the functioning of both the criminal organization itself and other criminal groups.

Objective signs:

- *quantitative sign* – five or more persons;
- *type of accomplices* – a criminal organization must have an executor, an organizer, and any other types of accomplices;
- *a feature of the structural ties of accomplices*.

It is characterized by two features.

1. *Organized nature of the group* – has the same meaning as for the commission of a criminal offense by an organized group.
2. *Hierarchy of the association* – involves the subordination of the participants of the association to the organizer and ensures a certain order of management within the association. It also contributes to the preservation of functional connections and the principles of interdependence among its participants or structural parts in the commission of joint criminal activities (paragraph 2 of point 12 of the mentioned resolution of the Plenum of the Supreme Court of Ukraine).

Subjective signs:

- *internal and external stability of the association*.

Internal stability of the association should be understood in the same way as for the commission of a criminal offense by an organized group.

External stability of the association should be understood as its ability to resist external destabilizing factors. Indications of external stability of a criminal organization may include establishing corrupt connections within the authorities, exchanging information channels regarding the activities of criminal competitors, creating illegal (shadow) insurance funds and determining the order of their funding and use, and so on (paragraph 3 of point 11 of the mentioned resolution of the Plenum of the Supreme Court of Ukraine).

- *the presence of prior conspiracy among the accomplices*;
- *the purpose* of a criminal organization is the direct commission of serious or particularly serious crimes by its members, or the leadership or

coordination of criminal activities by other individuals, or ensuring the functioning of both the criminal organization itself and other criminal groups.

In conclusion, a criminal organization is considered established (created) if, after reaching an agreement among individuals regarding the commission of the first serious or particularly serious crime but before its completion, the association acquires all the mandatory characteristics of such an organization. It is irrelevant whether the association preceded the acquisition of the characteristics of a criminal organization by existing as an organized group or whether the mentioned organization was immediately created as such (paragraph 2 of point 10 of the mentioned Resolution of the Plenum of the Supreme Court of Ukraine).

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