

БОРОТЬБА ЗІ ЗЛОЧИННІСТЮ: ТЕОРІЯ ТА ПРАКТИКА

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Oleh Tatarov – Doctor of Law, Professor,
Honored Lawyer of Ukraine, Professor
of the Department of Criminal Process of
the National Academy of Internal Affairs

UKRAINIAN PERSPECTIVES OF ILLEGAL ASSETS RECOVERY

Article examines powers and authority of State Financial Monitoring Service of Ukraine which still functions in a limited scope of competence concerning the illegal assets recovery. It is stated that among the significant steps made by the Ukrainian government to improve the present situation with tracing, search and recovery of assets we can mark establishment of National Agency of Ukraine for Illegal Assets Detection, Search and Management, execution of an interagency cooperation agreement and accreditation of National Anti-Corruption Bureau of Ukraine for detection of “corrupted” financial assets. Also it provides comprehensive analysis of legislative defects in terms of illegal property confiscation.

Keywords: financial assets; confiscation; detection, search and recovery; property arrest; legalization of illegal assets (money laundering).

Illegal assets recovery has become an issue of urgent character in Ukraine. During the period of January 2014-March 2016 State Financial Monitoring Service of Ukraine detected operations involving legalization of illegal assets for 350 bln UAH. At the same time only a few thousand UAH were returned to the state budget (e.g., in 2015 (3 months) only 5014 UAH of illegal assets

replenished the budget according to the State Treasury Service of Ukraine statistics).

To complete the recovery procedure assets must be proved to be illegal and the relevant confiscation order (court decision) must be issued (this is still one of the key obstacles). It is almost an impossible task to succeed in illegal assets recovery operation in cases when the accused person is not subjected to national jurisdiction, granted a legal privilege or escapes responsibility by evading the investigation and hiding away abroad – usually this task is completed only within trial in absentia [1]. Of the highest importance is the activity of State Financial Monitoring Service of Ukraine which is responsible for detection of suspicious financial transactions and ensures cooperation with foreign and international organizations in terms of financial assets searching.

Issues concerning financial assets recovery were mostly studied in the scope of such property arrest and detection in the territory of Ukraine by O. Korystin, M. Pogoretskyi, S. Cherniavskyi, A. Chubenko etc.

The aim of the article is to study the system of state bodies responsible for illegal assets detection and recovery in Ukraine along with identification of problems and search for relevant solutions.

State Financial Monitoring Service of Ukraine is authorized upon its initiative (according to p. 2, 3, 5 of Article 17 of the Law of Ukraine «On combating and prevention of money laundering, financing of terrorism and dissemination weapon of mass destruction» [2]) without the decision of court to freeze the accounts for 5–30 days (these provisions were also present in the «previous» law (2003–2014). But the majority of assets blocked by the State Financial Monitoring Service of Ukraine are released due to arrest delays or lack of satisfactory evidence. That is why we state that cooperation of law enforcement, judiciary and executive bodies is the key condition to succeed in any illegal assets recovery operation.

Moreover, national legislation defines a complex structure of subjects commissioned to carry out activities aimed at illegal assets recovery which, without any doubt, requires simplification and reorganization of interaction mechanisms.

Thus, members of operative units are tasked to ensure the collection of data concerning the illegal assets identification with provision of further support of arrest and confiscation operations using a set of operative «tools» including the covert investigative actions (operative search, confidential employees). Investigators (prosecutors, detectives) are responsible for conducting of investigative activity (interrogation, search and examination) in the scope of criminal proceeding and tasked to initiate the property arrest procedure in the court (trial is usually a time-consuming process). Court has right to conduct the property confiscation. State Executive Service acts according to the court's rulings in relation to direct extraction of the arrested property (acting in full compliance to the court decision and official data provided by banks and state bodies). Practically this procedure can last for years depending on the time limits of proceeding.

Unfortunately, current criminal legislation does not give the suspect a right to provide the request on property arrest individually to the court (this right is given only to civil plaintiffs). If the suspect autonomously identifies the location of money or property (owned by a criminal), he/she has no right to initiate the confiscation of these assets in the court autonomously – only followed by the prosecutor and investigator (it significantly extends the proceeding and in some cases makes compensation of damage impossible).

But the main problem is that the rights of State Financial Monitoring Service of Ukraine are limited by the legislation to detection of the abovementioned transactions (this state body is responsible for monitoring of the financial transactions exceeding 150 000 UAH according to the Law of Ukraine «On combating and prevention of money laundering, financing of terrorism and dissemination weapon of mass destruction» [1]) followed by the disposal of the collected data directly to the competent bodies for further investigation. The «post-disposal» interaction between the State Financial Monitoring Service of Ukraine and investigative bodies is not regulated. In practice the disposed data is used only as a ground to initiate the pre-trial investigation and potential arrest of assets.

As a result, in 2016 (January–August) State Financial Monitoring Service of Ukraine issued 419 reports but only a few criminal

proceedings on money laundering were passed to the court [3]. Another problem is the low professional level of investigators who demonstrate lack of skills in financial records management and, respectively, improper qualification. Only professionals must be involved in these investigations (e.g. special skills in audit and tax management) being able to operate the financial records and guaranteed a direct access to key state registers (customs, tax, real property registers etc) [4].

One of the positive outcomes is the establishment of National Agency of Ukraine for Illegal Assets Detection, Search and Management [5] (hereinafter referred to as «National Agency») – a state body, tasked to detect, search and administer the illegal assets (acts as a central executive body according to the Decree of the Cabinet of Ministers of Ukraine of February 24, 2016). Similar structures operate in France, Romania, Belgium, the Netherlands, the USA, Great Britain, Ireland etc. But these functions are performed only upon the request provided by investigator, detective, prosecutor or judge – respectively, it is not authorized to initiate or autonomously carry out detection and search operations.

Generally, this body is responsible for execution of investigation, prosecution and judiciary requests on detection and search of assets in the shortest terms (only three days after the request was received) or longer term (indicated in the request); also this term may be extended upon negotiation and confirmation from the investigation, prosecution or judiciary (p. 1 Article 17 of the Law of Ukraine «On National Agency of Ukraine for Illegal Assets Detection, Search and Management» [5]). Unfortunately this agency is still not functioning despite its official launching in February 2016.

It must be mentioned that in Ukraine already was an attempt to create a similar unit in the MoI structure [6]. In July 2015 a Department for Illegal Asset Recovery was established and tasked to investigate criminal offences and corruption cases directly connected with funneling the Ukrainian assets abroad. But this department was eliminated in November 2015 without any results due to operating delay.

Another legislative «gap» directly affects the procedure of arresting the property owned by the third parties (not in direct

ownership of suspect or accused). The suspect's property which could be potentially subjected to confiscation is not arrested in proper terms and, therefore, the property is made over to third parties and legally alienated [5]. In fact it means state loses a great opportunity to arrest it.

According to Criminal Procedure Code of Ukraine [7] property belonging to third parties is arrested if they received it for free of charge or for price exceeding/understating the market value and were aware of its «criminal origin». But the Code does not clearly regulate how exactly must be this third party «personal evaluation» proved, obstructing the arrest procedure. Every «third party» will testify of non-awareness of the property origin to avoid the confiscation and proving the opposite is an unbelievably difficult task. That is why these facts must be supported by testimonies (interrogations), results of covert investigative actions (phone calls recording) but not only with the operative reports which is quite common today.

Still we consider empowering of the third party with rights of suspect/accused in relation to the property arrest to be unreasonable. Firstly, suspect or accused has right to refuse to testify. Secondly, in some cases witness (a person aware or potentially aware of the crime circumstances to be established during the investigation) is also a third party whose property is arrested and according to the legislation is empowered with rights of suspect/accused. Thirdly, Criminal Procedure Code of Ukraine does not regulate the procedure of relevant third party's interrogation. These discrepancies cause significant difficulties during the property arrest and create grounds for the court to define the «third party evidence» as inadmissible.

However the biggest stumbling rock is still the detection of assets and its connection to the individual. The conclusions are made mostly with the operative reports but the data has no proper confirmation. As the financial assets are hidden and funneled through the bank transactions «protected» by the bank secrecy, these operations are under reliable «camouflage» of dozens of legal transactions.

This problem was attempted to be solved by amending the legislation in terms of authorizing the law enforcement to monitor the bank accounts as a covert investigative action (Article 269¹ of

Criminal Procedure Code of Ukraine, February 2015 [7]). Still the abovementioned competences today are granted only to the units of National Anti-Corruption Bureau of Ukraine (we consider the best solution to authorize other pre-trial investigation agencies with these functions – National Police of Ukraine, State Fiscal Service of Ukraine, State Bureau of Investigation and Security Service of Ukraine). Moreover, the complexity of this procedure does not allow to increase the efficiency of asset recovery operations as the unit of National Anti-Corruption Bureau of Ukraine, responsible for initiation of this action, must be aware of what bank is the financial assets holder – so far there is no unified database of bank clients in Ukraine.

For example, in Germany banks are obliged to identify international transactions and inform the Financial Intelligence Group of any suspicious operations. According to German law Federal Agency of Financial Control (Bundesanstalt Finanzdienstleistungsaufsicht, BaFin) is granted access via electronic means to the basic bank account data (banks are obliged to store these data in the central transaction database [8, p. 121]).

Complexity of asset recovery mechanism is also connected with the necessity of requesting the foreign law enforcement. In practice this request exchange can last for years (some countries of Latin America, Africa and Middle East can totally neglect every Ukrainian request). Absence of clear terms for request processing in the foreign legislation is the reason for long-term delays in the asset search operations. It can be explained with extremely low interest of the foreign state in terms of financial assets' transfer to Ukraine. These complications can be avoided by execution of cooperation agreements on illegal financial assets search and recovery (for example, in August 2014 an agreement was signed between the General Prosecutor's Office of Ukraine and International Center of Asset Recovery of Basel Institute of Management (ICAR), which is specialized in development of the states' potential in terms of asset recovery with due attention paid to financial investigation and assets tracing methodology, mutual legal aid and international cooperation in investigation of corruption and money laundering cases [9]).

It is also important to mention quite controversial and actively discussed issue – «extrajudicial confiscation». A draft law was

designed to amend the Criminal Procedure Code of Ukraine – a new chapter 24–1 «Peculiarities of recovery of financial assets, valuables and its derivatives prior to court decision» [10].

Author considers it necessary to update it by stating that in case if the investigation results in detection of the abovementioned crimes, the recovery procedure will be launched only: 1) if the owner of financial assets, valuables and its proceeds is not identified; 2) if the owner of financial assets, valuables and its proceeds is the suspect or the third party (assigned as the owners of financial assets, valuables and its proceeds by the suspect before or in the course of criminal proceeding) but none of them is able to prove its legal origin and the total value does not correspond to the data indicated in their declarations (officially declared property) [10].

Still it is difficult to understand why the Criminal Procedure Code of Ukraine is being amended. In fact it is offered to authorize the property confiscation (which is according to Article 59 of Criminal Code of Ukraine is defined as criminal penalty [11]) prior to the enactment of the conviction of an accused person.

Moreover, this confiscation can be enforced in relation to the «third parties» – citizens who were not necessarily aware of the assets' criminal origin. Here is the clear violation of the main constitutional principles – presumption of innocence which states that person is considered innocent and can not be subjected to a criminal penalty unless proven guilty according to the decision of court (p. 1 Article 62 of the Constitution of Ukraine) [12].

If we visualize the adoption of this amendment, we can clearly see the establishment of friendly environment for so called «legal» expropriation of property from the innocent person. We will have cases when a buyer of a specific property will be accused of committing a crime and the pre-trial investigation will reveal his/her inability to prove the origin of money for buying the property.

The seller in this situation can not and absolutely must not possess the information about the money he/she received in exchange for the property. The amending draft law foresees the extraction of this money and its further recovery and the property will either stay in the ownership of the suspect or will be confiscated by the state after the court decision is issued [12].

Extrajudicial confiscation is applied in many countries, especially in the jurisdictions of customary law – Australia, Israel, Ireland, Canada, Columbia, Liechtenstein, Switzerland etc. But even in the US and Great Britain this tool is used in parallel with criminal proceeding. US legislation stipulates blocking and freezing of some assets using only the executive decrees without the prior court decision. However, these procedures don't deprive a person from the ownership. Regulations set the possibility to appeal against the ruling according to the proceeding norms.

That is why we must first give a clear definition to the extrajudicial confiscation – a measure of ensuring the criminal proceeding or penalty enforced without the court decision? Any of these cases stipulates exceptional circumstances which make the implementation of certain law provisions impossible as the property confiscation a priori can not be considered as a measure of ensuring the criminal proceeding and as a penalty it may only be chosen exclusively upon the court decision in full compliance to the current legislation.

In Ukrainian reality extrajudicial confiscation can be easily turned into another tool of opponents' neutralization and become a part of forcible takeover schemes even if properly defined in the legislation with all legal guarantees granted to the property owners. It must be noted that an institute of special pre-trial investigation was established in the Criminal Procedure Code of Ukraine with aim to restore the state and citizens' rights, violated by the criminals, and complete the asset recovery operations.

We can conclude that a few steps are already made in Ukraine concerning the establishment of asset recovery system: launch of National Agency of Ukraine for Illegal Assets Detection, Search and Management tasked to detect, search and administer the illegal assets; first steps are made in establishment of international cooperation on asset recovery matters by execution of the agreement signed between the General Prosecutor's Office of Ukraine and International Center of Asset Recovery of Basel Institute of Management (ICAR); authorization of National Anti-Corruption Bureau of Ukraine for performance of covert detection and arrest of bank assets during the account monitoring.

Still efficient asset recovery mechanisms need to be supported by legislative and structural transformations in terms of coordination of relevant services activities and facilitation of international cooperation in order to create a fully functional asset recovery system in Ukraine.

REFERENCES

1. Poiasniuvalna zapyska do proektu Zakonu Ukrainy Pro osoblyvyi rezhym spetsialnoi konfiskatsii maina [Explanatory letter to the draft law «On special procedure of property confiscation»]. (n.d.). *rada.gov.ua*. Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=56358 [in Ukrainian].
2. Zakon Ukrainy Pro zapobihannia ta protydiu lehalizatsii (vidmyvanniu) dohodiv, oderzhanykh zlochynnym shliakhom, finansuvanniu teroryzmu ta finansuvanniu rozpovsiudzhennia zbroi masovoho znyschennia vid 14 zhovt. 2014 r. № 1702–VII [Law of Ukraine On combating and prevention of money laundering, financing of terrorism and dissemination weapon of mass destruction October 14, 2014 № 1702–VII]. *Vidomosti Verhovnoi Rady Ukrainy – Bulletin of Verkhovna Rada of Ukraine*, 50–51, pp. 2057 [in Ukrainian].
3. Informuvannia pro rezultaty roboty Derzhfinmonitorynhu za sichen-serpen 2016 roku [Informing of the State Financial Monitoring Service of Ukraine activities (January-August 2016)]. *Sait Uriadovyi portal – Site Government portal*. Retrieved from http://www.kmu.gov.ua/control/uk/publish/article?art_id=249285795&cat_id=244277212 [in Ukrainian].
4. Kaleniuk, D. (2015). Misiia mozhlyva. Yak povernuty koruptsiini aktyvy Ukraini? [Mission is possible. Recovery of corruption assets in Ukraine]. *Ukrainska Pravda – Ukrainian Pravda*. Retrieved from <http://www.pravda.com.ua/articles/2015/04/27/7065956/?attempt=2> [in Ukrainian].
5. Zakon Ukrainy Pro Natsionalne ahenstvo Ukrainy z pytan vyavlennia, rozshuku ta upravlinnia aktyvamy, oderzhanymy vid koruptsiinykh ta inshykh zlochyniv vid 10 lyst. 2015 r. № 772–VIII [Law of Ukraine On National Agency of Ukraine for Illegal Assets

Detection, Search and Management November 10, 2015, № 772-VIII]. *Vidomosti Verhovnoi Rady Ukrainy – Bulletin of Verkhovna Rada of Ukraine*, 1, p. 2 [in Ukrainian].

6. U MVS stvoreno upravlinnia po zabezpechenniu povernennia aktiviv, oderzhanykh zlochynnym shliakhom [MOI establishes Department for Illegal Asset Recovery]. *Sait Uriadovyi portal – Site Government portal*. Retrieved from http://www.kmu.gov.ua/control/publish/article?art_id=248308133 [in Ukrainian].

7. Zakon Ukrainy Kryminalnyi protsesualnyi kodeks Ukrainy : vid 13 kvit. 2012 r. № 4651-VI [Law of Ukraine Criminal Procedure Code of Ukraine : April 13th, 2012 № 4651-VI]. *Holos Ukrainy – Voice of Ukraine*, 90–91 [in Ukrainian].

8. Mahomedov, D. (2006). Protivodeystvie finansirovaniyu terrorizma: znachenie zarubezhnogo opyita dlya rossiyskogo zakonotvorchestva [Combating the terrorism financing: foreign experience in Russian legislative process: PhD thesis in Law]. *Candidate's thesis*. SPb: RGB [in Russian].

9. Pidpysano uhodu pro spivrobotnytstvo mizh Heneralnoi prokuraturoiu ta Mizhnarodnym tsentrom z povernennia aktiviv Bazelskoho instytutu upravlinnia [Agreement is signed between the General Prosecutor's Office of Ukraine and International Center of Asset Recovery of Basel Institute of Management (ICAR)]. *Sait Heneralnoi prokuratury Ukrainy – Site General Prosecutor's Office of Ukraine*. Retrieved from http://www.gp.gov.ua/ua/news.html?_m=publications&_t=rec&id=142546 [in Ukrainian].

10. Proekt zakony Ukrainy Pro vnesennia zmin do Kryminalnogo protsesualnogo kodeksu Ukrainy shchodo osoblyvosti zvernennia v dokhid derzhavy hroshovykh koshtiv, valiutnykh tsinnosti, derzhavnykh oblihotsii Ukrainy, kaznacheiskyykh zoboviazan Ukrainy, dorohotsinnykh metaliv ta/abo kaminnia, inshykh tsinnosti ta dokhodiv vid nykh do ukhvalennia vyroku sudu vid 15 liut. 2016 r. № 4057 [Draft law on amending the Criminal Code of Ukraine in terms of recovery of financial assets, currency, government stocks and treasury bonds of Ukraine, precious metals and/or gems, other valuables and its proceeds prior to the court decision February 15th, 2016, № 4057]. (n.d.). *rada.gov.ua*.

Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=58150 [in Ukrainian].

11. Zakon Ukrainy Kryminalnyi kodeks Ukrainy vid 5 kvit. 2001 r. № 2341-III [Law of Ukraine Criminal Code of Ukraine April 5th, 2001 № 2341-III]. *Vidomosti Verhovnoi Rady Ukrainy – Bulletin of Verkhovna Rada of Ukraine*, 25–26, p. 131 [in Ukrainian].

12. Tatarov, O. (2016). Pozasudova konfiskatsiia. Neobkhdnist chy reiderstvo «Po novomu»? [Extrajudicial confiscation. A requirement or forcible takeover tool?]. *LihabiznesInform – LIGA Businessinform*. Retrieved from <http://blog.liga.net/user/otatarov/article/21881.aspx> [in Ukrainian].

Татаров О. Ю. – доктор юридичних наук, професор, заслужений юрист України, професор кафедри кримінального процесу Національної академії внутрішніх справ

Актуальні проблеми повернення в Україну активів, одержаних злочинним шляхом

Досліджено повноваження Державної служби фінансового моніторингу України, що не мають дієвих механізмів виявлення та повернення грошових коштів, здобутих злочинним шляхом. Зазначено, що певні кроки щодо покращення ситуації стосовно виявлення, розшуку та повернення фінансових активів в Україні зроблено завдяки створенню Національного агентства України з питань виявлення, розшуку та управління активами, одержаними від корупційних та інших злочинів, а також наданню права Національному антикорупційному бюро України виявляти фінансові активи, здобуті під час вчинення корупційних злочинів. Розглянуто законодавчі ініціативи щодо конфіскації майна, здобутого злочинним шляхом.

Ключові слова: фінансові активи; конфіскація; виявлення; розшук; повернення; арешт майна; легалізація (відмивання) доходів, отримання злочинним шляхом.