

## PROTECTION OF PROPERTY RIGHTS: SIDE EFFECTS OF ECONOMIC CRIME INVESTIGATION

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**Abstract.** In the democratic countries, one of the main properties of public policy is to ensure the functioning of a stable economy; it requires special attention to the investigation and prevention of economic crime. However, the economic crime investigation can cause certain side effects, such as restriction or deprivation of property rights of individuals and legal entities. That is why the analysis of the peculiarities of the protection of property rights in the economic crimes investigation is particularly relevant. *The purpose* of the research is to generalize approaches for understanding the economic crime's nature and structure, analysing effective ways to protect property in the economic crimes investigation, as well as the specifics of releasing property from arrest as a way to protect third party property violated in the economic crimes investigation. *Materials and methods:* a set of general and special scientific methods was used in a study, in particular, the dialectical method; comparative legal method; methods of analysis and synthesis; formal logical (dogmatic) method; statistical method and generalization method. The empirical basis of the study is the cases of the Supreme Court (Ukraine) and the European Court of Human Rights, statistics of the State Judicial Administration of Ukraine for 2017-2019, as well as the authors' own experience as judge of the Supreme Court and the High Specialized Court of Ukraine for Civil and Criminal Cases. *Results:* there are two main approaches to understanding the essence of the concept of "economic crime" defined, its main features are identified and the system of economic crimes in Ukraine is characterized. It is argued that the application of such types of punishment for serious and especially serious profit-motivated crimes as special confiscation and confiscation of property is consistent with the practice of the ECHR. The case law of the Grand Chamber of the Supreme Court on determining the jurisdiction of legal disputes on the release of distrained property, used in the investigation of economic crimes, is summarized. *Conclusions:* for correct protection of the property rights of individuals and legal entities violated during the investigation of economic crimes, the state must ensure the proper functioning of effective legal means of protection of property rights.

**Key words:** economic crime, protection of property rights, special confiscation, confiscation of property, seizure of property, release of distrained property.

**JEL Classification:** K14, K38, D73

### 1. Introduction

A stable economy is a fundamental basis for the existence and development of a modern democratic state. That is why one of the most important tasks of the state is to form an effective system of economic relations, resistant to negative external influences and integrated into the international economic space simultaneously. At the same time, economic security can be achieved by combining the development of national

and international economic relations and ensuring the systematic economic crime prevention. Thus, the economic crime prevention remains one of the priorities of national policy, as the criminalization of the economy slows down the development of entrepreneurship, the formation of a real market environment, as well as affects the filling of state and local budgets. However, the variety of ways to commit crimes in the economic sphere, the use of various technologies and operations

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by the criminals, as well as other factors that contribute to the commission of illegal acts in the economic sphere, lead to the fact that the economic crimes investigation may cause certain side effects, such as restriction or deprivation of property rights of individuals and legal entities. This is unacceptable in a democratic state, and, therefore, in the legal system of the respective state, there must be effective mechanisms for the property rights protection of the specified entities. Thus, the information mentioned above is of scientific interest and determines the relevance of the chosen topic.

The following domestic and foreign scientists devoted their works to the problem of defining the economic crime essence: H. Mannheim (1965), C. Mills (1951), V. Packard (1959), Herbert A. Bloch and Geis Gilbert (1962), (1982), A. V. Andrushko, S. V. Lohin, V. M. Popovych and P. A. Trachuk (2009), A. M. Boyko (2008), B. M. Holovkin (2013), A. L. Dudnikov (2013), A. P. Zakalyuk (2007), Ye. V. Nevmezhenskyy (2005), O. V. Skvortsova (2012) and others.

At the same time, the issue of side effects of the economic crimes investigation, in particular, restrictions or deprivation of property rights, and ways to protect the property rights of third parties, violated during the investigation of economic crimes, have not been adequately covered in the specialized scientific literature yet.

The purpose of the article is to generalize approaches for understanding the economic crime's nature and structure, analysing effective ways to protect property in the economic crimes investigation, as well as the specifics of releasing of distrained property as a way to protect the property of third parties violated in the economic crimes investigation.

To achieve this goal and ensure the scientific validity of the results of the study, there were used the following methods of scientific knowledge: the dialectical method; comparative legal method; methods of analysis and synthesis; formal logical (dogmatic) method; statistical method and generalization method. The empirical basis of the study is the cases of the Supreme Court (Ukraine) and the European Court of Human Rights (hereinafter referred to as ECHP), statistics of the State Judicial Administration of Ukraine for 2017-2019, as well as the authors' own experience as judge of the Supreme Court and the High Specialized Court of Ukraine for Civil and Criminal Cases.

## 2. Economic crime: essence and structure

Due to the lack of a generally accepted concept of "economic crime" in the national legislation of both Ukraine and foreign countries, scientific discussions on the essence and structure of this concept in legal doctrine continue to this day.

Meanwhile, the analysis of professional sources gives grounds to conclude that, as a rule, two main approaches

in defining the concept of "economic crime" are used, namely: criminal legal and criminological.

For understanding the essence of economic crime, the representatives of the criminal legal approach, first of all, emphasize that the relevant composition of economic crime should be provided by the law on criminal liability.

In that way, A. V. Andrushko, S. V. Lohin, V. M. Popovych and P. A. Trachuk consider that the economic criminality is a set of the economic crimes under the Criminal Code of Ukraine, committed in the field of civil traffic of things, rights and actions for a certain period of time with the illegal use of legitimate technological and accounting transactions, financial, economic and civil instruments, organizational and regulatory, control and management rights and powers (Andrushko, Lohin, Popovych, Trachuk, 2009).

However, supporters of the criminological approach emphasize the form and focus of the intent, motive, sphere of commission, subjects of crime and determinants of economic crime.

For example, E. V. Nevmezhenskyy argues that the economic criminality (crimes in the field of economics) is primarily all acts, in which the direct reason is the economic benefit of the subject, i.e. have a profit motivation, and the purpose of such criminal encroachments is to appropriate the illegal. In order for a crime to be considered economic, it must be long-lasting, repeated, and committed systematically and within imprimitive economic or business activities (Nevmezhenskyy, 2005).

B. M. Holovkin defines economic crime as a profit-motivated criminal activity of officials and other participants of economic relations, aimed at causing material damage to enterprises, institutions, organizations of various forms of ownership or business entities (Holovkin, 2013).

O. V. Skvortsova considers crimes in the economic sphere as a type of socially dangerous, illegal, subject to criminal penalties, guilty acts that encroach on homogeneous economic relations, harm the economic interests of the state, protected by law, the interests of individuals and legal entities due to crimes against property, crimes in the economic field, as well as crimes in the sphere of official activity in legal entities of private law and professional activity related to the provision of public services (Skvortsova, 2012).

Investigating the essence of economic crime, it is impossible to avoid the question of the characteristics inherent in this type of crime. Research contains many approaches and positions on the typical features of economic crime. At the same time, using the generalization method, we will try to outline the main features. Thus, among the main features of economic crime, it is common to highlight (Dement'yeva, 1996; Holovkin, 2013; Zakalyuk, 2007; Matusovskiy, 1999; Boyko, 2008) the following ones: 1) common generic object of encroachment, i.e. economic relations; 2) the

presence of profit motivation and the goal of obtaining economic benefits of property and non-property nature common for all crimes; 3) determinism by the same social factors that are part of the identifying complex of economic crime; 4) crimes that are committed in the course of professional activity, as a rule within and under the guise of lawful economic activity; 5) crimes which have a selfish character; 6) crimes that are characterized by long-term systematic development and a high degree of latency; 7) for this category, the subjects of committing crimes are most often the following: direct participants in economic activity; persons who do not take part in economic activities but encroach on economic relations; representatives of the regulatory sphere of economic activity, endowed with permitting and control powers; 8) socially dangerous consequences of economic crimes cause material damage to the state and business entities, undermining their business reputation, as well as doing harm to the interests of consumers.

Given the lack of common approaches to understanding the nature and content of economic crime, at the level of legal doctrine, there is no single approach to the criteria for classifying economic crime. At the same time, having analyzed a number of scientific achievements on this issue, we believe that the most complete and exhaustive system of economic crimes, taking into account the provisions of the current Criminal Code of Ukraine, has been developed by A.L. Dudnikov (Dudnikov, 2013), who refers to the system of economic crimes as the following types of crimes under the current Criminal Code of Ukraine (hereinafter referred to as the CC of Ukraine) (Criminal Code, 2001): 1) crimes against property (Art. 190, 191 of the CC of Ukraine); 2) crimes in the field of the financial system (Art. 199, 200, 201, 204, 212, 212-1, 222, 224 of the CC of Ukraine); 3) crimes in the field of budget execution (Art. 210, 211 of the CC of Ukraine); 4) crimes in the field of entrepreneurship (Art. 203-1, 206, 209, 213, 218-1, 219 of the CC of Ukraine); 5) crimes in the field of free competition (Art. 229, 231, 232, 232-1 of the CC of Ukraine); 6) crimes in the field of privatization (Art. 233 of the CC of Ukraine); 7) crimes in the field consumer rights (Art. 227 of the CC of Ukraine); 8) service-related crimes (with material damage) (Art. 364, 364-1, 365-2, 367, 368, 368-3, 368-4, 368-5, 369, 369-2, 370 of the CC of Ukraine); 9) crimes in the field of computer activity (Art. 361, 361-1, 361-2, 362, 363 of the CC of Ukraine).

### **3. Special confiscation and confiscation of property as a form of punishment for profit-motivated crimes: the case law of ECHR**

Most of the crimes mentioned above (in particular, serious and especially serious profit-motivated crimes) are characterized by the use of such types of punishment

as special confiscation and confiscation of property. Thus, the punishment in the form of confiscation of property is the forced gratuitous confiscation of all or part of the convict's property. However, given the European integration aspirations of Ukraine, according to the framework of the study, it is important to note that, in general, the use of such types of punishment as special confiscation and confiscation of property is compliant with the case law of the ECHR.

In particular, the case law of ECHR has developed a number of procedural safeguards that must be provided by national law and judicial authorities in cases involving confiscation of property, namely: the adversarial and public nature of proceedings (case "Grayson and Barnham v. the United Kingdom", para. 45, 2008); full and comprehensive access of the party to the relevant proceedings (case "Denisova and Moiseyeva v. Russia", para. 59, 2010); the right to use the legal assistance of a lawyer chosen at one's own discretion (cases "Butler v. the United Kingdom", 2002; "Grayson and Barnham v. the United Kingdom", para. 45, 2008); reasonable opportunity for the party to present its arguments in the domestic courts (cases "Veits v. Estonia", para. 72, 74, 2015; "Jokela v. Finland", para. 45, 2002), including written and oral evidence (case "Butler v. the United Kingdom", 2002); a reasonable opportunity for the party to rebut the assumption of the criminal (illegal) nature of the assets (case "Geerings v. Netherlands", para. 44, 2007); a discretion of the judge not to apply the assumption if he or she considered that applying it would give rise to a serious risk of injustice (case "Phillips v. the United Kingdom", para. 43, 2001).

It is also recognized in the decisions of the cases concerning various forms of confiscation or fiscal repression of assets of ECHR that the assumption of criminal (illegal) nature of assets is in line with Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) (European Convention, 1950), namely the presumption of innocence. In particular, the application of the assumption of criminal (illegal) nature of assets, if a party has a real opportunity to rebut that assumption, it is compatible with the assumption of innocence, and conversely, a violation of paragraph 2 Article 6 of the Convention has been recognized in the case, when the order on the goods' confiscation has been released, although the owner was acquitted in criminal proceedings concerning the crime from which the proceeds allegedly arose (case "Geerings v. Netherlands", paras. 43-51, 2007). This approach is applied by ECHR in the context of presumptive complaints under Article 1 Protocol 1 to the European Convention (Protocol, 1952) (case "Cacucci and Sabatelli v. Italy", para. 43, 2014), as well as under Article 6 of the Convention on transfer to the applicant of the burden to prove the lawful nature of the acquisition of assets (cases "Grayson and Barnham

v. the United Kingdom”, para. 45, 2008; “Phillips v. the United Kingdom”, para. 43, 2001).

#### 4. Protection of property rights as the basis of economic stability of the state

In order to temporarily deprive the right to alienate, dispose of and / or use property that is subject to special confiscation and confiscation of property, the relevant property is seized in criminal proceedings. Seizure of property is one of the most common measures to ensure criminal proceedings. In particular, this applies to serious and especially serious profit-motivated crimes committed in the economic sphere. The procedure for imposing and revoking of property seized is regulated by Chapter 17 of the Criminal Procedure Code of Ukraine (hereinafter referred to as the CPC of Ukraine) (Criminal Procedure Code, 2012).

However, despite the effectiveness of arrest as a measure of criminal proceedings and confiscation of property as a form of punishment, their use may violate or limit the property rights of third parties (both individuals and legal entities, who are bona fide owners or purchasers of the relevant property). However, property rights are fundamental, guaranteed and protected by the provisions of national law, taking into account the requirements of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

Under Article 1 of Protocol No. 1 to the Convention, every individual or legal entity is entitled to the peaceful enjoyment of his or her possessions. No one shall be deprived of his or her possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

As a rule, when deciding on various forms of confiscation or fiscal repression, ECHR is guided by three rules of the provisions of Article 1 of Protocol No. 1 to the Convention: 1) the first rule is general and proclaims the principle of peaceful possession of property; 2) the second rule concerns the deprivation of property and determines certain conditions for recognizing interference with the right to peaceful possession of property as lawful; 3) the third rule recognizes the right of states to control the use of property in the presence of certain conditions (cases “The Former King of Greece and Others v. Greece”, para. 50, 2000; “Bruncrona v. Finland”, para. 65, 2005; “Anheuser-Busch Inc. v. Portugal”, para. 62, 2007).

The outlined rules are interrelated and should not be applied separately, they should be interpreted in the light of the general principle of peaceful possession of

property, however, the second and third rules concern important discretionary powers of the state, namely: the right to seize property in public interest and establish taxation system.

In its practice, ECHR has formulated three main criteria to be taken into account when determining whether an interference with a person's right to peaceful possession of property is compatible with the guarantees of Article 1 of Protocol No. 1 to the Convention, namely: 1) whether it is lawful; 2) whether it is due to the public interest; 3) whether it is proportionate to the defined purposes. If at least one of the above criteria is not met, ECHR confirms that the state has violated Article 1 of Protocol No. 1 to the Convention.

As a general guide, it should also be noted that ECHR has established the approach that confiscation is defined as control measure over the use of property under Rule 2 of Article 1 of Protocol No. 1 to the Convention, although de facto such a sanction involves deprivation of “property” (cases “Agosi v. the United Kingdom”, para. 51, 1986; “Raimondo v. Italy”, para. 29, 1994; “Silickiene v. Lithuania”, para. 62, 2012).

Therefore, the certain state, including Ukraine, is obliged to respect the right of everyone to peaceful possession of property, and its proper and effective legal protection is an important component of the stability of the state economy and one of the fundamentals of democracy.

#### 5. Release of distrained property: a matter of jurisdiction

In criminal proceedings, one of the most effective ways to protect the property rights of third parties, violated during the investigation of economic crimes, is to appeal to the court to release the distrained property. The effectiveness and efficiency of this method of protection of property rights in criminal proceedings are evidenced by court statistics. Hence, in 2017, investigating judges in Ukraine considered 16,610 requests to lift the seizure of property, of which 8,147 were satisfied (Report, 2017); in 2018, 18,130 requests were considered, of which 9,451 were satisfied (Report, 2018); in 2019, considered 22,430 requests, 11,553 of them were satisfied (Report, 2019).

In practice, there are many problematic issues related to the procedural features of releasing distrained property. In our opinion, one of the most problematic aspects of the release of distrained property is the correct definition of the jurisdiction of legal disputes on the release of distrained property, used in the investigation of economic crimes. Accordingly, within the limits of this article we consider it necessary to investigate this problematic aspect.

Unfortunately, the current legislation of Ukraine does not contain a clear answer to this question, unlike case law. In this way, the Grand Chamber of the

Supreme Court has developed rules that determine the jurisdiction of legal disputes over the release of distrained property used in the investigation of economic crimes. Therefore, in determining the jurisdiction of the legal issues outlined above, the following rules should be followed:

1) the request of a natural person who is not a debtor in enforcement proceedings to lift the seizure of his or her property and to exclude the latter from the act of description and seizure, the court considers the rules of civil proceedings (Judgment of Grand Chamber of Supreme Court case № 658/715/16-ц, 22.08.2018);

2) a dispute on the debtor's claim to the body of the State Executive Service of Ukraine on cancellation of the bailiff's decision on seizure of property and announcement of a ban on the alienation of this property is public law, if the bailiff has issued the mentioned decision in consolidated enforcement proceedings on the enforcement of court decisions of various jurisdictions. The Administrative Court has jurisdiction to consider this claim even when there is no forced execution of decision made by the rules of administrative legal proceedings in the consolidated enforcement proceedings (Judgment of Grand Chamber of Supreme Court case № 808/2265/16, 13.02.2019);

3) appeals against decisions on seizure of property in the execution procedure of the court decision, which satisfied a civil claim in criminal proceedings, must take place according to the rules of the Civil Procedure Code of Ukraine (Judgments of Grand Chamber of Supreme Court case № 752/14248/18, 27.11.2019; case № 320/247/19, 22.01.2020);

4) if the seizure is imposed on the property of a person who was not a party to the criminal proceedings initiated under the CPC of Ukraine dated 1960 and completed in the manner prescribed by law (sentence, decision on the termination of the proceedings), the dispute over the release of distrained law is private law. Depending on the parties of this dispute, it should be considered according to the rules of civil or economic proceedings (Judgments of Grand Chamber of Supreme Court case № 2-3392/11, 24.04.2019; case № 372/2904/17-ц, 15.05.2019);

5) if the seizure is imposed on the property of a person against whom a criminal case has been initiated under the rules of the CPC of Ukraine dated 1960, but further the decision to initiate a criminal case under the same procedural law has been revoked by the court without resolving the issue of termination of the proceedings, the dispute on release of the distrained property should be considered according to the rules of civil procedure (Judgment of Grand Chamber of Supreme Court case № 766/21865/17, 12.06.2019);

6) if the seizure is imposed on the property of a person who is not a part of a criminal proceeding initiated during the continuance of the CPC of Ukraine dated

1960 and ongoing, and the criminal proceedings are not submitted to court at the time of entry into force of the CPC of Ukraine dated 2012, the decision on termination of the property seizure and appeal of relevant actions or inaction of the investigator in criminal proceedings is carried out under the rules of the CPC of Ukraine dated 2012 (Judgments of Grand Chamber of Supreme Court case № 461/233/1717, 10.2018; case № 296/8586/16-ц, 07.11.2018);

7) if the seizure is imposed on the property of a person who is not a party to criminal proceedings under the rules of the CPC of Ukraine dated 2012, the decision to terminate the seizure and appeal the relevant actions or inaction of the investigator in criminal proceedings is carried out under the rules of the CPC of Ukraine dated 2012 (Judgments of Grand Chamber of Supreme Court case № 202/1452/18, 27.03.2019; case № 504/1306/15-ц, 11.09.2019).

## 6. Conclusions

The issue of combating economic criminality and ensuring the effective investigation of the economic crimes has been and remains extremely relevant. As a rule, in defining the concept of "economic crime" two main approaches are used, namely: criminal legal (the relevant composition of economic crime should be provided by the law on criminal liability) and criminological (attention focuses on the form and direction of intent, motive, subjects and determinants of economic crime). According to its structure, economic crime is branched and covers a significant number of *corpus delicti*, which can be classified depending on the object of criminal activity into the following groups: 1) crimes against property; 2) crimes in the field of the financial system; 3) crimes in the field of budget execution; 4) crimes in the field of entrepreneurial activity; 5) crimes in the field of free competition; 6) crimes in the field of privatization; 7) crimes in the field of consumer rights; 8) service-related crimes (in the presence of material damage); 9) crimes in the field of computer activity. However, even a full, comprehensive and objective investigation of economic crimes can cause certain side effects, such as restriction or deprivation of property rights of individuals and legal entities. In criminal proceedings, such restrictions on the right of ownership are due to the seizure of the property, as well as the use of special confiscation and confiscation of property as a form of punishment for serious and especially serious profit-motivated crimes. At the same time, property rights are fundamental and must be guaranteed and protected by the state. After all, proper and effective legal protection of property rights is an important component of the stability of the state economy and one of the democracy's fundamentals. In Ukraine, the system of legal protection of property rights violated

during the investigation of economic crimes includes such effective jurisdictional protection mechanisms as criminal legal, administrative legal and civil legal. In criminal proceedings, one of the most effective ways to protect the property rights of third parties violated during the investigation of economic crimes is to apply

to the court for the release the distrained property. Thus, in our opinion, the key task of the state within the outlined issues is to create and guarantee the proper functioning of effective legal means of protection of property rights violated during the investigation of economic crimes.

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