

Problems of Multidisciplinary Regulation of Confiscation of Property in Ukraine in the Conditions of European Integration Processes

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Abstract: This study provides a detailed theoretical analysis of problems of regulation of confiscation of property in Ukraine in different branches in the conditions of European integration processes. Property relations are the object of protection of various branches of law: constitutional, civil, administrative, criminal, etc. Accordingly, the regulation of property relations by the provisions of both public and private branches of law often gives rise to numerous discussions about certain social relations within this institution. In the national law of Ukraine confiscation is considered both as a ground for termination of property rights, as a special civil law method of protection of copyright and related rights, as a type of administrative penalties (including for violation of customs and tax legislation), as an additional type of criminal penalties, and as a special procedure in criminal proceedings. Proper legal provision of confiscation is a prerequisite for recognising Ukraine as a reliable partner of the European and world community. According to the results of the study, the position regarding the prospects of research and improvement of regulation of property confiscation in the modern market economy was outlined.

Keywords: Property, intellectual property, termination of property rights, criminal punishment, administrative penalty, confiscation.

INTRODUCTION

Article 41 of the Constitution of Ukraine (1996) guarantees everyone the right to own, use, and dispose of their property, as well as the results of intellectual and creative activity. In continuation of this guarantee, the inviolability of the right of private property and the impossibility of its unlawful deprivation are enshrined. Thus, the institution of property is fundamental in the market development of any society, and its proper regulation and protection is an indicator of democracy in the country. Protection and defence of property is an important task of any state, one of the main objectives of law. The expansion of the scope of civil law guarantees of property rights is associated with the development of market relations in Ukraine, which led to the adoption of new legislation aimed at ensuring effective mechanisms for protection and defence of property rights of owners.

Recently, new ways of protecting the rights of owners have appeared in the legislation of Ukraine, which necessitates improving their legal regulation, as well as further theoretical development of various

institutions, both civil, administrative, criminal law, and other branches of law and legislation. In turn, the significant changes that took place in Ukraine both after independence and after the Revolution of Dignity, in the regulation of property relations, the rejection of administrative and legal methods of influencing property relations, gave grounds to assert the freedom of the owner in their actions. However, recent trends indicate the need for clearer state regulation of certain property relations in order to optimally combine the interests of the owner with the public interest.

In general, it should be noted that the issue of property, as well as the actual legal institution, is the object of protection of various branches of law: constitutional, civil, administrative, criminal, etc. Accordingly, the regulation of property relations by the provisions of both public and private branches of law often gives rise to numerous discussions about certain social relations within this institution. Among such debatable aspects is the existence of civil law, administrative law, and criminal law regulation of confiscation as grounds for termination of property rights. Legal issues related to confiscation have been studied in the works of many scholars-representatives of various areas of modern legal science. Among them, in particular, are V. Kossak (2008), N. Kuznetsova

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(2008), V. Navrotskyi (2006), Z. Romovska (2005), M. Melnyk and M. Khavroniuk (2003) and many others.

The purpose of this scientific article is to carry out a detailed theoretical analysis of the legal regulation of confiscation as a basis for termination of property rights and the development of proposals to improve the regulation of these relations.

GENERAL STATE OF LEGAL REGULATION OF CONFISCATION OF PROPERTY IN UKRAINE

In accordance with Article 41 of the Constitution of Ukraine (1996), confiscation of property may be applied only by court decision in cases, to the extent and in accordance with the procedure prescribed by law. According to Article 354 of the Civil Code of Ukraine (2003), a person may be deprived of property rights based on a court decision as a sanction for committing an offence in cases specified by law. In this case, the property that was confiscated will become state property free of charge under such conditions. In the literature, it is fairly noted that the guarantee of the interests of the owner is clearly defined by law on the grounds and procedure for applying confiscation (Kossak 2008). According to Article 465 of the Customs Code of Ukraine (2012), customs law stipulates that confiscation as an administrative penalty for violation of customs rules lies in the compulsory confiscation, determined by the customs law, of vehicles and their free transfer to state ownership by a court decision. Similarly, Article 24 of the Code on Administrative Offences of Ukraine (1984) determines confiscation as a type of administrative penalties in relation to an object that has become an instrument of committing or a direct object of an administrative offence, or money received as a result of an administrative offence.

The confiscation is mentioned in Article 228 of the Tax Code of Ukraine (2010) in connection with ensuring control over the receipt of tax on alcoholic beverages and tobacco products. Along with this, the Cabinet of Ministers of Ukraine approved the Resolution No 1340 "On the Procedure for Accounting, Storage, Valuation of Confiscated and Other Property Transferring to State Ownership and Disposal: Resolution of the Cabinet of Ministers of Ukraine" (1998). In accordance with Article 52 of the Law of Ukraine No 3792-XII "On Copyright and Related Rights" (1993), among the methods of civil protection of copyright and related rights, there is confiscation of counterfeit copies of works, phonograms, videograms or broadcasting programmes and equipment and

materials intended for their production and playback. By court decision, counterfeit copies of works (including computer programmes and databases), phonograms, videograms, broadcasting programmes, at the request of the person who is the subject of copyright and(or) related rights and whose rights have been violated, may be transferred to this person. If this person does not require such transfer, the counterfeit copies shall be destroyed, and the materials and equipment used to reproduce the counterfeit copies shall be alienated with the transfer of the proceeds to the State Budget of Ukraine. Furthermore, the Verkhovna Rada of Ukraine registered a draft of a new wording of the Law of Ukraine "On Copyright and Related Rights" to implement Articles 157-192 Chapter 9 "Intellectual Property" of Section 4 of the Association Agreement between Ukraine and the European Union. In particular, it is planned to increase sanctions for infringement of copyright and related rights to 17,000 hryvnias with confiscation (Dzyubina 2019). Finally, according to Article 59 of the Criminal Code of Ukraine (2001), the penalty in the form of confiscation of property lies in the forced gratuitous confiscation of all or part of the property that is owned by the convict. According to the criminal law, confiscation of property is established for grave and especially grave lucrative crimes and can be appointed only in the cases specially stipulated in the Special part of the Criminal Code of Ukraine.

Notably, confiscation is an additional type of punishment. In addition, the legal literature notes that to ensure the confiscation of property and a civil claim, in the criminal procedure, an arrest on deposits, valuables and other property of the accused or suspect or persons who are legally entrusted with material responsibility for their actions is imposed, and property that is seized is also confiscated. Withdrawn money, securities and jewellery are transferred as described to the financial authorities for safekeeping; vehicles are described, valued and deposited with the police (Melnyk and Khavroniuk 2003); as of immovable property, an entry on the encumbrance (sequestration) is made in the State Register of Real Rights to Immovable Property. Separately, it is necessary to point out that the adoption of the Law of Ukraine No 222-VII "On Amendments to the Criminal and Criminal Procedural Codes of Ukraine Concerning the Implementation of the Action Plan on Visa Liberalization by the European Union for Ukraine" (2013), a special confiscation was introduced in Ukraine. Previously, it was noted in the literature that,

in essence, special confiscation was a “tool for disposing of material evidence” and lied in the compulsory confiscation of the instruments of crime belonging to the accused, as well as money, valuables, and other things acquired by criminal means, to the state income (Karpov 2010).

As A. Vynnyk (2019a) rightly points out, special confiscation differs from confiscation of property as a form of punishment not only by its legal nature, but above all by the fact that when they are applied, property of a different nature is seized, namely: the subject of property confiscation in accordance with Article 59 of the Criminal Code of Ukraine is property that belongs to the convicted person by right of ownership, while when applying special confiscation as a measure of a criminal legal nature in accordance with the provisions of Article 96-1 and 96-2 of the Criminal Code of Ukraine, property that is related to the commission of a crime is subject to confiscation. Therewith, proceeding from the content of the Decision of the Supreme Court in the case No 185/6228/18 (2019), special confiscation is not a criminal punishment, and therefore changing the legal basis for the seizure of property from the accused by way of special confiscation does not worsen the latter's position.

And in one of the criminal cases, having considered the cassation appeals of the convict and his wife, the Supreme Court returned the material evidence (the car and the certificate of its state registration) to the latter as the owner of the vehicle, who was unaware that her husband had used it illegally. As indicated in the Resolution of the Supreme Court, considering the provisions of Articles 96-1 and 96-2 of the Criminal Code of Ukraine, special confiscation can be applied to the property of the convicted person or, in the cases stipulated by the Criminal Code of Ukraine, to the property of another person, which was used as an instrument of committing a crime only if the owner was aware of its illegal use. Furthermore, when deciding to confiscate ½ of the vehicle, the panel of judges of the court of appeal noted that the disputed vehicle was a common joint property, that is, in criminal proceedings, it resolved the dispute over ownership by dividing the property. Thus, the court of appeal ignored the requirements of Article 100 of the Criminal Procedural Code of Ukraine (2012), which established that the dispute regarding the ownership of things is resolved in civil proceedings (Resolution of the Supreme Court... 2019).

DEVELOPMENT OF UKRAINIAN LEGISLATION ON CONFISCATION OF PROPERTY IN THE CONTEXT OF EUROPEAN INTEGRATION

The introduction of a new institution in criminal law was conditioned by the need to fully implement the EU requirements for the implementation of the EU Visa Liberalisation Action Plan for Ukraine, an integral part of which is the need to implement Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (Explanatory note to the draft... 2019). According to Article 96-2 of the Criminal Code of Ukraine, special confiscation is applied if money, valuables, and other property:

- 1) were received as a result of committing a criminal offence and/or are income from such property;
- 2) were intended (used) to persuade a person to commit a criminal offence, to finance an or provide material support for a criminal offence or to be rewarded for its commission;
- 3) were the subject of a criminal offence, except for those that are returned to the owner (legal owner), and if it is not established – become the property of the state;
- 4) have been found, manufactured, adapted or used as means or instruments of committing a criminal offence, except for those returned to the owner (legal owner), who were not aware and could not be aware of their illegal use.

In connection with the above Law, the corresponding amendments were introduced in Articles 91, 167, 169, 170, 172, 174, 374 of the Criminal Procedural Code of Ukraine. While on this subject, V. Navrotskyi (2006) once made a remark regarding special confiscation, noting that it is better to “regulate the institution of special confiscation in the criminal procedural legislation, while the Criminal Code of Ukraine should stipulate only general confiscation as a form of punishment”. Therewith, Article 100, which in part 9 stipulates that “The issue of special confiscation and the fate of material evidence and documents that have been submitted to the court is resolved by the court during the adoption of a court decision ending the criminal proceedings. Such evidence and documents must be kept until the decision enters into force. If the criminal proceedings are closed by the investigator or

prosecutor, the issue of special confiscation and the fate of material evidence and documents shall be resolved by a court decision based on a relevant petition, which is considered in accordance with Articles 171-174 of this Code. Therewith:

- 1) money, valuables and other property that are found, manufactured, adapted or used as a means or instruments of committing a criminal offence and/or retain traces of it, are confiscated, except in cases where the owner (legal owner) was not aware and could not be aware of their illegal use. In this case, the specified money, valuables, and other property are returned to the owner (legal owner);
- 2) money, valuables, and other property that were intended (used) to persuade a person to commit a criminal offence, financing and/or material support of a criminal offence or remuneration for its commission, are confiscated;
- 3) property that has been the subject of a criminal offence related to illicit trafficking and/or withdrawn from circulation is transferred to the relevant institutions or destroyed;
- 4) property that has no value and cannot be used is destroyed, and if necessary –transferred to the forensic collections of expert institutions or interested persons at their request from circulation, transferred to the relevant institutions or destroyed;
- 5) money, valuables, and other property that have been the subject of a criminal offence or other socially dangerous act are confiscated, except for those returned to the owner (legal owner), and if it is not established – become state property in the manner prescribed by the Cabinet of Ministers of Ukraine;
- 6) money, valuables, and other property received by a natural or legal person as a result of committing a criminal offence and/or are income from it, as well as property into which they have been fully or partially converted, are confiscated;
- 7) property (money or other property, as well as income from them) of a convicted person or their related person for committing a corruption crime, legalisation (laundering) of proceeds from crime, is confiscated, if the court does not confirm the legality of the acquisition on such property...” (Criminal Procedural Code... 2012).

In this regard, A.O. Vynnyk (2019b) rightly claims that to distinguish special confiscation from confiscation as a criminal procedure measure stipulated by the Criminal Procedural Code of Ukraine, it is necessary to proceed from the subject of confiscation, as well as the purpose of its application. In particular, the subject of special confiscation and material evidence seized under the Criminal Procedural Code are somewhat similar, but their main difference is the legal consequence of confiscation. Thus, when applying special confiscation, the property to be confiscated is transferred to the state revenue, i.e. has a certain monetary equivalent, so to speak, monetary value, it is suitable for use by the state for appropriate purposes and therefore subject to state revenue. Instead, material evidence in accordance with the provisions of paragraphs 3 and 4 Part 9 Article 100 of the Criminal Procedural Code of Ukraine – endowed with such an additional feature as unfit for use, due to their withdrawal from circulation or due to being unfit for use, has no value, given that it cannot be converted into state revenue, and therefore is destroyed or transferred to corresponding institutions for storage.

Then A.O. Vynnyk (2019b) points out that one of the most common mistakes made by courts in applying special confiscation of weapons and means of committing a crime, is the application of their confiscation in accordance with the provisions of Article 100 of the Criminal Procedural Code of Ukraine (as material evidence), instead of confiscating the relevant items to the state revenue in accordance with Article 96-1 of the Criminal Code of Ukraine. And vice versa – during the adoption of decisions, the courts do not distinguish the subject of special confiscation under Article 96-1 of the Criminal Code of Ukraine, from material evidence, and decide the fate of property that is not subject to special confiscation, applying Article 96-1 of the Criminal Code of Ukraine instead of the provisions of Article 100 of the Criminal Procedure Code of Ukraine.

Another point to address is that until 2016, the annex to the Criminal Code of 1961 – “List of property not subject to confiscation by court” played an important role in the application of confiscation of property as a form of punishment. This annex retained its legal force without any changes during the adoption of the current Criminal Code of Ukraine in 2001. And only the Law of Ukraine No 1404-VIII “On Enforcement Proceedings” (2016) recognised it as invalid. The same Law establishes a single (regardless of the type of confiscation) list of property, which cannot be levied on

enforcement documents. That is, the legislator unified the approach to ensuring human rights when applying confiscation of any kind. Notably, in accordance with Article 15 of the Law of Ukraine No 772-VIII "On the National Agency of Ukraine for Detection, Investigation and Management of Assets Obtained from Corruption and Other Crimes" (2015), the National Agency interacts with pre-trial investigation, prosecution and court, in particular by executing appeals of investigators, detectives, prosecutors, investigating judge, court on detection, search, valuation and management of assets, as well as on the implementation of decisions of foreign competent authorities on the seizure and confiscation of assets.

Thus, in the national law of Ukraine confiscation is considered both as a ground for termination of property rights, and as a special civil law method of protection of copyright and related rights, and as a type of administrative penalties (including for violation of customs and tax legislation), both as an additional type of criminal penalties, and as a special procedure in criminal proceedings. At the same time, proper legal support for confiscation is a prerequisite for recognising Ukraine as a reliable partner of the European and world community. Therewith, the issue of the existence of confiscation as a certain coercion of a civil nature, give rise to many discussions. Thus, according to N. Kuznetsova (2008), Article 354 of the Civil Code of Ukraine (2003) is devoid of real meaning; E. Kharitonov and Nina Saniakhmetova (2003) point out that confiscation is a measure of criminal punishment or administrative penalty. Instead, Z. Romovska (2005), given the existence of Article 208 of the Commercial Code of Ukraine (2003) and Article 52 of the Law of Ukraine No 3792-XII "On Copyright and Related Rights" indicates the preservation of civil confiscation in the legislation of Ukraine (1993).

In this connection, it should also be noted that on 19 March 2020, the Court of Justice ruled in the case of AGRO IN 2001 and interpreted Directive 2014/42 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union and its compatibility with national legislation, which stipulates civil proceedings for the confiscation of assets not based on a previous conviction. This case gave the court the opportunity to interpret the EU documents designed to harmonise Member States' rules on confiscation of criminal property. Based on the analysis made by the court, it was concluded that EU law allows Member States to make provision for civil confiscation proceedings regardless of the establishment of a

criminal offense (Martinez 2020). In general, some scientific sources distinguish three European models of confiscation of assets: Bulgarian, Italian, and Romanian, and the confiscation of illegally acquired property is interpreted as the responsibility of the state to its citizens in the name of justice; in this sense, the assessment of the effectiveness of confiscation is not limited to the application of economic efficiency criteria. As a form of state obligation, confiscation is regarded as one aimed at establishing justice, protection of the legal rights of all participants in public relations, and this is the logic of public interests in general (Galabov *et al.* 2015). Therewith, the Council of Europe Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on the Financing of Terrorism requires States parties to take measures to reverse the burden of proof in respect of serious offences, thus obliging the suspect to demonstrate the origin of the related income. However, States are obliged to apply this provision merely to the extent that it complies with the principles of their domestic legal system (Confiscation and asset recovery 2019).

CONCLUSIONS

Summarising the above, specifying some issues, it possible to draw the following conclusions. Confiscation of property may be applied only by a court decision in cases, to the extent and in accordance with the procedure prescribed by law. A person may be deprived of the right to own property based on a court decision as a sanction for committing an offense in cases specified by law. Therewith, the property that was confiscated will become state property free of charge under such conditions. At the same time, according to the criminal law, confiscation of property is established for grave and especially grave lucrative crimes and can be appointed only in the cases specially provided in the Special part of the Criminal Code of Ukraine. Provisions on confiscation are contained in various branches of law and legislation, both public and private, in particular: constitutional, administrative, tax, customs, economic, civil, criminal, etc. Furthermore, certain procedural laws enshrine provisions for the implementation of opportunities related to the confiscation of property.

In the national law of Ukraine confiscation is considered both as a ground for termination of property rights, and as a special civil law method of protection of copyright and related rights, as a type of administrative penalties (including for violation of customs and tax

legislation), as an additional type of criminal penalties, and as a special procedure in criminal proceedings. Proper legal support for confiscation in Ukraine is the key to the development of market relations, establishing partnerships with the world community, preventing the legalisation of illegal assets, as well as improving the domestic investment climate. Along with this, in the course of improving the national legislation of Ukraine and European integration processes, it is necessary to additionally regulate at the level of special legislative provisions, in particular, the procedure for registering the termination of ownership of real estate in connection with confiscation and special confiscation, as well as the basis for the application of confiscation and special confiscation in relation to property over which there are civil disputes, as well as the peculiarities of the confiscation of property transferred to the convicted person based on civil law contracts, considering the principle that each party bears the risk of choosing its counterparty.

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