

Types of forfeiture comply with the legislation of some foreign countries

Види конфіскації за законодавством окремих іноземних держав

Tetiana Pavlova

Key words:

criminal forfeiture, non-conviction based (NCB) asset forfeiture, administrative forfeiture.

Ключові слова:

конфіскація в кримінальному порядку, конфіскація поза кримінального провадження, адміністративна конфіскація.

Problem statement. The process of returning stolen public assets is a complex task that requires clear strategies, based on international and national laws ensuring efficient international cooperation. However, the existing differences in legal systems of different countries, the increasing financial flows, the lack of developed international cooperation, as well as the banking secrecy significantly complicate the process of returning criminally obtained proceeds (assets). Therefore, the study of foreign countries legislation in terms of types and legal nature of forfeiture as a legal mechanism for the return of criminally obtained proceeds (assets), tools (means) of crime, will contribute to the development of a single strategy in this field.

State of research. A number of Ukrainian scientists, like N.A. Gutorova, B.A. Kiris, V.I. Mikhailov, A.S. Pirozhenko, M.I. Havronyuk and others were engaged in studying certain issues dedicated to the regulation of the forfeiture laws in foreign countries. Such foreign scientists, as J.-P. Brjun, W. Grant, T. Greenberg, K. Scott, K. Stevenson, L. Samuel consider the forfeiture as a legal tool for the return of assets obtained as a result of corruption or by other criminal means. However, despite the conducted researches, the procedure of criminally obtained proceeds (assets) return in practice turns out rather a difficult issue to realize because of contradictions and gaps in the domestic legislation of states participating in the specified procedure.

The purpose of this article is to study the experience in the sphere of regulating types of forfeiture in the legislation of certain foreign countries for its further application in the course of improving the legislation of Ukraine in terms of this problem.

Statement of basic materials. The legislation of most countries linked with the seizure of criminally obtained proceeds, as well as of instruments and means for their commitment, provides for a forfeiture proceeding. However, modern foreign legislation does not offer a specific model for regulating the institution of forfeiture. The legislator of each state, in its own way, determines the legal nature of forfeiture, its types, as well as its place in the system of anti-corruption measures and other types of criminal activity, the order of its application, as well as other issues of this institution legal regulation.

The legislation of most European countries involves the following types of forfeiture: criminal forfeiture, non-conviction based (NCB) asset forfeiture. Each of these types of forfeiture has the same objective: to derive criminally obtained proceeds (assets) for the benefit of the state, as well as tools used to commit a crime. At the same time, there are certain differences between the above types of forfeiture. Criminal forfeiture and non-conviction based (NCB) asset forfeiture differ primarily by the forfeiture of assets proceeding. Criminal forfeiture involves the conduct of criminal proceedings and conviction, while non-conviction based (NCB) asset forfeiture does not require either. Administrative forfeiture is carried out without a court opinion. Let us consider the above mentioned types of forfeiture in more details.

Criminal forfeiture is an *in personam* order, an action against the person (for example, *State v. John Smith*). It requires a criminal trial and conviction, and is often part of the sentencing process¹.

¹ Greenberg T. Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture / Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray. Washington D.C. The International Bank for Reconstruction and Development. The World Bank Group, 2009. P. 13.

Criminal forfeiture, as a rule, is fixed in criminal law. Attention is drawn to the fact of different approaches in terminology ("forfeiture" and "special forfeiture") and the legal nature of forfeiture in different European countries.

Thus, the term "special forfeiture" is mainly used in the criminal legislation of countries formed in the post-Soviet space. In general, the legislation in countries of Commonwealth of Independent States (hereinafter – the CIS) moves forward by replacing forfeiture as a form of punishment, by another criminal law measure (security measure), which applies only to criminally obtained property, the proceeds obtained from this property, which is used as a mean (instrument) of committing a crime. And only in the criminal legislation of Ukraine, the Republic of Belarus, the Republic of Kazakhstan there still exist provisions on both ordinary forfeiture (as a form of punishment) and special forfeiture (as a different measure of criminal law)². For example, special forfeiture in Art. 98 item 2 (d) of the Criminal code of the Republic of Moldova is defined as a security measure³.

The criminal legislation of most European countries establishes the term "forfeiture" but in many ways defines its legal nature. In the legislation of this group of countries "property forfeiture" means punishment (Republic of Kazakhstan, Republic of Latvia, Republic of Belarus, Republic of Tajikistan, France, Ukraine) and/or other criminal legal measures other than punishment (Republic of Lithuania, Kingdom of Spain, Republic of Italy, Austria, Republic of Poland, Republic of Estonia and others). For example, in Art. 36 item 1 (1), Chapter IV "Punishment" of the criminal code of the Republic of Latvia, "forfeiture" is provided as an additional form of punishment. In item 1 of Art. 42, property forfeiture is a compulsory gratuitous alienation of the condemned person's property or its part in favour of the state⁴. Chapter 7 of the Estonian Penal Code "Other Enforcement Actions", provides for the forfeiture of a mean and the immediate object of guilty actions, Article 83¹ provides for the forfeiture of the property obtained as a result of guilty actions⁵.

Comply with item 3 of Art. 67 of the Criminal Code of the Republic of Lithuania, property forfeiture is provided as a punitive measure imposed along with punishment. Comply with paragraph 1 of Article 72 of the Criminal Code of the Republic of Lithuania, property forfeiture is a mandatory gratuitous alienation of any form property in favour of the state, which is subject to such forfeiture and is owned by the convicted person, his accomplices or other persons. The Court is obliged to forfeit: 1) money or other things of material value and which have been transferred to the guilty person or his/her accomplice for committing a crime; 2) money or other things of material value and which have been used for committing a crime; 3) money and other things of material value in case if they were criminally obtained (item 2 of Article 72 of the Criminal Code)⁶. The Criminal Code of the Kingdom of Spain provides for forfeiture as "additional consequences" of a crime. Comply with Article 127 of the Criminal Code of the Kingdom of Spain, all penalties imposed for committing crimes or willful misconduct, entail the loss of all property obtained as a result of above actions, as well as the seizure of property, funds and instruments that were used in the preparation for committing the crime, regardless of such property transformation. All the specified shall be subject to forfeiture, if all these things do not belong to third parties who are their *bona fide* purchasers and are not responsible for the committed crime⁷. Comply with Article 236 of the Criminal Code of Italy, forfeiture relates to property security measures. Comply with Article 240 of the Italian Criminal Code, forfeiture means a seizure of items obtained through the implementation of a criminal offense, and items that served or was intended to commit it. In addition, things are subject to forfeiture, the production, use, carrying, storage or alienation of which constitutes essential elements of criminal offence⁸. The issue of property forfeiture is addressed in § 26, section 3 of Austrian Criminal Code – "Punishment. Deriving profit, seizure of items and preventive measures"⁹. Comply with item 4 of Article 39 of the Criminal Code of the Republic of Poland, property

² Михайлов В.И. Институт конфискации имущества в международном праве и некоторые тенденции его развития в законодательстве государств СНГ. Питання боротьби зі злочинністю /ред. кол. Ю.В. Баулин та ін. Вип. 15. Харків: Кроссрод, 2008. С. 290.

³ Уголовный кодекс Республики Молдова. URL: <http://lex.justice.md/ru/331268/>.

⁴ Уголовный кодекс Латвийской Республики. URL: http://www.pravo.lv/likumi/07_uz.html.

⁵ Пениитенциарный кодекс Эстонии. URL: https://www.juristaitab.ee/sites/www.juristaitab.ee/files/elfinder/ru-seadused/%D0%9F%D0%95%D0%9D%D0%98%D0%A2%D0%95%D0%9D%D0%A6%D0%98%D0%90%D0%A0%D0%9D%D0%AB%D0%99%20%D0%9A%D0%9E%D0%94%D0%95%D0%9A%D0%A1_03.01.18.pdf.

⁶ Уголовный кодекс Республики Литвы. URL: <https://www.google.ru/search?newwindow=1&source=hp&ei=7rl5WqTTBcKPsAGv57HQSw&q=скачать+бесплатно+УК+Литвы+в+PDF+&oq=скачать+бесплатно+УК+Литвы+в+PDF>.

⁷ Уголовный кодекс Королевства Испании. URL: <https://www.google.ru/search?newwindow=1&ei=Lbp5Wq7YMsO0sQHB4leYA w&q=скачать+бесплатно+УК+Испании+в+PDF>.

⁸ Уголовное право зарубежных государств. Общая часть / под ред. и с предисл. И.Д. Козочкина. Москва: Институт международного права и экономики имени А.С. Грибоедова, 2001. С. 564.

⁹ Уголовный кодекс Австрии. URL: <http://crimpravo.ru/page/zar-uk/>.

forfeiture is provided in the system of criminal and legal measures, and involves forfeiture of subjects created as a result of crime, and in cases specified in the law, of subjects which served or were intended for committing a crime (Art. 44 of the Criminal Code)¹⁰.

Thus, it can be noted that forfeiture in the criminal legislation of some countries, formed in Soviet Union, is fixed as a punishment provision (and/or along with punishment as another enforcement measure). In the criminal legislation of most European countries, forfeiture is not a punishment, but a security measure (property security), a punitive measure, an additional consequence of a crime, a preventive measure. Feature of forfeiture is that it usually is another measure different from punishment, and applies only in respect of certain property. Such property, as a general rule, includes: tools and means of committing a crime, criminally obtained proceeds (assets) and other property "involved" in the crime.

NCB asset forfeiture, also referred to as "civil forfeiture", "*in rem* forfeiture", or "objective forfeiture" in some jurisdictions, is an action against the asset itself (for example, *State v. \$ 100.000*) and not against an individual. It is a separate action from any criminal proceeding and requires proof that the property is tainted (that is, the property is the proceeds or an instrumentality of crime). Generally, the criminal conduct must be established on a balance of probabilities standard of proof. This eases the burden on the government and means that it may be possible to obtain forfeiture when there is insufficient evidence to support a criminal conviction. Because the action is not against an individual defendant, but against the property, the owner of the property is a third party having the right to defend the property¹¹.

Special provisions on the property forfeiture outside of criminal proceedings were first provided for in the UN Convention against corruption as of October 31, 2003, under which each member state consider the adoption of such measures as may be necessary to allow possibility of property forfeiture without conviction within criminal proceedings, if the offender cannot be prosecuted by reason of death, concealment or absence or in other appropriate cases (Article 54, paragraph 1 (c))¹². In fact, in Art. 54 (1) (c) the point at issue is a need to harmonize rules and procedures applied in the forfeiture of criminally obtained proceeds (assets), for the effective international cooperation and the assets return to their countries of origin.

Legal regulation of provisions on forfeiture outside criminal proceedings is usually performed based on relevant laws, for example, Law 9284 of 30 September 2004 on Preventing and Striking at Organized Crime (Albania); Proceeds of Crime Act 2002 (Australia); Criminal Procedure Act (8/2006 of 26 January 2006), Article 498a (Slovenia); Prohibition on Money Laundering Law, 5760–2000 (Israel); Proceeds of Crime Act 2002 (c. 29), Sections 240–316, 341–416 Serious Crime Act 2007 (c. 27), Sections 74–85 Serious Organized Crime and Police Act 2005 (c. 15), Sections 97–101, 245A–D, 255A–F (United Kingdom); 18 United States Code, Sections 981, 983, 984, 985 (NCB asset forfeiture) (United States) and others¹³.

For example, there is an interesting experience of countries where forfeiture issues outside of criminal proceedings are regulated by norms of criminal and criminal-procedural legislation, for example Switzerland – Criminal Code, Articles 70–72; Liechtenstein – Code of Criminal Procedure (StPO) of 18 October 1988, sections 97a, 98, 98a, 253a, 353, 354, 356, 356a, 357; Criminal Code, Sections 20, 20a, 20b, 20c, 64, 165, 165a etc¹⁴.

There is both conviction based forfeiture and non-conviction based (NCB) asset forfeiture in Switzerland. They are based on the same provisions in the Criminal Code of Switzerland, Articles 70 to 72, and the same procedures apply. Specifically related to NCB asset forfeiture, Article 70, paragraph 1, states, "The judge shall order the confiscation of assets resulting from an offense or which were intended to induce or to reward the offender,

¹⁰ Уголовный кодекс Республики Польша. URL: <http://jf.mf-image.ru/d/eyJ0ljoimjAxOC0wMi0wNFQxNT01Mjo0MC40MzQyO-DEzWilsInRtljoxNSwiYmQiOjEslmZkljo0MDMxODM2LCJyZil6bnVsbCwic2wiOjQwLCJmbil6bnVsbCwicil6lmh0dHA6Ly9teS1maWxlcy5ydS9hM3ltYjgiLCJsljudWxsfQ,,E0613DD6B254E987C8A5B17B7A4708C0./%D0%A3%D0%B3%D0%BE%D0%BB%.pdf>.

¹¹ Greenberg T. Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture / Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray. Washington, D.C.: The International Bank for Reconstruction and Development. The World Bank Group, 2009. P. 14.

¹² United nations convention against corruption. URL: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.

¹³ Greenberg T. Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture / Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray. Washington, D.C.: The International Bank for Reconstruction and Development. The World Bank Group, 2009. P. 23.

¹⁴ Greenberg T. Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture / Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray. Washington, D.C.: The International Bank for Reconstruction and Development. The World Bank Group, 2009. P. 13.

provided that they do not have to be returned to the injured party to restore his rights". Thus, forfeiture occurs even without a conviction¹⁵.

NCB asset forfeiture is useful in a variety of contexts, particularly when criminal forfeiture is not possible or available, as in the following examples: 1) The violator is a fugitive. A criminal conviction is not possible if the accused is a fugitive. 2) The violator is dead or dies before conviction. Death brings an end to criminal proceedings. 3) The violator is immune from criminal prosecution. 4) The violator is so powerful that a criminal investigation or prosecution is unrealistic or impossible and others¹⁶.

From the procedure point of view, civil forfeiture is implemented much easier than the criminal one, since in accordance with the principles of civil procedure it is the owner who must prove legality of his property acquisition, but not the law enforcement agency. Thus, the state is exempted from the necessity to investigate the criminal offence, substantiation of all the circumstances of the offence, determination the amount of damage caused, etc. – the burden of proof is shifted from the state to the owner of the criminal asset, which distinguishes such type of forfeiture from the forfeiture in criminal proceedings.

Since civil property forfeiture is carried out in the case of a person committed a crime, there may be situations where criminal investigation and proceedings are carried out in parallel to civil forfeiture. Therefore, the law should specify those conditions under which a state is permitted to initiate non-conviction based asset forfeiture proceedings.

In some countries, including the United States, administrative forfeiture is applied, which is an out-of-court legal mechanism applied in cases of undisputed non-conviction based forfeiture. Upon forfeiture of this type, a non-judicial official has the right to make an application for seizure of property after: 1) the forfeiture has been duly notified to all parties concerned, and 2) nobody disputes this decision. For example, in the United States vehicles of any value and bank accounts in the amount of not more than 500 thousand dollars can be forfeited in the above order. It should be noted that forfeiture by the court order allows carrying it out as objectively as possible. For example, administrative forfeiture may be applied to forfeit a vehicle used for transporting prohibited goods or funds found at hands of a drug dealer. In such cases, legal powers are usually granted to the police or customs officers. This procedure can be helpful in fast and cost-effective forfeiture of such assets¹⁷.

Conclusions. Comparative analysis of the criminal legislation of some foreign countries allows identifying the following features of legal regulation and types of forfeiture.

First, forfeiture is in some form enshrined in the laws of all countries.

Second, forfeiture is divided into following types: criminal forfeiture, non-criminal forfeiture, administrative forfeiture. The mentioned types of forfeiture differ, first and foremost, in the implementation procedure. Criminal forfeiture is enshrined in criminal law. At that, the legal nature of forfeiture is different. Under the general rule, forfeiture is provided as a security measure (property security), a punitive measure, an additional consequence of the crime, a preventive measure. As a punishment, forfeiture is provided for in the criminal legislation of only some foreign countries. The provisions on non-criminal forfeiture are governed, as a rule, by norms of special laws (in some countries in the norms of criminal and criminal procedural law). In some countries, including the United States, administrative forfeiture is used, which is an out-of-court legal mechanism applied in cases of undisputed non-criminal forfeiture.

Thirdly, one and the same action may be considered within both the criminal and civil proceedings, while the human right to protection against double prosecution for the same offense is not violated since non-criminal forfeiture is not a punishment or a form of criminal prosecution. Civil forfeiture should not be considered as an alternative to criminal prosecution in cases when there are legal grounds for conviction of the perpetrator under criminal law. In other words, it is unacceptable that the offender should be able to escape punishment by resorting to civil forfeiture as a way to "pay off" for crimes committed.

Fourth, the study of the legislation of some foreign countries leads to the conclusion on the considerable experience in this field. The basics of the created by them system of search and forfeiture of proceeds (assets)

¹⁵ *ibid.* P. 112.

¹⁶ Greenberg T. *Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture* / Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray. Washington, D.C.: The International Bank for Reconstruction and Development. The World Bank Group, 2009. P. 14, 15.

¹⁷ Брюн Ж.-П., Грей Л., Стивенсон К., Скотт К. Руководство по возврату активов для специалистов. URL: http://www.unodc.org/documents/congress//background-information/Corruption._-_Russian.pdf. – P. 163, 164. – Name from a screen.

enables Ukraine to rethink the Western paradigm of operations in the field of return of the stolen property, to learn from their experience and to develop new approaches to the search and return of assets, based on international legal norms and features of domestic legislation.

Summary

The article examines types of forfeiture comply with the legislation of separate foreign countries: criminal forfeiture, non-criminal assets forfeiture, administrative forfeiture. The conclusion has been made on the fact that the legislator of each country determines on his own the legal nature, types, procedure of forfeiture, as well as its place in the system of other measures in the fight against crime.

Анотація

У статті досліджено такі види конфіскації за законодавством окремих зарубіжних країн: конфіскація в кримінальному порядку, конфіскація поза кримінального провадження, адміністративна конфіскація. Зроблено висновок, що законодавець кожної країни по-своєму визначає правову природу, види, процедуру конфіскації, а також її місце в системі інших заходів боротьби зі злочинністю.

Literature:

1. Greenberg T. Stolen Asset Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture / Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray. Washington, D.C.: The International Bank for Reconstruction and Development. The World Bank Group, 2009. 284 p.
2. Михайлов В.И. Институт конфискации имущества в международном праве и некоторые тенденции его развития в законодательстве государств СНГ. *Питання боротьби зі злочинністю* / ред. кол. Ю.В. Баулін та ін. Вип. 15. Харків: Кроссрод, 2008. С. 274–290.
3. Уголовный кодекс Республики Молдова. URL: <http://lex.justice.md/ru/331268/>.
4. Уголовный кодекс Латвийской Республики. URL: http://www.pravo.lv/likumi/07_uz.html.
5. Пенитенциарный кодекс Эстонии. URL: https://www.juristaitab.ee/sites/www.juristaitab.ee/files/elfinder/ru-seadused/%D0%9F%D0%95%D0%9D%D0%98%D0%A2%D0%95%D0%9D%D0%A6%D0%98%D0%90%D0%A0%D0%9D%D0%AB%D0%99%20%D0%9A%D0%9E%D0%94%D0%95%D0%9A%D0%A1_03.01.18.pdf.
6. Уголовный кодекс Республики Литвы. URL: <https://www.google.ru/search?newwindow=1&source=hp&ei=7rl5WqTTBcKP-sAGv57HQCw&q=скачать+бесплатно+УК+Литвы+в+PDF+&oq=скачать+бесплатно+УК+Литвы+в+PDF>.
7. Уголовный кодекс Королевства Испании. URL: <https://www.google.ru/search?newwindow=1&ei=Lbp5Wq7YMsO0sQHB4IeYAw&q=скачать+бесплатно+УК+Испании+в+PDF>.
8. Уголовное право зарубежных государств. Общая часть / под ред. и с предисл. И.Д. Козочкина. Москва: Институт международного права и экономики имени А.С. Грибоедова, 2001. 568 с.
9. Уголовный кодекс Австрии. URL: <http://crimpravo.ru/page/zar-uk/>.
10. Уголовный кодекс Республики Польша. URL: <http://jf.mf-image.ru/d/eyJ0IjoimjAxOC0wMi0wNFQxNT01Mjo0MC40MzQyO-DEzWilsInRtIjoxNSwiYmQiOjEslmZkljo0MDMxODM2LCJyZil6bnVsbCwic2wiOjQwLWJmbil6bnVsbCwicil6Imh0dHA6Ly9teS-1maWxlcy5ydS9hM3ltYjgiLCJsljpudWxsfQ,,E0613DD6B254E987C8A5B17B7A4708C0./%D0%A3%D0%B3%D0%BE%D0%BB%.pdf>.
11. United nations convention against corruption. URL: https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf.
12. Брюн Ж.-П., Грей Л., Стивенсон К., Скотт К. Руководство по возврату активов для специалистов. URL: http://www.unodc.org/documents/congress//background-information/Corruption_-_Russian.pdf. – P. 163,164. – Name from a screen.

Tetiana Pavlova,

Candidate of Law Sciences, Associate Professor,

Associate Professor of Criminal Law, Criminal Procedure and Criminology Department in I.I. Mechnikov Odessa National University