

Література:

1. Теорія держави і права: підруч. для студ. юрид. виш. навч. закл. /О.В. Петришин, С.П. Погребняк, В.С. Смородинський та ін.; за ред. О.В. Петришина. – Х.: Право, 2014. – 368 с.
2. Закон України «Про запобігання корупції»: чинне законодавство із змінами та допов. Станом на 18 січня 2018 року: Офіц. Текст. – К.: Алерта, 2018. – 76 с.
3. Про державну службу: Закон України від 10.12.2015 № 889-VIII // Відомості Верховної Ради України. – 2016. – № 4. – Ст. 43.
4. Про затвердження Державної програми щодо реалізації засад державної антикорупційної політики в Україні (Антикорупційної стратегії) на 2015–2017 роки: постановою Кабінету Міністрів України від 29.04.2015 року № 265 [Електронний ресурс]. – Режим доступу: <http://zakon3.rada.gov.ua/laws/show/265-2015-%D0%BF>.

EXPERIENCE OF SOME EUROPEAN COUNTRIES IN THE RECOVERY OF ASSETS DERIVED FROM CORRUPTION OR OBTAINED BY OTHER CRIMINAL MEANS

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The United Nations Convention against corruption dated 31st October 2003 (hereinafter referred to as «the UN Convention against corruption»), ratified by Ukraine on 18th October 2006 is the main international legal instrument for the recovery of assets derived from corruption or obtained by other criminal means.

Comply with article 2 of the UN Convention against corruption, forfeiture is the final deprivation of property by order of a court or other competent authority. The said Convention is the first instrument containing provisions on the forfeiture outside criminal proceedings (the so-called «civil forfeiture» or «forfeiture *in rem*»).

Article 43 of the UN Convention against corruption provides that states shall consider the possibility of assisting each other in the investigation and prosecution of civil and administrative matters relating to corruption. This article covers the procedure assets forfeiture outside criminal proceedings and considers a problem that has arisen in the past, when states were able to cooperate with each other providing legal assistance only in criminal cases but not in civil ones [1].

The principles of construction and operation of the criminal asset recovery system in the European Union (hereinafter – the EU) were laid down in 1980 by the Committee of Ministers of the Council of Europe in «recommendations for actions against the transfer and preservation of funds of criminal origin» [2].

The main EU document regulating the assets return is the Convention on laundering, search, seizure and forfeiture of criminally obtained proceeds of November 8, 1990 (hereinafter – Convention of November 8, 1990), ratified by Ukraine on December 17, 1997. Article 1 of the Convention as of December 8, 1990 provides that forfeiture means the punishment or a measure imposed by the court after consideration of the case in respect of a criminal offence or criminal offences, the result of which is the final deprivation of proper-

ty [3]. In 2005, amendments were introduced to the Convention dated 08.11.1990 with the concept of national financial intelligence subdivisions, the description of measures preventing money laundering and the essence of data requests on bank accounts, transactions and monitoring over them. Particular attention is drawn to the obligation of states in performing forfeiture upon request of other countries [4].

The legal and institutional framework for asset recovery in EU countries consists of the following key elements:

- legal framework of activities in ensuring the assets return;
- a set of specialized bodies for financial investigations and assets recovery;
- information and communication support for assets recovery activities;
- interdepartmental and international cooperation.

Despite the presence of a coherent approach on assets return, the states – EU members have their own peculiarities in legal regulation. Italy is a leader in assets recovery. It provides both official legal assistance to other states and informal support. Criminal and civil forfeiture are applied in Italy. In case of criminal forfeiture, assets can be returned only after passing all the stages of appeal. There is no separate law regulating criminal forfeiture in Italy, articles are placed in the Criminal Code, which stipulates that the court issues a confiscation order if being confident that funds were used or will be used to commit a crime. The Italian criminal law also sets out the procedure for «preventive» forfeiture, which is used in respect of legally derived proceeds. After introducing amendments in 2011, the preventive forfeiture adopted the full form of civil forfeiture. A number of conditions must be met to return the property in a civil order: the suspect must be a socially dangerous person, own assets (or they must be registered in his immediate environment) and there must be a difference between the legal income of such a person and the assets belonging to him/her. At that, the suspect can avoid forfeiture if he/she presents evidences confirming the legal origin of assets. Such forfeiture may be applied even in the event of death of a suspect [5, c. 18].

The experience of Romania is also of interest, as this state has a criminal (special and expanded) and civil forfeiture regime. Interim measures in the form of property seizure with the authorization of the Prosecutor or the judge are also applied in the country. Within the country, the criminally obtained property (which belongs directly to the suspect or persons who knew about its origin), the instrument of the crime, the property that is prohibited from having by law, are confiscated in a special criminal form. Forfeiture in the extended criminal form is created for property that cannot be directly identified with the suspect. For example, when it has been transferred to relatives, third parties, or legal entities. Civil forfeiture in Romania is used to compensate losses or damages to persons concerned. The country applies several methods of work with the received property, which must be carried out within 4 months – the property can be sold at auction, can be transferred to public authorities, religious organizations, it also can be destroyed or restored for further application [5, c. 20].

France, for example, offers official and informal cooperation to other countries; the latter could only be used to gather additional information. Two official bodies are involved in assets return within the country – Criminal Assets Identification Platform (PIAC) and the Agency for the Recovery and Management of Seized and Confiscated Assets (AGRASC). Over the past few decades, there were created several unified information registers in France that allow law enforcement agencies obtaining the necessary information in a timely manner.

Forfeiture in France is applied only in criminal proceedings as an additional sanction to criminal imprisonment (from one year or more) and/or fine. Civil forfeiture is not applied in France, but the country is able to assist other states in its implementation within the

framework of legal assistance on its own territory. Seizure of property may be applied as a security measure in performing investigation in the country. Any assets that belong to the convicted person, regardless of the method they have been obtained with, as well as the objects of crime and criminally obtained proceeds (the income is confiscated regardless of third party's claims) [5, c. 21-22], are subject to forfeiture.

Recovery of criminally obtained assets in Bulgaria is regulated by the Law on forfeiture of illegally acquired property as of the year 2012 (Law on Forfeiture in Favour of the State of Illegally Acquired Property). This law introduced provisions on the return of illegal assets without a court decision in a criminal case (non-conviction based asset forfeiture). The law establishes a 10-year limitation period for the verification of funds in excess of legal income and the subsequent forfeiture of those entities that will be unable to substantiate their income origin. An independent state body – the Commission for Illegal Assets Forfeiture – carries out the forfeiture process. There are two main types of forfeiture in Bulgaria: criminal and civil. The assets recovery may be effected against third parties in case if they had received these assets from the accused person or a participant in the civil process [5, c. 20-21].

It should be noted that all states-members to the European Union have established in their legislation the provision on mutual legal assistance to other countries, even in the initial stages of investigation, for example, assistance in searching and providing the information.

Thus, the study of legislation of the European States allows making a conclusion on the existence of criminal forfeiture in most countries, but also civil forfeiture of assets obtained by corrupt or other criminal means, which are not yet known to Ukrainian legislation. Studying the experience of European countries in the construction of a system related to the search and forfeiture of assets, gives Ukraine the opportunity to rethink the western paradigm in the area of the stolen property return, and to develop new approaches to the search and return of criminally obtained assets, while considering the peculiarities of domestic legislation.

References:

1. Конвенція ООН проти корупції [Електронний ресурс]: Конвенція ООН від 31.10.2003 р. [Electronic resource]. – Search mode: http://zakon5.rada.gov.ua/laws/show/995_c16.
2. Forsaith J., Irving B., Nanopoulos E., Fazekas M. Study for an Impact Assessment on a Proposal for a New Legal Framework on the Confiscation and Recovery of Criminal Assets. DRR-5380-EC. Final Report Prepared for the European Commission Directorate– General Home Affairs Published 2012 by the RAND Corporation http://ec.europa.eu/home-affairs/doc_centre/crime/docs/RAND%20EUROPE%20Study%20Final%20Report.pdf.
3. Конвенція про відмивання, пошук, арешт та конфіскацію доходів, одержаних злочинним шляхом [Electronic resource]: Конвенція Ради Європи від 08.11.1990 р. – Search mode: http://zakon3.rada.gov.ua/laws/show/995_029.
4. Конвенція Ради Європи про відмивання, пошук, арешт та конфіскацію доходів, одержаних злочинним шляхом, та про фінансування тероризму [Electronic resource]: Конвенція Ради Європи від 16.04.2005 р. – Search mode: http://zakon3.rada.gov.ua/laws/show/994_948.
5. Проблема возврата незаконно нажитых активов: опыт России, Украины и зарубежных стран / О.Р. Корзун, Д.Я. Примаков, М.М. Щигрева / Под науч. ред. Д.Я. Примакова. – М.: Инфотропик Медиа, 2016. – 164 с.