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MIĘDZYNARODOWE MODELE PRAWNE PRZECIWDZIAŁANIA NIELEGALNEMU WZBOGACENIU

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Adnotacja. W artykule mówimy o jednym z najczęstszych przestępstw korupcyjnych – nielegalnym wzbogaceniu. Przeanalizowano ustawodawstwo karne obcych państw w celu ustalenia odpowiedzialności karnej za nielegalne wzbogacenie, zidentyfikowano praktyczne problemy wymagające regulacji i zbadano międzynarodowe modele prawne przeciwdziałania nielegalnemu wzbogaceniu. Ustalono odpowiedzialność karną za nielegalne wzbogacenie w wymiarze międzynarodowym, badając przepisy antykorupcyjne i podstawowe środki reagowania karnego za takie przestępstwa, a także warunki zwolnienia z odpowiedzialności karnej. Główną metodą dochodzenia jest metoda analizy porównawczej, dzięki której zidentyfikowano różnice między kryminalizacją nielegalnego wzbogacenia w obcych państwach. Ogólny wniosek jest taki, że nielegalne wzbogacenie ma szereg różnic w międzynarodowym systemie prawnym. Różnice te określają cechy dochodzenia takich przestępstw. W szczególności takie cechy przejawiają się w polityce antykorupcyjnej.
Słowa kluczowe: odpowiedzialność karna, urzędnik, nielegalne wzbogacenie, przepadek.

FOREIGN MODELS OF LEGAL COUNTERACTION TO ILLICIT ENRICHMENT

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Abstract. The article is about one of the most popular corruption offenses by officials – illicit enrichment. The proposed article analyzed the criminal legislation of foreign states regarding the establishment of criminal liability for illicit enrichment by analyzing the characteristics of its features to overcome these practical problems. The place of criminal legal for illicit enrichment in the international system anti-corruption legislation and main measures of criminal response to such crimes and conditions of exemption from criminal responsibility has been outlined in the world. The main method used at investigation is the method of comparative analysis, which was used to expose differences between criminalization for illicit enrichment in foreign states. The general conclusion was made that illicit enrichment has a number of differences in the foreign legislative system. These differences determine the features of the investigation of such crimes. In particular, such features are manifested in anti-corruption politics.
Key words: criminal liability, public official, illicit enrichment, confiscation.

МІЖНАРОДНО-ПРАВОВІ МОДЕЛІ ПРОТИДІЇ НЕЗАКОННОМУ ЗБАГАЧЕННЮ

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Анотація. У статті йдеться про одне з найпоширеніших корупційних кримінальних правопорушень – незаконне збагачення. Проаналізовано кримінальне законодавство іноземних держав щодо встановлення кримінальної відповідальності за незаконне збагачення, визначено практичні проблеми, які потребують врегулювання, і досліджено міжнародно-правові моделі протидії незаконному збагаченню. Установлено кримінальну відповідальність за незаконне збагачення в міжнародному вимірі через дослідження антикорупційного законодавства й основних заходів кримінального реагування на такі кримінальні правопорушення, а також умов звільнення від кримінальної відповідальності. Основним методом розслідування є метод порівняльного аналізу, за допомогою якого були виявлені відмінності між криміналізацією незаконного збагачення в іноземних державах. Зроблено загальний

висновок, що незаконне збагачення має ряд відмінностей у міжнародно-правовій системі. Такі відмінності визначають особливості розслідування кримінальних правопорушень. Зокрема, такі особливості проявляються в антикорупційній політиці.

Ключові слова: кримінальна відповідальність, службова особа, незаконне збагачення, конфіскація.

Introduction. Priority works law enforcement agencies in the different foreign states are an anti-corruption policies. But the integration of anti-corruption measures in some countries often fails to give positive results. That's could be explain some political, economic, organizational legal, ideological, moral and psychological factors.

Year to year, the international anti-corruption organization Transparency International promulgates Consumer price index (CPI) in 180 countries. The Transparency International CPI measures the perceived levels of public-sector corruption in a given country and is a composite index, drawing on different expert and business surveys. Looking at the totals for 2021 it can be observed that in the top 10 countries where corruption has low level: Denmark, New Zealand, Finland, Singapore, Switzerland, Norway, the Netherlands, Germany and Luxembourg. However, it should also be noted that Ukraine has 117–122th place together with Nepal, Egypt, Eswatini, Sierra Leone and Zambia. The worst situation is in Somalia and South Sudan.

Problems of counteracting various forms of illicit enrichment was observed by such scientists as L. Bartels, T. Berger, S. Bikelis, J. Boles, J. Boucht, S. Cherniavskyi, V. Cherney, D. Garbazei, M. Mathias, M. Morales, L. Muzila, H. Nugroho, T. Oke, M. Simonato, M. Tromme, A. Vozniuk, D. Wilsher, W. Wodage and others. In the articles of these researchers to describe different ways counteraction to illicit enrichment, but a lot of issues still not remain unresolved.

Purpose. The purpose of the article is to research foreign models of legal counteraction to illicit enrichment. We believe that it would be helpful to develop effective model criminal liability for illicit enrichment by analyzed experience of foreign countries and positive or negative examples on the building of the legal institutions.

Problem statement. Study of international experience in the anti-corruption policy becomes especially today. For the first time, concept of illicit enrichment was included in the Inter-American Convention against Corruption (IACAC) in 1996. Under Article IX of the IACAC, subject to its Constitution and the fundamental principles of its legal system, each State Party that has not yet done so shall take the necessary measures to establish under its laws as an offense a significant increase in the assets of a government official that he cannot reasonably explain in relation to his lawful earnings during the performance of his functions (IACAC, 1996). After some time, concept of illicit enrichment was included in the United Nations Convention against Corruption (UNCAC).According to Article 20 of the UNCAC, subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income (UNCAC, 2003).

In the modern foreign system identifies two models of legal counteraction to illicit enrichment. These are:

1) recognition of unclear enrichment as the crime and bringing the perpetrators to criminal responsibility;

2) the confiscation of property, the origin of which a person cannot explain, during so called civil confiscation (Cherniavskyi, Vozniuk, 2019).

Confiscation is one important component of contemporary policies against serious crimes. International organizations are increasingly encouraging national legislators to introduce more effective and incisive tools to deprive criminals of the illicit gain, even in the absence of a final conviction (Simonato, 2017). Moreover, the effective use above – mentioned legal instruments have positive aspects:

a) stimulate persons authorized to perform functions of the state or local self – government, to lawful conduct, primarily to refrain from committing corruption offenses;

b) allow to remove illegally acquired assets and turn them into state revenue during the confiscation of property;

c) contribute to the reduction of corruption in the state (Cherniavskyi, Vozniuk, 2019).

This allows the conclusion that one of the most advantage establishment of criminal liability for illicit enrichment in Ukraine are that it could be one of the last legal instrument by prosecution of chargeable officials for such a corruption offense.

According to scientists, to the benefits already mentioned, illicit enrichment has some the points of contention. As noted by J. Boles, illicit enrichment statutes aggressively combat governmental corruption, but the placement of the burden of proof upon the criminal defendant constitutes an impermissible presumption that violates the human rights of the accused. Such legislation, by its operation, abuses the rights of defendants. For this reason, jurisdictions worldwide should resist using illicit enrichment offenses to combat corruption. The author suggests alternative measures exist via financial disclosure and tax evasion legislation that may properly address unexplainable wealth without violating human rights (Boles, 2014).

In order to attain a conviction of illicit enrichment, the prosecution must demonstrate that the official's enrichment cannot be justified from legitimate sources of income, raising the presumption that it is the proceeds of corruption. The public official may rebut this presumption by providing evidence of the legitimate origin of his wealth. Failure to rebut the presumption results in a conviction and the imposition of penalties. Some view the presumption of illicit enrichment as a partial reversal of the burden of proof and a relaxation of the presumption of innocence, considered principles of all legal systems (Muzila et al., 2012). It is difficult to arrive at any conclusions with regard to the best effective ways of legal counteraction to illicit enrichment, but a lot of foreign states included this offence in the domestic law. Not every European countries established criminal liability for illicit enrichment. Countries

such as Swedish, Germany, Estonia, Netherlands, Romania, Morocco and Mauritius did not establish criminal liability for illicit enrichment because it is contrary theirs to the constitutional principle.

Broadly, a goal of the most international countries are anti-corruption politic. Criminal liability for illicit enrichment has great potential, but not at all countries have been developed and given concrete. As pointed out by M. Tromme, asset forfeiture laws are powerful tools provided to law enforcement agencies in their quest to tackle crime and corruption by seizing ill – gotten assets (Tromme, 2019). The first countries to establish criminal liability for illicit enrichment was Argentina. The Penal Code of the Argentine Nation, in article 268-2, will be punished with imprisonment or imprisonment of two to six years, a fine of fifty per cent to one hundred percent of the value of the enrichment and absolute disqualification life imprisonment which, when properly be required, not acquit the provenance of an enrichment appreciable assets of yours, or person filed to conceal that fact, happened after the assumption of a public office or employment and up to two years after they have ceased in its performance (Penal Code of the Argentine Nation, 1984).

Illicit enrichment likewise entailed criminal liability under the Criminal Code of Ukraine. In Ukraine, the problem of introduction of the institute of corporate criminal liability is currently in the solution phase. Under Article 368-5 of the Criminal Code of Ukraine, acquisition by a person authorized to perform the functions of the state or local self – government of assets, the value of which exceeds his legal income by more than six thousand five hundred non –taxable minimum incomes, shall be punishable by imprisonment for a term of five to ten years with deprivation of the right to hold certain positions or engage in certain activities for up to three years (Criminal Code of Ukraine, 2001).

Let us consider to establish criminal liability for illicit enrichment in European. According to chapter 16, § 144 of the Criminal Code of Denmark (paragraph title: "Offences Committed While Exercising a Public Function"), any person who, while exercising a Danish, foreign or international public office or function, unlawfully receives, demands, or accepts the promise of a gift or other favor shall be liable to a fine or to imprisonment for any term not exceeding six years (Criminal Code of Denmark, 2005).

It is noteworthy that Lithuania also adopted legislative measures to criminalize illicit enrichment. Furthermore, Lithuania was the first European Union Member State to introduce general criminal liability for illicit enrichment. The Criminal Code of Republic of Lithuania in force contains an article 189-1 establishing criminal liability for unjust enrichment: "A person who holds by the right of ownership the property whose value exceeds 500 MSLs, while being aware or being obliged and likely to be aware that such property could not have been acquired with legitimate income, shall be punished by a fine or by arrest or by a custodial sentence for a term of up to four years" (Criminal Code of Republic of Lithuania, 2000).

As pointed out S Bikeles, the concept of the criminalization of illicit enrichment proves to be less promising than that of civil forfeiture. First, it is contentious in the context of proportionality and ultimate ratio. Second, it may infringe upon the prohibition of self-incrimination. Third, it appears that collecting sufficient evidence of illicit enrichment on the criminal standard of proof is an extremely difficult task for the prosecution (Bikelis, 2017).

Conclusions. We researched and analyzed the establishment of criminal liability for illicit enrichment in eighteen countries. The main conclusion that can be characterized as today's all foreign states to go on activity anti-corruption politics. Although, not all foreign states to include criminal liability for illicit enrichment in the domestic law. Countries such as Swedish, Germany, Estonia, Netherlands, Romania, Morocco and Mauritius did not establish criminal liability for illicit enrichment because it is contrary theirs to the constitutional principle. In carrying out foreign law of criminal liability for illicit enrichment have been formulated some conclusions:

1) the object of the crime under consideration is public relations in the sphere of official activity provided by foreign law;

2) the subject matter of the offence may be property or assets;

3) the objective side of illicit enrichment the duty of the official to substantiate and explain the received incomes which are disproportionate to their material condition;

4) the subject is an official or any other, regardless of the relationship to the civil service;

5) mental element of illicit enrichment can be only with direct intent.

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