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MONITORING LEGISLATION IN THE FIELD OF ASSET RECOVERY

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Abstract. *The author examined the legislation of foreign countries on the return to the state of illegally acquired and withdrawn assets, as well as methods for their return in a variety of situations, especially when criminal confiscation is impossible or cannot be applied.*

The Act of the Republic of Kazakhstan «On the return of illegally acquired assets to the state» (hereinafter referred to as the Act), adopted on July 12, 2023, and legal instruments for the return of these assets, including assets abroad, are analyzed.

The Act in general is generally characterized by a subjective, purely evaluative approach to whether a particular asset can be classified as illegally acquired, whether it is subject to seizure or not. This is indicated by the use of such phrases as «reasonable doubts», «presumed presence in property, use, possession».

The danger of this approach lies in the lack of clear legal criteria, which creates the threat of abuse by officials and law enforcement agencies. The lack of legal criteria creates limitless eventual possibilities for raiding.

It should be noted that due to the vastness of the topic under study, the author was not able to consider in one publication all the norms that contradict current high-level legislative acts (including constitutional laws and codes), including the subsequent effect on the national legal system of Kazakhstan from the operation of such a Act.

Keywords: *return of assets, illegally acquired assets, corruption, confiscation, civil forfeiture, criminal proceedings, criminal law.*

МОНИТОРИНГ ЗАКОНОДАТЕЛЬСТВА В СФЕРЕ ВОЗВРАТА АКТИВОВ

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Аннотация. *Автором рассмотрено законодательство зарубежных стран о возврате государству незаконно приобретенных и выведенных активов, а также способы их возврата в самых разных ситуациях, особенно когда конфискация в уголовном порядке невозможна или ее нельзя применить.*

Проанализирован, принятый 12 июля 2023 года Закон Республики Казахстан «О возврате государству незаконно приобретенных активов» (далее – Закон), правовые инструменты для возврата этих активов, включая активы за рубежом.

Для Закона вообще в целом характерен субъективный, сугубо оценочный подход в том, можно ли отнести тот или иной актив к незаконно приобретенным, подлежит ли он изъятию или нет. На это указывает применение таких оборотов, как «разумные сомнения», «предположительное нахождение в собственности, пользовании, владении».

Опасность такого подхода заключается в отсутствии четких правовых критериев, создающих угрозу злоупотреблений со стороны чиновников, правоохранительных органов. Отсутствие правовых критериев создает безграничные эвентуальные возможности рейдерства.

Необходимо отметить, что в силу обширности исследуемой темы, автором не удалось рассмотреть в одной публикации все нормы, противоречащие действующим зако-

нодательным актам высокого уровня (включая конституционные законы и кодексы), в том числе и последующий эффект для национальной правовой системы Казахстана от действия подобного Закона.

Ключевые слова: *возврат активов, незаконно приобретенные активы, коррупция, конфискация, гражданская конфискация, уголовное производство, уголовное законодательство.*

АКТИВТЕРДІ ҚАЙТАРУ САЛАСЫНДАҒЫ ЗАҢНАМАНЫҢ МОНИТОРИНГІ

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Аннотация. *Автор шетел мемлекеттерінің заңсыз алынған және алып қойылған мүлікті мемлекетке қайтару туралы заңнамасын, сондай-ақ әртүрлі жағдайларда, әсіресе қылмыстық тәркілеу мүмкін емес немесе қолдану мүмкін болмаған кезде оларды қайтару әдістерін зерттеді.*

2023 жылғы 12 шілдеде қабылданған «Заңсыз алынған мүлікті мемлекетке қайтару туралы» Қазақстан Республикасының Заңы (бұдан әрі – Заң) және осы активтерді, оның ішінде шетелдегі активтерді қайтарудың құқықтық құралдары болып табылады. талданған.

Жалпы Заң белгілі бір активті заңсыз сатып алынғандар қатарына жатқызуға болатынына, тыйым салуға жататынына немесе алынбауына субъективті, таза бағалау тәсілімен сипатталады. Бұл «ақылға қонымды күмән», «меншікте болуы, пайдалану, иелену» сияқты тіркестердің қолданылуымен көрсетіледі.

Бұл тәсілдің қауіптілігі шенеуніктер мен құқық қорғау органдарының теріс пайдалану қаупін тудыратын нақты құқықтық өлшемдердің болмауында. Құқықтық өлшемдердің жоқтығы рейдерлік әрекеттерге шексіз мүмкіндіктер туғызады.

Айта кету керек, зерттелетін тақырыптың ауқымдылығына байланысты автор бір басылымда қазіргі жоғары деңгейдегі заңнамалық актілерге (соның ішінде конституциялық заңдар мен кодекстерге) қайшы келетін барлық нормаларды, оның ішінде одан кейінгі әсерді қарастыра алмады. Қазақстанның ұлттық құқықтық жүйесі осындай Заңның әрекетінен.

Түйінді сөздер: *мүлікті қайтару, заңсыз алынған мүлік, сыбайлас жемқорлық, тәркілеу, азаматтық тәркілеу, қылмыстық іс жүргізу, қылмыстық құқық.*

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Introduction

The world community has adopted a number of principles against corruption, especially the theft of public assets. The United Nations Convention against Corruption (UNCAC) is a universal anti-corruption instrument and the only legally binding one.

The Republic of Kazakhstan ratified this Convention in 2008[1].

Article 30 of the UNCAC Convention defines the basic principles of prosecution, adjudication and sanctions, in accordance with paragraph 4 of the Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defense, to ensure that the conditions imposed in connection with decisions on release pending trial or pending a decision on a cassation appeal or protest, took into account the need to ensure the presence of the accused during subsequent criminal proceedings.

Controversial legal issues regarding non-criminal confiscation:

• Referring the law on confiscation outside of criminal proceedings to civil or criminal law (referring to criminal law will lead to additional protection of the rights of the accused and a change in the standard of proof);

[1] *Закон Республики Казахстан от 4 мая 2008 года N 31-IV «О ратификации Конвенции Организации Объединенных Наций против коррупции». Информационно-правовая система нормативных правовых актов Республики Казахстан «Әділет» https://adilet.zan.kz/rus/docs/Z080000031_*

• Double punishment;
• Application of the law on confiscation outside criminal proceedings with retroactive effect;
• Shifting the burden of proof violates the presumption of innocence (as an example of presumptions);
• The right not to testify against oneself in a criminal case;
• Violation of property rights;
• The applicant's right to compensation for legal costs.

According to the World Bank's Non-Criminal Asset Forfeiture Guidelines, the legitimacy of criminal forfeiture and civil asset forfeiture laws has been repeatedly questioned, including the principle of non-criminal forfeiture and the constitutionality of the laws being challenged in a number of countries and territories, including in Colombia, South Africa, Thailand, Ireland and the Canadian province of Ontario[2].

However, the European Commission of Human Rights clarified back in 1986 that the confiscation of assets outside of criminal proceedings does not contradict the presumption of innocence and does not violate fundamental property rights. At the same time, any confiscation, according to the members of the commission, must be contestable in court, as well as justified and proportionate. Courts in a number of countries and the European Court of Human Rights have examined the issue of compliance with the principles of civil confiscation of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[3].

Methods

The article uses formal-logical and dialectical, qualitative and special methods of scientific research, comparative legal, and empirical analysis.

Results and discussion

Non-criminal forfeiture is an effective way to recover assets in a variety of situations, especially when criminal forfeiture is not possible or cannot be enforced because in these cases the lawsuit is against the property rather than against a specific individual and/or there is no requirement for a conviction within the framework of criminal proceedings, as well as an effective tool in the fight against corruption in any jurisdiction, regardless of legal traditions. Although some common law countries (eg the United States, South Africa and Ireland) have had forfeiture mechanisms in place for a long time, many civil law jurisdictions have similar legislation. These include Albania, Colombia, the province of Quebec (Canada), Liechtenstein, Slovenia, Switzerland and Thailand, Great Britain.

In terms of legislative regulation, countries provide an out-of-court legal mechanism used in cases of uncontested confiscation outside of criminal proceedings. For example, in the USA, there is such a thing as «administrative confiscation». In this type of forfeiture, a non-judicial officer may make a declaration of the seizure of property after: 1) all interested parties have been properly notified of the forfeiture and 2) no one has expressed a desire to challenge the decision. In some countries, administrative confiscation applies only to low-value assets. Vehicles of any value and bank accounts in an amount not exceeding $500,000 can be administratively confiscated, but real estate, regardless of its value, can only be confiscated by a court decision. Asset confiscation legislation, as part of existing laws, is provided for in the UK Proceeds of Crime Act or Law No. 793 of 2002 in Colombia, Slovenian Criminal Procedure Act (8/2006 of 26 January 2006), art. 498a, Switzerland Penal Code, art. 70–72).

In Switzerland, since February 1, 2011, the federal law of October 1, 2010 «On the restitution of illegally acquired property assets of politically exposed persons». This law deserves special attention due to the fact that it regulates issues not only of restitution itself (as the name implies), but also of blocking and confiscation of property of non-residents of Switzerland, that is, it can be applied to assets located in Switzerland, the owners of which are Russian individuals or legal entities. This law has a very long history of adoption [1]. As is known, the problem of returning assets of non-residents

[2] *Attorney General of Ontario v. Chatterjee [2007], ONCA 406 (Апелляционный суд Онтарио). (Закон провинции о конфискации активов вне уголовного производства был признан конституционным в части, касающейся презумпции невиновности и отнесения закона к гражданскому и имущественному [юрисдикция провинции], а не уголовному законодательству [федеральная юрисдикция]. Апелляция рассматривалась в Верховном суде Канады 12 ноября 2008 г., предыдущее решение было оставлено в силе.) https://www.canlii.org/en/ca/scc/doc/2009/2009scc19/2009scc19.html*

[3] *Dassa Foundation v. Liechtenstein, Eur. Ct. H. R., Application no. 696 / 05 (July 10, 2007) (законодательство о конфискации имущества вне уголовного производства, имеющее обратную силу, не противоречит Конвенции); Walsh v. Director of the Assets Recovery Agency [2005], NICA 6 (Апелляционный суд Северной Ирландии). (Процедура конфискации активов вне уголовного производства признана гражданско-правовой, что не противоречит ст. 6 (2) конвенции.) https://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Non-conviction-based_Asset_Forfeiture_R.pdf*

stored in Swiss banks arose and became very urgent after the Second World War.

Switzerland began to experience pressure from foreign states, international institutions, the media, and the Swiss public. All of them demanded from Switzerland the restitution of dictators' funds, as well as the adoption of a law that would regulate relations arising in connection with the storage in this country of assets of persons who dishonestly use their political position to extract corruption and other illegal income [2].

In case of civil confiscation, the prosecution must prove that the assets are of criminal origin, that is, they were obtained by criminal means

or were used to commit a crime.

As for the domestic legislator, in January 2022, the President of Kazakhstan ordered to check the facts on the withdrawal of capital abroad and develop mechanisms for their return to the country. After discussion in the Mazhilis and the Senate of Parliament, as well as verification by the Constitutional Court, the Act was signed on July 12, 2023.

According to the Act, a commission is created in order to develop proposals and recommendations on the return of illegally acquired and withdrawn assets. The commission develops recommendations: on systemic measures aimed at eliminating the causes and conditions for the illegal acquisition of assets; on methods and mechanisms for returning illegally acquired assets to the state.

Recommendations are subject to mandatory approval by the Government of the Republic of Kazakhstan and are mandatory for consideration by the authorized body for asset recovery (Article 8, 9).

The commission creates a register for the return of assets at the proposal of the authorized body *(Prosecutor General's Office) (the deadline for a person to be in the register is one year from the date the person is included in the register).*

Persons included in the register have the right to submit declarations on the disclosure of assets owned (Article 15). Based on the results of consideration of the declaration, the Prosecutor General's Office submits the issue of further measures for consideration by the commission.

The commission has the right to recommend taking one of the following measures: 1) recognize the absence of grounds for going to court; 2) enter into an agreement on the voluntary return of assets (in the event of an appropriate request from the subject and taking into account the commission's consideration of the size of the returned assets and other conditions for the voluntary return proposed in the draft agreement submitted for consideration by the commission); 3) further study the declaration and the materials attached to it.

An application for preliminary interim measures is submitted to the court in compliance with the rules of jurisdiction provided for in accordance with the Civil Procedure Code of the Republic of Kazakhstan (Article 21).

The return of assets may be voluntary or compulsory. Voluntary return of assets is carried out by transferring all or part of illegally acquired and withdrawn assets to the state. Forced return of assets is carried out on the basis of judicial acts of the Republic of Kazakhstan, foreign states or decisions of competent authorities of foreign states in the manner prescribed by this Act and other legislative acts of the Republic of Kazakhstan (Article 22).

The subject and (or) its affiliates who have fulfilled all the terms of the agreement for the return of assets to the state, a settlement agreement or a procedural agreement to plead guilty and return illegally acquired assets or other agreements that do not contradict the legislation of the Republic of Kazakhstan, including those concluded in accordance with the legislation of foreign countries states may be exempt from liability in cases provided for by the legislation of the Republic of Kazakhstan (Article 25).

At the same time, according to the Act «On Legal Acts», the text of a normative legal act must be extremely brief, contain a clear meaning and not subject to different interpretations.

Thus, the words «may be relieved of liability» are not clearly defined.

In the event that the authorized body for asset recovery has reasonable doubt about the legality of the sources of acquisition (origin) of the assets of a person included in the register, after reviewing the materials by the commission, the authorized body for asset recovery, based on consideration of all necessary circumstances, based on the recommendations of the Commission, makes a decision on filing a claim in court for the forced gratuitous transfer of such assets to the state as unexplained wealth (assets of unexplained origin) based on the recommendations of the commission (Article 27).

However, the assessment by the Prosecutor General's Office is subject to reasonable doubt.

Even before the adoption of the Act, a prominent Kazakhstani legal scholar Suleimenov M.K. in his expert opinion, he expressed the opinion that: «the development of some new mechanism for the return of illegally

withdrawn assets or some new mechanism for confiscation of property obtained by criminal means seems unnecessary, since the current criminal, criminal procedural and civil procedural legislation is already contains such a comprehensive mechanism that is interconnected and meets the requirements of public international law in the field of combating corruption, combating the laundering of property obtained by criminal means, and the financing of terrorism» [3].

Similar doubts were expressed by another scientist D. Abzhanov, who also believes that: «Instability of civil (property) turnover, deterioration of the investment climate, reduction in lending to economic sectors due to fears of loss of collateral rights - this is what the adoption of the law in its presented form may threaten. It can safely be considered illegal» [4].

Meanwhile, despite this, the Act was adopted. We highlight some comments and recommendations:

1) in accordance with the Act, persons having family relations are: parents (parent), children and their spouses, adoptive parents and their spouses, adopted children and their spouses, full and half brothers and sisters and their spouses, grandfather, grandmother, grandchildren, great-grandchildren and their spouses, great-grandfather, great-grandmother.

In turn, the Code of the Republic of Kazakhstan «On Marriage (matrimony) and Family» establishes the concept of «close relatives - parents (parent), children, adoptive parents, adopted children, full and half brothers and sisters, grandfather, grandmother, grandchildren».

Thus, this concept is not consistent with the Code «On Marriage (Matrimony) and Family» and a reasonable circle of persons related to family relations is not defined.

2) In the UK, cases of non-criminal asset confiscation were dealt with by the Queen's Bench Division of the High Court.

In the United States, the Supreme Court hears cases involving confiscation of property.

According to the Anti-Money Laundering Act of the Philippines, when deciding, the court may refer to the following factors to determine the preponderance of evidence: a) the monetary instrument, property or proceeds were obtained by crime or as a result of money laundering, or were used as an instrument in the commission of a crime, or are associated with illegal activities.

Thus, international experience shows that in foreign countries the decision on the return of assets is made by the court.

In addition, the factors for determining evidence are also determined by the court, whereas in the Asset Recovery Act the main role is played by the commission, and the Prosecutor General's Office, represented by the authorized body, takes measures to return assets upon reasonable doubt.

Conclusion

Thus, the legal risks of asset recovery may vary depending on the specific legal framework and provisions governing asset recovery. However, it is possible to provide a general discussion of the potential risks that may arise in a legal context.

In the context of protecting fundamental rights. Asset recovery processes must respect and protect the fundamental rights of those involved, including the rights to due process, the right to a fair trial, and the right to privacy. There is a risk that asset recovery measures, if not properly designed or implemented, may violate these rights. There must be constitutional guarantees to ensure that the rights of individuals are respected throughout the asset recovery process.

Separation of powers. The principle of separation of powers is of decisive importance in law. Asset recovery processes involve various participants, including executive authorities, law enforcement agencies and the judiciary. Risks may arise if there is an imbalance of power or if one branch of government has disproportionate influence or control over the asset recovery process. The legal framework must provide clear checks and balances to prevent abuse of power and ensure the independence of the judiciary.

Proportionality and legality of measures. There is a risk that measures taken during asset recovery, such as freezing assets, seizing property or conducting searches, may be excessive, arbitrary or not supported by adequate legal authority. Constitutional safeguards, such as the requirement of reasonable suspicion or due judicial review, should be in place to mitigate these risks.

Judicial review. The existence of judicial review is critical to ensure that asset recovery measures comply with legal principles and statutory requirements. Risks may arise if the scope or effectiveness of judicial review is limited or if access to an independent and impartial judiciary is insufficient.

Provisions on retroactive effect of the law. Asset recovery laws or amendments that are retroactive, meaning they apply to events that occurred before the law was enacted, may raise

legal concerns. In particular, asset recovery legislation may violate the principles of legal certainty and non-retroactivity of criminal laws. There must be constitutional safeguards to ensure that retroactive legislation is used sparingly and in accordance with constitutional principles.

Based on the above, it is necessary:

- determine the relationship between the confiscation of property outside of criminal proceedings and any stage of the criminal process, including an unfinished investigation;

- indicate under what conditions the authorities are allowed to initiate confiscation proceedings outside of criminal proceedings. It is necessary to determine whether civil forfeiture will be allowed only when criminal prosecution and criminal forfeiture are not possible, or whether civil forfeiture and criminal proceedings can proceed simultaneously;

- the ability to allow confiscation to proceed in parallel with criminal proceedings, but in this case it must provide that information obtained from the owner of the assets cannot be used against him in a criminal investigation;

REFERENCE: The US Supreme Court in the case United States v. Ursery stated: «In reviewing the consistency of civil forfeiture with the Twice Prohibition Clause, we have been consistently guided by one principle... In rem forfeiture is a civil penalty distinct from potentially punitive civil penalties. penalties in person, such as fines, and is not a punishment for purposes of the Twice Prohibition Clause of the Fifth Amendment to the Constitution».

- clearly stipulate the possibility of confiscation of assets outside of criminal proceedings in cases where criminal prosecution of the property owner is impossible (presence of immunity).

- assets obtained illegally were not subject to the official's personal immunity from prosecution; this special legal status should not prevent confiscation.

- explicitly stipulate that personal immunity does not extend to assets, and the relevant government authorities should be prepared, if necessary, to cancel any immunity in relation to assets.

REFERENCES

1. Федотов А. Г. Краткий комментарий к швейцарскому закону о реституции неправомерно приобретенных имущественных ценностей политически значимых лиц. www.lecs-center.org/ru/publications/107-to-swiss-law Дата обращения: 11.11.2023г.

2. Новикова Е.В., Федотов А.Г., Розенцвайг А.В., Субботина М.А. Верховенство права как фактор экономики / Международная коллективная монография. Москва: Мысль, 2013. — 673 с.

3. Сулейменов М.К. Экспертное заключение по проекту Закона Республики Казахстан «О возврате государству незаконно приобретенных активов». Информационная система «ПАРАГРАФ» https://online.zakon.kz/Document/?doc_id=31839852&pos=354;-51#pos=354;-51 Дата обращения: 17.11.2023г.

4. Абжанов Д.К. Почему закон о возврате активов будет иметь разрушительные последствия. Информационная система «ПАРАГРАФ» https://online.zakon.kz/Document/?doc_id=32469798 Дата обращения: 17.11.2023г.

REFERENCES

1. Fedotov A. G. Kratkij kommentarij k shvejcarskomu zakonu o restitucii nepravomerno priobretennyh imushestvennyh cennostej politicheski znachimyh lic. www.lecs-center.org/ru/publications/107-to-swiss-law Data obrasheniya: 11.11.2023g.

2. Novikova E.V., Fedotov A.G., Rozencvajg A.V., Subbotina M.A. Verhovenstvo prava kak faktor ekonomiki / Mezhdunarodnaya kollektivnaya monografiya. Moskva: Mysl, 2013. — 673 s.

3. Sulejmenov M.K. Ekspertnoe zaklyuchenie po proektu Zakona Respubliki Kazahstan «O vozvrate gosudarstvu nezakonno priobretennyh aktivov». Informacionnaya sistema «PARAGRAF» https://online.zakon.kz/Document/?doc_id=31839852&pos=354;-51#pos=354;-51 Data obrasheniya: 17.11.2023g.

4. Abzhanov D.K. Pochemu zakon o vozvrate aktivov budet imet razrushitelnye posledstviya. Informacionnaya sistema «PARAGRAF» https://online.zakon.kz/Document/?doc_id=32469798 Data obrasheniya: 17.11.2023g.