

BRIEF FOR THE STUDY

§§ CIVIL FORFEITURE OF UNJUSTIFIED ASSETS THROUGH THE PRISM OF PROPERTY RIGHTS PROTECTION

Brief for the study “Civil forfeiture of unjustified assets through the prism of property rights protection”

Civil forfeiture is recognized worldwide as an effective mechanism to combat the acquisition and use of illegal and unjustified assets.

The analysis of the model of civil forfeiture of unjustified assets without a court conviction introduced into Ukrainian legislation showed that **Ukrainian legislation generally complies with international standards and best existing practices by providing broad procedural rights to the defendant and third parties.**

The experience of foreign countries that have introduced such instruments has demonstrated that their effectiveness directly depends on the practice in the application of these provisions by both law enforcement agencies and courts.

To ensure a fair and impartial implementation of the institution of civil forfeiture of unjustified assets, **as well as to prevent further rulings of the European Court of Human Rights on human rights violations by Ukraine, we recommend that the Supreme Court and the High Anti-Corruption Court of Ukraine consider the possibility of implementing the following proposals.**

1. The Supreme Court should develop clarifications with a thorough interpretation of what should be understood and how to define **“the action of an official that are identical in content to the exercise of the right to dispose of assets”** and **“the acquisition of assets on behalf”** in cases of the civil forfeiture of unjustified assets from nominee owners.

While the grounds for the confiscation of assets only formally owned by third parties are provided for in current legislation and potentially provide an opportunity to cover a wide range of assets and nominees to whom they may belong, previous cases of their interpretation by national courts indicate the use of restrictive interpretation.

2. **Taking into account international standards and the practice of the European Court of Human Rights, in considering this category of cases, the High Anti-Corruption Court should provide the necessary procedural guarantees for the owners of the disputed assets:**

- defendants in such cases should be provided with a reasonable opportunity to prove their own arguments in national courts, both in writing and orally,
- the hearings must be held in a competitive manner,
- the evidence, together with supporting documents, must be properly considered,
- seizure should only take place in accordance with the law and in cases where there is a reasonable risk to believe that the assets may be destroyed/hidden or otherwise lose their value through the fault of the owner.

The Parliament must clearly establish at what stage and in what form the relevant actions are taken, that is in the form of a resolution, in the form of accepting a claim or in any other form. Indeed, it is this that defines the transition of the burden of proof (also a recommendation to the Court)

3. Until the relevant changes in legislation are adopted **the Supreme Court should clearly define in the legislation at what stage, by what criteria and in which form the court determines the sufficiency of the evidence presented by law enforcement agencies** that the acquired assets are unjustified to shift the burden of proving the legality of the sources of the assets to the defendant. An additional settlement is required by the issue of admissibility of evidence, in particular, **whether the evidence collected in the framework of criminal proceedings can be used, and to what extent, what evidence can be used if the criminal proceeding was not previously opened.**

Realizing the need to provide the court with reasonable discretion, the lack of legal certainty on the above issues can prevent the owners of the disputed property, law enforcement agencies and the courts themselves from acting within the law and exercising their rights to the fullest extent.

4. Until the relevant legislative changes are adopted, the Supreme Court should clarify – **1) whether a person is obliged to prove the legality of the sources of his or her income received before his or her assumption of office; 2) how “deeply” the owner should prove the origin of his or her wealth, necessary for the acquisition of the disputed assets.** Actually, according to Art 291 of the Code of Civil Procedure, the court must establish the legality of the income necessary for the acquisition of the disputed assets, but the law doesn't specify the time limits within which such income could be obtained.

Kyiv, 2020

