Institute of legislative ideas

ANALYSIS OF THE HIGH ANTI-CORRUPTION COURT'S CASE LAW CONCERNING THE APPLICATION OF SANCTION IN THE FORM OF ASSET FORFEITURE

SUMMARY

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This study presents an analysis of 15 decisions of the High Anti-Corruption Court (HACC) and 2 decisions of the HACC Appeals Chamber imposing a sanction in the form of asset forfeiture. The think tank "Institute of Legislative Ideas" draws attention to the procedural and substantive peculiarities of the respective category of cases and offers recommendations aimed at ensuring compliance with the principles of the rule of law and fair trial in the consideration of these cases. In particular, the study covers the following issues: limitation period for filing a claim, time for trial, proper notification of the defendant, applicable standard of proof, prospective effect of the law, conditions for the forfeiture, proving the ownership or control over the assets and risks of violation of third party rights, etc.

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SUMMARY

The adoption of the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Improving the Efficiency of Sanctions Related to the Assets of Certain Individuals" (Law No. 2257-IX), which entered into force on May 24, 2022, paved the way for the confiscation of assets of individuals and companies that contribute to the Russian aggressive war against Ukraine. This law introduced a new type of sanction - asset forfeiture.

The Institute of Legislative Ideas, having the relevant expertise in non-conviction based forfeiture (NCBF), has been studying the mechanism starting from the stage of drafting the relevant Law. After the Law was adopted and before the first lawsuits were filed, we provided recommendations on how to make the measure compatible with the standards of property rights protection, fair trial standards and in line with the ECtHR case law.

In this vein, the Institute of Legislative Ideas now analyzes the practice of applying the new sanction (in 15 judgments of the High Anti-Corruption Court (HACC) and two decisions of the HACC Appeals Chamber) in order to identify tendencies and spotlight bottlenecks in jurisprudence on the matter and to provide recommendations for improving the mechanism of forfeiture. The study addresses the following issues: limitation period for filing a claim, time for a trial, proper notification of the defendant, applicable standard of proof, effect of the law in time, proof of the conditions for the forfeiture, establishing the ownership of the assets and risks for third parties" rights etc.

1. Limitation period for filing a claim

In the HACC"s case law two different approaches may be encountered with regard to when exactly the three-month period for filing a claim starts to run: according to one it is the day when the National Security and Defense Council of Ukraine (NCDC) freezes the defendant"s assets; according to the second, it is the day when all preconditions for the forfeiture eventuate. The limitation period should commence as soon as *all* the necessary preconditions for the forfeiture eventuate (assets freeze being just one of many), i.e. when all the facts that entitle the Ministry of Justice to file a claim has taken place.

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2. Time of trial

Proper examination of evidence in this category of cases is not feasible within the ten-day period allotted by the Law. That is why the HACC had to deviate from the statutory time limit in order to ensure full and comprehensive study of the circumstances and proper assessment of the evidence submitted. However, such a deviation cannot be regarded as a violation of the guarantees of Article 6 of the ECHR, since according to the ECtHR case law, the paramount criterion on which the reasonable time of the trial depends is the complexity of the case.

3. Proper notification of the defendant

Given that "Ukrposhta" (Ukraine"s National Post) does not exchange mail with the Russian Federation, the acute issue that remains is the proper notification of defendants, without which it is impossible to comply with the guarantees of a fair trial. A possible solution to this problem could be the creation of a website (within the HACC"s or the NSDC"s web-platforms) specifically dedicated to announcements concerning sanctioned persons. On such a website, the relevant persons could track any changes in their status, including notifications of upcoming court hearings.

4. Standard of proof

In cases concerning forfeiture under Article 283-1 of the Code of Administrative Proceedings of Ukraine, a lower (civil-law) standard of proof applies. However, the definition of the standard in the current legislation does not accurately correspond to its true meaning. The civil-law standard of proof should be determined not by the relative strength of the one party's evidence compared to the other party's evidence (since in this case, as long as the defendant does not appear in the proceedings, the court would have to rule in favor of the plaintiff, no matter how weak the latter"s evidence was), but rather on the basis of the degree of conviction of the judge in the truth of the allegations relied upon by the plaintiff (the judge must be convinced that such allegations are more likely to be true than false). This standard is called the preponderance of evidence standard (aka balance of probabilities), or the 50+ standard.

The difference between the standard applicable in the cases at hand and the "beyond a reasonable doubt" standard (which is applied in criminal cases) justifies why an administrative case concerning forfeiture can be tried before the sanctioned person is found guilty in criminal proceedings.

5. The effect of the law in time

The Law requires that confiscation can be applied only to persons whose assets were frozen after the forfeiture had been introduced into national legislation, i.e. after May 24, 2022. However, the date of assets freeze should not be relevant (provided that it took place after the entry into force of the Law of Ukraine "On Sanctions"), because when assessing the temporal effect of the provision on the forfeiture, the only factor to be taken into account is the date of the defendant's actions that justify the forfeiture.

6. Appeals

The right to appeal against a judgment in the relevant category of cases should be afforded not only to the parties, but also to third parties, which may often be the companies whose property or shares in the authorized capital the plaintiff seeks to forfeit to the state. Moreover, the tight deadline for appeal (five days) combined with the special rules on its calculation making it even shorter, and the fact that this deadline is not subject to renewal (Article 270(5) of the CAP) may be considered an obstacle that significantly hinders the practical exercise of the right of access to court by the person concerned.

7. The defendant's citizenship (residence)

In view of the imminent threat caused by the circumstances of the war in Ukraine, the provision of the Law of Ukraine "On Sanctions", according to which sanctions cannot be applied to Ukrainian citizens (except for those who carry out terrorist activities), seems unreasonable and probably discriminatory. This approach should be changed.

8. Regarding the preceding asset freeze

The HACC while considering a claim for the forfeiture assesses the lawfulness of the asset freeze that has to precede the forfeiture. Yet the position on the exact scope of the judicial review in this regard is unclear. The review remains mostly formal.

9. Regarding evaluative concepts

"Substantial threat" and "material assistance" as grounds for forfeiture are evaluative in nature. The very use of evaluative concepts *per se* cannot serve as a reason to criticize the Law, but the HACC should develop the proper criteria to assess the respective concepts.

And while there can hardly be any doubt that the threat to Ukraine's national security is substantial, the concept of "material assistance" may be subject to dispute. In general, the materiality of assistance should mean that the defendant's contribution to the "joint venture" of waging the aggressive war against Ukraine is tangible, noticeable, and significant in the context of the total efforts of all those involved in the aggression.

10. Establishing the ownership of assets

It is arguably the most difficult part in considering the relevant category of cases, due to the fact that not only the assets owned by the defendant directly, but also the assets that the defendant effectively controls without being the formal owner are subject to forfeiture.

To establish effective control, the following concepts should be utilized: ultimate beneficial owner; direct and indirect decisive influence; significant participation; indirect significant participation; control; related parties; chain of ownership of corporate rights in a company; affiliates; ownership structure of business entity.

The ownership structure often includes companies registered under foreign law. This can potentially create an opportunity to circumvent sanctions, provided that at least one of the companies in the chain is located in a jurisdiction that has not imposed sanctions on the defendant.

The court does not need to establish the fictitiousness of certain contracts (which were concluded to circumvent the sanctions), since the subject of proof is not the formal validity of a particular agreement, but the question of whether the defendant, despite the respective agreement (e.g. sale of shares in a company), retained the efficient control over the asset.

11. Protection of the rights of third parties

The application of a sanction in the form of asset forfeiture may potentially create risks of violation of the rights of third parties. For example, when the defendant's property is encumbered by the rights of third parties (pledge, mortgage, etc.), or when the asset to be confiscated belongs to a company in respect of which the defendant is the main, but not the only, beneficiary.In this case, the issue of protecting the rights of bona fide third parties becomes acute. Such protection can be ensured through providing some compensation mechanisms or saddling the state with the duty to purchase the shares of bona fide third parties upon their request, etc. However, one should not lose sight of the fact that such persons may also be indirectly related to the defendant, and it is subject to judicial determination. In this context, the burden of proof of one"s good faith may be allocated on those claiming violation of their rights by sanction measures, which would mean the introduction of a rebuttable presumption of bad faith of a third party.

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Conclusion

At the end of the day, the cautions and recommendations expressed in this study are aimed at ensuring that the requirements of the rule of law are met when applying the sanction in the form of asset forfeiture. In order for such interference with the property rights to be compatible with fundamental human rights, it must (a) be lawful; (b) pursue a legitimate aim; and (c) be proportionate to the aim pursued. Moreover, in addition to the ECtHR case law on the right to peaceful enjoyment of possessions and fair trial standards, the High Anti-Corruption Court should also take into account international law on the protection of foreign investment. In this regard, attention should be paid to compliance with the requirements of "necessity" as defined in Article 25 of the Articles of the UN International Law Commission on the Responsibility of States for Internationally Wrongful Acts.

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