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Objective Side of the Composition of the Criminal Offence of Unlawful Enrichment

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Abstract

The purpose of the study is to examine the objective side of the composition of the criminal offence of unlawful enrichment by analysing the content of individual features to solve theoretical and practical problems. The research methodology consists of a set of scientific methods, among which the main place is occupied by the dialectical method. A system of scientific methods is applied: generalisation – for the establishment of positions available in the specialised literature on determining the signs of the objective side of the composition of the criminal offence of unlawful enrichment; formal logic (induction, deduction, analogy synthesis, abstraction) – to clarify the essence of these issues; theoretical – in the process of research of scientific and educational literature; system analysis – to determine the areas for improving the provisions of the Criminal Code of Ukraine and the practice of its application. The scientific originality of the study lies in the fact that it highlights the relevant problems of the objective side of unlawful enrichment by analysing its characteristic features. Specific proposals have been developed to improve the content of a socially dangerous act specified in the disposition of Art. 368-5 of the Criminal Code of Ukraine, which may have theoretical and practical importance for further solving this problem. Based on the results of the study, conclusions are formulated regarding the determination of the objective side of the composition of unlawful enrichment. Based on the analysis of the objective side of unlawful enrichment, the importance of determining a specific period of committed act under study by a person authorised to perform the functions of the state or local self-government, has been established. It is proposed to present the text of part 2 of Art. 368-5 of the Criminal Code of Ukraine in the following wording: the acquisition of assets should be considered the acquisition of their ownership by a person authorised to perform the functions of the state or local self-government, and the acquisition of assets by another individual or legal entity, on behalf of a person authorised to perform the functions of the state or local self-government, or that a person authorised to perform the functions of the state or local self-government, may directly or indirectly perform actions with respect to such assets that are identical in meaning to the exercise of the right to own, use and dispose

Keywords:

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Introduction

At the present stage of development of the legal activity of the state, one of the priority tasks remains to counteract corruption law violations. In this context, an important place is given to the provisions of the Criminal Code (CC) of Ukraine, which contain modern effective anti-corruption tools. In particular, they relate to criminal liability for unlawful enrichment (article 368-5 of the CC of Ukraine). This criminal law tool is used to influence officials authorised to perform the functions of the state and local self-government, to prevent them from committing criminal corruption offences.

Analysis of the practice of applying Art. 368-5 of the CC of Ukraine and investigation of scientific literature indicates the presence of certain difficulties in implementing criminal liability for this criminal offence. As of October 10, 2020, ten criminal proceedings were registered, among which only one person was notified of suspicion. One of the reasons for this situation is the inaccurate formulation of the objective side of the composition of the criminal offence of unlawful enrichment since this feature plays a substantial role in its qualification.

The purpose of the study is to examine the forms of implementation of the objective side of the composition of the criminal offence of unlawful enrichment by analysing the content of its individual features and to outline ways to improve this criminal law regulation to increase the level of effectiveness of anti-corruption in Ukraine.

Results and Discussion

In Criminal law science, a correct theoretical and practical understanding of the objective side of the composition of a criminal offence is important. The objective side of the composition of a criminal offence should be considered a set of signs provided for by the law on criminal liability that characterises the external manifestation of a socially dangerous act that encroaches on the objects of criminal legal protection [1]. In the theory of criminal law, mandatory and optional features of the objective side of the composition of a criminal offence are distinguished. The study supports the opinion of M.R. Rudkovska, who claims that the mandatory signs of the objective side of the composition of a criminal offence affect the presence of public danger; they are considered when qualifying encroachment. In turn, optional features of the objective side of the composition of a criminal offence and circumstances that are outside its composition determine the degree of public danger; they are considered during the individualisation of criminal liability [2]. This position was defended by V.M. Kuts, noting that the element of the composition of a criminal offence, which unites a group of its objective features,

is the objective side [3]. That is, the establishment of signs of an objective side allows for identifying the presence of elements of a criminal offence in the actions of a person, properly qualifying a socially dangerous act, and distinguishing it from other criminal offences.

When investigating the composition of unlawful enrichment, it is necessary to focus on the content of a socially dangerous act and the form in which such an act can be expressed. Since the most promising direction of influencing crime should be to overcome the desire to commit crimes [4], the content of a socially dangerous act and its forms are embodied in the formulation of the disposition of the criminal law regulation under study. D.G. Mykhailenko aptly called the regulation on unlawful enrichment “an instrument of the final frontier of legal counteraction to corruption” [5]. According to Art. 368-5 of the CC of Ukraine, unlawful enrichment is the acquisition by a person authorised to perform the functions of the state or local self-government of assets the value of which exceeds their legal income by over six thousand five hundred non-taxable minimum incomes of citizens. In part 2 of Art. 368-5 of the CC of Ukraine, the legislator explains that the acquisition of assets should be considered the acquisition of their ownership by a person authorised to perform the functions of the state or local self-government, and the acquisition of assets by another individual or legal entity, if it is proved that such acquisition was conducted on behalf of a person authorised to perform the functions of the state or local self-government, or that a person authorised to perform the functions of the state or local self-government, can directly or indirectly perform actions with such assets that are identical in meaning to the exercise of the right to dispose of them. Thus, to identify what a socially dangerous act is and in what forms it can be implemented, it is necessary to determine the meaning of the terms used in criminal law to denote it.

S.S. Chernyavskiy & A.A. Vozniuk note that two models of legal counteraction to unlawful enrichment have become the most common in the world: recognition of unexplained enrichment as a criminal offence and bringing the perpetrators to criminal responsibility and confiscation of property, the origin of which a person cannot explain, in a civil manner [6]. For the most part, this is the confiscation of assets, which is not based on a guilty verdict, or the so-called civil confiscation [7]. These models have both advantages and disadvantages related to the observance and possible violation of human rights, and the potential to counteract unlawful enrichment [8]. In addition, the legal provisions of some countries require that the prosecution prove the existence of an additional element related

to a particular offence or behaviour [9]. Analysing the criminal law regulation of unlawful enrichment in Ukraine, by its construction and the moment of completion, unlawful enrichment is a criminal offence with material composition since the legislator in the disposition of the article indicates that the value of assets of a person authorised to perform the functions of the state or local self-government should exceed its legal income by over six thousand five hundred non-taxable minimum incomes of citizens. The legislator defines as a mandatory element of the objective side of unlawful enrichment: a socially dangerous act, consequences, and cause-and-effect relationship between the act and the consequences. The place, time, environment, method, tools, and means of committing a criminal offence do not affect the qualification of unlawful enrichment. This study shares the opinion of O.P. Denga, that the optional features of the objective side of a criminal offence should not be ignored, since they implement the principle of individualisation of criminal liability and the basic principles of criminal proceedings [10]. Failure to establish a specific period in which a person is authorised to perform the functions of the state or local self-government during the performance of the duties assigned to it and after their termination causes difficulties in qualifying this socially dangerous act. In particular, it is about that it would be appropriate to provide for the occurrence of criminal liability for unlawful enrichment of a person authorised to perform the functions of the state or local self-government during the performance of their official duties, and within one year after the termination of official activity. In addition, it should be indicated that criminal liability will not occur if a person authorised to perform the functions of the state or local self-government acquires assets before entering the service.

In the disposition of the article on unlawful enrichment, the legislator does not name the methods of unlawful enrichment. This means that unlawful enrichment can be committed in any way. The variety of ways to commit the criminal offence under study is due to the constant appearance in real life of new ways of corruption enrichment, which does not allow providing an exhaustive list of suitable methods. In the paper by I.M. Yasin, such methods of unlawful enrichment are identified. Obtaining illegal benefits during unlawful enrichment by a person authorised to perform the functions of the state or local self-government. The author considers other possible ways of unlawful enrichment to be typical, which are covered by the signs of certain elements of criminal offences provided for in the CC of Ukraine. In this case, the signs (socially dangerous act and method of committing criminal offence) are belonging to different elements of the

same criminal offence, but for objective reasons, in different compositions, they denote the same phenomenon of reality. The presence of such signs is a prerequisite for recognising these elements of criminal offences and unlawful enrichment as those provided for by contesting regulations. The researcher emphasises that the criminal law regulation on unlawful enrichment should be applied when a socially dangerous act committed by a subject of criminal law is a violation that is not covered by signs of other corruption abuse or the fact of committing such an act is not proven, and the standard of living of a person does not correspond to their official, annually declared income [11]. According to V.M. Kyrchko, applying the regulation on unlawful enrichment, should first establish the presence of assets on a large scale [12] however, notes A.A. Vozniuk, if a person has acquired assets legally, they will always be able to express their arguments about the legality of acquiring such assets. Even if there are certain doubts, the rule should be applied in a way that all doubts about the guilt of a person are interpreted in their favour [13]

It is appropriate to analyse the above-mentioned construction of part 2 of Art. 368-5 of the CC of Ukraine, in which the legislator specifies in more detail the commission of a socially dangerous act by a subject of unlawful enrichment. The study supports the position of N.Yu. Symonenko and I.O. Slobodianko that the current version of the criminal law ban on unlawful enrichment, despite its imperfection, is a radical measure aimed at reducing the scale of corrupt behaviour, the legal reality that provides for labour-intensive proof and simultaneously poses a danger of selective justice [14]. The Criminal Law regulation of unlawful enrichment clearly indicates that a person authorised to perform the functions of the state or local self-government, another individual, or a legal entity, can acquire ownership of assets if it is proven that such acquisition was conducted on behalf of a person authorised to perform the functions of the state or local self-government. That is, the legislator, using the term “proven”, imposes an obligation on law enforcement agencies to prove the fact of acquisition of assets by another individual or legal entity, if it is established that such acquisition was conducted on behalf of a person authorised to perform the functions of the state or local self-government. This may cause difficulties in applying the criminal law regulation on unlawful enrichment in practice. Therefore, it is considered appropriate to formulate its text as follows: “acquisition of assets by ownership by another individual or legal entity, if such acquisition was conducted on behalf of a person authorised to perform the functions of the state or local self-government”. The term “acquisition” is commonly used

in the text of the CC of Ukraine not only in relation to property rights but also to denote the emergence of civil rights and obligations. According to the general provisions of the Civil Code of Ukraine, in certain cases, the right of ownership of a thing can pass to the acquirer only after the transaction based on which such a thing is alienated is provided in the form established by law. In particular, in accordance with the requirements of parts 3 and 4 of Art. 334 of the Civil Code of Ukraine, the right of ownership of property under a contract that is subject to notarisation arises from the acquirer from the moment of such certification or from the moment of entry into force of a court decision recognising a contract that is not notarised as valid. If the contract on alienation of property is subject to state registration, the right of ownership of the acquirer arises from the moment of such registration, which is necessarily applied to the emergence of the right of ownership and other real rights to immovable things (Art. 182 of the Civil Code of Ukraine). That is, the right of ownership in such cases will arise only from the moment of notarisation or state registration of the contract. Regarding the acquisition of funds or other property, income from them, they should be considered the implementation of paid or gratuitous actions (purchase, receipt as a gift, in exchange, on account of debt, in the order of compensation for losses, etc.) that provide the opportunity to dispose of such money or property as their own, that is, to own it, alienate, or personally use [15]. Since action is an act that is not compatible with a rule of law that prohibits acting in a certain way, and inaction is an act that contradicts a regulation that contains an order to act in a certain way, unlawful enrichment can only consist in the form of action. The prohibition in this case is the acquisition by a person authorised to perform the functions of the state or local self-government of assets the value of which exceeds their legal income by over six thousand five hundred non-taxable minimum incomes of citizens.

The next controversial issue in part 2 of Art. 368-5 of the CC of Ukraine remains the identification by the legislator of the concept of performing actions by a person authorised to perform the functions of the state or local self-government that are identical in meaning to the exercise of the right to dispose of them. In general, the right of disposal determines the dynamics of property relations, which consists in the commission by the owner of certain active actions in relation to the thing. Based on the right of disposal, the owner has the opportunity to transfer their ownership of the item to other persons. By performing actions, the owner actually determines the future of the item, its further legal fate [16]. Determination of the fate of an item is conducted based on the conscious will of the person.

Actions of a person to terminate the right of ownership of an item committed against the will of the owner cannot be considered as the right of disposal. Given the completeness and absolute nature of the right of ownership, the owner of the property has an independent right to dispose of this property. That is, the owner, when disposing of property, is also obliged to consider the rights and interests of others, and the specific features of the object. This is due to the fact that the right of disposal should be exercised within the framework of legislation, failure to comply with which may lead to liability.

Therewith, actions such as ownership and use rights should also be considered. The study shares the opinions of A.A. Vozniuk and A.V. Tytenko that for a person authorised to perform the functions of the state or local self-government, the legislation should establish a clear obligation to provide information about the source of origin of assets that belong to them by right of ownership, use, disposal [17]. Considering the right of ownership, V.S. Myronenko notes that the main feature of the right of ownership is the possession (control) of a person over a thing, which should be interpreted as an influence on a thing, an attitude to a thing. The second sign of ownership is that control must be factual, although this does not always involve constant contact of the person with the thing. As for the right of use, the author notes that such a right is realised by using the useful properties of a thing, benefits that serve to satisfy the interests of the owner [18]. Consequently, each of the rights of a person authorised to perform the functions of the state or local self-government is independent and simultaneously is part of a single legal category – the content of the right to own actions. That is why it is considered appropriate to add the concept of “right of ownership, use, and disposal” to the text of part 2 of Art. 368-5 of the CC of Ukraine.

The scientific originality of the study lies in the fact that it highlighted the relevant problems of the objective side of unlawful enrichment by analysing its characteristic features. Specific proposals were suggested to improve the content of a socially dangerous act specified in the disposition of Art. 368-5 of the CC of Ukraine, which may have theoretical and practical importance for further solving this problem.

Conclusions

Based on the results of the study, it can be concluded that the formulation of the objective side of the composition of unlawful enrichment is not complete and exhaustive. Based on the analysis of the objective side of unlawful enrichment, the importance of determining a specific period of time when the person who committed the socially dangerous

act under study was authorised to perform the functions of the state or local self-government, has been established. It was proposed to present the text of the specified criminal law regulation in the following wording to clarify the criminal legal essence of the objective side of unlawful enrichment, part 2 of Art. 368-5 of the CC of Ukraine: the acquisition of assets should be considered the acquisition of them by a person authorised to perform the functions of

the state or local self-government, in ownership, and the acquisition of assets in ownership by another individual or legal entity, on behalf of a person authorised to perform the functions of the state or local self-government, or that a person authorised to perform the functions of the state or local self-government, can directly or indirectly perform actions with respect to such assets that are identical for the exercise of the right of ownership, use, and disposal.

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Об'єктивна сторона складу кримінального правопорушення незаконного збагачення

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Анотація

Метою статті є дослідження об'єктивної сторони складу кримінального правопорушення незаконного збагачення шляхом аналізу змісту окремих ознак для розв'язання теоретичних і практичних проблем. Методологію дослідження становить комплекс наукових методів, серед яких головне місце посідає діалектичний метод. Застосовано систему методів наукового пізнання: метод узагальнення для формування наявних у спеціальній літературі позицій щодо визначення ознак об'єктивної сторони складу кримінального правопорушення незаконного збагачення; формальної логіки (індукцію, дедукцію, аналогію синтез, абстрагування) – для з'ясування сутності зазначених питань; теоретичний – у процесі дослідження наукової та навчально-методичної літератури; метод системного аналізу – для окреслення напрямів удосконалення положень Кримінального кодексу України та практики його застосування. Наукова новизна статті полягає в тому, що в ній висвітлено актуальні проблеми об'єктивної сторони незаконного збагачення за допомогою аналізу характерних особливостей її ознак. Розроблено конкретні пропозиції з удосконалення змісту суспільно небезпечного діяння, означеного в диспозиції ст. 368-5 КК України, які можуть мати теоретичне та практичне значення для подальшого розв'язання цієї проблеми. За результатами здійсненого дослідження сформульовано висновки щодо визначення об'єктивної сторони складу незаконного збагачення. На підставі аналізу об'єктивної сторони незаконного збагачення встановлено важливість визначення конкретного проміжку часу вчинюваного особою, уповноваженою на виконання функцій держави або місцевого самоврядування, аналізованого суспільно небезпечного діяння. Запропоновано викласти текст ч. 2 ст. 368-5 КК України в такій редакції: набуттям активів слід вважати набуття їх особою, уповноваженою на виконання функцій держави або місцевого самоврядування, у власність, а також набуття активів у власність іншою фізичною або юридичною особою, за дорученням особи, уповноваженої на виконання функцій держави або місцевого самоврядування, або що особа, уповноважена на виконання функцій держави чи місцевого самоврядування, може прямо чи опосередковано вчиняти щодо таких активів дії, тотожні за змістом здійсненню права володіння, користування та розпорядження

Ключові слова:

незаконне збагачення; об'єктивна сторона; кримінальне правопорушення; корупція; кримінальне правопорушення у сфері службової діяльності; службова особа