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Subjective Side of the Criminal Offence of Illegal Enrichment

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■ **Abstract**. The purpose of the study is a comprehensive examination of the subjective side of the criminal offence of illicit enrichment by analysing the content of its individual features, and the development of new legal mechanisms to improve Article 368 of the Criminal Code of Ukraine. The methodology of the study is a set of scientific methods, among which a prominent one is a dialectical method, which allows for determining the theoretical, legislative, and applied aspects of the subjective side of illicit enrichment. The paper also uses general scientific and special methods of cognition, namely: formal-logical, system-functional, comparative-legal and historical. The scientific novelty of the study is that it highlights the relevant aspects of the subjective side of illicit enrichment using modern methods of cognition and considers the latest achievements of science. Specific suggestions for improving the content of Art. 368 of the Criminal Code of Ukraine was proposed. Based on the results of the study, the conclusions on the subjective side of the corpus delicti of illicit enrichment were formulated. In particular, it is argued that illegal enrichment can only be carried out with direct intent. The author proposes to define the intellectual moment of direct intent of illicit enrichment as the mental attitude of a person to their actions and consequences in case of committing the said criminal offence, which covers the awareness of three blocks of features: a) signs of the content of the act (the perpetrator, realising the social danger of their actions, acquires assets); b) features of social status (the subject's awareness of their legal status, the importance of the position held by the person in public authorities or local self-government bodies and the functions their performs); c) other signs of a socially dangerous act that depends on the time, method, place, and situation that the perpetrator must be aware of. In turn, the intentional aspect of the criminal offence in question involves the desire to commit the relevant socially dangerous act, namely the desire to acquire assets. Motive – mercenary (the method of which is the illegal, unlawful, prohibited by law acquisition of material wealth (acquisition of assets) for their own enrichment); purpose – acquisition of assets in respect of which a person will be able to directly or indirectly perform any actions at his discretion; emotional state – a state of strong emotional excitement (physiological affect), but does not affect the qualification of illicit enrichment. It is proposed to supplement Part 1 of Article 368 of this Code with the word "intentional" before the words "acquisition by a person... assets ...."

■ **Keywords**: illegal enrichment; criminal offence; subjective side; intent

■ Introduction

One of the key topical areas of the criminal law of Ukraine is the issue of the subjective side of a criminal offence. The establishment of the most important institutions of criminal law depends on the correct solution and establishment of the signs of the subjective side.

Criminal liability for illicit enrichment in Ukraine is provided for in Art. 368 of the Criminal Code of Ukraine: acquisition by a person authorised to perform the functions of the state or local self-government of assets, the value of which exceeds his or her legal income by more than six thousand five hundred tax-free minimum incomes. Note 1 to Art. 368 of the Criminal Code of Ukraine defines the persons subject to criminal liability for illicit enrichment. Part 2 of Article 368 of the Criminal Code explains how to interpret the acquisition of assets. The subject of illicit enrichment is defined in parts 3 and 4 of Art. 368 of this Code. Part 5 of Art. 368 refers to the difference between the value of the acquired assets and the legitimate income of the subject of illicit enrichment. However, the subjective side in the studied criminal law provision is not defined by the legislator.

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Despite a significant number of scientific works devoted to the aspects of the subjective side of illicit enrichment, which are of important scientific and practical importance, many issues remain unexplored. This is primarily due to the fact that the criminal law norm of illegal enrichment in the Criminal Code has been changed and supplemented seven times. In addition, the vast majority of studies of illicit enrichment were carried out under the wording of Art. 368 of the Criminal Code, which, according to the decision of the Constitutional Court of Ukraine of February 26, 2019, No. 1-p/2019, was recognised as inconsistent with the Constitution of Ukraine. The above shows the relevance of the chosen topic and necessitates an in-depth theoretical analysis of the subjective side of illicit enrichment.

The purpose of the study is a comprehensive study of the subjective side of the criminal offence of illicit enrichment by analysing the content of its individual features, and the development of new legal mechanisms for improving Article 368 of the Criminal Code of Ukraine.

The scientific novelty of the study is that it highlights the relevant aspects of the subjective side of illicit enrichment using modern methods of cognition and considers the latest achievements of science. Specific proposals for improving the content of Art. 368 of the Criminal Code of Ukraine are proposed.

Results and Discussion

In criminal law theory, it is generally accepted that the subjective side of a criminal offence is the internal side of a socially dangerous act, that is, a set of processes that occur in the consciousness and will of a person, awareness of their own actions and foresight of consequences, the goal that a person seeks to achieve, the motive by which they are guided, and the emotions they experience [1].

Valid is the argument of R.V. Veresha, who in his thesis "Problems of the subjective side of a criminal offence" emphasised that the subjective side of a criminal offence as a legal construct involves structuring (modelling) of the most significant characteristics of mental activity of the relevant type (variety) of a socially dangerous act for criminal law [2].

The content of the subjective side of the composition of a criminal offence covers the following legal features: guilt, motive, purpose, and emotional state. The mandatory feature among them is the plea of guilty, while other features are optional, and have a mandatory nature, when directly mentioned in the disposition of the criminal law norm, or arise from its content. Theoretically, guilt is characterised by such features as form and content. Sometimes there is also such a sign as the degree of guilt [3].

Art. 23 of the Criminal Code stipulates that the concept of "guilt" should be interpreted as the "mental attitude of a person to the committed action or inaction provided for by this Code and its consequences, expressed in the form of intent or negligence", while the content of its forms is covered in Articles 24, 25 of the Criminal Code of Ukraine.

It is evident that the definition of direct intent in Part 2 of Article 24 of the Criminal Code of Ukraine is quite correct only in relation to the material elements of criminal offences.

The analysis of Article 368 of the Criminal Code of Ukraine, suggests that according to the construction of the objective side, illicit enrichment refers to acts with a material composition [4]. That is, illicit enrichment can be committed only with direct intent. In view of the above, it is necessary to highlight the intellectual and volitional aspects of the direct intent of the criminal offence under investigation.

In particular, M.V. Kocherov argues that the intent of a person who receives an unlawful benefit is embraced by the fact that the items received or services accepted are of a property nature and their receipt is illegal [5].

According to O.P. Deneha, the guilty person, the guilty person, illegally acquiring assets in ownership, is aware that his actions cause damage to public relations in the public service and economic and national security in general [6].

Regarding the above stance, I.M. Yasin stressed that the consciousness of the perpetrator is occupied by the acquisition of assets that are not equivalent to the time spent on the performance of the functions of the state or local self-government, or other income not prohibited by law, and vice versa, such assets acquired illegally, without grounds provided for in the law, as a result of corruption schemes, illegal transactions or other offences aimed at illicit enrichment [7]. That is, the content of the intellectual sign of intent also includes the perpetrator's understanding of all the signs of the subject of illicit enrichment (physical, economic and legal).

The intellectual aspect of the direct intent of illicit enrichment is successfully reflected in the criminal legislation of the Republic of Lithuania. Based on the analysis of the problems that arose in the country on the way to implementing a modern legal mechanism of the criminalisation of illicit enrichment, C. Bikelis concludes that the concept of criminalisation of illicit enrichment is less promising than the concept of civil confiscation of property [8].

Part 1 of Art. 189 of the Criminal Code of the Republic of Lithuania stipulates that a person who owns property worth more than 500 minimum subsistence minimums and who at the same time was aware or could have been aware that such property was not acquired with the use of legitimate income shall be punished by a fine or arrest or imprisonment for up to four years.

The authors believe that the intellectual aspect of a person's mental attitude to his own actions and consequences during the commission of illicit enrichment includes awareness of three blocks of features: a) signs of the content of the act (the perpetrator, realising the social danger of his own actions, acquires assets that do not belong to him); b) features of social status (the subject's awareness of his legal status, the importance of the position held by the person in public authorities or local self-government bodies and the functions he performs); c) other signs of a socially dangerous act (depending on the time, method, place, situation, which the perpetrator must be aware of).

In turn, the volitional aspect of direct intent is the desire for the foreseeable consequences of one's own act. The volitional aspect of intent should be considered with regard to the differentiation of types of intent into direct (characterised by the desire for socially dangerous consequences) and indirect (unwillingness, but conscious assumption of socially dangerous consequences).

Given the outlined standpoint, along with the proposal by R.V. Vereshi, the authors find it reasonable to define the volitional feature of direct intent as the desire to commit relevant socially dangerous acts [2]. Since illicit enrichment can be committed only with direct intent, the volitional aspect of the criminal offence in question involves the desire to commit socially dangerous acts, in particular the desire to acquire assets.

It is also important to consider the motive, purpose and emotional state as signs of the subjective side of the criminal offence under Art. 368 of the Criminal Code of Ukraine.

Paragraph 2 of Part 1 of Article 91 of the CPC of Ukraine stipulates that in criminal proceedings the guilt of the accused in committing a criminal offence, the form of guilt, motive and purpose of committing a criminal offence shall be proved.

Motive is something that prompts a person to commit a socially dangerous act, a source of activity. Noteworthy is the conclusion of O.S. Yunin, who considers the motive of a criminal offence to be the result of a complex motivational process formed under the influence of the synthesis of subjective and objective factors, which proceeds in the mind of the subject and constitutes an internal incentive to commit a criminal offence [9].

According to K.V. Ilyashova, the vital need that the perpetrator wants to satisfy may be of a selfish nature or may not be related to the acquisition of material values or deprivation of property obligations at all, but its satisfaction can only be achieved by encroaching on a property, which does not yet indicate a selfish motivation for the perpetrator's behaviour [10].

It is necessary to emphasise that the commission of illicit enrichment has a predominantly selfish motive. Scholar V.I. Tyutyugin believes that the subjective side of illicit enrichment is characterised by the presence of a mercenary motive, because, pursuing such a goal, the guilty person is thereby guided by motives to illegally obtain material goods, acquire or preserve certain property rights, seeks to avoid material costs or achieve other material benefits [10].

Researcher I.M. Yasin shares this position and notes that the main motive on which the decision of the subject of illicit enrichment is based is mainly the desire to increase assets and improve their financial situation [7].

According to the authors, the defining feature for assessing the mercenary motive of illicit enrichment is the method, which consists of the illegal, unlawful, prohibited by law acquisition of material wealth (acquisition of assets) for their own enrichment.

It is important to note that there is a close internal connection between the motive and purpose of a criminal offence.

In criminal law theory, the purpose of a criminal offence is defined as a person's understanding of the result of his or her activity, and what the person is going to achieve [1]. Thus, this is what the subject of the criminal offence is trying to achieve by committing a socially dangerous act under the Criminal Code.

Justified is the argument of R.V. Veresha regarding the fact that the whole process of committing a criminal offence is accompanied by the formation of perception images. By committing criminal activity, the subject of a criminal offence seeks to get closer to the desired goal, that is, to achieve a certain result in the future [2]. Besides, the actors of corrupt relations aim to keep the committed socially dangerous acts secret. In this regard, the perpetrators avoid criminal liability, and illegally obtained assets are not contributed to the state revenue [11].

The main goal of the subject of illicit enrichment is to acquire assets in respect of which he will be able to directly or indirectly perform any actions at his discretion.

Emotional state – a state of strong emotional excitement (physiological affect) – is a constructive feature exclusively provided for in the article of the Criminal Code, and also, according to paragraph 7 of Article 66 of the Criminal Code, is a circumstance that mitigates the punishment. However, it is almost impossible to commit a criminal offence under Art. 368 of the Criminal Code under the influence of strong emotional distress caused by illegal or immoral actions of another person.

In view of the above, it is advisable to amend Art. 368 of the Criminal Code, in particular: Part 1 of Art. 368 of this Code should be supplemented with the word "intentional" before the words "acquisition of assets by a person...".

Conclusions

The study of the subjective side of the corpus delicti of illicit enrichment was conducted in view of legal features: guilt, motive, purpose and emotional state. It is established that illegal enrichment can only be carried out with direct intent. Based on this, the intellectual and volitional aspects of the direct intent of this criminal offence are investigated.

The author proposes to define the intellectual moment of direct intent of illicit enrichment as a person's attitude towards his actions and consequences in case of committing the said criminal offence, which includes awareness of three blocks of features: a) signs of the content of the act (the perpetrator, realising the social danger of his own actions, acquires assets); b) features of social status (the subject's awareness of his legal status, the importance of the position held by the person in state authorities or local self-government bodies and the functions he performs); c) other signs of a socially dangerous act that depend on the time, method, place, and situation that the perpetrator must be aware of. In turn, the intentional aspect of the criminal offence in question involves the desire to commit the relevant socially dangerous act, namely the desire to acquire assets.

Based on the study of optional features of the subjective side of illicit enrichment, it was established that the motive is mercenary (the method of which is the illegal, unlawful, prohibited by law acquisition of material wealth (acquisition of assets) for their own enrichment); purpose – acquisition of assets in respect of which a person will be able to directly or indirectly perform any actions at his discretion; emotional state – a state of strong emotional excitement (physiological affect), but does not affect the qualification of illicit enrichment.

It is proposed to supplement Part 1 of Article 368 of this Code with the word "intentional" before the words "acquisition by a person... assets ....".

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Суб’єктивна сторона складу кримінального правопорушення незаконного збагачення

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■ **Анотація**. Метою статті є комплексне дослідження суб’єктивної сторони складу кримінального правопорушення незаконного збагачення шляхом аналізу змісту окремих її ознак, а також розроблення нових правових механізмів удосконалення ст. 3685 Кримінального кодексу України. Методологію дослідження становить комплекс наукових методів, серед яких важливе місце посідає діалектичний метод, який дає змогу визначити теоретичні, законодавчі та прикладні аспекти суб’єктивної сторони незаконного збагачення. Також у роботі використано загальнонаукові та спеціальні методи пізнання, а саме: формально-логічний, системно-функціональний, порівняльно-правовий та історичний. Наукова новизна статті полягає в тому, що в ній висвітлено актуальні проблеми суб’єктивної сторони незаконного збагачення з використанням сучасних методів пізнання та врахуванням новітніх досягнень науки. Запропоновано конкретні пропозиції з удосконалення змісту ст. 3685 Кримінального кодексу України. За результатами здійсненого дослідження сформульовано висновки щодо суб’єктивної сторони складу незаконного збагачення. Зокрема, аргументовано, що незаконне збагачення може бути здійснено лише з прямим умислом. Запропоновано інтелектуальний момент прямого умислу незаконного збагачення визначати як психічне ставлення особи до власних діянь і наслідків, у випадку вчинення нею зазначеного кримінального правопорушення, що охоплює усвідомлення трьох блоків ознак: а) ознак змісту діяння (винний, усвідомлюючи суспільну небезпечність власних дій, набуває активи); б) особливостей соціального статусу (усвідомлення суб’єктом свого правового статусу, важливості посади, яку особа обіймає в органах державної влади або органах місцевого самоврядування, і функцій, які вона виконує); в) інших ознак суспільно небезпечного діяння, що залежать від часу, способу, місця, обстановки, які повинен усвідомлювати винний. Своєю чергою вольовий момент розглянутого кримінального правопорушення передбачає бажання вчинити відповідне суспільно небезпечне діяння, а саме бажання набути активи. Мотив – корисливий (спосіб якого полягає в незаконному, протиправному, забороненому законом заволодінні матеріальними благами (набуття активів) для власної потреби збагачення); мета – набуття активів, щодо яких особа зможе безпосередньо чи опосередковано вчиняти будь-які на її розсуд дії; емоційний стан – стан сильного душевного хвилювання (фізіологічний афект), однак на кваліфікацію незаконного збагачення не впливає. Запропоновано ч. 1 ст. 3685 цього Кодексу доповнити перед словами “набуття особою… активів….” словом “умисне”

■ **Ключові слова**: незаконне збагачення; кримінальне правопорушення; суб’єктивна сторона; умисел