Institute of legislative ideas

AMICUS CURIAE OPINION

by the Think Tank «Institute of Legislative Ideas»
on the constitutional complaint by
AEROC Investment Deutschland GmbH

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Authors: Tetiana Khutor, Bohdan Karnaukh, Andriy Klymosyuk

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This document was prepared by the Institute of Legislative Ideas (ILI) as Amicus Curiae Opinion for the Constitutional Court of Ukraine in the case on the constitutional complaint of AEROC Investment Deutschland GmbH, in which the complainant asks the Court to check the constitutionality of the sanction, provided for in paragraph 1-1 of part one of Article 4 of the Law of Ukraine «On Sanctions», namely, the recovery of assets belonging to an individual or legal entity, as well as assets in respect of which such a person may directly or indirectly (through other individuals or legal entities) perform actions identical in content to the exercise of the right to dispose of them.

This sanction has been in the focus of attention of the Institute of Legislative Ideas since its introduction. The ILI has published a number of analytical materials on the said sanction in terms of its compatibility with European human rights standards, as well as materials analysing the practice of applying this sanction by the High Anti-Corruption Court of Ukraine and suggesting ways to improve it (1). Therefore, the Institute of Legislative Ideas considered it its duty to express its own position on the constitutional complaint.

This paper emphasises that the interpretation of constitutional provisions on property protection should take into account the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the relevant case law of the European Court of Human Rights. From this perspective, the ILI proposes to assess the relevant sanction based on the proportionality test formulated by the European Court of Human Rights.

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1. See: Institute of Legislative Ideas (2022). Sanction Confiscation of Private Assets in Ukraine: Recommendations for Application in the Light of the ECHR Case Law; Institute of Legislative Ideas (2024). Establishment of actual control over the asset and protection of the rights of third parties in the practice of applying the sanction of asset forfeiture to the state revenue (Article 4(1)(1)(a) of the Law of Ukraine «On Sanctions»); Institute of Legislative Ideas (2024). Analysis of the practice of the High Anti-Corruption Court in applying the sanction of asset forfeiture to the state revenue for 2022-2023; Institute of Legislative Ideas (2023). Standards for consideration of cases in absentia and the HACC's practice of asset forfeiture of sanctioned persons to the state.

In its constitutional complaint, AEROC Investment Deutschland GmbH (hereinafter referred to as AEROC) asks the Constitutional Court of Ukraine (hereinafter referred to as the CCU) to check the constitutionality of the sanction provided for in paragraph 1-1 of part one of Article 4 of the Law of Ukraine «On Sanctions», namely, the recovery of assets belonging to an individual or legal entity, as well as assets in respect of which such a person may directly or indirectly (through other individuals or legal entities) perform actions identical in content to the exercise of the right to dispose of them.

Since the relevant sanction and the practice of its application by the High Anti-Corruption Court of Ukraine has been in the focus of our attention since the beginning (2), the Think Tank «Institute of Legislative Ideas» considers it its duty to express its position on the said constitutional complaint and sincerely hopes that the following considerations may serve the purposes of the administration of constitutional justice.

The adoption of the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine on Improving the Effectiveness of Sanctions Related to the Assets of Individuals» (Law No. 2257-IX), which entered into force on 24 May 2022, paved the way for the state to recover assets of individuals and companies that contribute to the Russian aggressive war against Ukraine. This Law introduced a new type of sanction – «the recovery of assets belonging to an individual or legal entity, as well as assets in respect of which such a person may directly or indirectly (through other individuals or legal entities) perform actions identical in content to the exercise of the right to dispose of them».

As the application of this sanction has serious consequences in terms of possessions of the person to whom it is applied, Ukraine must ensure that fundamental human rights standards are respected in its application.

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2. The Institute of Legislative Ideas, having the relevant expertise in confiscation without a court conviction, analysed the mechanism of sanctioned confiscation at the stage of draftingthe law and adoption of . After its adoption and before the lawsuits were filed, we provided recommendations on how to make such a measure compatible with property rights guarantees and fair trial standards and in line with the ECHR case law.

From a substantive point of view, this refers to the right to own, use and dispose of one's property, as well as the principle of inviolability of private property rights, as provided for in Article 41 of the Constitution of Ukraine.

However, the right to peacefully enjoy one's property is not only enshrined in the Basic Law of Ukraine, but is also one of the fundamental rights defined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter - the ECHR). It is referred to in Article 1 of Protocol No. 1:

«Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.»

Since the Constitution of Ukraine and the ECHR share common values, we are convinced that when interpreting the content of the constitutional provision on the right to property, the case law of the European Court of Human Rights (hereinafter - the ECtHR) on the right to peaceful enjoyment of property and its permissible restrictions should also be taken into account.

The Decision of the CCU of 01 June 2016 No. 2-рп/2016 states:

«The Constitutional Court of Ukraine shall take into account the provisions of the international treaties in force, ratified by the Verkhovna Rada of Ukraine, and the practice of interpretation and application of these treaties by international bodies whose jurisdiction has been recognised by Ukraine, in particular the European Court of Human Rights.»

This approach follows from the international law-friendly approach developed by the CCU, the essence of which is that if a certain provision of the Constitution (in particular, from Section II «Rights, Freedoms and Duties of Man and Citizen») corresponds to a similar provision of the ECHR, the practice of interpretation and application of the said article of the Convention by the European Court of Human Rights should be taken into account when the Constitutional Court considers cases concerning the relevant article of the Basic Law.

The CCU also relied on the ECtHR case law when assessing the constitutionality of interference with property rights in case No. 1-23/2001 (the case of citizens' savings).

In its Decision of 13 September 2023 No. 8-r(II)/2023 (on the remuneration of the prosecutor as a guarantee of his/her independence), the CCU explicitly stated:

«Given that the said provisions of Article 41 of the Constitution of Ukraine are comparable to the provisions of Article 1 of Protocol No. 1 to the Convention concerning the protection of property rights and the limits of the exercise of this right, the Constitutional Court of Ukraine takes into account the case law of the European Court of Human Rights in this area.»

Therefore, when considering the issues raised in the constitutional complaint, it is also appropriate to refer to how the right to peaceful enjoyment of property is understood in the ECtHR case law.

In this context, it should first be noted that the right to own, use and dispose of one's property (or the right to peaceful enjoyment of property in ECHR terminology) is not absolute. This follows from the ECHR, and the CCU has noted this.

Thus, in its Decision of 10 October 2001 No. 13-rp/2001 (the case of citizens' savings), the CCU noted:

«5.4. According to the Constitution of Ukraine, when exercising the right to property, owners must comply with the constitutional provisions that 'property obliges' and 'shall not be used to the detriment of a person and society' (part three of Article 13), and that the use of property may not harm the rights, freedoms and dignity of citizens, or the interests of society (part seven of Article 41).
Thus, a systematic analysis of the provisions of the Constitution of Ukraine shows that the right to property may be restricted.
The right of the state to restrict the possession, use and disposal of property is also defined by the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 995_004. Every individual or legal entity, as stated in this document, has the right to peacefully enjoy his or her possessions. However, the state has the right to 'enact such laws as it deems necessary to control the use of property in accordance with the general interest...» (Article 1).»

Thus, the right to own, use and dispose of one's property may in principle be restricted. However, such restrictions must be compatible with human rights standards.

In order to assess whether a particular measure restricting the right to peaceful enjoyment of property is compatible with the Convention, the ECtHR has formulated a certain algorithm for analysing a case. This algorithm can be presented in the form of the following sequence of questions:

(1) Was there any property, i.e. can the asserted right be qualified as property or possessions (which in the context here are the same)?
(2) Has there been an interference with the applicant's property right?
(3) Was the interference lawful?
(4) Did the interference have a legitimate aim?
(5) Was the interference proportionate to the aim pursued? (3)

If the answer to any question other than the first two is negative, the ECtHR finds a violation of Article 1 of Protocol 1 of the ECHR.

1. Whether there was property (possessions). The concept of property in the ECHR case-law has an autonomous meaning (4). This means that the concept of property, as understood by the ECtHR, does not depend on how this concept is defined in the national legislation of the state against which the application is filed. The idea of an autonomous interpretation of property follows from the purpose of the ECHR as an international legal instrument designed to introduce unified standards of human rights protection in all member states.

Both rights in rem and rights of claim (obligatory rights) may be recognised as property, or possessions, in the context of Article P1-1. The main thing is that the respective right must have an economic value that can be calculated in monetary terms.

With regard to the first question, there is no doubt that the assets subject to sanctions constitute ‘property’ within the meaning of Article 1 of Protocol 1 of the ECHR. Thus, the cases considered by the HACCU, usually involve funds in bank accounts, land plots, residential and commercial real estate, vehicles, equipment, rights of claim and very often shares in the charter capital of companies. All of this is considered ‘property’ in the case law of the ECtHR (5).

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3. See: Karnaukh, B.P. (2021), «Protection of Property by the European Court of Human Rights and the Horizontal Effect», Law of Ukraine, No. 5, pp. 149-166.
4. See: Parrillo v. Italy [GC], no. 46470/11, § 211, 27 August 2015; Fabris v. France [GC], no. 16574/08, § 49, 7 February 2013; Öneryildiz v. Turkey [GC], no. 48939/99, § 124, 2004-XII.
5. See: Karnaukh, B.P. (2016), ‘The Concept of Property in the Context of Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms’, Problems of Legality, No. 132, pp. 205-214.

2. Whether there was an interference. According to the established practice of the ECtHR, interference with property rights can be of two types: (a) deprivation of property or (b) control over the use of property (6).

Typically, deprivation of property occurs when a person's right to a thing de jure ceases to exist, i.e. the person officially and permanently loses the title of owner. However, along with this, the ECtHR case law has also formulated a category of de facto expropriation. This is the case when a person's right to a thing formally continues to exist, but a number of measures and restrictions taken by the defendant state nullify the very essence of the relevant right and render the legal title useless from a practical point of view - it turns into an empty shell.

In contrast, the control over the use of property is said to be the case when a person does not completely lose his/her right, but is subject to restrictions in its exercise. With respect to rights in rem, the restrictions may be as follows: a person is obliged to perform certain acts in relation to his property (facere); a person is prohibited from performing certain acts in relation to his property (non facere); or a person is obliged to tolerate the acts of others in relation to his property (pati).

There is no doubt that the sanction provided for in clause 1-1 of part one of Article 4 of the Law of Ukraine «On Sanctions» constitutes interference with the defendant's property rights (7). This sanction should probably be considered as deprivation of property, since as a result of the HACC decision, the ownership of the property is officially transferred to the state of Ukraine, and the defendant's ownership of the disputed asset is terminated.

3. Whether the interference was lawful. The principle of the rule of law, which is inherent in all provisions of the ECHR, is designed to protect individuals from arbitrary action by public authorities. In order for interference with property rights not to be arbitrary, it must first of all be provided for in the law. If a person may be subjected to interference with his or her property right, he or she should be aware of this possibility in advance and know under what conditions interference is allowed. If interference with property always happened unexpectedly, like snow in summer, it would destroy any hopes for legal certainty and stability of property relations.

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6. Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights. Protection of property. Updated on 31 August 2020. Council of Europe/European Court of Human Rights, 2020. Pp. 21–24. URL:https://rm.coe.int/guide-art-1-protocol-1-eng/1680a20cdc (accessed 28.04.2024).
7. Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights. Protection of property. Updated on 31 August 2020 (Council of Europe/European Court of Human Rights, 2020), 21-24. Available at: https://www.echr.coe.int/documents/d/echr/Guide_Art_1_Protocol_1_ENG(accessed 28 April 2024), pp. 21-24

Therefore, the ECtHR emphasises:

«...the first and most important requirement of Article 1 of Protocol No. 1 is that any interference by a public authority with the peaceful enjoyment of possessions should be lawful. The requirement of lawfulness, within the meaning of the Convention, demands compliance with the relevant provisions of domestic law and compatibility with the rule of law, which includes freedom from arbitrariness» (8).

Thus, the first thing the ECtHR ascertains when checking whether the respondent state complies with the rule of law is whether there is an act in national law that provides for the possibility of such interference with the applicant's property right.

The requirement of statutory provision is met in relation to the sanction of asset forfeiture to the state, as such a sanction was introduced into national legislation with the adoption of the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine on Improving the Effectiveness of Sanctions Related to Assets of Individuals» (Law No. 2257-IX), which was duly promulgated and entered into force on 24 May 2022.

However, the mere existence of a law is not enough - for an interference to be «lawful» in the sense of the ECtHR, the law itself must meet the requirements of quality. These requirements are as follows: the law must be (a) accessible, (b) clear and (c) predictable in its application (9).

Accessibility means that the law has been brought to the attention of the public, and every interested person has had the opportunity to read its content. At the same time, the ECtHR is not limited to a formal approach, in the sense that the law must be published in the official gazette. Even if there was no such publication, the ECtHR may nevertheless recognise the law as accessible, provided that the state has provided a real opportunity to get acquainted with it through other resources (10) (for example, through the government website).

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8. East/West Alliance Limited v. Ukraine, no. 19336/04, § 167, ECHR 23 January 2014.
9. Vistiņš and Perepjolkins v. Latvia [GC], no. 71243/01 §§ 96-97, ECHR 25 October 2012; Hutten-Czapska v. Poland [GC], no. 35014/97, § 163, ECHR 2006-VIII.
10. Špaček, s.r.o. v. The Czech Republic, no. 26449/95, §§ 57-60, ECHR 9 November 1999.

Clarity means that the provisions of the law should be formulated with sufficient precision so that its content does not allow for numerous interpretations, which opens up space for manipulation by the authorities applying the provision. A law that is too vague and unclear is tantamount to no law at all and only masks the arbitrariness of law enforcement.

Predictability means that a person, taking into account the content of the law and the practice of its application, can calculate in advance what consequences a particular behaviour will entail. This is necessary in order to enable short- and long-term life planning, without which a person would be deprived of the opportunity to achieve their goals. Without predictability in the application of the law, a person would be thrown into a constantly and arbitrarily changing maelstrom of judicial practice, in which reasonable goal-setting would lose its meaning.

As already mentioned, the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine on Improving the Effectiveness of Sanctions Related to Assets of Individuals» (Law No. 2257-IX) was duly promulgated in accordance with the procedure established by law and should therefore be considered to have been communicated to all interested parties.

With regard to the clarity of the provisions on the sanction of asset forfeiture to the state, it should be noted that the mere use of evaluative categories in the Law does not mean that the law is unclear and therefore of poor quality. Both the ECHR and the ECtHR case law use evaluative concepts.

Thus, in order to apply asset forfeiture to the state, the HACC must establish that the defendant's actions have created a significant threat to the national security, sovereignty or territorial integrity of Ukraine (including through armed aggression or terrorist activity) or have significantly contributed (including through financing) to the commission of such actions by other persons.

Paragraph 4 of Part 1 of Article 51 of the Law of Ukraine «On Sanctions» contains a detailed list of actions that may be considered as causing significant damage to the national security, sovereignty or territorial integrity of Ukraine (ten items in the first paragraph) and significant assistance to this (twelve items in the second paragraph).

The key wording includes two evaluative concepts, namely «substantial damage» and «substantial assistance». Substantial damage and substantial assistance cannot be determined in a general way - they are subject to determination by the court in each specific case separately, taking into account all the circumstances of the case.

The HACC notes:

«With regard to such requirements... as causing substantial damage to the national security, sovereignty or territorial integrity of Ukraine or the significance of the degree of assistance for the commission of such actions (including in the form of information assistance), the court indicates that they are evaluative concepts.
Therefore, the specific circumstances of the case must be taken into account and the defendant's activities must be assessed against these criteria» (11).

For example, publishing a post on a social network in support of Russian aggression may constitute substantial assistance in some cases, but not in others. If such a post is made by an ordinary citizen, it is unlikely to have a significant impact. Instead, if such a post is made by the rector of a university with thousands of students on the official page of the institution (12) as part of an ongoing campaign to support aggression, it may well be recognised as substantial assistance.

Materiality of assistance means that the causal contribution of the defendant to the «common cause» of the aggressive war against Ukraine is tangible, noticeable, and significant in the context of the total efforts of all those involved in the crime. An idea of what kind of assistance the HACC considered to be significant, i.e. sufficient for the recovery of assets for the benefit of the state, is given by the table of cases on the application of a sanction in the form of recovery of assets for the benefit of the state, considered by the HACC.

In terms of the predictability of the application of the relevant provisions, it is worth paying attention to the issue of retroactive effect of the law, which has been analysed in the HACC practice.

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11. See the Polukhin case.
12. See the Torkunov case as well: Confiscation of assets of rectors. What does the HACC say? Ukrainska Pravda. 15 December 2022.

Since the asset forfeiture has to be preceded by the asset freeze, the following events may be considered relevant (in terms of preventing the retroactive effect of the law): defendant's actions entailing the asset freeze; decision by the National Security and Defense Council on assets freeze; defendant's actions entailing asset forfeiture.

It is worth noting that the Law of Ukraine «On Sanctions» came into force on September 12, 2014. However, the sanction in the form of asset forfeiture was introduced into the Law much later - as a result of 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.

Under Art 6 of the Law of Ukraine «On Sanctions», assets forfeiture may be applied only to persons whose assets were frozen after the new sanction (forfeiture) was introduced into national legislation, i.e. after May 24, 2022.

Since the provision on asset freeze has been in force since 2014 (when the Law was initially adopted), the actions of the person that led to the assets freeze may have taken place before May 24, 2022, but the NSDC's decision and actions that serve as the reason for forfeiture must take place after that date (13).

In many cases, the actions that give rise to an asset freeze are systematic or ongoing. Therefore, they may commence before 24 May 2022, provided that they continue after that date. Thus, due consideration should be given to verifying episodes that occur after this date and confirm that the person has not revised his or her position and continues to actively support Russian aggression.

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13. Case no. 991/5572/22 (Yanukovych case), Decision of the High Anti-Corruption Court of 12 December 2022. Available at: https://court.gov.ua/userfiles/media/new_folder_for_uploads/hcac/administrative/judgments/991_5572_22_12-12-2022.pdf (accessed 28 April 2024); Case no. 991/6655/22 (Kolbin case), Decision of the High Anti-Corruption Court of 30 January 2023. Available at: https://court.gov.ua/userfiles/media/new_folder_for_uploads/hcac/administrative/judgments/991_6655_22_30-01-2023.pdf (accessed 28 April 2024); Case no. 991/5732/22 (Torkunov case), Decision of the High Anti-Corruption Court of 12 December 2022. Available at: https://court.gov.ua/userfiles/media/new_folder_for_uploads/hcac/administrative/judgments/991_5732_22_12-12-2022.pdf (accessed 28 April 2024); Case no. 991/6376/22 (Lyabikhov case), Decision of the High Anti-Corruption Court of 12 January 2023. Available at: https://court.gov.ua/userfiles/media/new_folder_for_uploads/hcac/administrative/judgments/991_6376_22_12-01-2023.pdf (accessed 28 April 2024).

However, the panel in the Rothenberg et al. case took a different view, concluding that the recovery of assets for the benefit of the state is possible even if the defendant's unlawful acts occurred before 24 May 2022. This conclusion was based on the fact that the prohibition of aggressive war is a peremptory norm of international law (jus cogens).

This rule, as the Court noted,

«...was introduced and recognized by the international community long before the invasion of the territory of Ukraine by the armed forces of the Russian Federation, and therefore was known in advance to all persons who participated in the decision to start an international armed conflict, supported or justified it, wherever they were and under the jurisdiction of whatever state they were at the time of the commission of these actions» (14).

And since the norms of international treaties to which Ukraine is a party automatically become part of national law, it should be recognized that the norm prohibiting aggressive war and any form of aiding and abetting such a war existed in national law long before May 24, 2022. Accordingly, the imposition of a sanction for aiding and abetting an aggressive war cannot be considered a punishment for actions that were not recognized as illegal at the time of their commission.

However, in our opinion, in the context of retroactive effect of the law, it is not necessary to focus on the date of asset freezing - it should not matter, since the sanction, which was introduced into the legislation later, is the recovery of assets for the state's revenue. Therefore, the date on which the person's actions that give rise to the asset forfeiture occurred is important. They must occur after the new sanction has been introduced into law, regardless of when the assets were frozen.

4. Whether the interference had a legitimate aim. Any interference with property rights must have a legitimate aim, i.e. serve a general, public interest (15).

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14. Case no. 991/1914/23 (Rotenberg case), Decision of the High Anti-Corruption Court of 20 March 2023. Available at: https://court.gov.ua/userfiles/media/new_folder_for_uploads/hcac/administrative/judgments/991_1914_23_20-03-2023.pdf (accessed 28 April 2024).
15. Lekić v. Slovenia [GC], no. 36480/07, § 105 ECHR 11 December 2018.

It is the task of national authorities to identify the needs of society and determine on this basis what constitutes the public interest. And according to the principles of the conventional system, the ECtHR cannot replace national authorities and decide what goals should be pursued in the economic, social, cultural or other policies of the state. Therefore, in this sense, member states have a wide margin of appreciation and the ECtHR generally respects the decisions of member states as to what constitutes the public interest, unless such a decision is manifestly devoid of any reasonable justification (16).

The ECtHR case law has recognised the following as legitimate aims: protection of the environment, preservation of cultural heritage, combating tax evasion, combating drug trafficking and smuggling, reducing alcohol consumption, protecting morality, transition from a socialist to a market economy (17), etc.

It is extremely rare for the ECtHR to conclude that the interference with the applicant's property rights did not pursue any legitimate aim (18).

In the light of the wide discretion that the ECtHR recognises for states in this regard, and given the existential threat posed by Russia's armed aggression against Ukraine, there can hardly be any doubt that the sanction provided for in paragraph 1-1 of part one of Article 4 of the Law of Ukraine 'On Sanctions', in particular, and the sanctions policy in general, pursue a legitimate goal.

As the HACC notes:

«The measure of asset forfeiture to the state is an exceptional measure due to the urgency of the situation and the need to achieve the goals of protecting national interests, national security, sovereignty and territorial integrity of Ukraine, countering terrorist activities, as well as preventing violations, restoring violated rights, freedoms and legitimate interests of Ukrainian citizens, society and the state, under the legal regime of martial law.» (19).

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16. Gogitidze and Others v. Georgia, no. 36862/05, §§ 96-97, ECHR 12 May 2015; Béláné Nagy V. Hungary [GC], no. 53080/13, § 113, ECHR 13 December 2016.
17. Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights. Protection of property. Updated on 31 August 2020. Council of Europe/European Court of Human Rights, 2020. Pp. 27–29.
18. See, for example: Vassallo v. Malta, no. 57862/09, §§ 42-3, ECHR 11 October 2011.
19. https://court.gov.ua/userfiles/media/new_folder_for_uploads/hcac/administrative/judgments/991_265_23_16-02-2023.pdf

Thus, the objectives pursued by the sanction include such priority interests as national sovereignty, security, territorial integrity and protection of life. These objectives are achieved by having a tangible impact on those who support the war. The HACC also emphasises that the aim is not to punish the defendant, but to compel him to cease actions that contribute to an aggressive war.

Whether the intervention was proportionate. This is the final and most difficult question of the entire algorithm. The restrictions or losses suffered by the applicant should be placed on one side of the scale, and the public benefit for which the applicant was subjected to these restrictions or losses should be placed on the other. And the court must answer whether a fair balance has been struck between the interests of the applicant, on the one hand, and the public interest, on the other. In other words, it has to determine whether the 'sacrifice' suffered by the applicant was proportionate to the aim pursued. If a fair balance has not been struck, the ECtHR concludes that an excessive burden has been imposed on the applicant and finds a violation of the right to property (peaceful enjoyment of possessions).

In weighing the two interests - the applicant's and the public's - the court makes a value judgement as to whether, taking all the circumstances of the case as a whole, it can be said that the interference with the applicant's property right was a reasonable means of achieving the legitimate aim pursued by the public authority. The weighing process is not at all straightforward, as the scales often involve values that are difficult to compare (such as property rights and the protection of public morality). The 'weight' of such values cannot be expressed by a single measure. Therefore, the ECtHR takes into account a number of circumstances, the list of which is not exhaustive, in order to apply the proportionality test.
In particular, the ECtHR pays attention to whether the person was provided with a reasonable opportunity to appeal against the intervention measures taken against him/her by presenting his/her position to the competent authority. (20) These are the so-called procedural guarantees. They constitute another safeguard against arbitrariness, which is sometimes considered in the context of requirements for the quality of the law (21).

When choosing to interfere with an applicant's right as a means of achieving a goal, the authorities must take into account all the specifics of the applicant's particular situation. Otherwise, the interference may also be deemed disproportionate.

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20. G.I.E.M. S.R.L. and Others v. Italy [GC], no. 1828/06 , § 302 ECHR 28 June 2018.
21. Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights. Protection of property. Updated on 31 August 2020. Council of Europe/European Court of Human Rights, 2020. P. 26.

In particular, the ECtHR emphasises that if, for example, a part of the applicant's property is seized from him (say, a part of a land plot), the government must take into account how this fact will affect the value of the remaining property that the applicant will retain (22). For example, if a road is built on the seized part of the land plot, the owner will suffer damage not only in the amount of the value of the seized part of the land, but also in the amount by which the market price of the non-seized part has decreased. This fact must be duly taken into account by the government.

The assessment of the proportionality of the intervention is also influenced by whether the restrictions on the applicant's rights were permanent or only temporary; whether the applicant belongs to a particularly vulnerable category of the population; whether the applicant's behaviour was in good faith; whether the applicant knew about the existence of restrictions or the possibility of their application in the future when he or she acquired the relevant property, etc. (23).

From the perspective of proportionality of interference with the rights of the persons subject to the sanction, the following considerations should be taken into account. First of all, the significance of the goal to be achieved by the sanction. In a broad sense, this goal is to end the war and restore the territorial integrity of the State of Ukraine. The goal of ending the war, which means ending the numerous deaths and destruction, is probably the highest in the hierarchy of conceivable goals that public authorities can pursue. Compared to the scale of this goal, restricting the property rights of an individual seems a justified step. Compared to the enormous human losses and colossal economic destruction caused by the war, the potential material losses of the defendant seem almost insignificant.

Moreover, the HACC, when considering the relevant cases, compares the assets to be recovered with the defendant's total assets to avoid depriving the person of his or her only refuge or all means of livelihood. As many defendants are Russian oligarchs who are losing a small part of their wealth (those located in Ukraine), this comparison usually does not prevent a decision in favour of asset recovery. If the defendant is not a multimillionaire, he or she is often a Russian citizen (or has recently become one) and owns property there. Therefore, it is safe to say that none of the HACC decisions have left the defendant without means of subsistence.

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22. Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights. Protection of property. Updated on 31 August 2020 (Council of Europe/European Court of Human Rights, 2020), 31.
23. Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights. Protection of property. Updated on 31 August 2020 (Council of Europe/European Court of Human Rights, 2020), 31-2.

In summary, we consider that the sanction provided for in paragraph 1-1 of part one of Article 4 of the Law «On Sanctions» does not contravene the constitutional provisions on the right of a person to own, use and dispose of his or her property (Article 41 of the Constitution of Ukraine) and the Convention standards for the protection of the right to peaceful enjoyment of possessions (Art. 1 of Protocol No. 1 to the ECHR), as such a sanction is provided for by law, which has been duly promulgated, is sufficiently clear and predictable in its application; this sanction is a compulsory measure pursuing a legitimate aim - ending the war and restoring the territorial integrity of Ukraine; and, finally, the burden imposed on the persons to whom it is applied is justified by the high goal of countering the existential threat posed by the aggressor.

ANALYSIS OF THE PRACTICE OF THE HIGH ANTI-CORRUPTION COURT ON THE APPLICATION OF SANCTIONS IN THE FORM OF ASSET FORFEITURE TO THE STATE FOR 2022-2023

SANCTION CONFISCATION OF PRIVATE ASSETS IN UKRAINE: RECOMMENDATIONS FOR APPLICATION IN THE LIGHT OF ECHR PRACTICE

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