

UDC 343.98

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Yaroshenko, Roman (2023). Description of the target of illegal encroachment in the course of investigation of criminal offences under part 5 of Article 191 of the Criminal Code of Ukraine. *Entrepreneurship, Economy and Law*, 6, 93–97, doi <https://doi.org/10.32849/2663-5313/2023.6.17>

DESCRIPTION OF THE TARGET OF ILLEGAL ENCROACHMENT IN THE COURSE OF INVESTIGATION OF CRIMINAL OFFENCES UNDER PART 5 OF ARTICLE 191 OF THE CRIMINAL CODE OF UKRAINE

Abstract. Purpose. The purpose of the article is to study the specifics of the target of illegal encroachment in the course of investigation of criminal offences under Part 5 of Article 191 of the Criminal Code of Ukraine. **Results.** The article studies the specifics of the subject matter of criminal offences related to misappropriation, embezzlement or acquisition of property by abuse of office committed by an organised group. A comprehensive study of the national and international legal framework ratified by Ukraine enables to analyse the conceptual framework regarding the target of illegal encroachment, property, funds, electronic money, etc. On the basis of the scientific achievements of prominent criminologists and experienced practitioners, the author characterises the target of the illegal encroachments as property of economic entities of all forms of ownership, where a significant part is made up of cash and non-cash funds in large and especially large amounts. It is proved that in criminal proceedings on the facts of misappropriation, embezzlement or acquisition of property by abuse of office committed by an organised group, a significant part of the budgetary funds is made up of budgetary funds, which have been covered depending on the actor and purpose. The list of property which is nowadays more often the target of illegal encroachments is provided, including: food, fuel, grain, timber products, construction materials and equipment (sand, bricks, insulation, crane beams, etc.), printing equipment, precious metal products, other movable and immovable property. Special attention is paid to military property that is the target of illegal encroachment. **Conclusions.** It is concluded that in the course of pre-trial investigation of misappropriation, embezzlement or acquisition of property by abuse of office committed by an organised group, one of the key elements of forensic characterisation as the target of illegal encroachments is characterised by the property of economic entities of all forms of ownership, where a significant part is made up of cash and non-cash funds in large and especially large amounts.

Key words: criminal offences, misappropriation, embezzlement, abuse of office, organised group, forensic characteristics, the target of the illegal encroachment, property, funds.

1. Introduction

Investigations into the misappropriation, embezzlement or acquisition of property through abuse of office committed by an organised group are especially grave crimes, mostly causing damage on a particularly large scale and being difficult to prove. In order to obtain forensically significant information about the criminal offence committed, it is important to have complete information on the forensic characteristics, an essential element of which is the target of the illegal encroachment.

Significant contributions and important scientific achievements in the methodology

of criminal offences investigation have been made by prominent scholars, such as V.P. Bakhin, V.D. Bernaz, V.K. Veselskyi, A.F. Volobuiev, V.H. Honcharenko, A. V. Ishchenko, N.S. Karpov, V.O. Konovalova, V.S. Kuzmichov, V.K. Lysychenko, Ye.D. Lukianchykov, V.H. Lukashevych, L.M. Loboiko, Ye.I. Makarenko, H.A. Matusovskyi, M.V. Saltevskyi, V.M. Tertyshnyk, V.Yu. Shepitko, K.O. Chaplinskyi, and many others. However, the specifics of the target of illegal encroachments on the facts of misappropriation, embezzlement or acquisition of property through abuse of office committed by an organised group require fur-

ther study to meet the current needs of forensic practice.

The purpose of the article is to study the specifics of the target of the illegal encroachment in the course of investigation of criminal offences under Part 5 of Article 191 of the Criminal Code of Ukraine.

2. The content of unlawful encroachment in the course of investigation of criminal offences under Part 5 of Article 191 of the Criminal Code of Ukraine

As is known, in the forensic sense, the target has a broader characteristic than in the criminal law sense. Therefore, we will analyse this issue in more detail.

From the criminal law perspective, the target in Article 191 of the Criminal Code of Ukraine is only such property that was entrusted to the perpetrator or was in his/her legal custody, i.e., that which was legally owned and in respect of which he/she exercised the authority to dispose of, manage, deliver, use or store, etc. Therefore, when committing a crime under Article 191 of the CC of Ukraine, the perpetrator uses the powers (authorities) available to him/her in relation to the target object. It is this feature that distinguishes the analysed crime from other property offences (in particular, theft), in which the perpetrator is not involved in the property at all or has only access to it by the nature of work, or is entrusted with the protection of this property, or it is transferred to him/her for use in the production process (Azarov, Hryshchuk, Savchenko, 2016).

In addition, scholars clarify this concept and define the target as someone else's property that was entrusted to the perpetrator or was in his/her control, or in respect of which the person had certain powers, the value of which should exceed 0.2 tax-free minimum incomes (tax social benefit) (Marmura, 2019). Otherwise, the theft of another's property is considered small-scale if the value of such property at the time of the offence does not exceed 0.2 times the tax-free minimum income, as regulated by Article 51 of the Code of Administrative Offences (Code of Ukraine on Administrative Offences, 1984).

Analysing the criminological literature, we agree with the scientific perspective of A.F. Volobuiev. The scholar emphasises that the definition of the target of criminal offences in the theory of criminal law includes any thing of the material world, with certain features of which the criminal law associates the presence of a specific criminal offence in the actions of a person, and applies only to cases where the target of criminal offences is indicated directly in the disposition of the article of the Criminal Code of Ukraine. The target

of embezzlement is property, including money, material assets and other things. From the forensic point of view, information about the characteristics of the target of theft is of fundamental importance for the investigation of offences. This is due to the fact that the specific features of the object of theft are naturally related to the specifics of the conditions of committing unlawful acts and other elements of their mechanism (Volobuiev, 2000).

Therefore, the Dictionary of the Ukrainian language defines property as things that belong to someone on the basis of property rights (Dictionary of the Ukrainian language, 2005). The Legal Encyclopedia defines it as objects of the material world owned by a party to the legal relations (individual, legal entity, state, territorial community, Ukrainian people), including: a single thing, a set of things, property rights and obligations, money and securities, as well as property rights to them (Shemshuchenko, 2001).

According to Article 190 of the Civil Code: "1. Property as a special object is a separate thing, a set of things, as well as property rights and obligations. 2. Property rights are a non-consumable thing. Property rights are recognised as real rights" (Civil Code of Ukraine, 2003).

Furthermore, international law, in particular, the United Nations Convention against Transnational Organised Crime, regulates a broader concept and defines property as any assets, tangible or intangible, movable or immovable, whether embodied in things or in rights, and legal documents or assets evidencing ownership of or interest in such assets (United Nations Convention against Transnational Organized Crime, 2004).

Following the results of the survey of practitioners and the analysis of forensic practice, the following are more often the targets of illegal encroachments: food, fuel, grain, timber products, construction materials and equipment (sand, bricks, insulation, crane beams, etc.), printing equipment, precious metal products, other movable and immovable property. Unfortunately, there are cases when the subject of unlawful encroachment is the property of the Ministry of Defence of Ukraine, in particular, components for air defence missile systems and artillery systems, tank engines, engines for armoured vehicles, etc.

Summarising the materials of the Unified State Register of Court Decisions, we found that in 42.4% of cases the target of unlawful encroachment is property; in 67.6% – funds, of which about 88.1% are in non-cash form.

The current legislation, such as the Law of Ukraine "On Banks and Banking" and the Civil Code of Ukraine, defines funds as money in

national or foreign currency or its equivalent (Law of Ukraine On Banks and Banking Activity, 2000). The Law of Ukraine "On currency and currency transactions" regulates the value of the national currency (hryvnia) and foreign currency (On currency and currency transactions: Law of Ukraine, 2018) in the form of banknotes, coins, and electronic money.

3. The target of illegal encroachment in the course of investigation of criminal offences under Part 5 of Article 191 of the Criminal Code of Ukraine

Undoubtedly, the most common form of payment is non-cash. Based on the analysis of the concept of "electronic money in the banking sector", V. D. Nykyforchuk identifies the necessary elements from which the terminological component is built, namely: 1) have a monetary value, which is a claim to the issuer; 2) are stored electronically on a technical device, in particular, a magnetic device; 3) information and telecommunication networks, in particular the Internet, are used to transmit electronic code signals of electronic payments between banks; 4) they are used to receive funds for the purpose of payment transactions; 5) they are issued after receiving funds in the amount not less than the electronic monetary value; 6) they are accepted by an individual or legal entity that is not an institution that issues electronic money. Therefore, the term "electronic money in the banking sector" should be interpreted as monetary value stored in electronic form for the purpose of payment transactions and accepted by an individual or legal entity that is not an institution that issues electronic money. Electronic money is a certain sequence of numbers that symbolise banknotes and coins, and this is the only information content. They can be used to make payments, settlements, and purchase goods and services in real time using remote bank account management tools – a computer, telephone, mobile radio, bank and plastic cards, etc. connected to the Internet (Nykyforchuk, 2018).

It should be noted that the target of illegal encroachment is the funds of enterprises and organisations of all forms of ownership, with a significant part being budgetary funds. Due to the existing specific features in the distribution and use of budget funds of different levels, M.A. Hohoretskyi, O.O. Vakulik and D.B. Serhieieva, depending on the actor and purpose, divide them into the following groups:

1) Distributive funds:

a) funds intended for further distribution among different levels of budgets, budget managers and recipients;

b) credit funds intended for the allocation of financial assistance or compensation from the budget;

2) Internal funds intended for direct expenditure for the needs of a state body, enterprise, institution or organisation whose main activity is carried out at the expense of the state and/or local budget;

3) Reserve funds, i.e. funds of the reserve fund of the respective budget created to finance unforeseen expenses;

4) Free budget funds (free balance of funds formed at the beginning of the budget year; budget revenues additionally received in the course of its implementation; amounts of excess of revenues over expenditures);

5) Component earmarked funds allocated from the state or local budget to state non-budgetary institutions, as well as enterprises, institutions and organisations of non-state ownership in the form of targeted financial assistance, budgetary compensation or to finance certain programmes (Pohoretskyi, Vakulik, Serhieieva, 2014).

The following example of criminal proceedings under Part 5 of Article 191 of the Criminal Code and Part 2 of Article 366 of the Criminal Code demonstrates the misappropriation of funds from the local budget. Thus, PERSON_10, being from 31.08.2016 to 06.02.2018 in the position of director of LLC "IC FLAGMAN", constantly holding a position at the enterprise related to the performance of organisational, administrative and economic functions, that is, according to Part 3 of Article 18 of the Criminal Code of Ukraine, as an official, he took possession of another's property of the Horkey Village Council by abusing his official position in a particularly large scale, namely, funds totalling UAH 3,056,244.92.

On 19.06.2017, the Horkey Village Council (the Customer), represented by the village head PERSON_11, and LLC "IC FLAGMAN" (the Contractor), represented by the director PERSON_10, entered into a contract No. 1, the subject matter of which is the reconstruction of the kindergarten building with the installation of an autonomous boiler room. Subsequently, in the period from 06.12.2017 to 22.12.2017, the exact time has not been established, the director of LLC "IC FLAGMAN" PERSON_10 had a criminal intent aimed at issuing knowingly false official documents – acts of acceptance of completed construction works (form KB-2v) and certificates of the cost of completed construction works and expenses (form KB-3), which contained knowingly false information about the amount of construction work actually performed, with the aim of further illegal conversion of other people's property in favour of other persons using the official's official position contrary to the interests of the service, namely: money from the local budget of the territorial community

of Horky village, Dniprovskiy district, represented by the Horky Village Council (Verdict of the Industrial District Court of Dnipropetrovsk, 2019).

4. Conclusions.

Therefore, in the course of pre-trial investigation of misappropriation, embezzlement or acquisition of property by abuse of office committed by an organised group, one of the key elements of forensic characterisation as the target of illegal encroachments is characterised by the property of economic entities of all forms of ownership, where a significant part is made up of cash and non-cash funds in large and especially large amounts.

References:

- Azarov, D.S., Hryshchuk, V.K., Savchenko, A.V. (2016). *Naukovo-praktychnyi komentar Kryminalnoho kodeksu Ukrainy* [Scientific and practical commentary on the Criminal Code of Ukraine]. Kyiv (in Ukrainian).
- Kodeks Ukrainy pro administratyvni pravoporushennia: vid 7 hrudnia 1984 r. [Code of Ukraine on Administrative Offenses: dated December 7, 1984]. (1984). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/80731-10#Text> (in Ukrainian).
- Konventsia Orhanizatsii Obiednanykh Natsii proty proty transnatsionalnoi orhanizovanoi zlochynnosti: vid 04 liutoho 2004 r. № 995_789 [United Nations Convention against Transnational Organized Crime: February 4, 2004 No. 995_789]. (2019). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/995_789#Text (in Ukrainian).
- Marmura, O.Z. (2019). *Kryminalno-pravova kharakterystyka zlochyniv proty vlasnosti* [Criminal law characteristics of crimes against property]. Lviv (in Ukrainian).
- Nykyforchuk, V.D. (2018). *Elektronni hroshi u sferi finansovo-bankivskykh zlochyniv: problematyka ta vyznachennia* [Electronic money in the field of financial and banking crimes: problems and definitions]. *Naukovyi visnyk Natsionalnoi akademii vnutrishnikh sprav*, no. 2 (107), pp. 158-171 (in Ukrainian).
- Pohoretskyi, M.A., Vakulik, O.O., Serhieieva, D.B. (2014). *Rozsliduvannia ekonomichnykh zlochyniv* [Investigation of economic crimes]. Kyiv : Dakor (in Ukrainian).
- Pro valiutu i valiutni operatsii: Zakon Ukrainy vid 21.06.2018 № 2473-VIII [On currency and currency transactions: Law of Ukraine dated June 21, 2018 No. 2473-VIII]. (2018). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/2473-19/ed20221201#Text> (in Ukrainian).
- Shemshuchenko, Yu.S. (2001). *Yurydychna entsyklopediia* [Legal encyclopedia]. Kyiv : Ukrain-ska entsyklopediia (in Ukrainian).
- Slovnuk ukrainskoi movy [Dictionary of the Ukrainian language]. 2005. Retrieved from <https://slovnuk.ua/index.php?swrd=%D0%B-C%D0%B0%D0%B9%D0%BD%D0%BE> (in Ukrainian).
- Tsyvilnyi Kodeks Ukrainy: vid 16 sichn 2003 r. № 435-IV [Civil Code of Ukraine: dated January 16, 2003 No. 435-IV]. (2003). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/435-15/ed20030116#Text> (in Ukrainian).
- Volobuev, A.F. (2000). *Rozsliduvannia i poperedzhennia rozkradan maina v sferi pidpriemnytstva* [Investigation and prevention of theft of property in the field of entrepreneurship]. Kharkiv : Rubikon (in Ukrainian).
- Vyrok Industrialnoho raionnoho sudu m. Dnipropetrovska 08 lystopada 2019 roku [Verdict of the Industrial District Court of Dnipropetrovsk on November 8, 2019]. (2019). *court.gov.ua*. Retrieved from <https://reyestr.court.gov.ua/Review/85481504> (in Ukrainian).
- Zakon Ukrainy Pro banky i bankivsku diialnist: vid 07 hrudnia 2000 r. № 2121-III [Law of Ukraine On Banks and Banking Activity: dated December 7, 2000 No. 2121-III]. (2000). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/2121-14?find=1&text=%D0%BA%D0%BE%D1%88%D1%82%D0%B8#w1_4 (in Ukrainian).

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ХАРАКТЕРИСТИКА ПРЕДМЕТА ПРОТИПРАВНОГО ПОСЯГАННЯ ПІД ЧАС РОЗСЛІДУВАННЯ КРИМІНАЛЬНИХ ПРАВОПОРУШЕНЬ, КВАЛІФІКОВАНИХ ЗА Ч. 5 СТ. 191 КК УКРАЇНИ

Анотація. Метою статті є дослідити специфіку предмета протиправного посягання під час розслідування кримінальних правопорушень, кваліфікованих за ч. 5 ст. 191 КК України. **Результати.** У науковій статті досліджено специфіку предмета кримінальних правопорушень, пов'язаних із привласненням, розтратою майна або заволодінням ним шляхом зловживання службовим становищем, учиненого організованою групою. Ґрунтовним вивченням вітчизняної та міжнародної нормативно-правової бази, ратифікованої Україною, було проаналізовано понятійний апарат щодо

предмету протиправного посягання, майна, коштів, електронних грошей тощо. Враховуючи наукові надбання видатних криміналістів та досвідчених практичних співробітників охарактеризовано предмет протиправних посягань як майно суб'єктів господарювання всіх форм власності, де значну частину складають кошти в готівковій та безготівковій формах, в великих та особливо великих розмірах. Доведено, що у кримінальних провадженнях за фактами привласнення, розтрата майна або заволодіння ним шляхом зловживання службовим становищем, учиненого організованою групою, вагому частину складають бюджетні кошти, які було висвітлено залежно від суб'єкта і призначення. Надано перелік майна, яке в умовах сьогодення частіше становить предмет протиправних посягань, серед якого: продукти харчування, паливо, зерно, лісопродукція, будівничі матеріали та обладнання (пісок, цегла, утеплювач, підкранові балки тощо), типографське обладнання, вироби із дорогоцінних металів, інше рухоме та нерухоме майно. Особливу увагу приділено майну військового призначення, яке становить предмет протиправного посягання. **Висновки.** Зроблено висновок, що під час досудового розслідування привласнення, розтрата майна або заволодіння ним шляхом зловживання службовим становищем, учиненого організованою групою, один із ключових елементів криміналістичної характеристики як предмет протиправних посягань характеризується майном суб'єктів господарювання всіх форм власності, де значну частину складають кошти в готівковій та безготівковій формах, в великих та особливо великих розмірах.

Ключові слова: кримінальні правопорушення, привласнення, розтрата майна, зловживання службовим становищем, організована група, криміналістична характеристика, предмет протиправного посягання, майно, кошти.

The article was submitted 17.10.2023

The article was revised 08.11.2023

The article was accepted 28.11.2023