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TEST FOR PROPORTIONALITY ON THE NORM ON THE ILLEGAL ENRICHMENT VIA THE PRACTICE OF THE EUROPEAN COURT OF HUMAN RIGHTS

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The mechanism of criminal and legal counteraction to corruption crimes is currently on the verge of solving an important problem. The solution of this very problem will determine the further development of Ukraine's anti-corruption legislation – the permissibility and form of limiting human rights in order to effective corruption combatting in a state governed by the rule of law. As it was already noted in the legal literature, crisis of a liberal approach to the modern legal system could have a positive impact on a solution of this issue. The legal implementation of criminal liability for illegal enrichment and its effective application would be always linked with the need of restriction of certain human rights (the principle of presumption of innocence, the right not to testify against oneself, etc.). In this regard we need to establish clear legislative provision of the possibility and conditions of such a restriction. The establishment of the current version of Art. 20 of the UN Convention against Corruption (hereinafter «the Convention») rejected proposed ways to avoid or hide outlined interferences in fundamental human rights. At the same time, one should not shift the legal problems that arise during the implementation of Art. 20 of the Convention, from the debate about the balance of proof established by the burden of proof, and transfer it to the plane of direct violation of the presumption of innocence.

In the context of this problem, it should be noted that in 2006, the European Commission summarized the practice of the European Court of Human Rights (hereinafter «the Court») regarding the presumption of innocence and identified three situations in which the burden of proof does not lie entirely on the prosecution: (a) strict liability offenses (crimes of strict liability), (b) offenses where the burden of proof is reversed (crimes where the burden of proof under certain conditions is partially transferred to the accused), and (c) when a confiscation order is made (in cases of confiscation of property). In the first case, the prosecution must present evidence to prove that the accused committed the act (actus reus), but should not prove that he intended to act in such a way or to cause such a result (mens rea). In the second case, the prosecution has to prove that the accused acted in a certain way, when the accused has to prove that his actions were committed in the absence of guilt. The third case concerns cases of asset recovery at the expense of the accused or a third party, where the burden of proof can be transferred in the assumption that the assets are proceeds of crime that the owner of the assets must refute *(Green Paper – The Presumption of Innocence*

(COM(2006) 174 final). Commission of the European Communities, Brussels, 26.04.2006). All mentioned above cases when the burden of proof is transferred to the accused should be provided by domestic law. The aforesaid demonstrates that the limitation of the principle of presumption of innocence in situations when the burden of proof is transferred is permissible from the point of view of the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms of 04.11.1950.

At the same time, Ukrainian scientific studies regarding the criteria and limits of interference in the human rights have not yet been appropriately developed. All this shows the necessity of studying the peculiarities of the test for proportionality application in the field of the Criminal Law of Ukraine.

Nowadays this test is the most appropriate method to determine the extent of restriction of certain human rights in Europe. The technology of this test allows determining whether it is possible to interfere (limit) some right or legitimating interest by a certain measure in certain circumstances. The application of the test for proportionality" by the Court has created a specific practice. Its study and application allows providing such a test in Ukraine in order to establish rules on illegal enrichment in the model of Art. 20 of the Convention in the Criminal Code of Ukraine. Thus, while determining the legitimacy of the purpose of limiting the principle of presumption of innocence, one should proceed from the fact that the goals, which are first achieved when the norm about illegal enrichment is applied, is to expose and punish corruption, to reduce its level and to become closer to the implementation of the inevitability of criminal responsibility, that is to avoid the impunity of corruption in conditions of its widely dissemination. According to the Court's case law, «protection of public order» and «crime prevention», in case when certain measures restrict human rights, are objectives which are fully compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms (*Beldjoudi v. France, № 12083/86, § 70, ECHR 1992*). It is clear that the purpose pursued by the limitation of the principle of presumption of innocence by introducing liability for illegal enrichment is legitimate.

When checking the norm about unlawful enrichment on the criterion of the test «need for action», it is important to demonstrate that the interference with the principle of presumption of innocence while establishing criminal liability for illegal enrichment is negligible. In this case it would show the low rate of human rights encroachment. Here, it is noteworthy that, in its own assessment of the evidence in the case, the Court is guided by the criterion of proof «in the absence of reasonable doubt». In the light of the requirements of paragraph 2 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms the Court accepts the existence of presumptions that bear the burden of proving the innocence on the accused, unless it is restricted by reasonable limits, which take into account specificities of the situation and observe the right to a fair trial. In such cases, attention is paid to whether the accused was able to effectively defend and refute the existence of incriminated facts that are believed to be [1, p. 22]. There is a large number of specific ways to legitimately increase the official's assets in the case of proving that assets growth had been reached in illegal (corrupt) way. In order to prove the discrepancy of his property status with the official incomes, prosecution has to verify and prove the absence of the whole set of possible legal ways of acquiring such property, which in fact is extremely complex, and often impossible. On the contrary, defense has an opportunity to indicate a concrete way of the accused property increasing in order to justify that such an increasing is lawful. That is, the prosecution should check a very large number of facts, and the defense can justify only one and this seems to be not so difficult tusk. This allows us to conclude that there is minor restriction of human rights (the principle of presumption of innocence) by the norm of illegal enrichment and the proper provision of the right to fair trial while its application, which, in turn, proves that the criterion of the test for the need for action is met.

In order to find a solution for our problem which is discussed in this article it is especially important to analyze the Court's practice on the test for proportionality stricto sensu. At this stage, the test does not require a comparison of the two incommensurable values [in the case being analyzed, it is the value of the principle of presumption of innocence, on the one hand, and national security or public order (ordre public) on the other]. Here, not the listed values are compared, but the depth of the violation of each of them in the case of application and in the case of non-application of rights restrictions. In case when restricted right causes the disproportionately greater violation of the presumption than the violation of national security upon its non-application, then such a restriction should be rejected, otherwise it should be recognized as permissible and necessary in a democratic society.

In the case under consideration, the purpose of limiting one of the elements of the principle of presumption of innocence is to counteract corruption (to avoid the impunity of corruption by a significant increase in efficiency in its disclosure and punishment, in order to reduce the level of this phenomenon under conditions of its excessive distribution).

Thus, in the case of approximately the same (as in the case of illegal enrichment), depth of the violation of the principle of presumption of innocence (by transferring the burden of proof in relation to particular circumstances to the accused), we could outline the following purpose of such legal requirements and the situation of their application: 1) avoidance of impunity in case of violation of traffic rules by establishing liability of its owner in a situation where it is impossible to identify a person who has driven a car (if the accused does not prove that his car was guided by another person against his will) *(Joost Falk against the Netherlands, № 66273/01, ECHR 2004)*; 2) avoiding the impunity of smuggling of prohibited goods by establishing responsibility for such a crime of a person possessing the relevant objects (if the accused can not prove the circumstances of force majeure) (*Salabiaku v. France, № 10519/83, ECHR 1988; Pham Hoang v. France, № 13191/87, ECHR 1992*); 3) preventing the commission of offenses by a company by requiring the head of a company to properly perform its duties to control its activities by establishing the liability of the director of such a company for any of its offenses (if the latter does not prove that the offense was committed without his knowledge and that he used all measures to prevent it) *(AG against Malta, No. 16641/90, ECHR 1991)*; 4) Avoiding the legalization of proceeds from drug trafficking and avoiding forfeiture of property for such actions by using seizure of assets acquired during the six years preceding the specified crime (if the accused can not prove the legality of the source of their origin) *(Grayson and Barnham v. United Kingdom, No. 19955/05 and No. 15085/06, ECHR 2008)*.

The Court did not recognize that the transfer of the burden of proof is contrary to paragraph 2 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms in all described situations. In the context of studying the legal problems of the instrument provided by Art. 20 of the Convention, the cases described and their judgment by the Court are valuable because in each of them the purpose pursued by the restriction of the presumption of innocence appears to be less important for the democratic functioning of Ukrainian society than the purpose of establishing responsibility for illicit enrichment.

So taking into account the Court's practice on the application of the test for proportionality, we are to conclude that limiting the principle of the presumption of innocence by shifting the burden of proof to assert legality of the increase in assets (the subject of a corruption offense) to the part of defense with previous proving a significant increase in the assets of the entity and inconsistency of such increase with the declared legal incomes during the establishment of criminal liability for illegal enrichment ting is proportionate in view of the purpose, which is achieved by the action of this measure. In this regard, the transfer of the burden of proof provided by the norm of illegal enrichment which is aimed to counteract corruption does not contradict Clause 2 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms and is consistent with the requirements of Art. 62 of the Constitution of Ukraine and Art. 17 CPC of Ukraine.

References:

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