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Topic of the issue:

## IMPLICATIONS OF LEGISLATIVE CHANGES REGARDING SEIZURE OF PROPERTY AND SPECIAL CONFISCATION FOR BUSINESS

On 28 February 2016 Law No.1019-VIII "On Amendments to the Criminal Code and the Criminal Procedure Code of Ukraine pursuant to the recommendations contained in the sixth report of the European Commission on the status of the implementation by Ukraine of the Action Plan for liberalization of the EU visa regime for Ukraine regarding the improvement of procedures for seizure of property and the institute of special confiscation" (hereinafter – the Law)<sup>1</sup> came into force.

Having analyzed the provisions of the above Law, we consider it necessary to emphasize the main legislative changes that may be useful for business representatives and are as follows.

### On special confiscation

1. Special confiscation means uncompensated seizure of money or other valuable property of a person into state ownership upon a judicial decision.

2. From now on special confiscation may be applied to:

- a person for having committed a crime primarily punishable by **imprisonment or a fine of over three thousand** untaxed minimum incomes of individuals, **or a crime provided for by** par. one of Article 150, Article 154, par. two and three of Article 159<sup>-1</sup>, par. one of Article 190, Article 192, par. one of Articles 204, 209<sup>-1</sup>, 210, par. one and two of Articles 212, 212<sup>-1</sup>, par. one of Articles 222, 229, 239<sup>-1</sup>, 239<sup>-2</sup>, par. two of Article 244, par. one of Articles 248, 249, par. one and two of Articles 300, par. one of Articles 301, 302, 310, 311, 313, 318, 319, 362, Article 363, par. one of Articles 363<sup>-1</sup>, 364<sup>-1</sup>, 365<sup>-2</sup> of this Code.

Thus, special confiscation may actually be applied for any committed crime, if the latter falls under the above list or if a person has been sentenced to **imprisonment** or a fine of three thousand or more untaxed minimums of individuals (UAH 51,000 in 2016) for having committed it. In particular, this measure is applied to cases of fraud, causing property damage, tax evasion, receiving undue benefits etc.

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<sup>1</sup> <http://zakon5.rada.gov.ua/laws/show/1019-viii>

For instance, if a person is convicted for a crime of tax evasion (Article 212 of the Criminal Code of Ukraine), the court may also confiscate all the money that it believes to have been unpaid to the State Budget. Such money will be considered as obtained as a result of committing alleged crime.

For comparison, the previous wording of the Law provided for the possibility to apply special confiscation only for particular types of committed crimes (fraud; appropriation of property, sale of property obtained by crime, tax evasion, financial fraud etc.), without any link to the extent of liability for having committed them;

- a third party, if the latter obtained property from a suspected, accused or convicted person without payment, in exchange or for an amount much lower than its market value, and **knew or should have known** that the property corresponds to any characteristics provided by paragraph 1 of Article 96-2 of the Criminal Code of Ukraine (i.e. the property has been obtained from crime; is proceeds of crime, subject of crime etc.), or knew or should have known that the purpose of the property transfer was to avoid confiscation or special confiscation.

Therefore, if a person convicted, for instance, for tax evasion has transferred the relevant funds to a third party (spouse, relative), such property may be confiscated as being obtained by crime and transferred to be hidden from the investigation and obviously to avoid confiscation.

### **On seizure**

1. The Law stipulates that seizure of property is a provisional remedy, whereby a judicial decision deprives a person of the right to alienate, dispose of and/or use the property regarding which there is a **set of appropriate evidence sufficient** to believe that it is a proof of crime or may be subject to confiscation or special confiscation.

The mentioned changes consist in the legally enshrined requirements for the grounds for seizure of property. Thus, a mere whims or suspicions on the part of an investigator would not suffice to put a person's property under a ban. Investigators will be obliged to properly and adequately argue in favour of their requests for seizure to the court and back up their arguments with evidence.

2. Another important change is the legal status granted to third parties, whose property is pending decision on seizure. Thus, the Criminal Procedure Code of Ukraine has been amended in Article 64-2, under which it is provided that a third party, whose property is pending decision on seizure, may be any individual or legal entity. The above status is granted to a person as soon as a prosecutor files a motion for seizure of property with the court.

Therefore, legal entities and individuals, whose property is seized, are now able to assert their rights within the respective criminal proceedings to the fullest extent, in particular, to challenge the legality of the arrest; unlawful actions, decisions and omissions of investigator or prosecutors.

It is also important that the mentioned persons are endowed with the rights and obligations provided for suspected and accused in terms of seizure of property. Thus, unlike before, the law grants them the right to an attorney and his/her participation in criminal proceedings.

To sum up the above, we may say that Law No.1019-VIII on amendments to the procedure for special confiscation and seizure of property is aimed at regulating contentious aspects of such measures and guaranteeing protection from illegal seizure to property owners. At the same time, realistic conclusions on the applicability of the Law will become possible only after its practical implementation.

Kind regards and best wishes,

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