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Legal support for improving transparency of the asset recovery and management agency's activities

Правове забезпечення покращення транспарентності діяльності Національного агентства України з питань виявлення, розшуку та управління активами, одержаними від корупційних та інших злочинів

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Abstract

The purpose of the article is to study the legal basis for ARMA and submit the proposals to improve the transparency of this agency. The subject of the study is the activities of ARMA from the standpoint of transparency. Methodology. Methodological tools for the study are selected according to objectives, specifics of the object and subject matter of the research: dialectical method, system and structural method, dogmatic and legal method, comparative and legal method; logical and legal method; method of generalization. Research results. The article analyzes the legal provision of transparency of ARMA's activities. The problematic issues are identified and the areas for improvement in the legal framework for ARMA's transparency are suggested. The analysis of current normative and legal regulation of ARMA interaction with other executive bodies is performed. Practical meaning. The author's definition of transparency of ARMA's activity is proposed. Value /

Анотація

Мета статті полягає у вивченні правових основ діяльності АРМА та подання на цій основі пропозицій щодо удосконалення транспарентності діяльності вказаного органу. Предметом дослідження є діяльність АРМА з позиції транспарентності. Методологія: Методологічні засоби дослідження підібрані відповідно до цілей, специфіки об'єкта та предмета дослідження: діалектичний метод, системно-структурний метод, догматико-правовий метод, порівняльно-правовий метод; логіко-правовий метод; метод узагальнення. Результати дослідження. У статті проаналізовано правове забезпечення транспарентності діяльності АРМА. Встановлено проблеми та запропоновано напрямки удосконалення правового забезпечення прозорості цього органу. Проведено аналіз чинного нормативно-правового регулювання взаємодії АРМА з іншими органами виконавчої влади. Практичне значення. Надано авторське визначення

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originality. The ways to improve the transparency of ARMA's activities in Ukraine are proposed.

Key words: administrative offenses related to corruption, ARMA, fight against corruption, openness, transparency.

Introduction

The fight against corruption is one of the priorities of our State. However, nowadays there is a significant latency of administrative offenses related to corruption in half of the territory of Ukraine. All this shows the existence of problems in the normal functioning of civil society, indicates the formation of distrust in law and justice, damages the international image of Ukraine. This situation requires updated administrative and legal approaches to the study of liability for the offenses related to corruption.

To this end, the Law of Ukraine "On the Principles of State Anti-Corruption Policy in Ukraine (the Anti-Corruption Strategy) for 2014 – 2017" (Law of Ukraine No. 1699-VII, 2014) provided for the establishment of a mechanism for the public administration of seized (confiscated) assets in criminal proceedings, or found to be unfounded in claims cases for assets found to be unreasonable and for recovery of State revenue. In accordance with the Action plan on Visa Liberalisation, in 2015 in Ukraine the Asset Recovery and Management Agency (hereinafter – ARMA) was established as a separate independent executive agency responsible for performing the functions of detection, search and asset management.

ARMA's activities are carried out in the same way as those of recovery agencies that operate successfully in EU Member States in accordance with the Council Decision 2007/845/JHA of 6 December 2007 and other acts of EU law. However, the regulation of ARMA is only the first step in creating a model of management of seized assets, and the further functioning of this agency requires a number of similar reforms and regulatory changes, which determines the relevance of this study.

Thus, the purpose of the article is to study the legal basis for ARMA and submit the proposals to improve the transparency of the agency.

транспарентності діяльності АРМА. Цінність/оригінальність. Запропоновано шляхи удосконалення транспарентності діяльності АРМА в Україні.

Ключові слова: адміністративні правопорушення, пов'язані з корупцією, АРМА, боротьба з корупцією, прозорість, транспарентність.

Methodology

Methodological tools for the study are selected according to objectives, specifics of the object and subject matter of the research. It is based on a general dialectical method of scientific knowledge of real phenomena, as well as their links with the practical activities of ARMA, as well as general and specific methods of legal science, in particular.

System and structural method is used for the determination of the content of the categories and legal phenomena studied, in particular the formation of a conceptual and categorical apparatus and the systematization of scientific knowledge of the chosen research area.

Dogmatic and legal method helps to analyze the provisions of regulations governing the activities of ARMA from the standpoint of transparency, as well as the practice of their application.

Comparative and legal method is applied to compare domestic legislation and by-laws, international legal instruments, which are the legal basis for ensuring transparency of ARMA.

Logical and legal method makes it possible to develop of the conceptual apparatus of the research, in particular, to propose the Authors' definition of transparency of ARMA's activity.

With the help of the method of generalization the ways to improve the transparency of ARMA's activities in Ukraine are proposed.

Literature Review

Buiazhdy (2018, p. 144) notes that institutions similar to ARMA exist in all 28 countries - members of the European Union - and in more than 100 jurisdictions around the world. Moreover, for the members of the European Union, the search, arrest and return of corrupt assets are prerogatives in the fight against corruption.

As it is impossible to control the effectiveness of asset management systems at European level without the participation of Member States, the establishment of offices to detect, trace and manage seized assets is an integral tool of international anti-corruption cooperation (European Law Enforcement Agency, 2016).

Procedures for managing seized and confiscated property also differ in national legal systems. In general, the process of managing seized property in the EU is influenced by various factors; one of the most acute is the lack of regulations that discipline the timing of management procedures (Shentov, Stoyanov & Yordanova, 2014).

According to Tereshchuk (2019, p. 60) ARMA, on the one hand, improves the mechanism for anti-corruption activities, and on the other one – initiates the implementation of the practically new function by the State, in particular, the formation of the conceptual and categorical apparatus and the systematization of scientific knowledge in the implementation of management policy on assets that may be seized within criminal proceedings.

An integral attribute of the formation of both a new agency and new public function is the quality of legislative and regulatory support, which is based on the principles. The study of the principles of ARMA's activity in administrative and legal science has not yet been disclosed; in particular, the issue of implementation of the principles of transparency.

The content of the category "ARMA principles" in theoretical terms should be based on the following: firstly, their belonging to the sphere of public relations, and secondly, it is necessary to separate the principles of the ARMA and the principles of public administration of criminal assets as a legal policy. Instead, the latter thesis is somewhat controversial, based on the idea of the Law on the ARMA, which establishes both the general principles of the agency and the implementation of the procedures for detection, tracing and asset management (Bukhanevych, 2010).

However, issues related to the legal transparency of ARMA by modern scholars have not yet been fully explored.

Results and Discussion

The categories of "transparency" and "communication" are not only accompanying concept for many scholars, but also the

components of a single mechanism of State power.

Kret (2010, p. 8), argues that the institutional component of transparency is interpreted as a multilevel component, covering not only vertical but also horizontal levels (transparency of higher government structures to lower and vice versa, as well as the mechanisms for establishing links and interaction between different branches and levels of government). There is also the phenomenon of internal transparency, which, for example, Pylaieva (2017) associates with accountability of collaboration, adding that internal accountability can be effective only if it is transparent and open to public participation.

The creation of ARMA was declared as a new institution of the anti-corruption mechanism, a standard in the fight against corruption, a demonstration of anti-corruption risks of the management model. Transparency, openness and verification are not only part of the legal status, as noted in a number of scientific studies, but also an independent direction of institutional and managerial activities, a means of supporting functions, implementing public policy, etc. This has been noted by a number of scholars in their work (for example, Mazurik, 2016; Tymoshenko, 2015; Kondratenko, 2015).

According to the Part 1, Article 170 of the Criminal Procedure Code of Ukraine (Law of Ukraine No. 4651-VI, 2012), the investigator, prosecutor should take the necessary measures to identify and search for property that may be seized in criminal proceedings, in particular by requesting the relevant information from ARMA, other State agencies and local governments, natural persons and legal entities.

According to Part 1, Article 9 of the Law of Ukraine "On the Asset Recovery and Management Agency" (hereinafter – the Law) (Law of Ukraine No. 772-VIII, 2015) one of the main functions of ARMA is implementation of measures for the identification and tracing of assets at the request of an investigator, detective, prosecutor, judge (investigating judge), providing explanations, methodological and advisory assistance to investigators, detectives, prosecutors and judges on the issues related to the detection, search for assets. In accordance with Par. 1, Part 1, Article 10 of the Law, ARMA requires from public authorities the information necessary to comply with law enforcement appeals.

Besides, taking into account the powers of ARMA, defined in Par. 2, Part 1, Article 10 of the Law, this agency has full access to automated information and reference systems, registers and data banks, the holder (administrator) of which are government agencies. The number of connections and accesses to registers, data banks, information resources is constantly increasing.

In order to effectively perform the tasks of the ARMA defined by law, the access has been given to a significant number of registers and information data banks managed and / or owned by State and local governments; the ARMA's authorized persons have the right to request documents from these bodies, which facilitate the process of identification and tracing of assets.

To date, ARMA has access to 46 registers and information databases on the basis of concluded memoranda and agreements and joint decisions. Besides, pursuant to Par. 10, Part 1, Article 62 of the Law of Ukraine "On Banks and Banking" (Law of Ukraine No. 2121-III, 2000) ARMA has access to bank secrecy regarding the existence and status of accounts, transactions in accounts of a particular legal entity or a natural person, natural person-entrepreneur. The exchange of information with banking institutions is implemented as soon as possible due to the connection of ARMA to the e-mail system of the National Bank of Ukraine.

At the same time, ARMA is constantly searching for and analyzing new data banks that can be used to identify and trace for assets. The ARMA, along with the Prosecutor General's Office of Ukraine, the Security Service of Ukraine, the Ministry of Internal Affairs of Ukraine, the National Anti-Corruption Bureau of Ukraine and the Ministry of Finance of Ukraine, also approved the Procedure for cooperation of communications from bodies carrying out pre-trial investigations, Procurators' offices and the execution of requests from foreign States for the identification and tracing of assets (Order No. 115/197-o/297/586/869/857, 2017).

In addition, as a result of cooperation between the ARMA and the State Investigation Bureau, the Procedure for Cooperation between these agencies in identification and tracing of assets that may be seized in criminal proceedings was approved (Order No. 151/262, 2021). The entry into force of this instrument makes it possible to practically regulate the relationship between ARMA and the State Investigation Bureau in the process of exercising their powers, which is an

important component of State policy in the area of identification and tracing of assets.

Despite the fact that the Law establishes a number of means to ensure transparency and openness, the implementation of its provisions appears in a narrow and unsystematic way. This is clearly manifested by the Chairman of ARMA in the Report on the activities of the ARMA, published on the official website of ARMA, where the ARMA's transparency is considered as the demonstration of openness and creating a positive image through public events with the ARMA's leadership, international partners, representatives of government agencies, NGOs, business, media and participation in various national and international events (Law of Ukraine No. 772-VIII, 2015; ARMA, 2019).

One of the key priority effective anti-corruption measures is achieved through transparency of personnel policy. The Law events (Law of Ukraine No. 772-VIII, 2015) establishes special public procedure for the election and status of the ARMA's Chairman. According to it, the Chairman is appointed by the Cabinet of Ministers of Ukraine for a term of five years based on the results of a competition. The same person cannot serve two consecutive terms. The Chairman of ARMA is appointed by the Cabinet of Ministers of Ukraine on the proposal of the Prime Minister of Ukraine, who nominates a candidate selected on the basis of a competitive examination. Besides, the Law (Law of Ukraine No. 772-VIII, 2015) establishes the procedures for forming and authorizing the Competition Commission to elect the Chairman of the ARMA, the procedure for submitting documents and requirements for candidates for the Chairman post. The Competition Commission is open to media representatives and journalists.

The Secretariat of the Cabinet of Ministers of Ukraine provides video and audio recording and real-time broadcasting of relevant video and audio information from the meetings of the tender commission on the official website of the Cabinet of Ministers of Ukraine. Information on the time and place of the meeting of the tender commission is published on the official website of the Cabinet of Ministers of Ukraine no later than 48 hours before its start. These provisions are designed to ensure high public attention to the election of the Chairman of the ARMA, to provide proper publicity to the procedures and maximum coverage of all stages of the competition for the general public.

Distinctive from the work of other executive bodies is the specificity of accountability and control of the ARMA, which provides, first of all, an annual public audit. Attribution of this procedure to the elements of transparency is ensured by the involvement of the public, other public authorities and independent experts. According to Art. 12 of the Law (Law of Ukraine No. 772-VIII, 2015), each year the external control commission consisting of three persons (one from the President of Ukraine, the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine) conducts an independent external evaluation of ARMA's activities. An integral part of the independent external evaluation of ARMA's activities is the annual external audit, which is conducted exclusively by an international or national audit company that is recognized and has a high business reputation in the relevant market of Ukraine. According to the results of these procedures, ARMA prepares annual reports on its activities, which are published by April 15, inclusively, on the official website.

Recognizing the importance of the communicative component in the activities of the ARMA, the legislator has laid down a number of provisions and legal guarantees that not only consolidate its status as the transparent actor of interagency cooperation, but also establishes some responsibilities to facilitate cooperation with other executive bodies to facilitate the implementation of ARMA's tasks.

In view of the need to expand the legal regulation of the relevant type of cooperation, the National Agency signed the Order No. 115/197-o/297/586/869/857, which establishes the principles of legal procedures for cooperation between the National Agency and investigators, detectives, prosecutors, pre-trial investigation bodies, procuratorial authorities on the issues of the implementation by the ARMA of requests from investigators, detectives, prosecutors, pre-trial investigation bodies, procuratorial authorities to identify and trace the assets (funds, property, property and other rights), which may be seized in criminal proceedings; fulfillment by the bodies of pre-trial investigation, prosecutor's office of requests of the National Agency to provide information necessary for the National Agency to respond to the request of the relevant body of a foreign state authorized by it to perform the functions of the asset recovery institution; consideration by pre-trial investigation bodies, prosecutor's offices of information of the National Agency on signs of offenses identified by him during the performance of statutory

functions and powers of the National Agency, other issues related to the performance of powers by the National Agency.

Besides, the Law (Law of Ukraine No. 772-VIII, 2015) gives the right to the ARMA to interact with the National Bank of Ukraine, the State Property Fund of Ukraine, the Ministry of Justice of Ukraine, the National Agency for Corruption Prevention, State Fiscal Service of Ukraine, central executive body implementing State policy in preventing and combating the legalization (laundering) of proceeds of crime, financing of terrorism and proliferation of weapons of mass destruction, and other State agencies.

Thus, formally, the Law provided for the possibility of communication of the ARMA with any public authorities, but at the same time the it establishes the format, type of such interaction, which may be mandatory both for the ARMA and for the other party of communication due to the nature and tasks of the first.

An equally important element of the mechanism for ensuring transparency and civil control in the procedural activities of the ARMA in cooperation with other authorities is the Public Council.

Public Council at the ARMA is a permanent public control body at the ARMA, which hears information on the activities, implementation of plans and tasks of the ARMA, exercises public control over the spending of the State Budget of Ukraine, the main administrator of which is the ARMA, provides conclusions on draft regulations acts of ARMA, delegates two representatives to participate in the meetings of the interdepartmental commission on the sale of assets and the competition commission to fill vacant positions of civil servants in the ARMA. The Public Council has the right to receive documents and information related to the activities of the ARMA (except those that constitute State secret).

The role of public entities in State agencies has shown high effectiveness of control in: promoting the exercise of citizens' constitutional right to participate in the management of State affairs; exercising public control over the activities of the agency; promoting the consideration of public opinion in establishing and implementation of public policy.

The specific role of the ARMA Public Council in the aspect of establishing transparency can be

manifested through: 1) control; 2) monitoring; 3) participation in decision-making; 4) study of public opinion and assistance in forming a positive image of the ARMA; 5) generalization of conclusions and proposals in the activities of the ARMA.

Among other functions and tasks in terms of ensuring the transparency of the policy of detection, tracing and management of assets, the ARMA is authorized to establish and administer the Unified State Register of Assets Seized in Criminal Proceedings. Art. 25 of the Law (Law of Ukraine No. 772-VIII, 2015) lists the information contained in this Register.

Information from the Register is conditionally divided into open for public access and closed one (with limited access). The Law (Law of Ukraine No. 772-VIII, 2015) establishes some categories of subjects of information work with the data of the register. Thus, the registrars are authorized employees of the ARMA. The information to be included in the Register shall be submitted to the ARMA by electronic means by investigators, detectives, prosecutors, judges, State executors, other officials no later than the following working day after the reasons for providing such information. The users of the register are the ARMA employees, heads of prosecutor's offices and pre-trial investigation bodies, prosecutors, investigators, detectives and other authorized persons of pre-trial investigation bodies who provide information and analytical support for law enforcement agencies and keep special records in accordance with the Law.

At the same time, the Law (Law of Ukraine No. 772-VIII, 2015) does enshrine such an important rule on the distribution of roles of the users and registrars of the Register depending on the level of access to restricted data and does not propose their classification with appropriate access rights. We believe that this information should be regulated in detail in the Regulation on the Unified State Register of Assets Seized in Criminal Proceedings (Order No. 418, 2020).

Thus, the activities of ARMA are diverse and include a number of organizational tasks such as: accumulation, structuring of information; selection of the necessary data in the context of a specific search criterion; monitoring compiling, adjustment and publication of data; control and comparison of performance indicators of the department, executors; automation of formation of certificates, reports; keeping statistics and accounting of correspondence; ensuring the integrity and reliability of information, etc.

Conclusion

Thus, the transparency of the ARMA is a modern form of public activity designed to establish an open organizational and legal platform for this body, aimed at achieving effective management and quality service.

In order to ensure the transparency of its activities, it is necessary to develop effective Strategic Principles of Asset Tracing and Management, as well as a plan for their implementation. The draft strategic principles and plan should be developed with the involvement of a wide range of experts, representatives of the public and international organizations, as well as government agencies, with which the ARMA will continue to work closely.

These acts should become policy documents on the issues of State policy formation, development of functions and powers of the ARMA, interaction of the latter with other authorities, international cooperation of the ARMA with the relevant bodies of foreign States, international, inter-governmental organizations, networks, etc.

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