UDC [343.13:343.272](477)“364”
DOI https://doi.org/10.32782/2524-0374/2024-10/99

METHODS OF PROTECTING THE PROPERTY RIGHTS OF INDIVIDUALS WHOSE ASSETS HAVE BEEN SEIZED DURING THE MARTIAL LAW IN UKRAINE[1]

СПОСОБИ ЗАХИСТУ ПРАВ ВЛАСНОСТІ ФІЗИЧНИХ ОСІБ, НА МАЙНО ЯКИХ БУЛО НАКЛАДЕНО АРЕШТ В ПЕРІОД ДІЇ ВОЄННОГО СТАНУ В УКРАЇНІ

Verkhoglyad-Gerasymenko O.V., PhD in Law,
Assistant Professor at the Department of Criminal Procedure
Yaroslav Mudryi National Law University

The article analyzes two ways to protect the property rights of individuals whose assets have been seized: the cancellation of the property seizure by submitting a motion to the investigating judge (during the pre-trial investigation) or to the court (during judicial proceedings) (Article 174 of the CPC); and the appeal against the ruling of the investigating judge regarding the property seizure (Paragraph 9 of Part 1 of Article 309, Article 310 of the CPC)."

It is emphasized that the grounds for canceling the seizure of property established by Art. 174 of the Code of Criminal Procedure can be divided into three types: 1) the application for canceling the seizure of property by the suspect, accused, their defender, legal representative, other owner or owner of the property, representative of the legal entity in respect of which the proceedings are carried out, who were not present when considering the issue of seizure of property (par. 1 h. 1 Art. 174 CPC); 2) no need for further application of the seizure of property; 3) unreasonable seizure of property (par. 2 Part 1 of Art. 174 CPC) (may occur in those cases, when there are no grounds for applying this measure to ensure criminal proceedings or the requirement of proportionality of the value of property is not met, which is to be arrested in order to secure a civil claim or recover the undue benefit received and the amount of damage, caused by a criminal offense or specified in a civil lawsuit, the amount of undue benefit received by a legal entity).

The order of cancellation is disclosed: preliminary arrest of property of legal entities imposed by the decision of the Director of the National Anti-Corruption Bureau of Ukraine (Bureau of Economic Security of Ukraine); arrest of property in criminal proceedings for its subsequent transfer to the needs of the Armed Forces of Ukraine. It is concluded that the position of those investigating judges who grant motions from representatives of legal entities to lift the seizure of property imposed under Part 9 of Article 170 of the CPC should be supported, as the mere presence of a record in the State Register of Encumbrances on movable property regarding the seizure of movable assets of legal entities–when there are no legal grounds for this–unjustifiably and unreasonably infringes upon their right to freely possess and dispose of their property.

Key words: methods of protection, ownership, seizure of property, preliminary seizure of property, appeal against inaction, cancellation of seizure of property, martial law, investigating judge, Armed Forces of Ukraine.

У статті проаналізовано два способи захисту права власності осіб, на майно яких накладено арешт: скасування арешту майна шляхом подання клопотання до слідчого судді (під час досудового розслідування), суду (під час судового провадження) (ст. 174 КПК); оскарження в апеляційному порядку ухвали слідчого судді про арешт майна (п. 9 ч. 1 ст. 309, ст. 310 КПК).

Наголошено, що підстави скасування арешту майна, встановлені ст. 174 КПК, можна поділити на три види: 1) заявлення клопотання про скасування арешту майна підозрюваним, обвинуваченим, їх захисником, законним представником, іншим власником або володільцем майна, представником юридичної особи, щодо якої здійснюється провадження, які не були присутні при розгляді питання про арешт майна (абз. 1 ч. 1 ст. 174 КПК); 2) відсутність потреби у подальшому застосуванні арешту майна; 3) необґрунтований арешт майна (абз. 2 ч. 1 ст. 174 КПК) (може мати місце у тих випадках, коли відсутні підстави для застосування цього заходу забезпечення кримінального провадження або не дотримана вимога співмірності вартості майна, яке належить арештувати з метою забезпечення цивільного позову або стягнення отриманої неправомірної вигоди та розміру шкоди, завданої кримінальним правопорушенням або зазначеної у цивільному позові, розміру неправомірної вигоди, яка отримана юридичною особою).

Розкрито порядок скасування: попереднього арешту майна юридичний осіб, накладеного за рішенням Директора Національного антикорупційного бюро України (Бюро Економічної безпеки України); арешту майна у кримінальному провадженні для подальшої передачі його на потреби Збройних сил України. Зроблено висновок про необхідність підтримати позицію тих слідчих суддів, які задовольняють клопотання представників юридичних осіб про скасування арешту майна, накладеного в порядку ч. 9 ст. 170 КПК, оскільки сам факт наявності у Державному реєстрі обтяжень рухомого майна запису про обтяження у вигляді арешту рухомого майна юридичних осіб за обставин, коли відсутні будь-які правові підстави для цього, безпідставно та необґрунтовано порушує її право на вільне володіння та розпоряджання майном.

Ключові слова: способи захисту, право власності, арешт майна, попередній арешт майна, оскарження бездіяльності, скасування арешту майна, воєнний стан, слідчий суддя, Збройні сили України.

The CPC provides for two ways to protect the property rights of persons whose property is seized:

1) cancellation of the seizure of property by filing a petition to the investigating judge (during the pre-trial investigation), the court (during the trial) (Article 174 of the CPC);

2) appeal against the decision of the investigating judge on the seizure of property (paragraph 9 of part 1 of article 309, article 310 of the CPC).

According to paragraph 7 Part 7 of Art. 173 of the CPC this right belongs to the suspect, accused, third parties.

It should be noted that in paragraph 6 of the Resolution of 14.09.2017 No. 5-162x (15) 17), the Supreme Court of Ukraine (hereinafter referred to as the SCU) clarified that... "the right to appeal, as a constitutionally guaranteed basis of proceedings, provides the right to appeal to the higher court not only to the suspect, the accused, and the category "other persons" in the meaning of paragraph 10 of Article 393 of the CPC also covers those participants in criminal proceedings, the rights, freedoms or interests of which concern the court decision [1] Additionally, regarding the content of the concept of a person, the rights, freedoms and interests of which concerns a court decision, it is necessary to take into account the legal opinion set forth in the resolution of the SCU of 03/03/2016. No. 5-347x15, that provided that the court decision concerns the rights, freedoms and interests of the person, the latter has the right to appeal to the higher court with his appeal regardless of his participation in the trial. In such circumstances, it is obvious that the owner of the property in respect of which the issue of arrest is decided is a person whose rights, freedoms and interests relate to the court decision, and therefore belong to the category of "other persons" who have the right to file an appeal against the decision of the investigating judge" [2].

[1] The article was written within the EURIZON project, which is funded by the European Union under grant agreement No. 871072.

The appeal procedure in these cases is marked by the following features: the appeal against these decisions is submitted directly to the Court of Appeal (Clause 2 of Part 1 of Article 395 of the CPC) within 5 days from the date of their announcement (paragraph 2 of Part 2 of Article 395 of the CPC) (for a person in custody, the period for filing an appeal is calculated from the moment of delivery of a copy of the decision (paragraph 2 of Part 2 of Article 395 of the CPC); if the decision of the investigating judge was made without calling the person appealing it, then the term of the appeal for such a person is calculated from the date of receipt of a copy of the court decision by him (par. 2 h. 3 Art. 395 CPC)).

However, in accordance with paragraph 13 of the Information Letter of the High Specialized Court of Ukraine for Civil and Criminal Cases (hereinafter – HSCU) dated 05.04.2013 No. 223-558/0/4-13 "On some issues of judicial control by the investigating judge of the court of the first instance over the observance of the rights, freedoms and interests of persons when applying measures to ensure criminal proceedings" (hereinafter referred to as the CCP)... "if submitted by persons defined in Article 174 of the CPC, complaints against the ruling of the investigating judge of the court of the first instance on the seizure of property in connection with the groundlessness of its imposition, the court of appeal must check, whether these persons filed a petition to cancel this measure of providing the investigating judge with a local court and, in case of a negative answer to this question, may leave the ruling unchanged [3]. In other words, based on the lack of justification for the seizure of a person's property, the individuals listed in Part 1 of Article 174 of the CPC have the right to submit a motion to the investigating judge of the court of first instance to revoke his own ruling (paragraph 2 of Part 2 of Article 174 of the CPC). If they disagree with the decision made, they can appeal the ruling on the property seizure in accordance with Article 309 of the CPC. It is important to note that the clarification from the Higher Specialized Court of Ukraine only pertains to one ground for revoking the ruling on property seizure, namely “lack of justification”.

According to the content of Part 1 of Art. 170 of the CPC, the time limits for the seizure of property are determined from the moment the ruling of the investigating judge, the court on the application of this MECP until the cancellation of the seizure of property, which can occur both during the pre-trial and during the trial.

The grounds for canceling the seizure of property established by Art. 174 of the CPC can be divided into three types:

1) filing a petition to cancel the seizure of property by the suspect, accused, their defender, legal representative, other owner or owner of the property, representative of the legal entity in respect of which the proceedings are being carried out, who were not present when considering the seizure of property (par. 1 h. 1 Art. 174 of the CPC) (due to the fact that paragraph 1 Part 1 of Art. 174 of the CPC applies only to persons who were not present when considering the seizure of property, first of all, filing a petition to the investigating judge to cancel the seizure of property is a way of protecting the right of a person, which was not present when considering the application for the seizure of property and therefore did not take the opportunity to provide the investigating judge with evidence in favor of a decision to refuse to seize the property. That is why the legislator provided for such persons a means of judicial protection of their interests, which is noted by efficiency and provides them with the opportunity to participate in the hearing personally and provide the investigating judge with evidence justifying the need to cancel the seizure of property. Separately, the paragraph. 2 Part 1 of Art. 174 of the CPC, which provides for two grounds for filing a petition to cancel the seizure of property, namely "groundlessness" and "no longer needed"), should be considered;

2) no need for further application of the seizure of property (may be the basis for full or partial cancellation of the seizure of property);

3) unreasonable seizure of property (paragraph 2 Part 1 of Article 174 of the Code of Criminal Procedure) (may occur in cases where there are no grounds for applying this CPCA or the requirement of proportionality of the value of the property to be arrested is not met in order to secure a civil claim or recover the undue benefit received and the amount of damage caused by a criminal offense or specified in a civil claim, the amount of undue benefit received by a legal entity).

The obligation to prove that there is no need for further application of this measure or its application unreasonably lies with the person who filed a petition for the full or partial cancellation of the seizure of property on these grounds.

The petition for cancellation of the arrest on these grounds is considered by the investigating judge, the court no later than 3 days after its receipt in court. The time and place of consideration shall be notified to the person who filed the petition and the person at whose request the property was seized. According to the results of the trial of the petition to cancel the seizure of property, the investigating judge or the court issues a ruling to completely or partially revoke the property seizure, or to deny the motion for revocation.

It is necessary to pay attention to the fact that the decision to cancel the seizure of property can be formalized in other procedural documents, namely in the decision of the prosecutor to close the criminal proceedings, if the property is not subject to special confiscation (part 3 of article 174 of the CPC) and the court decision that ends the trial (sentence or ruling) (part 4 of article 174 of the CPC). The normative nature of the obligation of the judge and the prosecutor is to make a timely decision to cancel the arrest of property is a guarantee of the rights of the owner of the arrested property, because it relieves him of the need to appeal to the state authorities with a request to cancel the arrest at the end of the criminal proceedings. The rapid restoration of the rights of the owner is an integral part of the legal mechanism for protecting his interests, the existence of which the European Court of Human Rights insists on in national legislation (hereinafter – the ECHR, the Court). So, in the case of "Raimondo v. Itali "(1994), the Italian authorities seized a significant proportion of the property pending evidence of the legality of the origin of the said property belonging to a person suspected of having links to the mafia. Finding no violation of Art. 1 of the First Protocol, which guarantees the right of property, the Court focused on the purpose for which the mafia uses such property, the difficulties encountered by the government fighting against such use of property, and that the orders for seizure were of limited nature [4]. The Court also found no violation of the requirements of the Convention in the case concerning the seizure of a dwelling as evidence in the framework of a criminal investigation (the decision in the case "Vendittelli v. Italy» (1994)) [5]. However, in both of these cases, the Court found a violation in that the Government had not taken prompt measures to re-grant the property for full use after the completion of the relevant investigations [4; 5].

Decisions of the investigating judge on full or partial cancellation of the seizure of property and on refusal to cancel the seizure of property, decided in accordance with Art. 174 of the CPC, are not subject to appeal [6; 7]. At the same time, refusal to cancel the seizure of property does not deprive a person of the right to apply to the court with a repeated petition for cancellation of the seizure of property in accordance with Art. 174 of the CPC both at the pre-trial investigation and during the trial [7].

Separately, it is necessary to pay attention to the issue of the procedure for cancelling the preliminary seizure of property of legal entities (hereinafter – LE). Let’s remind that in urgent cases and solely for the purpose of preserving physical evidence or ensuring possible confiscation or special confiscation of property in criminal proceedings for a serious or especially serious crime by decision of the Director of the National Anti-Corruption Bureau of Ukraine (hereinafter – NABU)

(or its deputy), Director of the Bureau of Economic Security of Ukraine (hereinafter – BESU) (or its deputy), agreed by the prosecutor, may be pre-seized on property or funds in the accounts of individuals or legal entities in financial institutions. Such measures apply for up to 48 hours. Immediately after making such a decision, but not later than within 24 hours, the prosecutor appeals to the investigating judge with a petition for the arrest of property. If during this period the prosecutor did not apply to the investigating judge with a petition for the arrest of property or if such a petition was refused, the previous arrest on property or funds is considered canceled, and the seized property or funds are immediately returned to the person (part 9 of article 170 of the CPC). At the same time, as the generalization of judicial practice shows, the previous arrest of property is not automatically canceled in the above cases. Confirmation of this is the receipt by legal entities of extracts from the State Register of Encumbrances of Movable Property, the State Register of Property Rights to Real Estate, the Register of Ownership Rights to Real Estate, the State Register of Mortgages, the Unified Register of Prohibitions on Alienation of Real Estate Objects in Relation to the Subject (hereinafter referred to as the Register), from the contents of which it becomes known that encumbrances (arrest) have been imposed on movable and immovable property of the legal entity according to the decisions of the NABU (BESU) (with a validity period until a certain date or without a validity period).

This encourages representatives of legal entities to apply with the request to cancel the seizure of property in the pretrial (administrative order) to the Ministry of Justice of Ukraine (complaints about the inaction of state registrars), the Central Interregional Department of the Ministry of Justice of Ukraine, Regional Branches of the State Enterprise (hereinafter – SE) "National Information Systems," SE "National Information Systems" and NABU (BESU) (as an encumbrancer). At the same time, according to Article 41 of the Law of Ukraine "On Securing Creditors" Claims and Registration of Encumbrances, "public encumbrance is terminated on the basis of a decision of the authorized body from the day it comes into force. And in accordance with paragraph 24 of the Procedure for maintaining the State Register of Encumbrances of Movable Property, approved by Decree of the Cabinet of Ministers of Ukraine No. 830 dated 05.07.2004, information on the termination of encumbrances is registered on the basis of a court decision or an application of the encumbrance or an authorized person. Therefore, the demands of the representatives of the LE to cancel the arrest remain unsatisfied by the registrar due to the lack of appropriate authority and the need to cancel the arrest of the property of the encumbrancer's application, that is, the NABU (BESU), or a court decision. In the future, representatives of the LE appeal to the NABU (BESU) to send a statement to the Registrar about the need to withdraw data/information on encumbrances/arrests/prohibitions on the property of the LE from state registers. On its part, the NABU (BESU) denies this, because they believe that such cancellation should occur automatically.

Consequently, there is a situation in which, although the preliminary seizure imposed by the decision of the Director of the NABU (BESU) is temporary and, according to the provisions of Part 9 of Article 170 of the CPC, is considered revoked, no provisions of current legislation directly impose an obligation on the registrar to make the corresponding entry in the register, which can only be carried out by a court decision and/or upon a request from the NABU (which refuses to submit the relevant request). In such circumstances, the only way to protect the right of ownership of the legal entity to the property belonging to them is to cancel the arrest imposed by the investigating judge.

At the same time, the analysis of judicial practice testifies to the lack of a unified approach of judges to resolve the petition for cancellation of the seizure of property imposed in accordance with Part 9 of Art. 170 of the CPC. Thus, some investigating judges satisfy the aforementioned petition, justifying their decision as follows [8; 9; 10]:... "on the basis of the decisions of the NABU Director, the relevant encumbrances were registered in the Register, in the presence of which the legal entity is deprived of the opportunity to dispose of its movable and immovable property. The statements of the legal entity regarding the termination of the relevant encumbrances in the Register were left without satisfaction by the registrar, due to his lack of appropriate authority and the need to cancel the arrest of the statement of the encumbrance, that is, the NABU (BESU), or a court decision. On the same grounds, the complaint of the Legal Entity against the actions of the registrar was refused. From the moment the property seizure was terminated, the detective, as the encumbrancer, did not contact the state registrar with a request to terminate the corresponding encumbrances in the Register. In fact, the seizure of the property of the legal entity cannot be considered canceled, since the latter continues to be subject to restrictions in its rights as the owner of the property, given the existing encumbrances in the Register. Along with this, par. 2 Part 1 of Art. 174 of the CPC of Ukraine establishes that, the seizure of property can be canceled by the decision of the investigating judge during the pre-trial investigation at the request of the owner of the property, if they prove that in the further application of this measure there was no need or the arrest was imposed unreasonably. Since the investigating judge found that after the decision of the Appeals Chamber of the High Anti-Corruption Court of the ruling there was no need for further application of the seizure of the property of the legal entity, such an arrest, taking into account the above circumstances, is subject to cancellation."

At the same time, other investigating judges refuse to satisfy the request to cancel the seizure of property imposed in the order of Part 9 of Art. 170 of the CPC, justifying its decision as follows:

–... "the investigating judge perceives the applicant's arguments given by him in support of his application to cancel the seizure of property, and the restrictions of the enterprise associated with such arrest, however, believes that such restrictions actually still exist in the register solely in connection with the inaction of the subject of state registration of rights regarding the non-exclusion of the corresponding record of the seizure of the property of the legal entity from the State Register of encumbrances of movable property, which can be appealed, in particular to the Ministry of Justice of Ukraine in the order, defined by the Law of Ukraine "On state registration of property rights to real estate and their encumbrances," and in no way causes the emergence of grounds for canceling the arrest by the investigating judge. Submitting a request to the investigating judge to resolve the issue of revoking the preliminary seizure by the director of the NABU through a court ruling is erroneous and not based on legal norms, as such a seizure no longer exists, and there are also no legislative obstacles for the registrar to enter information into the State Register of Encumbrances on Movable Property regarding the termination of encumbrances concerning the property of legal entities based on paragraph 2 of Part 9 of Article 170 of the CPC" [11].

– "by the decision of the investigating judge, the proceedings on the application for the arrest of property are now closed, and therefore, their satisfaction is actually denied, and therefore, on the basis of paragraph 2 of Part 9 of Art. 170 of the CPC, such arrest of property is considered canceled, and all restrictions on such property should be immediately removed so that the owner does not experience unreasonable interference with the right of ownership [12; 13]";

– "at the time of consideration of the petition, the preliminary arrest imposed by the decision of the Director of NABU was canceled, in the understanding of the CPC, which does not require additional cancellation of the arrest by the decision of the investigating judge. At the same time, the CPC does not

impose on the person who made the decision on the preliminary arrest of property in the order of Part 9 of Art. 170 of the CPC, the obligation to take actions aimed at registering information on the termination of encumbrance, since such a procedural decision has a clear, legally determined period of validity. At the same time, the fact that the state registrar established the validity of public encumbrance may indicate that the registrars went beyond the requirements of the decision on the preliminary arrest of property. The investigating judge draws attention that in accordance with the provisions of the "Procedure for Maintaining the State Register of Encumbrances of Movable Property," approved by CMU Resolution No. 05.07.2004 of 830, entering information into the relevant register on the occurrence, change, termination of encumbrances, is carried out exclusively by registrars/state registrars, whose inaction regarding the failure to provide information on the termination of encumbrances, imposed on the basis of the decision of the Director of NABU in the order of Part 9 of Art. 170 of the CPC of Ukraine, due to the lack of legislation regulating such relations, may be the subject of an administrative claim (part 4 of article 6 of the Code of Administrative Offenses of Ukraine) [14; 15; 16; 17]".

Interestingly, some representatives choose another way to protect the property rights of the legal entity and apply on the basis of paragraph 1 of Part 1 of Art. 303 of the Code of Criminal Procedure with a complaint to the investigating judge about the inaction of the detective, which consists in the non-violation, defined by the Law of Ukraine "On Securing Creditors' Claims and Registration of Encumbrances," of procedural actions to withdraw data/information on encumbrances/arrests/prohibitions from state registers [18]. At the same time, inaction, which consists in the non-implementation of other procedural actions that the detective is obliged to perform within the period determined by the CPC, implies the presence of three mandatory signs: 1) the detective is endowed with the obligation to perform a certain procedural action provided for by the CPC; 2) such procedural action must be committed within the period determined by the CPC; 3) the corresponding procedural action was not committed by the detective within the prescribed period [19]. At the same time, the CPC does not define the concept of "procedural action." However, from the system analysis of the provisions of the CPC, it is seen that the procedural action refers to the action, the commission of which belongs to the procedural powers of the investigator (detective), investigator, prosecutor, its implementation is provided by various means on the grounds and in the manner prescribed by the criminal procedural legislation, and which entails legal consequences in the form of the emergence, change or termination of criminal procedural relations (rights, duties, etc.) within the framework of a particular criminal proceeding. Thus, the above norm allows for complaint to the investigating judge not about any inaction, but only in relation to the specific obligations defined by the criminal procedural legislation, for the fulfillment of which a specific period is established. At the same time, the CPC does not impose on the person who made the decision on the preliminary arrest of property in the order of Part 9 of Art. 170 of the CPC of Ukraine, in particular, the NABU detective (BESU), the obligation to take actions aimed at registering information on the termination of public encumbrance of property. On the other hand, Part 9 of Article 170 of the CPC of Ukraine specifies both the duration of such a property seizure decision, namely up to 48 hours, and the cases when such a seizure is considered revoked. Consequently, there are no circumstances that would indicate the failure of the NABU detective (BESU) to perform certain procedural actions within the period established by the CPC. Therefore, there are no grounds for concluding that the detective allowed inaction, within the meaning of paragraph 1 of Part 1 of Art. 303 of the Code of Criminal Procedure and the investigative judges should refuse to satisfy such complaints of representatives of the Legal Entity.

It seems that it is necessary to support the position of those investigating judges who satisfy the petition of the representatives of the LE to cancel the seizure of property, imposed in the order of Part 9 of Art. 170 of the CPC, since the very fact of the presence in the State Register of encumbrances of movable property of an encumbrance record in the form of seizure of movable property of the legal entity in the circumstances, when there are no legal grounds for this, unreasonably and unreasonably violates its right to free possession and disposal of its property. The only way to protect the right of the legal entity to peaceful possession and disposal of property in such a situation is to appeal to the investigating judge with a petition to cancel the seizure of property.

Separately, it should be noted that after the introduction of martial law in Ukraine, cases of commanders of military units within the structure of the Armed Forces of Ukraine (hereinafter – AFU) requesting assistance in materially supporting their needs have become widespread, through the gratuitous transfer of seized property within the framework of criminal proceedings (tobacco products, vehicles, cash, etc.) to the units of the military unit. In turn, investigators inform representatives of the defense about this fact, which prompts the latter to apply for cancellation of the seizure of property in criminal proceedings to the investigating judge in accordance with Art. 174 of the CPC for further transfer to the needs of the Armed Forces.

In addition, representatives of the prosecution also file a similar petition to the investigating judge, which is not directly provided for by Article 174 of the CPC. At the same time, the investigating judges consider and satisfy these petitions, quite rightly referring to the following arguments [20]: "In cases where the provisions of the CPC do not regulate or ambiguously regulate the issues of criminal proceedings, the court, in accordance with part 6 of article 9 of the CPC, applies the general principles of criminal proceedings provided for in part 1 of article 7 of the CPC. Thus, in accordance with Art. 22 of the CPC, the parties to criminal proceedings have equal rights to collect and submit to the court things, documents, other evidence, petitions, complaints, as well as to exercise other procedural rights provided for by the CPC. Article 129 of the Constitution of Ukraine defines the basic principles of legal proceedings, among which are the equality of all participants in the trial before the law and the court, the adversarial nature of the parties and the freedom to provide the court with their evidence and to prove their persuasiveness to the court. The parties to the criminal proceedings are free to exercise their rights within the limits and in the manner provided by the CPC (Part 1 of Article 26 of the CPC). The investigating judge, the court in criminal proceedings resolve only those issues that are submitted for their consideration by the parties and are within their jurisdiction under the CPC (Part 3 of Article 26 of the CPC of Ukraine).

Therefore, based on the system analysis of the above provisions, the representatives of the prosecution have equal rights with the representatives of the defense to appeal to the court with a petition to cancel the seizure of property in accordance with Art. 174 of the CPC for the transfer of property to the needs of the Armed Forces, and the investigating judge, the court must decide the corresponding petition in accordance with the procedure established by the CPC.

As for the justification of the grounds for appealing to the investigating judge with a petition to cancel the seizure of property in order to transfer it to the needs of the Armed Forces of Ukraine, it differs, depending on the purpose for which the seizure of property was imposed. So, if the purpose of this type of MECP was the need to ensure confiscation or special confiscation, then the following provisions are cited as justification [21; 22]:

– Article 59 of the Criminal Code of Ukraine provides that the punishment in the form of confiscation of property is the forced free seizure of all or part of the property that is

the property of the convicted person into state ownership. At this stage the transfer of the pre-trial investigation of funds for the needs of the Armed Forces of Ukraine to ensure and equip military units that protect national security embodies the ultimate goal of potential punishment – the transfer of property (funds) into the ownership of military formations financed by the state;

– in accordance with Parts 1, 2 of Article 319 of the Civil Code of Ukraine (hereinafter – the Civil Code), the owner owns, uses, disposes of his property at his own discretion; has the right to perform any actions in relation to its property that are not contrary to the law; in the exercise of their rights and duties, the owner must adhere to the moral principles of society (part 1, 2 of article 319 of the Civil Code);

– the suspect waived in writing the right provided by Part 6 of Art. 17 of the Law of Ukraine "On the Defense of Ukraine," to full compensation for the value of the property seized under conditions of martial law, if the court does not issue a guilty verdict and confiscation of property is not applied as a result of the criminal proceedings;

– the use of all property resources, the list of which includes, in particular, property arrested in criminal proceedings, is one of the measures to prevent the threat, repel armed aggression and ensure national security, eliminate the threat of danger to the state independence of Ukraine, its territorial integrity;

– the goal pursued by the parties – the provision of assistance to the Armed Forces of Ukraine to establish national security is fully justified and proportional, and therefore determines the need to satisfy the petition for the abolition of the arrest imposed on property seized during criminal proceedings.

If the purpose of the seizure of property was to ensure the safety of physical evidence, then the following provisions are indicated as justification [21]:... "the material evidence seized during the search was examined and described in detail in the inspection protocol, does not contain traces of a criminal offense, so the lack of the possibility of their inspection at the stage of the trial will not affect the effectiveness of criminal proceedings. In such circumstances, the protocol of examination of material evidence reflects the basic information about them and may become the subject of direct research and evaluation by the court during the adversarial litigation, with the participation of the parties to the criminal proceedings, regardless of the possibility of studying the material evidence itself.... The prosecutor's position regarding the lack of necessity for a direct examination of the funds at the stage of court proceedings is a manifestation of their independence and the implementation of the duty of proof assigned to them in the manner of their choosing"

In both of the above cases, investigating judges agree with the above-mentioned justification, satisfy the petition for cancellation of the seizure of property and allow its transfer to the needs of the Armed Forces of Ukraine [23]. It seems that this position of the investigating judges fully complies with the requirements of the law, since:

– in accordance with Article 1 of Protocol No. 1 to the Convention, every natural or legal person has the right to own his property. No one shall be deprived of his property except in the public interest and on the conditions prescribed by law and the general principles of international law. The above principle is enshrined in Art. 41 of the Constitution of Ukraine, which states that the right of ownership is inviolable, everyone has the right to own, use and dispose of his property, no one can be unlawfully deprived of the right of ownership. In the decision "Smirnov v. Russia" of 07.06.2007, the ECHR noted that the most important requirement of Article 2 of Protocol No. 1 to the Convention is that any act of interference by a state body in the exercise of the right to unhindered use of its property must be legal [24]. In addition, Article 19 of the Constitution of Ukraine stipulates that public authorities and their officials are obliged to act only on the basis, within the limits of authority and in the manner provided for by the Constitution and laws of Ukraine;

– By the Decree of the President of Ukraine No. 64/20211 of 24.02.2022 "On the introduction of martial law in Ukraine" in connection with the military aggression of the russian federation against Ukraine, based on the proposal of the National Security and Defense Council of Ukraine, in accordance with paragraph 20 of Part 1 of Art. 106 of the Constitution of Ukraine, The Law of Ukraine "On the Legal Regime of Martial Law" it was decided to introduce martial law in Ukraine starting from 05:30 AM of 24.02.2022 for a period of 30 days. By Law of Ukraine No. 2102-IX dated 24.02.2022, 'On the Approval of the Decree of the President of Ukraine "On the Introduction of Martial Law in Ukraine,"' in accordance with paragraph 31 of Part 1 of Article 85 of the Constitution of Ukraine and Article 5 of the Law of Ukraine 'On the Legal Regime of Martial Law,' the Verkhovna Rada of Ukraine approved the above decree. The indicated decree has been extended and remains in effect. Article 2 of the aforementioned Decree of the President stipulates that the military command, together with the Ministry of Internal Affairs of Ukraine, other executive authorities, and local government bodies, is to implement and carry out the measures and powers provided for by the Law of Ukraine 'On the Legal Regime of Martial Law,' necessary to ensure the defense of Ukraine, the protection of the safety of the population, and the interests of the state [25];

– according to paragraph 4 of Article 1 of the Law of Ukraine 'On the Legal Regime of Martial Law,' in Ukraine or in its separate areas where martial law is imposed, military command, together with military administrations (in case of their formation), may introduce and implement, within the framework of temporary restrictions on constitutional rights and freedoms of individuals and citizens, as well as the rights and legitimate interests of legal entities, the measures provided for by the Decree of the President of Ukraine on the introduction of martial law, including the following measure under the legal regime of martial law: the forced acquisition of property that is privately or communally owned, the confiscation of property belonging to state enterprises and state economic associations for the needs of the state under the legal regime of martial law in accordance with the law, and the issuance of corresponding documents of the established form [26];

– in accordance with Part 6 of Art. 17 of the Law of Ukraine "On the Defense of Ukraine," under conditions of martial law, the forced seizure of private property and the alienation of objects of private ownership of citizens are permitted by law, with subsequent full compensation for their value in the manner and within the time frames established by the Cabinet of Ministers of Ukraine [27];

– part 1 of Article 4 of the Law of Ukraine 'On the Transfer, Forced Alienation, or Seizure of Property under the Legal Regime of Martial Law or Emergency Situations' stipulates that the forced alienation or seizure of property in connection with the introduction and implementation of measures under the legal regime of martial law is carried out by the decision of the military command, agreed with the Council of Ministers of the Autonomous Republic of Crimea, the regional, district, Kyiv, or Sevastopol city state administrations, or the executive body of the relevant local council. At the same time, according to Part 2 of this article, in areas where hostilities are taking place, the forced alienation or seizure of property is carried out by the decision of the military command without coordination with the bodies mentioned in Part 1 of this article [28].

REFERENCES

1. Постанова Верховного Суду України від 14.09.2017 р. у справі № 5-162кс(15)17). URL: https://reyestr.court.gov.ua/Review/69073689
2. Постанова Верховного Суду України від 03.03.2016 р. у справі № 5-347кс15. URL: https://reyestr.court.gov.ua/Review/56939749
3. Інформаційний лист ВССУ від 05.04.2013 р. № 223-558/0/4-13 «Про деякі питання здійснення слідчим суддею суду першої інстанції судового контролю за дотриманням прав, свобод та інтересів осіб під час застосування заходів забезпечення кримінального провадження». URL: https://zakon.rada.gov.ua/laws/show/v0558740-13#Text
4. Рішення Європейського суду з прав людини у справі «Raimondo v. Itali» від 22.02.1994 р. URL: https://hudoc.echr.coe.int.ukr
5. Рішення Європейського суду з прав людини у справі у справі «Vendittelli v. Italy» від 18.07.1994 р. URL: https://hudoc.echr.coe.int.ukr
6. Постанова Об'єднаної палати Касаційного кримінального суду Верховного Суду від 19.02.2019 року у справі № 569/17036/118. URL: https://reyestr.court.gov.ua/Review/79957677
7. Постанова Об'єднаної палати Касаційного кримінального суду Верховного Суду від 20.05.2024 року у справі N 712/191/23 (провадження N 51-3208 кмо 23). URL: https://reyestr.court.gov.ua/Review/119535382
8. Ухвала слідчого судді Вищого антикорупційного суду від 22.01.2024 року у справі № 991/11006/23. URL: https://reyestr.court.gov.ua/Review/116545442
9. Ухвала слідчого судді Вищого антикорупційного суду від 12.01.2024 року у справі № 991/11060/23. URL: https://reyestr.court.gov.ua/Review/116276972
10. Ухвала слідчого судді Вищого антикорупційного суду від 15.07.2024 року у справі № 991/5716/24. URL: https://reyestr.court.gov.ua/Review/120675673
11. Ухвала слідчого судді Вищого антикорупційного суду від 28.05.2024 року у справі №991/4435/24. URL: https://reyestr.court.gov.ua/Review/119494747
12. Ухвала слідчого судді Вищого антикорупційного суду від 6.12.2023 року у справі № 991/10092/23. URL: https://reyestr.court.gov.ua/Review/115610800
13. Ухвала слідчого судді Вищого антикорупційного суду від 17.06.2024 року у справі № 991/5167/24. URL: https://reyestr.court.gov.ua/Review/119874056
14. Ухвала слідчого судді Вищого антикорупційного суду від 19.08.2024 року у справі № 991/7619/24. URL: https://reyestr.court.gov.ua/Review/121223174
15. Ухвала слідчого судді Вищого антикорупційного суду від 16.04.2024 року у справі 991/2171/24. URL: https://reyestr.court.gov.ua/Review/118559426
16. Ухвала слідчого судді Вищого антикорупційного суду від 18.04.2024 року у справі 991/2986/24. URL: https://reyestr.court.gov.ua/Review/118634441
17. Ухвала слідчого судді Вищого антикорупційного суду від 18.04.2024 у справі № 991/2987/24. URL: https://reyestr.court.gov.ua/Review/118634442
18. Ухвала слідчого судді Вищого антикорупційного суду від 13.03.2024 року у справі № 991/1220/24. URL: https://reyestr.court.gov.ua/Review/117792671
19. Узагальнення судової практики Вищого спеціалізованого суду України з розгляду цивільних і кримінальних справ «Про практику розгляду скарг на рішення, дії чи бездіяльність органів досудового розслідування чи прокурора під час досудового розслідування» (лист від 12.01.2017 р. № 9-49/0/4-17). URL: https://protocol.ua/ua/vssu_uzagalnennya_pro_praktiku_rozglyadu_skarg_na_rishennya_dii_chi_bezdiyalnist_organiv_dosudovogo_rozsliduvannya/
20. Ухвала слідчого судді Вищого антикорупційного суду від 8.06.2022 року у справі № 991/1453/21. URL: https://reyestr.court.gov.ua/Review/104736858
21. Ухвала слідчого судді Вищого антикорупційного суду від 9.07.2024 року у справі № 991/5728/24. URL: https://reyestr.court.gov.ua/Review/120371717
22. Ухвала слідчого судді Вищого антикорупційного суду від 26.05.2022 року справі №. 344/2364/19. URL: https://reyestr.court.gov.ua/Review/104500235
23. Ухвала слідчого судді Личаківського районного суду м. Львова від 12.01.2024 року у справі № 463/6382/23. URL: https://reyestr.court.gov.ua/Review/116304369
24. Рішення Європейського суду з прав людини у справі «Смірнов проти Росії» від 07.06.2007. URL: https://zakon.rada.gov.ua/laws/show/980_168#Text
25. Про введення воєнного стану в Україні : Указ Президента України від 24.02.2022 № 64/2022. URL: https://zakon.rada.gov.ua/laws/show/64/2022#Text
26. Про правовий режим воєнного стану : Закон України від 12.05.2015 № 389-VIII (зі змінами та доповненнями). URL: https://zakon.rada.gov.ua/laws/show/389-19#Text
27. Про оборону України : Закон України від 06.12.1991 № 1932-XII (зі змінами та доповненнями). *Відомості Верховної Ради України* (ВВР), 1992, № 9, ст. 106. URL: https://zakon.rada.gov.ua/laws/show/1932-12#Text
28. Про передачу, примусове відчуження або вилучення майна в умовах правового режиму воєнного чи надзвичайного стану : Закон України від 17.05.2012 № 4765-VI (зі змінами та доповненнями). *Відомості Верховної Ради* (ВВР), 2013, № 15, ст. 99. URL: https://zakon.rada.gov.ua/laws/show/4765-17#Text