

M.G. Albekova^{*1}, P. Gilmour²

¹Karaganda Buketov University, Karaganda, Kazakhstan;

²University of Portsmouth, United Kingdom
(E-mail: albekova_m@mail.ru)

Capital withdrawal from Kazakhstan: Challenges and prospects of the recovery mechanism for stolen assets

The purpose of this research article is to study the problem of capital withdrawal from Kazakhstan and the importance of returning stolen assets in protecting the property rights of citizens, organizations and the state. The article examines the multi-step process of returning criminal money, highlighting the complexities and difficulties such as identifying assets, identifying their beneficiaries and returning them to the country of origin. The article reviews the legal framework of international and national legislation on the return of stolen assets, as well as the positive experience of Kazakhstan and other countries in this direction. The focus is on the new law of the Republic of Kazakhstan of July 12, 2023, which focuses on the return of illegally acquired assets to the state. In addition, the article provides an overview of the challenges and prospects in addressing this pressing problem and emphasizes the need for effective measures to restore social justice in society. This paper discusses in detail the challenges countries face in recovering stolen assets in the context of existing differences in legal systems, increasing financial flows, and offshore zones.

Keywords: asset recovery, illicit proceeds, stolen funds, beneficiaries, offshore, international co-operation.

Introduction

The return of stolen assets from abroad is an important part of the mechanism for protecting the property rights of citizens, organizations and the state. The volume of withdrawn funds is over 300 billion tenge, of which only 20 % of the stolen funds have been recovered. For comparison: at the end of 2018, the National Fund accumulated 47.7 trillion tenge [1].

The problem of withdrawing money from Kazakhstan abroad is not new and has a long history. According to the Tax Justice Network, about 140 to 160 billion dollars have been withdrawn from Kazakhstan to foreign offshore companies over the last 25 years. In 2021, the assets invested abroad by Kazakh citizens alone were estimated at \$45.7 billion. Some experts believe that the amount of funds withdrawn illegally could be much higher [2].

Criminal money recovery is a multi-stage process of introducing criminal assets into the legitimate economic cycle of the state, carried out by state authorities with the aim of restoring social justice in society. The process is lengthy and arduous and is compounded by the problems of identifying assets and their beneficiaries, locating and repatriating them to their country of origin, and international cooperation with foreign authorities.

* Corresponding author. E-mail: albekova_m@mail.ru

Methods and Materials

When preparing the article, general scientific and special scientific methods of understanding social and legal reality, such as analytical, formal-logical, comparative legal and system-structural, were used. The theoretical basis was the works of famous Kazakh and foreign scientists who made a significant contribution to the study of the problems of the return of criminal assets; A literature review was conducted on the topic of stolen funds and methods of their return. Materials from criminal cases and court decisions from the Paragraph system's court database were examined.

Results and Discussion

One of the first normative instruments for asset recovery with basic principles is the UN Convention against Corruption (2003). The Convention is considered a practical document containing basic provisions for effective action and international cooperation in this area. The Convention defines the concept of property and specifies that "Property" shall mean assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to or interest in such assets. The Convention also forms the concept of proceeds of crime and defines them as any property derived from or obtained, directly or indirectly, through the commission of an offence [3].

In addition to the UN Convention against Corruption, the UN Convention against Transnational Organized Crime is an important normative instrument aimed at more effectively preventing and combating transnational organized crime, including the return of assets obtained through crime [4].

The main international organizations engaged in the search for stolen assets are Interpol and its divisions (Europol, Asiapol, Ameripol); the Egmont Group; the World Customs Organization; the Camden Asset Repatriation Interagency Network (CARIN); the Arab Network for Integration and Anti-Corruption; the European Judicial Network; and many others.

There are also international communities of prosecutors and investigators who work together and assist in asset recovery. These networks include CARIN in Europe, ARIN-AP in Asia and Oceania, and ARIN-WCA in West and Central Asia. Kazakhstan joined these networks with the support of the UN Office on Drugs and Crime. In April 2023, a cooperation agreement was signed in Switzerland between the Prosecutor General's Office of Kazakhstan and the Basel Institute of Governance. The International Center for Asset Recovery (ICAR) is part of it and is considered one of the largest in the world.

In addition to the above-mentioned organizations supporting the recovery of criminal assets, Kazakhstan cooperates with global international organizations such as StAR (Stolen Asset Recovery), the World Bank and the United Nations [5; 10].

The Republic of Kazakhstan is committed to active cooperation in crime prevention by joining international treaties and concluding bilateral agreements with neighboring and non-CIS countries. The country is also committed to assisting in the identification, search and extradition of persons who commit dangerous crimes on the territory of these countries.

The principle of transparency should be adhered to in asset recovery, as this principle shows the effectiveness of the system and gives the Kazakh people confidence in the positive side of this matter. The principle of transparency refers to the openness of information about the number and financial size of ongoing cases, as well as the accountability of law enforcement authorities, which contributes to citizens' trust in the process. However, the capital recovery process is lengthy and labor-intensive, as money must be recovered from other jurisdictions, and this is complicated by the various procedural steps, the willingness to cooperate and the legal status of the perpetrators.

According to the Kazakh Prosecutor General's Office, the government has recovered up to KZT 760 billion (\$1.7 billion) in embezzled assets as of May 2023. Of this amount, around \$575 million was repaid to Kazakhstan abroad. More than 100 requests for legal assistance were forwarded to other states. Property valued at over \$100 million was seized [6].

One of the most high-profile cases of asset return to Kazakhstan was the return in September 2020 of more than 390 million tenge from Switzerland, which were withdrawn by members of organized crime abroad, in the "Khorgos case". These assets belonged to one of the suspects in this case, Magnus Abdraliev, who had been on an international wanted list since 2012. The funds of the above-mentioned defendant in this case in the amount of 762,000 USD and 915,000 KZT were returned to the state revenue at the request of the Prosecutor's Office of Kazakhstan in April 2018 [7].

One of Kazakhstan's first positive experiences with asset recovery was the recovery of \$84 million in the “Kazakhgate” case in 2008 [8; 320]. According to an agreement between the governments of Kazakhstan, the United States and Switzerland, the funds received were transferred to the Special case transferred founded the “Bota” foundation and donated it to charitable purposes.

When assessing international experience in recovering stolen assets, there are some countries that have the most effective practices. These countries include Switzerland, the United States of America and the United Kingdom.

Most legal acts on the procedure for recovering stolen assets are provided for in current Swiss legislation. One of these laws is the law on the return of stolen property through political influence, passed in 2011. The law provides for an out-of-court procedure for the return of assets to the affected state without criminal proceedings and without a court judgment.

In the United States of America, the Bank Records and International Transactions Reporting Act is the primary regulatory framework for unlawful asset withdrawals, establishing reporting requirements for individuals, banks and financial institutions [9; 66].

In 2018, the UK passed the Criminal Finances Act, which gives law enforcement authorities the power to investigate if they suspect assets over £50,000 have been criminally acquired by foreigners. In the United Kingdom, tools such as disclosure orders by the defendant or a third party, seizure of the defendant's passport, freezing of third party property and searches are used to enable a successful process to return assets to the state [10].

In the Republic of Kazakhstan, issues of asset recovery are regulated by the Law of July 12, 2023 “On the return of illegally acquired assets to the state”. This law provides for the application of a mechanism for the return of assets, civil confiscation, assets acquired illegally and transferred abroad.

The law was developed on the basis of a thorough study and implementation of all modern internationally recognized standards and practices in the field of combating corruption and money laundering of criminally acquired property, as well as on the basis of an analysis of Kazakhstan's practice experience in returning illegally acquired property, including from abroad, and related cooperation with international organizations, courts and competent authorities of foreign states.

According to the new law, the return of illegal assets can be voluntary or compulsory. In the event of compulsory enforcement proceedings, court acts of the Republic of Kazakhstan or foreign states as well as decisions of competent authorities of foreign states are the basis [11].

As part of the monitoring, the authorized body must determine the circle of persons involved in the illegal extraction of assets, as well as their associated persons, the total volume of these assets, the reasons and conditions for the acquisition of the assets, the mechanism of extraction of assets abroad and other information.

The law defines the scope of the subjects that fall within the scope of this law. This includes persons who are or have been public officials, officials of public bodies and bodies in the quasi-public sector. In addition to the above-mentioned persons, the law also applies to persons associated with these entities, such as close relatives, spouse's relatives and others. For the law to apply to these individuals, they must have total assets exceeding the threshold of MCI 13 million (KZT 44 billion 850 million or approximately USD 100 million) set in the law.

An authorized body, the Asset Recovery Committee of the Attorney General's Office, was set up to carry out asset recovery. A special state fund will also be created, which will be a cash control account for the assets received for the benefit of the state. These funds will finance social and economic projects aimed at improving the well-being of the people of Kazakhstan.

After analyzing all the information, the authorized body will make proposals to the Asset Recovery Commission in the event that there are legitimate reasons for the lawful acquisition of assets regarding the need to include these companies and their affiliates in the register. In addition, the Commission takes a final decision on the inclusion of persons in the relevant register and the measures to be applied for asset recovery and prepares recommendations. If a person cannot prove the legitimacy of the acquired assets, the assets are recognized as assets of uncertain origin.

By taking all necessary measures to legislatively regulate the issue of property recovery, states, including the Republic of Kazakhstan, face a number of problems, such as: peculiarities of foreign legislation, offshore jurisdictions, underdeveloped international cooperation, closed banking systems and evolving communications technologies. All of these factors contribute to individuals easily concealing illegally acquired assets.

In Kazakhstan, before recovering stolen assets taken abroad, a preliminary court decision on the guilt of a specific person in a criminal case must be obtained. During the collection of evidence, a significant number of documents are produced, while the defendant manages to evade prosecution and hide funds. An example of such a situation is the criminal case against the former head of the Atyrau region B. Ryskaliev in 2014 in connection with corruption. In the course of the investigation, in strict compliance with the established rules of procedure, while the members of the organized criminal group he created were being interrogated, the former Akim, with the help of his “cashiers”, transferred a stolen half a billion dollars abroad and fled to England. As a result, 22 people were convicted, but it was not possible to return the stolen funds [12].

According to Professor Suleimenov M.K. problems with the return of illegally withdrawn assets are not of a legislative or organizational nature, but of a systemic nature and are more related to the problems of insufficient experience and qualifications of persons carrying out law enforcement actions in the execution of court decisions or in the event of non-performance or improper performance of their official and Official duties [13].

Other challenges in asset recovery include the lack of necessary asset recovery tools, rapid responses and asset freezing mechanisms, high levels of banking secrecy, procedural difficulties such as mandatory convictions for the confiscation of such assets, and many others. In order to improve the methods of searching and seizing stolen assets, it is necessary to conclude agreements with the relevant authorities of foreign states on the use of information from their financial services. In particular, the activities of exchanging tax information with foreign countries should be intensified within the framework of the Common Reporting Standard (CRS), and the process of recognizing the national financial surveillance system of Kazakhstan at the international level should be accelerated by joining the Republic of Kazakhstan into the structure of the FATF (Financial Action Task Force) integrated.

Conclusions

The process of returning illegally transferred assets abroad is a complex, long-term and multidimensional task, which, of course, may require the development of additional measures to promote the return of illegally transferred funds and associated assets by the persons involved in crimes leading to illicit transfer of assets abroad.

As practice shows, states face a number of difficulties in recovering stolen assets, arising from factors such as the lack of uniform legal bases for the return of stolen assets from abroad in the laws of different countries; the need to recognize unlawful acts as criminal offenses both under national law and under the law of the foreign state; increased requirements for the collection and enforcement of evidence of criminal possession of assets; lengthy procedures and different deadlines for claiming liability; Bank secrecy, limitation of liability of beneficiaries for the company's actions and use of offshore programs [14].

The successful recovery of these assets requires close cooperation from all stakeholders, both public and private. This requires careful attention, feedback and information sharing between government and the regulated sector, clarity on the role of each stakeholder and collaboration with international partners.

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М.Г. Альбекова, П. Гилмор

Қазақстаннан капиталды шығару: ұрланған активтерді қайтару тетігінің сын-қатерлері мен перспективалары

Мақаланың мақсаты Қазақстаннан капиталды шығару мәселелерін және ұрланған активтерді азаматтардың, ұйымдар мен мемлекеттің мүлкітік құқықтарын қорғау үшін қайтарудың маңыздылығын зерттеу. Авторлар қылмыстық ақшаны қайтарудың көп сатылы процесін қарастырған, яғни активтерді, олардың бенефициарларын анықтау және шыққан еліне оралудағы қиындықтар мен тәуекелдерді айқындаған. Ұрланған активтерді қайтару мәселелері бойынша халықаралық және ұлттық заңнаманың нормативтік-құқықтық базасына шолу, сондай-ақ Қазақстан мен шет елдердің осы бағыттағы оң тәжірибесі ұсынылған. Заңсыз сатып алынған активтерді мемлекетке қайтаруға бағдарланған 2023 жылғы 12 шілдедегі Қазақстан Республикасының жаңа Заңына назар аударылған. Сонымен қатар, мақалада қоғамдағы әлеуметтік әділеттілікті қалпына келтірудің тиімді шараларының қажеттілігін көрсете отырып, осы өзекті мәселені шешудегі қиындықтар мен перспективаларға шолу жасалған. Ұрланған активтерді құқықтық жүйелердегі айырмашылықтар, ұлғайған қаржы ағындары және оффшорлық аймақтар жағдайында қайтару кезінде елдердің алдында тұрған мәселелер мұқият қарастырылған.

Клт сөздер: активтерді қайтару, заңсыз табыс, ұрланған қаражат, бенефициарлар, оффшорлар, халықаралық ынтымақтастық.

М.Г. Альбекова, П. Гилмор

Вывод капитала из Казахстана: вызовы и перспективы механизма возврата похищенных активов

Целью статьи является исследование проблемы вывода капитала из Казахстана и определение важности возврата похищенных активов для защиты имущественных прав граждан, организаций и государства. Авторами рассмотрен многоступенчатый процесс возврата преступных денег, выявлены сложности и трудности, такие как идентификация активов, установление их бенефициаров и возвращение в страну происхождения. Представлен обзор нормативно-правовой базы международного и национального законодательства по вопросам возврата похищенных активов, а также положительный опыт Казахстана и зарубежных стран в данном направлении. Акцентируется внимание на новый Закон Республики Казахстан от 12 июля 2023 года, ориентированный на возврат государству незаконно приобретенных активов. Кроме того, статья представляет собой обзор вызовов и перспектив в решении данной актуальной проблемы, подчеркивая необходимость эффективных мер для восстановления социальной справедливости в обществе. Предметно рассмотрены проблемы, с которыми сталкиваются страны при возврате похищенных активов в условиях существующих различий в правовых системах, увеличивающихся финансовых потоков и оффшорных зон.

Ключевые слова: возврат активов, незаконный доход, похищенные средства, бенефициары, офшоры, международное сотрудничество.

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Information about the authors

Albekova M.G. — Master of jurisprudence, doctoral student, Karaganda Buketov University, Karaganda, Kazakhstan;

Gilmour P. — PhD, Senior Lecturer in Economic Crime, Centre for Cybercrime and Economic Crime, University of Portsmouth, Portsmouth, United Kingdom, e-mail: paul.gilmour@port.ac.uk.