

The decision of the Constitutional Court on decriminalization of illicit enrichment: analysis

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On February 26, the Constitutional Court found unconstitutional the article 368-2 of the Criminal Code of Ukraine, which provided for criminal liability for illicit enrichment.

The decision came in force on the day it was adopted. Therefore, all legal consequences of the decision are already enacted.

The decision of the Court fully decriminalized the article on “illicit enrichment”. Judges not only recognized the wording of the crime in the certain version unconstitutional but completely removed the very guilt for such action. This means that any new wording based on the principles of the UN Convention Against Corruption of “illicit enrichment” will now be unconstitutional and could easily be appealed in the court.

So far, according to current legislation, the Court decision is unchangeable and unappealable. It will have a reverse effect, meaning that all existing 65 criminal cases into illicit enrichment will be closed, and their subjects will be left unpunished.

Moreover, the constitutional petition by 59 MPs stated about the unconstitutionality of the disposition of article 368-2 of the Criminal Code of Ukraine in the wording of Laws No. 1698-VII as of October 14, 2014 and No. 198-VIII as of February 02, 2015. However, the resolution part of the Court decision states that the article 368-2 of the Criminal Code is declared unconstitutional. There are no references in the decision to laws, by which the wording was implemented in the Criminal Code.

Therefore, the Court decision is not entirely clear about what version of this article was cancelled. This fact again proves the lack of professionalism and the particular bias of the Court. Among the grounds to abolish the article on illicit enrichment, the Court stated “violation of the requirement of legal certainty” – however, this very Court decision itself lacks certainty.

The Court ruled the whole article 368-2 of the Criminal Court to be unconstitutional. Motivating its decision, the Court gave three arguments:

- violation of the requirement of legal certainty (part 1 article 8 of the Constitution)
- violation of the presumption of innocence (article 62 of the Constitution)
- violation of provisions on the inadmissibility of bringing the person to responsibility for the refusal to testify against himself and his relatives (article 63 of the Constitution).

All these arguments could be easily refuted.

As to the **legal certainty**, the Court concluded that the article on “illicit enrichment” does not meet requirements of clarity, accuracy, and unambiguousness. However, the Court did not elaborate which

exactly part/words of the provision in question are open to ambiguity.

As to **the presumption of innocence and the refusal to testify against themselves**, the Court stated that specifics of wording “legitimacy of grounds of acquisition that is not proved by evidence” allegedly impose a duty to collect evidence exclusively on the defence side.

According to article 62, 63 of the Constitution of Ukraine and article 17 of the Criminal Procedure Code, nobody is obliged to prove their innocence. A person either can provide evidence of their innocence voluntarily or may decide not to do this.

The norms of the Criminal Procedure Code clearly state that the obligation to prove guilt lies solely on the prosecution party and this does not have any exceptions for the article “illicit enrichment”. Therefore the presumption of innocence is not violated. Moreover, the prosecution party is obliged to investigate circumstances which may acquit the accused person. The accused person has the right, and not the obligation, to provide the necessary evidence to the court in order to refute the charges.

Separate opinion from the Court judge Serhiy Holovatyι also emphasizes that criminal responsibility for illicit enrichment is possible only when the investigation proves that a significant increase of assets is not explained with legal income.

Moreover, the stance of the Court may be interpreted in such a way that according to any article of the Criminal Code of Ukraine any possibility for the accused person to prove his innocence will be interpreted as a violation of the presumption of innocence.

The head of the SAPO Nazar Kholodnytsky had informed (before the ruling of the Constitutional Court) that they had to close 37 cases on illicit enrichment due to the lack of evidence, meaning that the presumption of innocence is working on practice

With regards to the **refusal to testify against themselves**, article 368-2 of the Criminal Code does not include any indication to the obligation of the accused to testify. The right to give explanations is purely the subject of regulation by the criminal procedure legislation.