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ОКРЕМІ ПРОБЛЕМИ РОЗУМІННЯ ПРЕДМЕТА ЗЛОЧИНІВ ПРОТИ ВЛАСНОСТІ

Анотація. Проведено аналіз доктринальних підходів учених щодо розуміння правової природи безготівкових грошей. Визначено, що безготівкові гроші мають змішану, речово-зобов'язальну юридичну природу. Гроші загалом мають багату історію становлення, в процесі якої вони мали різні форми, а безготівкові гроші з'явилися порівняно недавно, зробивши такий же переворот, як і поява паперових грошей, які швидко витіснили монети. Бурхливий розвиток комп'ютерної техніки свідчить про те, що безготівкові гроші незабаром зовсім можуть замінити готівку. При цьому єдиного підходу до розуміння поняття «безготівкові гроші» не існує, питання, пов'язані з незаконним заволодінням безготівкових грошей, не отримали однозначного рішення у кримінально-правовій науці.

Нема єдиного розуміння поняття «безготівкові гроші», а кримінально-правова оцінка незаконного привласнення безготівкових грошей, зокрема, належить до питань, які не мають чіткого вирішення у теорії та мають суперечливе вирішення на практиці. Об'єктом статті є критичний аналіз досягнень попередніх дослідників і, отже, продовження розробки та узагальнення доктринальних підходів до розуміння правової природи безготівкових грошей, уточнення їх особливостей як предмета правопорушень проти власності. І фінансові експерти, і юристи намагаються визначити сутність безготівкових грошей. Проведений аналіз наукових праць дозволив з'ясувати, що неоднозначність правової природи безготівкових грошей не може не ускладнити вирішення питань щодо характеру незаконного їх використання. Різні точки зору стосовно цього питання викладені в літературі з кримінальної юстиції.

Деякі експерти вважають, що у випадку незаконної передачі безготівкових ресурсів шкода завдається встановленню зв'язків між собою, і тому застосування кримінально-правових норм, що стосуються відповідальності за правопорушення, пов'язані з майном, видається нерозумним. Існує проблема визначення загального об'єкта правопорушень, відповідальність за які передбачено у Розділі VI «Злочини проти власності» Спеціальної частини Кримінального кодексу України. Річ у тім, що діапазон відносин, які фактично захищені положеннями кримінального права, поєднані в цьому розділі, не обмежуються відносинами власності. Наукова література наводить чинники, які розкривають характер реального права на безготівкові гроші: якщо ми розглянемо певні зобов'язання, пов'язані з рухом коштів, то зрозуміло, що закон трактує безготівкові гроші як об'єкт права власності. Проведене дослідження дозволяє зробити висновок про те, що характер злочинів проти грошових ресурсів не залежить від їх форми (готівка чи безготівкові гроші); суб'єкт правопорушення у разі незаконного вилучення сум безготівкових коштів з банківських рахунків є майном, що належить власникам рахунків; злочин проти безготівкових грошей слід розглядати як захоплення майна інших осіб у спосіб, визначений Кримінальним кодексом України. Діапазон проблем предмета правопорушень проти власності залишається актуальним, особливо з точки зору визначення перспектив заміни поняття «правопорушення проти власності», розробленого в радянський період концепцією майнового правопорушення.

Ключові слова: злочини проти власності, предмет злочину, безготівкові гроші.

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SEPARATE PROBLEMS OF UNDERSTANDING THE SUBJECT OF OFFENCES AGAINST PROPERTY

Abstract. It is a well-known fact that the institution of money went through the long development process, during which money acquired different forms. Non-cash money is a relatively recent form that made the same breakthrough, as the introduction of paper money, which drove the coins out quickly in the past centuries. Due to the rapid development of computer technology non-cash money may replace the cash very soon. The purpose of the proposed article is to analyze and generalize doctrinal approaches to understanding the legal nature of non-cash money and to clarify the peculiarities of this money as a subject of property crimes.

There is no uniform understanding of the concept of «non-cash money», and the criminal legal assessment of misappropriation of non-cash money, in particular, belongs to the issues that have no clear solution in criminal law and have contradictory solution in practice. The object of the article is a critical analysis of achievements of previous research workers and, therefore, continuation of development and generalization of doctrinal approaches to the understanding of the legal nature of non-cash money, clarification of special aspects of non-cash money as the subject of offenses against property. Both financial experts and lawyers are trying to determine the nature of non- cash money. The undertaken analysis of scientific papers allows clarifying that the ambiguity of the legal nature of non-cash money can not but complicating the resolution of issues regarding the nature of misappropriation of such money. Different points of view regarding this issue are expressed in the criminal justice literature.

Some experts believe that in case of illegal transfer of non-cash resources the damage is done to binding relations, and therefore application of provisions of criminal law regarding responsibility for offenses against property seems to be unreasonable. Not acquiring the outlined position substantially, it is noted at the same time that there is the problem of determination of the generic object of offenses, responsibility for which is provided in Section VI «Offenses against property» of the Special part of the Criminal Code of Ukraine. The point is that the range of relations which are actually protected by provisions of the criminal law, combined in this section, is not limited to property relations and therefore its name, in my opinion, should be specified. Scientific literature refers to the factors that point at the nature of the real right of non-cash money: if we consider certain liabilities associated with the movement of funds, it is clear that the law considers non-cash money as the object of property rights.

The undertaken study allows to draw conclusion that the nature of offenses against money resources does not depend on their form (cash or non-cash); subject of the offense in case of the illegal writing sums of non-cash resources off the bank accounts is the property which belongs to holders of accounts; offense against non-cash money should be regarded as taking possession of property of others in a particular way, defined in the Criminal Code of Ukraine. The range of problems of the subject of offenses against property remains relevant especially in terms of defining the prospects of replacement of the concept of offenses against property developed in the Soviet period by the concept of property offenses.

Keywords: offenses against property, the subject of offense, non-cash money.

Introduction

It is a well-known fact that the institution of money went through the long development process, during which money acquired different forms. Non-cash money is a relatively recent form that made the same breakthrough, as the introduction of paper money, which drove the coins out quickly in the past centuries. Due to the rapid development of computer technology non-cash money may replace the cash very soon.

There is no uniform understanding of the concept of «non-cash money», and the criminal legal assessment of misappropriation of non-cash money, in particular, belongs to the issues that have no clear solution in criminal law and have contradictory solution in practice.

Significant contribution to the study of this problem, the timeliness of which is caused by the in crease in the number of criminal attacks on cash-less money, made by such scholars as N. O. Ant-

onyuk, O. I. Fighters (2004), M. P. Bikmurzin (2006), N. V. Vishnyakova (2003), B. V. Volzhenkin, N. O. Lopashenko (2005), P. V. Oliynyk, O. V. Khabarov, V. V. Khilyuta (2009), A. Yu. Shvets and others.

The purpose of the proposed article is to analyze and generalize doctrinal approaches to understanding the legal nature of non-cash money and to clarify the peculiarities of this money as a subject of property crimes.

1. Relevance of research

Non-cash money is a relatively recent form that made the same breakthrough, as the introduction of paper money, which drove the coins out quickly in the past centuries. Due to the rapid development of computer technology non-cash money may replace the cash very soon. There is no uniform understanding of the concept of «non-cash money», and the criminal legal assessment of misappropriation of non-cash money, in particular, belongs to the issues that have no clear solution in criminal law and have contradictory solution in practice.

Both financial experts and lawyers are trying to determine the nature of non-cash money. The undertaken analysis of scientific papers allows clarifying that the ambiguity of the legal nature of non-cash money can not but complicating the resolution of issues regarding the nature of misappropriation of such money. Different points of view regarding this issue are expressed in the criminal justice literature.

2. The basic concepts for understanding the legal nature of bank money

Analysis of scientific papers allows distinguishing three basic concepts (approaches) for understanding the legal nature of bank money:

1) non-cash money – a special form of money that is proprietary legal nature [1, 44–49];

2) non-cash money is the right customer requirements to the bank, which is binding [2, 68];

3) bank money are mixed, Real-binding nature [3, 59].

This concept combines the first and second approaches, and its proponents suggest that bank money is the law of obligations, which constructs the fiction of things, so that it becomes possible to apply to such rights, including their belongings, property law regime. On the one hand, bank money is the law of obligations (legal requirements) the account holder on the bank; on the other (for third parties), they are a means of payment.

Clarified the ambiguity of the legal nature of bank money can not complicate issues such qualifications misappropriation of money. In the criminal justice literature on the subject expressed different points of view. I am impressed by the approach under which the bank money are mixed, Real-binding nature. They are fiction stuff that has a binding nature. For convenience (training needs of crime) it is possible to use bank money regime of property rights, recognizing their property.

3. Results

The concept of property as per its legal nature of intersectional is one of the defining civil categories. And the final word in clarification of the term must not belong to criminologists and jurist. In this case, the provisions of the Civil Code of Ukraine follow that kind of money recognized property. Under the thing to understand subject material world, for which there may be civil rights and obligations (Article. 179), and under the property as a special object of civil rights and obligations – a separate thing, a set of things and property rights and obligations (p. 190). Article 192 entitled «Money (cash)» without differentiating past for cash and non-cash placed within Chapter 13 «thing». Property part III «a civil matter» current Civil Code of Ukraine. Thus, the Civil Code of Ukraine definitely counts money in property without regard to their cash or bank transfer.

Also p. 24 of the Law of Ukraine «On Banks and Banking» legislators strengthened the concept of money as money in national or foreign currency and deposits (deposits) – as a means of cash or non-cash, in the currency of Ukraine and foreign currency placed by customers on their personal bank accounts on a contractual basis for a fixed period or without specifying a date and payable to the depositor in accordance with the laws of Ukraine and conditions of the contract. According to Art. 3 of the Law of Ukraine «On Payment Systems and Money Transfer in Ukraine» funds are in cash (the form of currency) or non-cash form (the form of entries in the accounts at banks). Thus, the law defines as a contribution amount. Consequently, the funds may be subject to crime in the form of cash (stored in a bank account). Non-cash money is documentary and electronic records on bank accounts.

In such circumstances hardly deserves support proposal of M.P.Bikmurzin in the text of the criminal law point out that in the subject property as crimes against property should be understood, in particular, bank money. The foregoing and as is evident considering the following regulatory provisions (civil) law. However, M. P. Bikmurzin rightly believes that the coverage of non-cash assets concept allows considered criminal infringement of such funds as traditional crimes against property, and therefore does not need CC some new restrictions designed to target attacks. Agree with scientists and that a real opportunity to dispose of non-cash money in wine there since the transfer of money to his bank account, and in some cases – already at

the time of writing off money from the fraudulent account the legitimate owner of the account of a third party (debt repayment, payment for goods or services) [4, 143, 144, 152].

As rightly noted by N. V. Vyshniakova, based on the disclosure of civil legal nature of bank money are two possible solutions to the issue of the money as an object of property crimes:

1) recognize cash and non-cash money property belonging to the person's ownership;

2) recognize things cash and non-cash – legal requirements that are part of the property belonging to the person's ownership. Both of these approaches as appropriate in civil point of view, can recognize non-cash money subject to crimes against property. By the way, in a number of European Court of Human Rights explained that property which is owned, can be both things and rights, including the right to claim; bank money is property that is owned [5].

Similar to statements N. V. Vishnyakova is the next position. If you ignore the archaic dogma and strictly guided by the text of the criminal law should be understood that the criminal law of theft is not only things, but also of any property, and hence of the funds in the account as at object of the law of obligations and rights to property [6]. On the bank money as a form of property belonging to the owner of the bank account, respectively, of the subject property crimes referred to in the writings and other researchers [7, 8].

In legal literature suggests that «in deciding on the recognition of non-cash offense subject should keep in mind that this is, in fact, the acquisition of property rights binding (right to property), since the concept of» account holder and «cash in the bank account» – arbitrary, after all, a bank account and wire money to him are the categories of obligations and legal nature. Bank, the recipient of these funds, for example, depositors, is the owner and investor in these funds appears to claim. So bank funds, criminals infringe on the property of the bank, and which cause harm [9, 10].

Indicative in this respect is reasoning N. O. Antonjuk which indicates that bank money is a legal fiction, a commitment that shows the movement of money and is the obligation of the bank to pay money to a client (list them); criminal protection bank money should be identical criminal protection of cash as a form of things [11, 131–134]. Many other scientists [12] are advocates of such a position, that there is reason to recognize compromise. It is alleged that money is always the money, and non-cash – a form of existence.

Some experts believe that in case of illegal transfer of non-cash resources the damage is done to binding relations, and therefore application of provisions of criminal law regarding responsibility for offenses against property seems to be unreasonable. Not acquiring the outlined position substantially,it is noted at the same time that there is the problem of determination of the generic object of offenses, responsibility for which is provided in Section VI «Offenses against property» of the Special part of the Criminal Code of Ukraine. The point is that the range of relations which are actually protected by provisions of the criminal law, combined in this section, is not limited to property relations and therefore its name, in my opinion, should be specified.

Scientific literature refers to the factors that point at the nature of the real right of non-cash money: if we consider certain liabilities associated with the movement of funds, it is clear that the law considers non-cash money as the object of property rights.

The author appeals to the approach whereby non-cash money is mixed, real right-binding in nature. It is fiction of the property item which is binding in nature. For convenience (of needs for determination of the nature of offenses) it is possible to use the regime of the real right for non-cash money, considering it the property.

As of today judicial practice determines the nature of offenses, in which non-cash money is the subject of offense, as uncompensated withdrawal of non-cash money, which is the property of others. It is noteworthy that in the above case, law enforcement, which can be considered typical, the court proceeded from the fact that the offense is considered complete at the time of or directly receiving money from the account (deposit) of the victim, or at the time of transfer to the account from which the offender to dispose of non-cash money. Where the funds from another account paid for goods (works, services), for example, using a fictitious or lost credit (cash) card theft is considered complete after writing off money from the account holder.

Trying to justify the supporters of a real concept non-cash money means that crime can be considered complete only when the «transfer funds into cash», raises serious doubts. Yes, illegally transferring funds from one account to another, which he can freely dispose of criminal there is no need to translate them into cash: it can use them without it. As you can see, the practice of moving towards recognition of non-cash money subject property crimes in terms of mixed, proprietary concept binding obligation.

Conclusions. Research conducted under this article suggests that the concept of civil property and includes non-cash costs and therefore, fix fact, penal concept of «property» (вy amending the Criminal Code of Ukraine) are required. Question of mostly clothing or binding legal nature of bank money as a form of property to solve problems related to a

criminal assault on the money, is not essential. With regard to the recognition of non-cash money subject property crimes should recognize the constructive compromise approach, under which the bank money are mixed (floating-binding) nature.

The undertaken study allows to draw conclusion that the nature of offenses against money resources does not depend on their form (cash or non-cash); subject of the offense in case of the illegal writing sums of non-cash resources off the bank accounts is the property which belongs to holders of accounts; offense against non-cash money should be regarded as taking possession of property of others in a particular way, defined in the Criminal Code of Ukraine. The range of problems of the subject of offenses against property remains relevant especially in terms of defining the prospects of replacement of the concept of offenses against property developed in the Soviet period by the concept of property offenses.

List of the references

1. Ефимова Л. Г. Правовые проблемы безналичных денег. *Хозяйство и право*. 1997. № 2. С. 44–49.
2. Тараканов С. Информационная природа безналичных денег. *Хозяйство и право*. 1998. № 9. С. 68–72.
3. Скловский К. И. Собственность в гражданском праве. 5-е изд., перераб. М., 2010. 893 с.
4. Бикмурзин М. П. Предмет преступления: теоретико-правовой анализ. М., 2006. 184 с.
5. Вишнякова Н. В. Объект и предмет преступлений против собственности: автореф. дис. на соиск. уч. степени канд. юрид. наук. Омск, 2003. 27 с.
6. Тарасов А. А. Безналичные денежные средства как предмет хищений в сфере финансовой деятельности воинских частей. URL: http://www.zonazakona.ru/law/ comments/334
7. Отзыв о проекте Федерального закона о внесении в УК РФ дополнений и изменений, касающихся уголовной ответственности за мошенничество. URL: http://www.iuaj.net/node/1169
8. Лопашенко Н. А. Преступления против собственности: теоретико-прикладное исследование. М., 2005. 408 с.
9. Олійник П. В. Предмет злочинів проти власності: поняття, види, кримінально-правове значення: монографія. Х., 2011. 208 с.
10. Виявлення та розслідування злочинів, пов'язаних з використанням засобів доступу до банківських рахунків / В. О. Фінагеєв, С. С. Чернявський, О. Ю. Татаров та ін. К.: НАВС, 2013. 79 с.
11. Антонюк Н. О. Кримінально-правова охорона власності. Львів, 2012. 514 с.
12. Бойцов А. И. Преступления против собственности. Санкт-Петербург, 2002. 775 с.

References

1. Efymova L. H. (1997) Pravovyie problemy beznalychnykh deneh (Legal issues of non-cash money). *Khozyaystvo i pravo* (*Economy and law*), 2, 44–49 [in Rus.]
2. Tarakanov S. (1998) Informatsionnaya pryroda beznalychnykh deneh (Information nature of non-cash money). *Khozyaystvo y parvo* (*Economy and law*), 9, 68–72 [in Rus.]
3. Sklovskyy K. Y. (2010) Sobstvennost' v hrazhdanskom prave (Ownership in civil law). Moskva, 893 p. [in Rus.]
4. Bykmurzyn M. P. (2006) Predmet prestupleniya: teoretyko-pravovoy analiz (The subject of the crime: theoretical and legal analysis). M., 184 p. [in Rus.]
5. Vyshnyakova N. V. (2003) Obyekt i predmet prestuplenyy protyv sobstvennosty (Object of crime against property): avtoref. dys. … kand. yuryd. nauk. Omsk, 27 p. [in Rus.]
6. Tarasov A. A. Beznalychnye denezhnyie sredstva kak predmet khyshchenyy v sfere fynansovoy deyatel'nosty voynskykh chastey (Non-cash as a subject of theft in the sphere of financial activities of military units). URL http://www.zonazakona.ru/law/comments/334 [in Rus.]
7. Otzyv o proekte Federal'noho zakona o vnesenii v UK RF dopolneniy y yzmenenyy, kasayushchykhsya uholovnoy otvetstvennosty za moshennychestvo (Review of the draft Federal Law on the introduction into the Criminal Code RF of the additions and amendments concerning criminal liability for fraud). URL http://www.iuaj.net/node/1169 [in Rus.]
8. Lopashenko N. A. (2005) Prestupleniya protiv sobstvennosti: teoretiko-prykladnoye issledovanye (Crimes against property: theoretic and applied research). M., 408 p. [in Rus.]
9. Oliynyk P. V. (2011) Predmet zlochyniv proty vlasnosti: ponyattya, vydy, kryminal'no-pravove znachennya (The subject of crimes against property: the concept, types, criminal-law significance). Kharkiv, 208 p. [in Ukr.]
10. Vyiavlennya ta rozsliduvannya zlochyniv, pov'yazanykh z vykorystannyam zasobiv dostupu do bankivs'kykh rakhunkiv (Detection and investigation of crimes related to the use of bank account access tools) / V. O. Finaheyev, S. S. Chernyavs'kiy, , O. Yu. Tatarov and other. Kyiv: Nats. akad. vnutr. sprav, 2013. 79 p. [in Ukr.]
11. Antonyuk N. O. (2012) Kryminal'no-pravova okhorona vlasnosti (Criminal protection of property). L'viv, 514 p. [in Ukr.]
12. Boytsov A. Y. (2002) Prestuplenyya protyv sobstvennosty (Crimes against property). SPb., 775 p. [in Rus.]