

Review Paper

Enforcement Discretion in Financial Law: Personal, Political, and Economic Special Sanctions in Wartime

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Received: 14-12-2022

Revised: 23-03-2023

Accepted: 25-04-2023

ABSTRACT

The research aims to characterise the discretionary powers in financial law and to focus on the application of special personal and economic sanctions and combating criminal schemes, including legalisation (laundering) of the criminally obtained funds during the war. The study was conducted using comprehensive scientific and special legal methods of synthesis and analysis, formal logical and formal legal methods, and the comparative legal method. The research focuses on highly automated systems using the latest information technologies. The author examines the mechanism of combating financial crime in terms of improving the regulatory framework, institutional modernisation, and functional changes considering the experience of such countries as the USA, the UK, Germany, and Italy. Personal political and economic special sanctions are identified in Ukraine as an effective instrument of discretionary law enforcement. When deciding on the application of personal political and economic sanctions, legality, transparency, objectivity, proportionality, and effectiveness must be ensured. Decision-making on the application of sanctions must meet the requirements of legality, transparency, and objectivity. The research formulates and substantiates recommendations which may be used to improve legislation aimed at countering criminal schemes in wartime. These proposals can be used in further research, in the educational process, in the development of scientific recommendations, as well as in the practical activities of state authorities in application of discretionary powers and counteraction to criminal schemes during martial law.

HIGHLIGHTS

- The article aims to characterize discretionary powers in financial law, focusing on the application of special sanctions and combating criminal schemes, and proposes recommendations for improving legislation in countering criminal schemes during wartime, ensuring legality, transparency, objectivity, and proportionality in the application of sanctions.

Keywords: Artificial Intelligence, Blockchain, Discretionary Enforcement, Martial Law, Personal Sanctions

Every year, discretion is becoming increasingly important in legal doctrine, as this phenomenon has many aspects. In the modern world, the regulation of the use of discretion is an important and complex topic that requires further research. Insufficient legislative regulation of this phenomenon, together with the dynamics of financial and legal relations, makes it difficult to understand and apply. Therefore, to fully understand and solve this problem, it is necessary to study discretion and its impact on

society and law. Therefore, this issue is relevant and requires further scientific research.

To date, there is no standard procedure for exercising discretionary powers in the enforcement of financial law. The limits of discretionary powers are not clearly defined in the regulatory framework

How to cite this article: Barikova, A. (2023). Enforcement Discretion in Financial Law: Personal, Political, and Economic Special Sanctions in Wartime. *Econ. Aff.*, 68(Special Issue): 735-740.

Source of Support: None; **Conflict of Interest:** None



and law enforcement practice, which leads to uncertainty in the procedure for exercising the competence of public administration entities and a significant number of lawsuits in connection with violations of the rights and legitimate interests of participants in financial relations. Ensuring economic security is an important component of Ukraine's national interests in wartime. To achieve this, it is necessary to effectively counteract the legalisation (laundering) of the proceeds of crime, both in the context of their prior withdrawal from the state budget and concerning their illegal flow to the real sectors of the economy.

The concept of law enforcement discretion in financial law is the subject of research by various scholars and scientists. The focus is on the issue of discretionary application of financial law provisions, which is a broad concept that includes discretionary practice in customs, tax law and other areas. A. Barikova (2021) examines modern doctrinal approaches and notes the signs of natural discretion that determine it. The study of special sanctions is also reflected in the study of O. Bayik and M. Bayik (2022) and R. Abdullayev (2022). The latter conducted a comprehensive study of the institution of sanctions in the law of the European Union and its development in the context of the Russian aggression against Ukraine.

However, despite the widespread interest in this topic among legal scholars, there is currently a need to study this phenomenon. Therefore, the research aims to characterise the discretion in financial law, in application of special personal and economic sanctions and counteraction to criminal schemes legalisation (laundering) in wartime.

MATERIALS AND METHODS

The research object is social and legal relations arising while exercising discretionary powers in the field of financial law, in the context of combating money laundering and application of personal economic sanctions during martial law. The subject matter of the study is theoretical aspects of the formation and exercise of the discretion of law enforcement in financial law in wartime. Various methods were used to consider the issues of law enforcement discretion in financial law. The synthesis and analysis methods were used to

formulate the basic provisions on the operation of the discretion of law enforcement in financial law in wartime, in the context of countering military schemes and applying personal economic sanctions. Formal logical and formal legal methods were used to formulate the key conclusions and proposals for improving the legal regulation of discretion in financial law under martial law in artificial intelligence and anti-money laundering.

The application of the comparative legal method allowed to analyse the experience of the United States of America, the United Kingdom, Germany, and Italy in combating criminal schemes in the field of money laundering. The classification and grouping methods were used to analyse the main areas of the State's activities and the rules applicable to the exercise of discretionary powers in financial and legal relations. Concretisation and generalisation methods were used to identify the main problems and gaps in ensuring the discretion of law enforcement in financial law in Ukraine in wartime. Using the concretisation and generalisation techniques, the main problems and gaps which impede the exercise of discretion in the application of financial law in Ukraine in wartime were identified.

Studies, published between 2020 and 2023, were studied in detail, which allowed to identify the key aspects of the topic under study. The search for the necessary information was carried out primarily through online resources, using keywords that were found outside the research scope, such as discretion in financial law, law enforcement discretion, personal and economic sanctions, countering criminal schemes, legalisation (laundering) of proceeds of crime, and wartime. In addition, various sources were used, such as scientific articles, books, dissertations, reports and other materials related to the research topic. To increase the scope of the study and achieve a more complete analysis of the topic, the methods of analysis and comparison were used, as well as a study of foreign experience, in particular the experience of the United States of America, the United Kingdom, Germany, and Italy, in countering criminal schemes in wartime.

RESULTS

Discretion in the application of financial law is one of the most important issues in modern legal

science. It covers various areas of law, including customs and tax law. This category can be seen as the process of choosing the most optimal solution to a case within the framework of legislative regulation (Kasyanenko, 2010; Bekh, 2021; Moskalenko, 2020). The Supreme Court considers discretionary powers as one of the tools of judges and other entities that allow them to choose the best solution within the limits established by law (Resolution of the..., 2021). Today, many factors affect discretion in the application of financial law. This includes both objective and subjective factors that affect the effectiveness of the application of legal techniques. Objective factors may be related to the compliance of the legal technique with the law and the presence of corruption. Subjective factors, on the other hand, include an individual approach to meeting the needs of the participants in the procedures and a balance between private and public interests. Regarding discretion in financial law, it should be noted that this concept is extensive. Discretionary law enforcement can be used in various areas of law, including customs, tax. It should be noted that the use of discretionary powers should be limited by law. The quality of legislation should meet the criteria of accessibility, predictability, and quality, which is important for ensuring a reliable democratic rule of law.

In the case of *Koretsky and others v. Ukraine* (2008), the European Court of Human Rights (ECHR) detailed the requirements for the “quality of the law” the need for personalised accessibility, clarity of wording of provisions, the ability to foresee the consequences of one’s actions and the provision of remedies. According to the Decision of the European Court of Human Rights in the case of *Volochs v. Ukraine* (2006), the limits of discretionary powers and the procedure for their application must be sufficiently clearly defined, considering the legitimate aim of the measure. In addition, according to the Decision of the European Court of Human Rights in the case of “*Ukrainian Press Group v. Ukraine*” (2005), the quality of the law requires the predictability of the relevant measures. Therefore, discretionary powers in financial law should be limited by law and meet the criteria of sound democratic legitimacy. The legislation should ensure that discretionary measures are clear and predictable and that legal remedies against arbitrary interference are available.

As a result of this approach to discretion in financial law enforcement, the interests and values are aligned, which creates an appropriate level of legal awareness and legal culture. In the case law of the European Union, this approach is interpreted as justification of the burden imposed by regulations and maintaining a fair balance between different interests, with the necessary balance between protecting the rights and interests of the individual and achieving the goals of the relevant decision (Judgment of the European Court..., 1974).

Personal political and economic special sanctions

One of the components of the fight against crime is personal political and economic special sanctions. It is important to note that the first sanctions in response to the Russian actions in occupied Crimea were imposed by the United States of America and the European Union on 17 March 2014. Initially, these were personal sanctions against Russian statesmen – officials, military officers, and MPs, as well as several Ukrainian citizens involved in the violation of Ukraine’s sovereignty and territorial integrity (Decision of the National Security..., 2021). Since the beginning of the full-scale invasion – on 24 February 2022, the sanctions list has, of course, been expanded, and sectoral sanctions have been added to the personal sanctions (Decision of the National Security..., 2022; 2023). To date, personal political and economic sanctions in Ukraine have become an effective tool of discretionary law enforcement (Decision of the National Security..., 2021, 2022, 2023; Law of Ukraine..., 2014; Law of Ukraine, 2002).

As such, in the Resolution of the Supreme Court of Ukraine in case No. 800/321/17 (2018) it is determined that the decision to impose personal political and economic sanctions is a complex and responsible process. The Supreme Court of Ukraine, considering the importance of the rights and freedoms in a democratic society, explains that the President’s discretionary powers to impose such sanctions are necessary to ensure real and/or potential threats to the national interests, national security, sovereignty, and territorial integrity of Ukraine. Sanctions may be imposed based on p.1 a.4 of the Law of Ukraine No. 1644-VII “On Sanctions” (2014), based on which personal political

and economic sanctions may be imposed based on a decision of the National Security and Defence Council of Ukraine. Within the framework of his discretionary powers, the President has the right to implement the decision, issue relevant decrees and assess the expediency, legality, and validity of such decisions. Judicial control over the imposition of sanctions is limited, as the court cannot reassess the existence and sufficiency of the grounds for imposing sanctions but can verify compliance with the limits of discretionary powers and the procedure for imposing sanctions. The imposition of personal political and economic sanctions is legally enshrined and has a legitimate purpose as a necessity for immediate and effective response to threats to Ukraine's national security.

Foreign experience shows that sanctions can be imposed both based on international decisions and based on the decisions of domestic government agencies. Depending on their focus, sanctions may restrict commercial activities, border crossings, banking operations. Sanctions are usually imposed against entities that are not subject to the jurisdiction of the country concerned, such as foreign legal entities, foreigners, and states.

Criminal schemes during the war

Financial crime harms the national financial order and can be linked to other types of crime that provide financial support for various forms of organised crime. One of these criminal activities is money laundering, which is done to convert illegal income into legal income and conceal it. This harms not only the financial system but also the economy and social stability of the country. In wartime, individual schemes related to the purchase and sale of defence goods and services and the conversion of illegally obtained funds appear in Ukraine. Such actions violate the law and can have serious consequences for national security and stability in the country. For example, the Kherson Regional State Administration spent over UAH 41 million to purchase uniforms for the Kherson Territorial Defence Forces. However, it later turned out that the prices for the purchased products were significantly overstated, and for some items even by more than 40%. In particular, the companies that made the sales were interconnected and engaged in the garbage business in the Kirovohrad region,

having nothing to do with the sale of uniforms for the military (The official page..., 2023).

It is important to note that systems and mechanisms of financial control over illicit income are effective tools for de-shadowing in many countries. For example, in Italy, the government has banned large cash payments, which helps to prevent the misuse of larger amounts of money. Germany has introduced the mandatory declaration of settlements with non-residents, and Japan ensures financial monitoring by notifying the relevant government authorities of significant financial transactions. At the same time, in Germany, not only banks and financial institutions, but also lawyers and auditors must report suspicious transactions (European Security..., 1995). Thus, the use of appropriate mechanisms allows for combating illegal actions in the financial sector and ensures an appropriate level of economic security.

The implementation of blockchain technology in the judiciary can help create a uniform cross-border approach to the use of discretionary categories, for the provision of electronic evidence certified by blockchain technology or through an e-discovery platform. Blockchain technology can be applied in various aspects, including interrogatories, debates and closing arguments. With online courts, judges and parties can access court proceedings from anywhere in the world, allowing them to interact and make decisions at their convenience. Judges consider evidence submitted by a party to a case through the relevant autonomous court platform, short message, fax, email, instant messaging account or other electronic means while considering the reliability of such evidence and carefully analysing its origin and storage.

Concerning discretionary powers in justice, artificial intelligence provides access to legal data by developing tools that use this technology to automatically anonymise or pseudonymise court decisions for the use of open data. Additionally, artificial intelligence is used to link legal data to develop software that analyses court decisions to meet specific needs. Examples of such technical solutions include Estonian AI judges, robot mediators in Canada and the UK, and a chatbot for an e-justice portal.

DISCUSSION

The legislation granted state bodies with discretionary powers to enable them to take certain legally significant actions that fall within the competence of these bodies. Discretionary powers are a complex subject for research, as there are different positions in the scientific community. For example, M. Halac and P. Yared (2022) believe that discretionary powers strengthen the rule of law because they are part of the competence of the relevant authorities. However, this statement does not protect against the possibility that the law may be unlawful due to the use of discretionary powers by their content, form, or subject.

It is also important to note that the regulatory authorities have limited powers to apply discretionary measures, and before applying them, it is necessary to objectively assess the actual circumstances of the case, compare the consequences of applying and not applying such measures, decide on the preservation of private and public interests and determine the possibility and rationality of their application. When analysing the factual circumstances of a case, the authorities may establish the need to apply discretionary measures, which is a key step before the exercise of discretion. However, regulatory authorities should comply with legal requirements and restrictions when exercising discretionary powers to ensure the protection of the rights and interests of entities and avoid possible negative consequences.

D. Patel *et al.* (2022) highlight blockchain technology, which, using smart contracts, can establish a framework for activities that threaten public safety and ensure the transfer of information to law enforcement agencies for prevention. F. Tsai (2021) focuses on the results of experiments with the Ethereum blockchain and a smart contract, which showed that the proposed model can verify the immutability of evidence and provide a more efficient exchange of information about criminal cases.

N. Shyshka (2021) concluded that the introduction of artificial intelligence into Ukrainian justice is a relevant and promising step in the current environment. However, it is very important to adhere to the basic principles contained in the Ethical Charter on the Use of Artificial Intelligence

in the Judiciary and the Environment, as well as the White Paper on Artificial Intelligence: A European Approach to Excellence and Trust.

Ukraine has a sufficient level of legal regulation of this problem in the domestic and international arena. However, countries such as the US, UK and EU member states are constantly looking for new ways to combat illegal activities related to money laundering using cryptocurrencies. To incorporate best practices into Ukrainian legislation, research into this issue should continue. Improving the effectiveness of the state policy on combating money laundering is an important factor in ensuring the national security of Ukraine, so this issue should be included in the current vector of state policy development.

CONCLUSION

The conditions of martial law impose special requirements on budget planning in the context of combating money laundering and other proceeds of crime in Ukraine. In such a situation, it is important to ensure an increase in the level of socio-economic security of the population, the elimination of factors that encourage crime, and comprehensive planning and forecasting of effective measures to prevent and counteract it. It is also necessary to counteract the shadow economy, which undermines the stability of the economy, and to create reserve resources to cover unforeseen costs of stabilising economic processes. When determining measures to impose personal political and economic sanctions, it is important to be guided by the principles of legality, transparency, objectivity, proportionality, and effectiveness. It is especially important to determine the duration of sanctions, except when their application may lead to the termination of rights or other sanctions that cannot be applied temporarily.

The use of artificial intelligence and blockchain technology can significantly improve international cooperation in the fight against criminal schemes in times of war, particularly in financial law. This is possible through the integration of information and communication technologies that provide access to legal information and promote the unification of discretionary legal practice. Electronic procedures and communication are becoming an important component of effective law enforcement. They

provide simplified and quick access to information, facilitate the use of external proceedings through secure electronic means of communication, and support a digital approach by default. In addition, it is important to use user-centred applications, as well as tools and systems that provide usability and empowerment. Such technologies must be legal, transparent, and effective, and have a time limit for their use. The use of digital technologies helps to avoid unnecessary procedures and ensure data protection. Programmes developed following these principles can be successfully used to ensure legal certainty and seamless interoperability in national and international contexts.

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