Continued support to the criminal justice reform in Ukraine

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OPINION
ON THE DRAFT LAW OF UKRAINE "*ON AMENDING THE CRIMINAL PROCEDURE CODE OF UKRAINE REGARDING THE PECULIARITIES OF FORFEITURE TO THE STATE OF MONIES, CURRENCY VALUABLES, UKRAINIAN GOVERNMENT BONDS, UKRAINIAN TREASURY BONDS, PRECIOUS METALS AND/OR STONES, OTHER VALUABLES AND PROCEEDS FROM THEM BEFORE THE DELIVERY OF JUDGMENT*"

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A. Introduction

1. These comments are concerned with the Law of Ukraine No. 4057 *"On amending the Criminal Procedure Code of Ukraine regarding the peculiarities of forfeiture to the State of monies, currency valuables, Ukrainian government bonds, Ukrainian treasury bonds, precious metals and/or stones, other valuables and proceeds from them before the delivery of judgment"* ('the Draft Law'), the adoption of which is being considered by the Verkhovna Rada of Ukraine.

2. The present comments review the compliance of the amendments with European standards and, in particular, with the requirements of the European Convention on Human Rights ('the European Convention') and its Protocols as interpreted and applied by the European Court of Human Rights ('the European Court').

3. The comments first review the case law of the European Court relating to interference – whether of a temporary or permanent nature - with property interests in connection with the commission of criminal offences and crime prevention. They then consider the explanatory note prepared in connection with the Draft Law, before addressing the provisions in the Draft Law. The comments conclude with an overall assessment of the compatibility of the Draft Law with European standards.

4. These comments have been prepared upon the contribution of the Council of Europe consultant Mr Jeremy McBride[1] and have been based on English translations of the Ukrainian text of the Draft Law, the Criminal Procedure Code of Ukraine and the Criminal Code of Ukraine. They have been prepared under the auspices of the Council of Europe's Project "Continued support to the criminal justice reform in Ukraine", financed by the Danish Government.

B. The case law of the European Court

5. The European Court has seen four provisions to be potentially relevant where there is some form of interference with property interests that are possessed or controlled by a person that is or has been the object of criminal proceedings or where this interference is in some other way connected with the commission of offences or their prevention. These are Articles 6(1) (right to a fair trial), 6(2) (presumption of innocence) and 7 (no punishment without law) of the European Convention and Article 1 of Protocol No. 1 (protection of property).

6. In applying all four of these provisions, an important consideration – not generally stated explicitly – is that the person affected by the alleged interference has some form of claim or title to the property interest in question. This does not, however, have

[1] Barrister, Monckton Chambers, Gray's Inn, London; Chair of the Scientific Committee of the European Union Agency for Fundamental Rights (2010-2013).

to be absolute or even obtained legally and this is likely to be reinforced by national legal presumptions concerning such interests. There will, of course, be no claim or title where property has been stolen or improperly taken from someone else but an assertion that this was not the case would be sufficient to attract the protection of Article 1 of Protocol No. 1 until such time as this is conclusively found not to be so by a court[2].

7. It is well-established that property which is potentially evidence of a crime can be taken on a provisional basis. Such a taking – which will preclude the person from whom it is taken exercising any control over it - must not only have a basis in law[3] but must also be genuinely provisional, i.e., until the conclusion of the relevant criminal proceedings in the case of evidence unless there is some separate basis for retaining it[4].

8. Furthermore, an order for the confiscation – in the sense of a permanent deprivation by way of transfer to the State - of a sum corresponding to the proceeds of crime assessed by the court to have been gained by the defendant following his or her conviction for the offence concerned will be regarded by the European Court as a penalty within the meaning of the European Convention[5].

9. As such, its imposition will be contrary to Article 7 of the European Convention if it entails the person affected suffering a more far-reaching detriment than that to which he or she was exposed at the time of the commission of the offence for which he or she was convicted[6]. In other words, such a penalty can only be imposed in respect of offences committed after it has been prescribed by law.

10. However, no violation of Article 1 of Protocol No. 1 will be found by the European Court to have occurred where (a) the aim of the measure was to act as a weapon against a serious crime[7], (b) the sum involved corresponded to the amount which the

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[2] See, e.g., the following observation of the European Court in *Rummi v. Estonia*, no. 63362/09, 15 January 2015 that "pursuant to the Property Act the possessor of movable property is deemed its owner until the contrary is proved. Possession, in turn, is deemed lawful until the contrary is proved (see paragraph 42 above). The Court further notes that the disputed property was in R.'s possession when it was seized and that the applicant has presented the Court with an intestate succession certificate according to which she inherited one third of R.'s property (see paragraph 20 above). Thus, pursuant to the domestic law, the applicant is to be considered as having inherited the seized property unless the presumptions mentioned above were rebutted" (para. 105). See also D*enisova and Moiseyeva v. Russia*, no. 16903/03, 1 April 2010, at paras. 47-54.

[3] Not simply as a matter of national law but also in accordance of the requirements of accessibility and foreseeability that have been identified by the European Court.

[4] Such as being material that constituted the offence (as in *Handyside v. United Kingdom*, no. 5493/72, 7 December 1976) or the means by which it was committed (e.g., *Yildirim v. Italy* dec.), no. 38602/02, 10 April 2003).

[5] See, e.g., *Welch v. United Kingdom*, no. 17440/90, 9 February 1995, para. 35 and *Phillips v. United Kingdom*, no. 41087/98, 5 July 2001, at paras. 33-34 and 51.

[6] As was found to be the case in *Welch v. United Kingdom*, the relevant legislation having come into force more than two months after the offences concerned had been committed.

[7] Among the cases considered by the European Court are ones involving drug trafficking (*Phillips v. United Kingdom*) and smuggling (*Silickiene v. Lithuania*, no. 20496/02, 10 April 2012). Thus, the European Court

defendant was found to have benefited from through the offence(s) concerned, (c) the sum was one which he or she could realise from the assets in his or her possession and (d) the procedure followed in the making of the order was fair and respected the rights of the defence[8].

11. The need for a fair procedure to be followed is underlined by the fact that its absence in the case of such a permanent taking would not only result in a finding of a violation of Article 1 of Protocol No. 1 but also of Article 6(1) of the European Convention[9].

12. In considering whether there has been a fair procedure, the European Court has not objected to the use of a presumption that property held by someone convicted of an offence within a prescribed period before the relevant proceedings were commenced was received by him or her as a payment or reward in connection with that offence and that any expenditure incurred by him or her during the same period was paid for out of the proceeds from the offence. However, it has emphasised the importance of reviewing how that presumption is applied in the specific circumstances of the case. The significant considerations in this regards will be the existence of a judicial procedure including a public hearing, advance disclosure of the prosecution case and the opportunity to adduce documentary and oral evidence so as to rebut the presumption by showing, on the balance of probabilities, that the property had been acquired other than through the commission of the offence[10].

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stated in the *Phillips* case that "the making of a confiscation order operates in the way of a deterrent to those considering engaging in drug trafficking, and also to deprive a person of profits received from drug trafficking and to remove the value of the proceeds from possible future use in the drugs trade" (para 52).

[8] See *Phillips v. United Kingdom*, at paras. 52-54. See also *Silickiene v. Lithuania*, at paras. 65-70 and *Grayson and Barnham v. United Kingdom*, no. 19955/05, 23 September 2008.

[9] This requirement has been found to be satisfied in *Phillips v. United Kingdom*, *Silickiene v. Lithuania* (albeit on a *de facto* basis) and *Grayson and Barnham v. United Kingdom*.

[10] See, e.g., the positive assessment by the European Court of the approach followed in *Phillips v. United Kingdom*: "44. The Court notes that there was no direct evidence that the applicant had engaged in drug trafficking prior to the events which led to his conviction. In calculating the amount of the confiscation order based on the benefits of drug trafficking, therefore, the judge expressed himself to be reliant on the statutory assumption (see paragraph 13 above). In reality, however, and looking in detail at the steps taken by the judge to reach the final figure of GBP 91,400, the Court notes that in respect of every item taken into account the judge was satisfied, on the basis either of the applicant's admissions or of evidence adduced by the prosecution, that the applicant owned the property or had spent the money, and that the obvious inference was that it had come from an illegitimate source. Thus, the judge found "real indications on the civil basis of proof" that the sale of the house to X had not been genuine and was instead a cover for the transfer of drug money (see paragraph 14 above). As for the additional GBP 28,000 which the applicant admitted receiving in cash from X, the judge said: "No sensible explanation for the involvement of [X] … was given to me at all, and it is impossible, in my judgment, to see any sensible reason other than that ... it was a simple payment." Similarly, when assessing the amount of the applicant's expenditure on cars, the judge based himself on the lowest of the applicant's estimates as to how much he had spent (see paragraph 16 above). Since the applicant was not able to provide any record explaining the source of this money, the judge assumed that it was a benefit of drug trafficking. On the basis of the judge's findings, there could have been no objection to including the matters in a schedule of the applicant's assets for the purpose of sentencing, even if the statutory assumption had not applied.45. Furthermore, the Court notes that, had the applicant's account of his financial dealings been true, it would not have been difficult for him to rebut the statutory assumption; as the judge stated, the evidentiary steps which he could have taken to demonstrate the legitimate sources of his money and property were "perfectly obvious and ordinary and simple" (see paragraph 13 above). It is not open to the applicant to complain of unfairness by virtue of the fact that the

13. Furthermore, such a deprivation following a conviction - notwithstanding that it can be regarded as constituting a penalty - will not be regarded as infringing the presumption of innocence contrary to Article 6(2) of the European Convention. This is because the purpose of the procedure will not be seen as the conviction or acquittal of the person concerned for any other offence but to assess the amount payable and thus was analogous to the determination by a court of the sentence to be imposed on a properly convicted offender[11].

14. Even where it is not imposed following a conviction, the permanent deprivation of property by way of transfer to the State may still be compatible with Article 1 of Protocol No. 1 where such a measure forms part of a crime-prevention policy. Thus, it has been upheld by the European Court in respect of action to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established or which are the fruit of unlawful activities[12].

15. Thus, the European Court has recently stated that:

> Having regard to such international legal mechanisms as the 2005 United Nations Convention against Corruption, the Financial Action Task Force's (FATF) Recommendations and the two relevant Council of Europe Conventions of 1990 and 2005 concerning confiscation of the proceeds of crime (ETS No. 141 and ETS No. 198) (see paragraphs 55-65 above), the Court observes that common European and even universal legal standards can be said to exist which encourage, firstly, the confiscation of property linked to serious criminal offences such as corruption, money laundering, drug offences and so on, without the prior existence of a criminal conviction. Secondly, the onus of proving the lawful origin of the property presumed to have been wrongfully acquired may legitimately be shifted onto the respondents in such non-criminal proceedings for confiscation, including civil proceedings in rem. Thirdly, confiscation measures may be applied not only to the direct proceeds of crime but also to property, including any incomes and other indirect benefits, obtained by converting or transforming the direct proceeds of crime or intermingling them with other, possibly lawful, assets. Finally, confiscation measures may be applied not only to persons directly suspected of criminal offences but also to any third parties which hold ownership rights without the requisite bona fide with a view to disguising their wrongful role in amassing the wealth in question[13].

16. Moreover, although any taking must not be arbitrary, the European Court has made it clear that such a conclusion will not follow from the fact that the confiscation has occurred in the absence of a criminal conviction. Thus, it has stated that

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judge may have included in his calculations assets purchased with the proceeds of other, undocumented forms of illegal activity, such as "car ringing".

[11] *Phillips v. United Kingdom*, at para. 34. See to similar effect *Van Offeren v. Netherlands* (dec.), no. 19581/04, 5 July 2005.

[12] See *M v. Italy* (dec.), no. 12386/86, 15 April 1991, *Raimondo v. Italy*, no. 12954/87, 22 February 1994, *Autorino v. Italy* (dec.), no. 39704/98, 21 May 1998, *Arcuri v. Italy* (dec.), no. 52024/99, 5 July 2001, *Riela and Italy* (dec.), no. 52439/99, 4 September 2001, *Butler v. United Kingdom* (dec.), no. 41661/98, 27 June 2002, *Walsh v. United Kingdom* (dec.), no. 43384/05, 21 November 2006 and *Gogitidze and Others v. Georgia*, no. 36862/05, 12 May 2015..

[12] No. 30810/03, 1 March 2007.

[13] *Gogitidze and Others v. Georgia*, at para. 105.

As regards property presumed to have been acquired either in full or in part with the proceeds of drug-trafficking offences or other illicit activities of mafia-type or criminal organisations, the Court did not see any problem in finding the confiscation measures to be proportionate even in the absence of a conviction establishing the guilt of the accused persons. The Court also found it legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence which suggested that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. Indeed, whenever a confiscation order was the result of civil proceedings in rem which related to the proceeds of crime derived from serious offences, the Court did not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1. The domestic authorities were further given leeway under the Convention to apply confiscation measures not only to persons directly accused of offences but also to their family members and other close relatives who were presumed to possess and manage the ill-gotten property informally on behalf of the suspected offenders, or who otherwise lacked the necessary bona fide status (see Raimondo, cited above, § 30; Arcuri and Others v. Italy (dec.), no. 52024/99, ECHR 2001-VII; Morabito and Others v. Italy (dec.), 58572/00, ECHR 7 June 2005; Butler v. the United Kingdom (dec.), no. 41661/98, 27 June 2002; Webb v. the United Kingdom (dec.), no. 56054/00, 10 February 2004; and Saccoccia v. Austria, no. 69917/01, §§ 87-91, 18 December 2008; compare also with the more recent case of Silickienė, cited above, §§ 60-70, where a confiscation measure was applied to the widow of a corrupt public official).
Having regard to all the above considerations the Court finds, by analogy, that the civil proceedings in rem in the present case, conducted under the procedure regulated by Article 37 § 1 of the CCP and Article 21 §§ 4 to 11 of the CAP, can likewise not be considered to have been arbitrary or to have upset the proportionality test under Article 1 of Protocol No. 1. In this connection the Court also attaches importance to the similar conclusions of the Constitutional Court of Georgia, which found the civil proceedings in rem to be devoid of any arbitrariness (see paragraphs 37-43 above) Indeed, it was only reasonable to expect all three applicants – one of whom had been directly accused of corruption in a separate set of criminal proceedings, whilst the remaining two were presumed, as the accused's family members, to have benefited unduly from the proceeds of his crime – to discharge their part of the burden of proof by refuting the prosecutor's substantiated suspicions about the wrongful origins of their assets. Moreover, those civil proceedings for confiscation clearly formed part of a policy aimed at the prevention and eradication of corruption in the public service, and the Court reiterates that in implementing such policies, respondent States must be given a wide margin of appreciation with regard to what constitutes the appropriate means of applying measures to control the use of property such as the confiscation of all types of proceeds of crime (see, for instance, Yildirim v. Italy (dec.), no. 38602/02, ECHR 2003-IV, and Butler, cited above)[14].

17. However, such a measure must not be based on mere suspicions and must be subject to an effective judicial guarantee that reflects the requirements noted above[15], including the ability to rebut any presumptions relied upon, such as that the property concerned represents the proceeds from unlawful activities, has been acquired with those proceeds or is to be used for such activities.

18. Thus, the failure to fulfil these requirements will lead to the taking being regarded as arbitrary and in violation of Article 6(1) of the European Convention and Article 1 of Protocol No. 1, such as in *Rummi v. Estonia* where the European Court observed that the

[14] *Gogitidze and Others v. Georgia*, at paras. 107-108.
[15] See para. 12 above.

> Court of Appeal, in upholding the first-instance court's confiscation decision, mainly referred to two documents drawn up by the police, the first of which set out suspicions against R., and the second of which requested confiscation of the property, and to the statements of two witnesses, including the applicant. The Court notes that the Court of Appeal merely referred to the documents drawn up by the police, without making any attempt to assess the suspicions raised or conclusions drawn in these documents. As concerns the witness statements, K.'s statements were merely referred to, with no mention of their content. The applicant's statements were summarised briefly, and from this concluded that the property had been obtained through crime or that its legal owner could not be identified. The Court observes, however, that according to the applicant's statements this property was obtained by her husband, who had placed his money in precious metals (see paragraph 23 above). In these circumstances, the Court is unable to conclude that the lack of reasoning in the first-instance court's decision was remedied by the Court of Appeal.
> The foregoing considerations are sufficient to enable the Court to conclude that the requirements of a fair trial were not complied with in the present case. Having reached this conclusion, the Court considers it unnecessary to further examine the question whether Article 6 § 1 was also breached on account of the lack of oral hearing[16].

19. Moreover, it should be borne in mind that the ability to challenge a taking of property before a court should be accorded to all who have an interest in it and not just the person suspected of involvement in acquiring it through, or using it for, illegal activities.

20. Furthermore, a failure to establish the specific requirements in the legislation authorising confiscation will also lead to a finding that Article 1 of Protocol No. 1 has been violated, as can be seen in the case of *Rummi v. Estonia*, in which the European Court observed that

> under Article 63 (3) of the Code of Criminal Procedure, relied on by the County Court, property obtained through crime could be confiscated. Having regard also to the presumption of innocence enshrined in Article 6 § 2 of the Convention, the Court notes that in the present case neither R. nor any other accused in the criminal proceedings were convicted of any offence …Thus, as the commission of any crimes was not established by the domestic authorities, the Court is unable to see how the property could be confiscated as obtained through crime under Article 63 (3) of the Code of Criminal Procedure. The Court also notes in this connection that it has not been shown that possession of such items and substances was unlawful in itself.
> As regards the question whether the confiscation of this part of the property might have been based on the consideration that the property had been obtained as proceeds of crime, the Court is not convinced by the investigating authorities' reliance on R.'s tax return for 2000, according to which he admittedly could not have obtained such an amount of precious metals by lawful means …, subsequently complemented by K.'s statements that R. had been living beyond his means …. In this connection, the Court firstly notes that Article 63 (3) of the Code of Criminal Procedure, on which the confiscation decision was based, concerned property received as a result of a criminal offence and not property acquired as proceeds of crime. Moreover, it has not been demonstrated, as regards either of these grounds, that domestic law provided for confiscation of the property of a suspect who died during the criminal proceedings and in whose respect the proceedings were discontinued for that reason without him having been convicted. Secondly, and in any event, the domestic authorities appear to have carried out no assessment as to the sums R. might have obtained through crime and invested in precious metals. In these circumstances, the Court is bound to conclude that the

[16] No. 63362/09, 15 January 2015, at paras. 83 and 84. Cf. *Arcuri v. Italy* and *Gogitidze and Others v. Georgia*, in which the requirements of Article 6(1) were found to be satisfied.
[16] No. 30810/03, 1 March 2007.

confiscation of the gold and silver items and diamonds was an arbitrary measure, its scope being determined by the somewhat incidental seizure of evidence at the outset of the proceedings[17].

21. A similar conclusion was reached by the European Court in D*enisova and Moiseyeva v. Russia*, in which it stated that

> 62. The Khoroshevskiy District and the Moscow City Courts' persistent failure to take cognisance of the merits of the applicants' claim for vindication of their property was at variance with the requirements of the Russian law. In a series of binding rulings the Plenary Supreme Court consistently reminded the courts of general jurisdiction that a confiscation order may only apply to the convict's portion of the jointly owned property and may not affect the property rights of cohabiting family members, unless it has been established that the property was criminally acquired and registered in family members' names with a view to avoiding confiscation. To achieve the proper balance of interests, the courts examining claims for release of the spousal portion from confiscation were required to determine the portion of each spouse by reference to the family property in its entirety, so that each spouse's portion comprises both confiscated and non-confiscated property items (see paragraphs 37 and 38 above). The first applicant supported her claim to one half of the spousal property with evidence capable of showing the legitimate origin of at least a part of the family property, such as Mr Moiseyev's pay statements from the Ministry of Foreign Affairs and the rental agreement in respect of the car garage. Although the domestic courts did not declare that evidence inadmissible, it was not mentioned in their judgments, which moreover did not contain any analysis of the composition of the family property. It follows that the domestic courts did not carry out a global assessment of the family property and the balancing exercise of the rights of family members, which were both required under the applicable domestic law provisions.
> 63. After Mr Moiseyev had regained possession of the car following a legislative amendment of Russian criminal law and after the bailiffs had determined that confiscation of bank assets, personal property and the garage was not physically possible, the first applicant reintroduced her claim for the spousal portion of the contested cash funds and the second applicant sought to vindicate her right to the computer. However, the second civil claim was likewise dealt with in a summary fashion. The domestic courts did not give heed to the evidence and submissions by the applicants or make a global assessment of the family property with a view to determining the spousal portions. As to the second applicant's claim to the computer, it was likewise dismissed without any explanation why her submission that the computer had been given to her by her parents as a gift appeared implausible. The Khoroshevskiy District and Moscow City Courts did not mention or refer in their judgments to any provisions of the Civil or Family Code.
> 64. In the light of the foregoing considerations, the Court finds that the applicants "bore an individual and excessive burden" which could have been rendered legitimate only if they had had the opportunity to challenge effectively the confiscation measure imposed in the criminal proceedings to which they were not parties; however, that opportunity was denied them in the subsequent civil proceedings and therefore the "fair balance which should be struck between the protection of the right of property and the requirements of the general interest" was upset (compare Hentrich v. France, judgment of 22 September 1994, Series A no. 296-A, § 49)[18].

22. In addition, a taking will be regarded as arbitrary where the property concerned – or part of it - cannot be shown to be linked to the illegal activities on which it is supposed to the based[19].

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[17] Paras. 107-108.
[18] No. 16903/03, 1 April 2010.
[19] There is no specific case law on the point but it is implied in the rulings in cases such as D*enisova and Moiseyeva v. Russia and Rummi v. Estonia.*

23. It is unlikely that any retrospective applicability of a measure authorising the taking of property linked to illegal activities or acquired through them will be regarded by the European Court as inconsistent with Article 1 of Protocol No. 1. Thus, the European Court observed in *Gogitidze and Others v. Georgia* that

> at the outset that the amendment in question was not the first piece of legislation in the country which required public officials to be held accountable for the unexplained origins of their wealth. Thus, as far back as 1997 the Act on Conflict of Interests and Corruption in the Public Service had already addressed such issues as corruption offences and the obligation of public officials to declare and justify the origins of their property and that of their close entourage, subject to possible criminal, administrative or disciplinary liability the exact nature of which was to be regulated by separate laws governing breaches of those anti-corruption requirements (see paragraphs 44-48 above). That being so, it is clear that the amendment of 13 February 2004 merely regulated afresh the pecuniary aspects of the existing anti-corruption legal standards. Furthermore, the Court reiterates that the "lawfulness" requirement contained in Article of Protocol No. 1 cannot normally be construed as preventing the legislature from controlling the use of property or otherwise interfering with pecuniary rights via new retrospective provisions regulating continuing factual situations or legal relations anew … It finds no reason to find otherwise in the present case[20].

24. However, such an approach would not be appropriate where the activities on which the taking was based were not a crime at the time of their commission. In such circumstances, the taking of the property would undoubtedly be characterised as arbitrary and disproportionate.

25. Any taking of property pursuant to such powers should necessarily be of a provisional nature until there is a final judicial determination as to either its intended unlawful use or its provenance in case of property suspected of being obtained through illegal activities or being the proceeds of them. Where neither of these are established it would then be inconsistent with Article 1 of Protocol No. 1 to retain the property concerned or to fail to regularise its legal status[21].

26. However, where all these requirements are met and the taking of the property becomes permanent, the European Court and the former European Commission of Human Rights have not regarded such a measure as either involving a finding of guilt subsequent to a criminal charge or a penalty. As a result, the taking of property in these circumstances would not involve a breach of the presumption of innocence contrary to Article 6(2) of the European Convention or of the prohibition on no punishment without law contrary to Article 7[22]. Furthermore, this is so even where the relevant proceedings precede a pending criminal trial[23].

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[20] At para. 99.

[21] Thus in *Raimondo v. Italy*, no. 12954/87, 22 February 1994 a substantial delay in regularising the legal status of some of the applicant's property – namely, the removal of the relevant entry relating to it in the public registers concerned – was found by the European Court to be "neither "provided for by law" nor necessary "to control the use of property in accordance with the general interest" within the meaning of Article 1 of Protocol No. 1" (para. 36).

[22] See *M v. Italy* (dec.), *Autorino v. Italy* (dec.), *Arcuri v. Italy* (dec.), *Riela and Italy* (dec.), *Butler v. United Kingdom* (dec.), *Walsh v. United Kingdom* (dec.) and *Gogitidze and Others v. Georgia*.

[23] *Gogitidze and Others v. Georgia*, at para. 126.

27. Nonetheless, this does not mean that the making of an order for confiscation of property can never give rise to a breach of the presumption of innocence and indeed the European Court has found this to have occurred where such a measure was closely linked to criminal proceedings against the applicants concerned.

28. Thus, in *Geerings v. Netherlands*[24], a confiscation order had been made in respect of assets held notwithstanding that an adequate explanation for their origin could be given and this order related to the very crimes of which the applicant had in fact been acquitted. The European Court found that the finding of a supposed unlawful benefit obtained by the applicant had relied upon no more than conjectural extrapolation based on a mixture of fact and estimate contained in a police report. Furthermore, the European Court observed that the finding in respect of the applicant was more than the voicing of mere suspicions but amounted to a determination of his without him actually having been "found guilty according to law". As a result, it held that there had been a violation of Article 6(2).

29. Subject to the foregoing requirements elaborated by the European Court, there is no necessary inconsistency between the taking by the State of property that has been improperly acquired or may be improperly used - both as part of criminal proceedings and in absence of them - and obligations under the European Convention and its Protocols. Thus there is no necessary conflict between these requirements and the various international obligations which encourage the use of such measures to tackle criminality, notably, the United Nations Convention Against Corruption, the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. Indeed, the rulings of European Court have taken account of both these treaties and of the work of bodies such as the Council of Europe Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism (MONEYVAL) and the Council of Europe Group of States Against Corruption (GRECO)[25].

C. The Explanatory Note

30. The Explanatory Note begins by suggesting that

> the practical application of the Criminal Procedure Code of Ukraine has highlighted certain provisions that do not fully correspond with to the existing trends in international law in the field of fight against corruption, objectives of criminal proceedings, or prevent the return to

[24] No. 30810/03, 1 March 2007.

[25] See, e.g., *Gogitidze and Others v. Georgia*, no. 36862/05, 12 May 2015, at paras. 55-69.

> the state budget of funds or other valuables obtained by criminal means, due to the fact that respective individuals flee from investigation and attempt to avoid criminal liability.

31. However, there is no indication in the Explanatory Note of the provisions that are considered not to fully correspond with the international trends. Instead the Explanatory Note continues by referring to the estimated amount of assets lost by Ukraine through abuse of power in the preceding four years. In addition, it points out the sums in foreign bank accounts held by former Ukrainian officials - including those of the former President Yanukovych – that have been frozen at the request of the Prosecutor General's Office of Ukraine.

32. The Explanatory Note then states that the blocking of these sums

> evidences the need for resolute actions in order to effect the actual seizure, i.e. forfeiture to the State of criminally obtained property, particularly where a person cannot be held criminally liable because of his/her flight, death or for other reasons. Such provisions in Ukraine's Criminal Procedure Code are currently practically non-existent.

33. However, there is again no reference to the provisions that are considered deficient nor any discussion as to how the provisions in the Draft Law might be used to recover the sums held in the frozen accounts or of the other relevant legal provisions that might be needed to be used for this purpose.

34. Instead, it indicates that the proposal in the Draft Law is to include a chapter to the Criminal Procedure Code of Ukraine that

> would define the procedure for forfeiture to the State, before the court sentence, of monetary funds, foreign exchange assets or income derived from them.

35. In doing so it states that the innovation being proposed is based on the experience of other countries and relevant treaties.

36. It thus instances the adoption of powers in various countries to permit the non-conviction based asset forfeiture without the need for a criminal conviction and states that such powers are either found in a separate law or form part of a criminal procedure code and legislation on civil proceedings. In addition, it cites the existence of 36 key legal and practical guidelines that have been developed under a joint project of the World Bank and the UN Office on Drugs and Crime. However, it does not specify what those guidelines, give any reference to where they can be found[26] or indicate to what extent those guidelines are followed in the provisions of the Draft Law.

[26] They are available at https://star.worldbank.org/star/sites/star/files/Non%20Conviction%20Based%20Asset%20Forfeiture.pdf.

37. Also cited in aid of the provisions in the Draft Law is an unspecified ruling of the European Commission on Human Rights from 1986[27] and the suggestion in Article 54(1)(c) of the United Nations Convention against Corruption that States consider taking action to allow non-conviction based asset forfeiture.

38. The Explanatory Note emphasises that non-conviction based asset forfeiture is

> a **tool for prosecuting a thing**, irrespective of proof of guilt (conviction) of a person to whom it belongs.

and it states the objective of the Draft Law is to improve provisions to enable forfeiture of monies, etc. where a person suspected of committing certain corruption-related crimes or establishing a criminal organisation flees from investigation.

39. In addition, the Explanatory Note states that the adoption of the Draft Law will ensure recovery of monies, etc. to the State budget and increase the effectiveness of pre-trial investigation.

40. There is nothing in the Explanatory Note that is inconsistent with either international standards in general or the rulings of the European Court in particular. Nevertheless, it fails to provide a useful guide as to the content of the Draft Law and does not give any indication as to how its provisions will be operationalised, let alone their relationship with other provisions dealing with international cooperation and mutual legal assistance that are likely to be of crucial importance in practice. This is not an appropriate approach towards law-making, particularly given the potential impact of the provisions concerned on rights under the European Convention.

D. The Draft Law

41. The provisions in the Draft Law are intended to comprise an entirely new Chapter of the Criminal Procedure Code, 24^{2}. It will be located between Chapter 24^{1} ("Specifics of special pre-trial investigation of criminal offences") and Chapter 25 ("Specifics of pre-trial investigation of criminal misdemeanors"). However, its only real connection with the focus of those two chapters is that the forfeiture is to be conducted during the pre-trial investigation of certain crimes. Certainly, there is no reason to imagine that the provisions in this new Chapter will, as the Explanatory Note asserts, increase the effectiveness of pre-trial investigation.

42. The new Chapter 24^{2} will be comprised of 6 Articles.

[27] It is probable that it is, in fact, *M v. Italy* (dec.), no. 12386/86, 15 April 1991.

43. All the provisions that it is proposed to include in Chapter 24^2 are concerned with the forfeiture of monies, currency valuables, Ukrainian government bonds, Ukrainian treasury bonds, precious metals and/or stones, other valuables and proceeds from them (“monies, etc.”).

44. There is, however, no definition of this kind of forfeiture either in the Draft Law or in the existing provisions of the Criminal Procedure Code of Ukraine. The absence of this is regrettable since the term used in the Ukrainian text[28] of the Draft Law and rendered in English as “forfeiture” is not the same as the Ukrainian term used in Article 51(7) of the Criminal Code of Ukraine. Given the significance of the term in the provisions in the Draft Law, the absence of any definition is necessarily inconsistent with the need for precision in a legal measure affecting property rights and could prove problematic should its use be scrutinised by the European Court[29].

Article 297^6

45. Article 297^6 provides that the forfeiture of monies, etc. is only possible pursuant to the provisions of the proposed Chapter 24^2.

46. Thus, it will allow such forfeiture (a) in respect of certain crimes[30], (b) where the monies, etc. are detected during the course of the pre-trial investigation, (c) they are either owned by a suspect or a third person to whom they were transferred prior to the initiation of the criminal proceedings or in the course of them and (d) there are evidences of unlawfulness of the acquisition[31].

47. The limited range of offences to which forfeiture applies is not as such inconsistent with the approach seen in the case law of the European Court and it is unlikely to fall foul of the prohibition on discrimination in Article 14 of the European Convention if there is a basis for concluding that these offences are particularly problematic as regards the loss of State funds.

48. The requirement that there be evidences of the unlawfulness of the acquisition of the monies, etc. is rather vague, as indeed are other provisions in the Draft Law on this issue[32]. In particular it is unclear what is the standard of proof applicable at the various stages of the proposed proceedings and to what extent the standards in Chapter 4 of the Criminal Procedure Code of Ukraine are applicable, including those regarding the admissibility of evidence. As a result, there will be uncertainty as to

[28] “звернення в дохід держави”
[29] See n. 2 above.
[30] Namely, misappropriation, embezzlement or conversion of property by abuse of official post, creation of a criminal organization and acceptance of an offer, promise or receipt of illegal benefit by an officer, pursuant to articles 191(2)-(5), 255 and 368 of the Criminal Code of Ukraine.
[31] Para. 4.
[32] See paras. 54, 55, 60, 63 and 71.

whether someone subject to forfeiture proceedings would necessarily be able to demonstrate that a particular item of property had a lawful provenance and this would be inconsistent with the approach seen in the rulings of the European Court, particularly where presumptions are used.

49. Under the proposed provision, the application of forfeiture is also subject to two other conditions. Firstly, it will only be able to be conducted in respect of certain persons – namely, those suspected of the relevant crimes and other individuals having received the monies, etc. from the suspects prior to or during the criminal proceedings[33]. Secondly, it will only be applicable when a suspect is fleeing from investigation and justice in order to escape criminal liability, is the object of a national, interstate or international wanted warrant and hasremained on the wanted list for over six months, orwhen the criminal proceedings have been terminated on account of his or her death or the failure of the state from which he or she had been extradited to consent to his or her prosecution for the offence concerned[34].

50. There seem to be a potential inconsistency in the provisions in the Draft Law since the proposed Article 297[11] provides for the possibility of monies, etc. being returned in the event of an acquittal, which is obviously not possible if the proceedings are terminated. It thus needs to be clarified whether or not the possibility of acquittal is only intended to be relevant in respect of proceedings *in absentia*.

51. Under the proposed provision, investigators detecting the relevant circumstances must inform the prosecutor of this within 24 hours who then initiates the forfeiture proceedings if the investigator's arguments are deemed valid. The prosecutor is also empowered to initiate such proceedings in the event of detecting the relevant circumstances him or herself. This is not, in itself problematic.

Article 297[7]

52. Article 297[7] is concerned with the proceedings regarding forfeiture.

53. Paragraph 1 states that these proceedings "are to be conducted in compliance with the provisions of the present Code and peculiarities provided for by the present Chapter".

54. It is required that the following circumstances be proved: the fact of ownership of the monies, etc., the circumstances under which this ownership was obtained and the circumstances that the monies, etc. were acquired unlawfully[35]. In the event of circumstances being proved that the suspect is trying to conceal monies, etc., the

[33] Para. 4
[34] Para. 5.
[35] Para. 2.

prosecutor is to take measures to invalidate transactions such as sale-purchase, gift or loan under the civil litigation procedure[36].

55. As has already been noted[37], there is a lack of clarity as to the standard and means of proof. This is all the more problematic in the present provision as at this stage of the proceedings the concern is with action being taken by the prosecutor to interfere with property rights and not a judicial ruling in which a fair procedure is required to be followed. Moreover, while there is ultimate resort to the courts – whether for the purpose of granting a motion on forfeiture or for invalidating a transaction – there is some confusion in the present provision. This is because it is located in the Code of Criminal Procedure of Ukraine with the possibility of the criminal standard being applicable and yet there is the stipulation that the civil standard is ultimately to be applied where proceedings are taken to invalidate a transaction.

56. Upon it being established during these proceedings that "enough evidence" – which again remains unnecessarily vague - has been collected to substantiate that the monies, etc. could not have been lawfully obtained, the prosecutor is then required to file a motion to the court having jurisdiction upon the criminal proceedings[38].

57. This motion is set out, inter alia, the grounds to apply for forfeiture, details relating to the suspect, third person and the monies, the circumstances of the discovering the monies, etc. and their location, the nature and amount of the damages resulting crime, the relevant proofs corroborating the circumstances and the estimated costs of the proceedings[39]. There is also a requirement to notify "the defence lawyer of the suspect, the third person, the representative of the latter" of the filing of the said motion[40].

58. These provisions are not in themselves problematic but it is unclear why there is no provision for notifying the suspect him or herself, as is provided for in respect of rulings on motions on forfeiture[41]. Moreover, there is no indication in any of the provisions of the Draft Law as to how a suspect is to acquire a defence lawyer. It does not seem that any of the provisions on State appointment in the Criminal Procedure Code of Ukraine have any applicability to this procedure. Furthermore, given that the forfeiture proceedings are predicated on the absence of the suspect, the absence of any arrangement to ensure that he or she is effectively represented in the proceedings is likely to result in the proceedings being in violation of the requirements of Article 6(1) of the European Convention.

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[36] Para. 3
[37] See para. 48.
[38] Para. 4
[39] Para. 5.
[40] Para. 6.
[41] In Article 297[10].

59. Finally, there is no requirement to publicise the initiation of the forfeiture proceedings so that persons (other than the suspect or a third party) who may have a valid claim to the property in question can seek to establish this before the court concerned.

Article 297^8

60. There is provision for a court hearing on the prosecutor's motion to conduct forfeiture in Article 297^8, which must be heard by the court sitting alone "no later than ten days upon its receipt[42].

61. In addition, there is provision for the participation of the defence lawyer of the suspect and, where applicable, the third person and/or representative, with them being accorded the procedural rights set out in Article 64^2 of the Criminal Procedure Code. However, their failure to show for the hearing "shall not be an obstacle for the hearing of the motion". This provision reinforces the likelihood just noted[43] of the proceedings resulting in a violation of Article 6(1) of the European Convention. Furthermore, the specification of a 10 day deadline for holding the hearing will invariably be incompatible with the fair procedure required by Article 6(1) since, in view of the potential complexity of the task of establishing the provenance of many items of property, a reasonable time for preparation should be accorded those whose property is subject to the relevant proceedings. This is especially important in those cases where the suspect is outside the country but his or her paperwork is still in Ukraine and not readily accessible to him or her.

62. In addition, it is specified in paragraph 2 that the hearing of the prosecutor's motion is

   "to be conducted in compliance with the requirements of the present Code and take into consideration the peculiarities provided for by the present Chapter"

   and that, upon the motion of the defence lawyer of the suspect, other persons can be summoned to the hearing to testify with regard to the motion. The first part of the phrase is unclear as there is no indication as to what requirements of the Code of Criminal Procedure of Ukraine might be of relevance. Moreover, the second part of this phrase is clearly ambiguous. It could entail efforts to address the problems faced by suspects outside the country in substantiating a claim that their acquisition of the property concerned was lawful but it could equally provide an incentive for the court to favour claims for forfeiture. This clause in the provision is entirely unsatisfactory and does nothing to give confidence that the requirements of Article 6(1) of the European Convention will be fulfilled.

[42] Para. 1.
[43] In para. 57.

63. At the same time the possibility of the defence lawyer being able to submit motions for persons to be summoned to testify in connection with the motion for forfeiture is entirely appropriate. However, there is no justification for denying this possibility also to the legal representative of any third person involved in the proceedings.

Article 297^{9}

64. During the hearing the court is required by Article 297^{9} to decide whether the monies, etc. had been discovered during criminal proceedings to which the proposed new Chapter applies, the unlawfulness of acquisition by the suspect or the third persons of the rights to those monies, etc., whether enough search measures had been taken to establish the whereabouts of the suspect and/or to establish the owner of the monies, etc. and the cost of proceedings on forfeiture and their distribution.

65. Once again this provision is problematic given the absence of clarity as to standard of proof and the admissibility of evidence.

Article 297^{10}

66. Upon consideration of the prosecutor's motion, the court is required to issue a ruling either to grant or dismiss it. Such a ruling will come into effect effect upon termination of the term of appeal established by the Criminal Procedure Code if no appeal is filed and it subject to immediate enforcement. This is not, as such, problematic.

67. There is also appropriate provision for a copy of the ruling to be handed to the defence lawyer of the suspect and the third person or its representative, as well as for a copy to be addressed to the suspect at his or her last known place of stay.

68. It is further provided that any appeal is to be completed within ten days of the ruling to open appeal proceedings "according to the procedure set forth by the present Code and taken into consideration the peculiarities provided for by the present Chapter". As already noted[44], such a short deadline is not compatible with the task involved and is likely to be entail violations of Article 6(1) of the European Convention.

69. The judgment of the court of appeal is final and not subject to appeal. This is not, as such, problematic.

70. There is, however, no provision for appeal or the reopening of the proceedings in cases where someone who was not involved in the proceedings or otherwise had

[44] See para. 60.

notice of them disputes the finding of ownership by the court and contends that the property in question is his, her or its (in the case of a company). The absence of this possibility would be an unjustified interference with the property rights of the person concerned under Article 1 of Protocol No. 1[45].

Article 297[11]

71. The final provision of the proposed new Chapter – Article 297[11] – provides for a judgment on the return of the monies, etc. or their monetary equivalent to be delivered simultaneously with the delivery of an acquittal. Such return is to be effected within 12 months of the coming into force of the acquittal.

72. As has already been noted[46], there is some uncertainty as to how an acquittal might be possible following forfeiture proceedings given the condition for bring them that the prosecution has been terminated. Subject to this point being clarified, it might seem appropriate for property to be returned where there has been an acquittal. However, a further problem might seem to exist if the standard of proof in both forfeiture and criminal proceedings is the same as there would then be contradictory rulings on essentially the same issue. This is, of course, only a problem arising from the formulation of the Draft Law since that it is unclear as to whether the civil or criminal standard of proof is to be used in forfeiture proceedings. Nonetheless, at this point it is not fundamentally problematic as an acquittal will ultimately be favourable for the person subject to the forfeiture proceedings.

73. In addition, this Article provides a right for the person whose monies, etc. have been subject to forfeiture to file a claim for their return and such return is to "conducted in case such a claimant proves the lawfulness of acquirement of the ownership" of the monies, etc. The matter of return of the monies, etc. is to be decided by the civil court.

74. This provision seems inconsistent with the preceding one since the latter provides for an order of return "simultaneously" in the event of acquittal but the current one is requiring the lawfulness of acquisition to be proved and is setting a time limit for doing so of 12 months from the acquittal, which would necessarily preclude return being ordered at the same time as the acquittal. Moreover, as the decision is to be taken by a civil court, it would seem that a civil standard is implied, underlining the general incoherence in the Draft Law as regards evidence and proof.

75. The final clause of the Article – which is the second paragraph 2 in it – provides for

> the forfeiture to the state under the provisions of the present Chapter is to be taken into consideration during the delivery of the sentence

[45] *Cf. Ünsped Paket Servisi SaN. Ve TiC. A.Ş. v. Bulgaria*, no. 3503/08, 13 October 2015.

[46] See paras. 49-50.

As previously noted[47], the meaning of such a phrase is both unclear and potentially inappropriate. If the intention is to reduce or increase the sentence by reference to the forfeiture, there ought to be more specificity as to the basis on which this is to be taken into account.

76. Although the European Court has established that civil proceedings for forfeiture do not involve the determination of a criminal charge and that the presumption of innocence is generally inapplicable to such proceedings, it should not be entirely discounted that this might not be an objection successfully raised in connection with the application of the provisions in the Draft Law. Pertinent considerations in this regard might be: the intertwining of the forfeiture and criminal proceedings as seen in the consequences of an acquittal; the apparent reliance on criminal standards of proof (albeit that there is uncertainty in that regard); the repeated use of the term "suspect" to describe the person that is the object of the relevant proceedings; and the fact that Part 2 of the Draft Law provides that the provisions that it will introduce into the Criminal Procedure Code of Ukraine will only "be effective during two years from the day of coming into effect". Much might turn on the way particular proceedings are handled but the fact that the Explanatory Note points to a very specific group of persons – "the former Ukrainian President's inner circle" – being targeted by the proposed adoption of the Draft Law would certainly increase the potential for particular proceedings to be regarded as infringing the presumption of innocence and thus be contrary to Article 6(2).

E. Conclusion

77. The content of the provisions in the Draft Law is problematic in a number of respects.

78. Firstly, there is a lack of clarity as to the applicable standard of proof and the relevant rules of evidence.

79. Secondly, both this lack of clarity and the limited time within which motions for forfeiture must be considered will inevitably make the task of resisting accusations of improper acquisition and thus lead to unfair proceedings, inconsistent with the requirements of Article 6(1) of the European Convention.

80. Thirdly, there is no adequate provision for legal representation given the circumstances in which forfeiture proceedings are to be conducted, i.e., with the suspect necessarily absent from them.

[47] See para. 61.

81. Fourthly, there is a lack of clarity in aspects of the drafting and some of the terminology being used, as well as some potential inconsistency between provisions and the use of inappropriate indications as to the handling of proceedings.

82. Finally, there is a risk that the use of the proceedings envisaged in the Draft Law could in some instances give rise to a breach of the presumption of innocence.

83. Although the object of seeking to recover property acquired through criminal offences and the proceeds of such acquisition is not inconsistent with the standards elaborated in the rulings of the European Court, the adoption of the Draft Law in its current form would be incompatible with many of the requirements of the European Convention and its Protocols.