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Draft Law of Ukraine

On amendments to certain legislative acts of Ukraine regarding the ensuring of unjustified assets recovery into the revenue of the State

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This Technical Paper presents an expert review/opinion of the *Draft Law of Ukraine on amendments to certain legislative acts of Ukraine regarding the ensuring of unjustified assets recovery into the revenue of the State* ("Civil Confiscation Law"). The Paper has been prepared based on an unofficial English translation of the Civil Confiscation Law and supporting materials. It has been produced within the framework of the Council of Europe's Projects: the CoE/EU Programmatic Cooperation Framework Project: "Fight against Corruption in Ukraine", Open Advisory Facility Services (PCF-UA) and the CoE Project "Continued support to the criminal justice reform in Ukraine", financed by the Danish Government.

The views expressed herein can in no way be taken to reflect the official position of the European Union and/or the Council of Europe.

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I. Introduction

The *Draft Law on amendments to certain legislative acts of Ukraine ensuring of unjustified assets recovery into the revenue of the State* ("Civil Confiscation Law") was submitted in July 2016 to the Ukrainian Parliament for adoption. The Civil Confiscation Law represents a fourth attempt to introduce an assets seizure/forfeiture mechanism in Ukraine since the beginning of 2016. In view of this, Ms Oksana Syroyid Deputy Speaker of the Parliament asked the Council of Europe for an expert opinion on the Civil Confiscation Law in order to evaluate it against the relevant asset seizure and forfeiture and human rights international standards.

The Civil Confiscation Law was preceded by two initiatives which had received criticism for failing to comply with applicable international standards and a third legislative initiative which was later withdrawn. The first initiative was submitted to the Parliament in mid-February 2016, in the form of the *Draft Law 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* ("Draft Law № 4057"). The Draft Law № 4057 aimed to introduce a criminal procedure mechanism for forfeiture of assets prior to the conclusion of criminal proceedings in cases where the perpetrator is a fugitive from justice or where proceedings are terminated due to the death of the accused or the failure to obtain extradition from abroad. In April 2016, the Council of Europe provided an expert opinion on the Draft Law № 4057 which states notable human rights shortcomings, namely weak guarantees of presumption of innocence.[1] The Delegation of the European Union to Ukraine also pointed out weak protection of property rights corresponding to EU standards.[2] In light of these concerns, the Draft Law № 4057 was withdrawn from the Parliament mid-April 2016.

Subsequently a second draft, the *Draft Law on amendments to certain legislative acts of Ukraine regarding the establishing of effectual mechanisms directed on search of the proceeds gained from crime or other illegal way, prevention of its usage against the interests of society and the State* ("Draft Law № 4811"), was submitted to the Parliament. Again, it aimed at introducing non-conviction based forfeiture through amendments to the Criminal Procedure Code. The Draft Law № 4811 was also found to embody significant

[1] CoE, "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 judgement", 5 April 2016, Available from: www.coe.int, Accessed on 25 August 2016

[2] EU Delegation's assessment of the bill 4057 (on confiscation), 28 March 2016, Available from: http://eeas.europa.eu; Accessed on 25 August 2016

shortcomings[3] and was subsequently withdrawn from the Parliament. The final attempt to introduce a mechanism initially envisaged by the Draft Law № 4057 took place in June 2016 in the form of the *Draft Law on amendments to certain legislative acts of Ukraine regarding the peculiarities of forfeiture to the State illegal assets and assets with unidentified owner* ("Draft Law № 4890"). Draft Law № 4890 was rejected by the Parliamentary Committee on Legislative Support to Law Enforcement due to mirroring solutions critiqued in respect to Draft Laws № 4057 and № 4811.

This Expert Opinion represents a consolidation of legal findings of three Council of Europe consultants with expertise in asset confiscation and human rights issues: Jonathan Fisher QC, Lajos Korona and Jeremy McBride. The Expert Opinion has been coordinated, reviewed and edited by the Secretariat of the Council of Europe Economic Crime and Cooperation Division.

II. Executive Summary

The Civil Confiscation Law is the latest attempt in Ukraine aimed at finding proper means to identify, secure and recover illegal property of corrupt state officials, including those abscondees. In that sense, the legislative objective behind the current initiative is consistent with measures contemplated in international conventions on the fight against money laundering, serious crime and corruption. However, in light of its narrow scope, the Civil Confiscation Law appears to be more of an add-on to existing legislation on confiscation, without really building upon it. As a result, it does not provide a comprehensive approach to asset recovery envisaged by international standards, nor does it remedy deficiencies of the existing criminal and civil confiscation regimes. On a technical level, it contains solutions that are not harmonized with the existing provisions of the *Criminal Procedure Code* (CPC) and the *Civil Procedure Code* (CivPC).

It would be advisable for authorities to take a more comprehensive approach towards improving the overall asset recovery regime in Ukraine. This task goes beyond the remits of the current legislative proposal and would need to address all relevant pieces of legislation, which is discussed in more detail in Sections V and VI of this Opinion. In respect of the Civil Confiscation Law, it would be paramount to resolve the issues of incompatibility of several proposed solutions with the CPC and the CivPC (discussed in Section V of the Opinion) to ensure the overall coherence of legislation in this field.

[3] Dovydas Vitkauskas, Gintaras Svedas, Loic Guerin, Mika Aalto, "Consolidated Expert Position on Bill no. 4811 / European Union project "Support to Justice Sector Reforms in Ukraine"", 15 June 2016, Available from – http://www.justicereformukraine.eu; Accessed on 25 August 2016

Recommendations:

(i) Harmonize the proposed legislative provisions with general rules of the Ukrainian CivPC, confiscation rules set out in Section III Chapter 9 of the CivPC and rules on measures to be taken to secure assets under the CC and CPC regimes, and eliminate vagueness regarding the priority between different measures;

(ii) The applicability of the regime should be widened in order to ensure full effectiveness of the regime and remove possible discrimination arguments;

(iii) Provisions regarding the standard and the placement of the burden of proof require further clarification;

(iv) Revise the rules governing evidentiary standards in proceedings against a suspect and a nominee in order to eliminate existing discrepancies and ensure overall fairness of proceedings;

(v) Interconnection between proceedings against a suspect and a nominee should be regulated to ensure that the actual owner of the property would have standing in proceedings related to his/her assets;

(vi) Judges should have a mandatory obligation to verify whether the defendant had been given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the prosecution and to present his or her case under conditions that did not place him or her at a substantial disadvantage vis-à-vis the prosecution;

(vii) Lastly, there would be a need for more explicit protection of the rights of third parties.

The Council of Europe stands ready to assist Ukrainian authorities in this initiative and provide further support to processes that would help harmonize existing legislation with such newly introduced mechanisms.

III. Overview of the proposed legislation

Legislative objective

The proposed legislative changes are designed to equip Ukraine with the tools needed to confiscate the proceeds of corruption. According to the information contained in a memorandum compiled by the National Institute for Strategic Studies under the President of Ukraine, the estimated amount of assets lost by Ukraine through such abuse of power in the last four years has reached $70bn.

Some assets have already been frozen by banks abroad. At the request of Ukraine's Prosecutor-General's Office, Switzerland has blocked US$2bn in accounts held by former Ukrainian officials. In the UK, assets of £117m belonging to former Ukrainian

President Viktor Yanukovych have been frozen. In Cyprus, Eu 1.5m and US$3m held by Ukrainian officials have been similarly frozen. The Ukrainian Prosecutor-General has opened at least four criminal cases against Mr Yanukovych as well as other former Government officials but it appears that a number of the key suspects have fled to Moscow.

This has generated a serious problem for the Ukrainian Government since at the present time the provisions in the Ukrainian Criminal Procedural Code for securing asset forfeiture to the State are practically non-existent where a person cannot be held criminally liable because of his/her flight, death or for other reasons.

The Civil Confiscation Law proposes amendments to a range of existing pieces of legislation, including the *Civil Procedure Code* (CivPC) the *Criminal Procedure Code* (CPC) and the *Criminal Code* (CC), aimed at introducing the procedure for forfeiture to the State before criminal conviction and sentence. Typically, the property includes monetary funds, foreign exchange assets or income derived from them.

The proposed innovations are based on the experience of other countries where legislation for non-conviction based confiscation (NCB), and particularly in a form of "in rem" civil action, has already been implemented so as to provide an opportunity to use forfeiture as a weapon in the fight against corruption, irrespective of proof of guilt (conviction) of the person to whom the assets belong.

Proposed changes to the criminal confiscation and provisional measures regime – the Criminal Code

Whereas the main purpose of the Civil Confiscation Law is obviously to introduce the non-conviction based civil confiscation and the related provisional measures regime in the CivPC and CPC, it would also looks to amend the CC and extend the range of circumstances where the special confiscation regime can be applied. As a result, the list of court decisions that are the basis for application of this measure (Art. 96-1 [2] CC) would be extended to cover proceedings that have been terminated by a court ruling due to the death of the accused, as well as to cases where the prosecution has terminated criminal proceedings against a suspect for the same reason and there is a court ruling for the application of the special confiscation regime. As a result, the termination of criminal proceedings due to the death of the suspect/accused will not be an obstacle to the application of special confiscation, which is a feature successfully applied in many jurisdictions and would helpfully complement the existing, already robust system of this coercive measure. The Ukrainian authorities may wish however to reconsider whether the rules of the CPC sufficiently provide for adequate legal representation of the deceased's interests in such cases.

The second amendment to the CC Art. 96-2 (3), provides that special confiscation will also be applicable even if the perpetrator is exempt or discharged from criminally liability due to, among other reasons, diminished capacity and also if the criminal proceedings are closed because of the death of the suspect or the accused. This gives rise to a potential breach of the presumption of innocence as it could entail a finding that the deceased person has committed an offence.[4] Finally, for sake of consistency, the Civil Confiscation Law removes the previous exception related to cases where discharging from criminal liability was based on expiration of the statute of limitations.

Proposed changes to the civil confiscation regime – Civil Procedure Code

The new Section III Chapter 10 of the CivPC introduced by the Draft Law provides for a three-step court procedure initiated by a lawsuit filed by the competent public prosecutor[5] in the interests of the State with the court of appeal having jurisdiction according to the location of assets subject to the asset recovery procedure. The lawsuit is a property claim for the transfer of ownership of the respective assets and thus cannot be classified in itself as legal liability.

The scope of property to which the unjustified assets recovery applies extends to cash and non-cash national and foreign currency funds, securities and other financial instruments, precious metals and precious stones, in case their value exceeds 1000 × minimum monthly wage. The draft mechanism would not apply to property that constitutes object of special confiscation or confiscation of property in course of the criminal proceedings (Art. 233-5 of the CivPC).

Proceedings are commenced by a lawsuit issued by the competent prosecutor against the owner of the assets who may be (i) a suspect in the criminal proceedings where the assets were uncovered or (ii) an individual suspected to be a nominee owner of the assets, holding them on behalf of the suspect as the actual (beneficial) owner.

The lawsuit has to contain information and supporting documents/evidence listed in detail in Art 233-8 of the Civil Confiscation Law. The competent court will proceed if it established that: (a) the contents of the lawsuit meets the requirements set forth by law; (b) that the assets can be classified as assets subject to recovery; (c) the assets have been identified (uncovered) in the course of criminal prosecution of corruption-related crimes against individuals entrusted with the performance of national or local government functions; (d) the assets have been seized lawfully in the course of

[4] See Vulakh and Others v. Russia, no. 33468/03

[5] Pursuant to Art. 233-4 (1) prosecutors competent for filing the lawsuit are the Prosecutor General of Ukraine, his/her First Deputy as well as the Head of the Specialized Anti-Corruption Prosecutor's Office (who is a Deputy Prosecutor General him/herself). Any reference to "prosecutor" in this Opinion will necessarily cover these prosecutorial leaders.

criminal proceedings against individuals entrusted with the performance of the functions of the State or that of the local self-government for corruption related offences; and (e) the public prosecutor has provided the necessary evidence to support the claim. In case any of these conditions are not met, the court may rule against opening of proceedings. This however does not the prosecutor from refilling the lawsuit, after having addressed stated shortcomings.

The preliminary hearing represents the second step of the proceedings and is of key importance for the overall process due to significance of determinations that should be made during this hearing, namely:

(i) the prosecutor must prove that there are reasonable grounds for believing that the value of the assets is inconsistent with what is otherwise known about the suspect. This is to be assessed by reference to suspect's overall income and his last stated income in official sources. It is for the defendant to refute that this is the case and show that his ownership of the assets is consistent with his reported income;

(ii) If the action is brought against a nominee who is holding the assets on behalf of another, at the preliminary hearing the prosecutor must prove that there are reasonable grounds for believing that the suspect in the criminal proceedings can directly or indirectly (through individuals or legal entities) perform such acts in respect of the assets which the owner would otherwise perform. It is for the defendant to refute that this is the case

Should the prosecutor prove, and should the defendant respectively fail to refute these circumstances, the court closes the preliminary hearing and schedules a date for the hearing on the merits, i.e. the third stage of proceedings. As of this moment, the assets indicated in the prosecutor's lawsuit are considered as being "unjustified" (Art. 233-6 of the CivPC). The hearing on the merits must be scheduled so that the case can be resolved within a reasonable time, but no later than within 3 months from the date of commencement of proceedings (Art. 233-7 of the CivPC).

In this part, the Civil Confiscation Law also provides a detailed outline of the level and burden of proof as well as the various circumstances each party is supposed to prove in course of the proceedings. The standard of proof differs depending on the stage of the proceedings. During the preliminary hearing, the "reasonable grounds to believe" standard is applicable, while at the merits stage the "beyond reasonable doubt" standard is sough. The burden of proof is shared between the prosecution and the defence in a manner that the prosecution is mandated to prove the claims stated in the lawsuit, while the defence would be obliged to rebut them ("shifting burden of proof"). Should the defendant fail to rebut allegations made by the prosecution, the court will rule in favour of the recovery recover of unjustified assets into the revenue of the State (Art. 233-11 CivPC).

Proposed changes to the civil confiscation regime – provisional measures in the Criminal Procedure Code

The Civil Confiscation Law introduces "attachment of assets[6] for ensuring the recovery of unjustified assets into the revenue of the State within the course of civil proceedings" as a new provisional measure in Art. 174-1 of the CPC. This is aimed at securing the enforcement of the decision issued in the civil confiscation proceedings. The main differences between this new mechanism and the existing ones in Arts. 170 to 174 of the CPC result from the fat that the existing rules had been edited to fit with the new process outlined in Section III, Chapter 10 of the CivPC. This implies that according to the proposed system:

- the scope of property to which attachment is applicable is more restricted;
- legal grounds for attachment and the persons whose property may be affected (nominee owner / suspect under warrant) differ.

Other provisions do not differ from the respective general rules of attachment of property, apart from the fact that the whole mechanism has been simplified and is now missing its proactive and urgent aspects, particularly when it comes to provisional attachment of property (see Art. 174 [9] of the CPC v. Art. 174-1).

IV. International standards

Ukraine's desire to establish legislation enabling asset confiscation where monies have been obtained through corruption and the suspect has fled, died or become too ill to stand trial in a criminal court, is consistent with measures contained in the leading international conventions to assist in the fight against money laundering, serious crime and corruption and its obligations under the European Convention on Human Rights (ECHR).

Three key points emerge from a consideration of the international conventions.

First, the international conventions articulate a clear public interest in measures to confiscate the proceeds of crime.

Secondly, the international conventions contemplate the utilisation of the civil process to achieve confiscation in appropriate cases.

Thirdly, the international conventions are comfortable with the establishment of an evidential presumption which shifts the burden of proof onto the defendant to satisfy a court that the property in question has been legitimately obtained.

[6] Also, "seizure" in the English version provided for this analysis.

The European Court of Human Rights (ECtHR) does not consider that the approach set out in those conventions to be incompatible with the rights guaranteed by the ECHR.

The Council of Europe

In 1990, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime proclaimed in its Preamble that one of the "modern and effective methods" in the "fight against serious crime ... consists in depriving criminals of the proceeds from crime".

In Art. 2, the Convention called upon the Signatory Parties to "adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds". The term "confiscation" was defined in Art. 1 as "a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property".

The terms of the Convention were updated in 2005 when the Council of Europe adopted a more comprehensive Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. In particular, the revised Convention contemplated that a reversal in the evidential burden was a legitimate measure which could be taken.

Art. 3(4) provided as follows:

> "Each Party shall adopt such legislative or other measures as may be necessary to require that, in respect of a serious offence or offences as defined by national law, an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law."

As the Explanatory Report noted:

> "71. Paragraph 4 of Art. 3 requires Parties to provide the possibility for the burden of proof to be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation in serious offences. ..."

Financial Action Task Force

The Financial Action Task Force (FATF) has also provided a steer to the international community on the importance of applying confiscation measures. In 2003, the FATF issued a specific recommendation (Recommendation 3) which supported asset

confiscation in the absence of a criminal conviction (known as "non-conviction based", or by its acronym "NCB") as well as reversal of the burden of proof in asset confiscation cases:

> "... Countries may consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction, or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law."

The United Nations

With specific reference to property obtained as a result of corruption, the United Nations Convention against Corruption 2005 contained requirements to similar effect.

Art. 31 references the reversed burden of proof in the following terms:

> "1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:
> (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds; ...
>
> 8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.
>
> 9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties. ..."

NCB confiscation is contemplated by Art. 54(1)(c):

> "Each State Party ... shall, in accordance with its domestic law: ...
> (c) consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases."

The European Union

Most recently, the European Union has drawn together various measures relating to asset confiscation in EC Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. The Directive was agreed on 3rd April 2014. Although Ukraine is not a member State, the EC Directive is nonetheless highly informative of contemporary international standards in this area.

Confiscation in cases of absconding or unwell defendants

NCB confiscation by order of a civil court in the case of an absconding or unwell defendant is contemplated by Recitals 10, 15 and 16:

> "(10) Member States are free to bring confiscation proceedings which are linked to a criminal case before any competent court.
>
> (15) Subject to a final conviction for a criminal offence, it should be possible to confiscate instrumentalities and proceeds of crime, or property the value of which corresponds to such instrumentalities or proceeds. Such final conviction can also result from proceedings in absentia. When confiscation on the basis of a final conviction is not possible, it should nevertheless under certain circumstances still be possible to confiscate instrumentalities and proceeds, at least in the cases of illness or absconding of the suspected or accused person. However, in such cases of illness and absconding, the existence of proceedings in absentia in Member States would be sufficient to comply with this obligation. When the suspected or accused person has absconded, Member States should take all reasonable steps and may require that the person concerned be summoned to or made aware of the confiscation proceedings.
>
> (16) For the purposes of this Directive, illness should be understood to mean the inability of the suspected or accused person to attend the criminal proceedings for an extended period, as a result of which the proceedings cannot continue under normal conditions. Suspected or accused persons may be requested to prove illness, for example by a medical certificate, which the court should be able to disregard if it finds it unsatisfactory. The right of that person to be represented in the proceedings by a lawyer should not be affected."

The objectives set out in the Recitals are given effect by Art. 4 of the Directive:

Article 4

Confiscation

"Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.

Where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial."

Confiscation of assets held by nominees

Confiscation of assets held by nominees forms the substance of Recital 24:

"(24) The practice by a suspected or accused person of transferring property to a knowing third party with a view to avoiding confiscation is common and increasingly widespread. The current Union legal framework does not contain binding rules on the confiscation of property transferred to third parties. It is therefore becoming increasingly necessary to allow for the confiscation of property transferred to or acquired by third parties. Acquisition by a third party refers to situations where, for example, property has been acquired, directly or indirectly, for example through an intermediary, by the third party from a suspected or accused person, including when the criminal offence has been committed on their behalf or for their benefit, and when an accused person does not have property that can be confiscated. Such confiscation should be possible at least in cases where third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer was carried out free of charge or in exchange for an amount significantly lower than the market value. The rules on third party confiscation should extend to both natural and legal persons. In any event the rights of bona fide third parties should not be prejudiced."

Article 6 gives effect to the legislative intention:

Article 6

Confiscation from a third party

"1. Member States shall take the necessary measures to enable the confiscation of proceeds, or other property the value of which corresponds to proceeds,

which, directly or indirectly, were transferred by a suspected or accused person to third parties, or which were acquired by third parties from a suspected or accused person, at least if those third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value.

2. Paragraph 1 shall not prejudice the rights of bona fide third parties."

Rebuttable presumption that assets obtained through corruption

The operation of a rebuttable presumption in asset confiscation cases features in the EC Directive as well, with specific reference to corruption cases.

Article 5

Extended confiscation

"1. Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.

2. For the purpose of paragraph 1 of this Article, the notion of 'criminal offence' shall include at least the following:

(a) active and passive corruption in the private sector, as provided for in Art.2 of Framework Decision 2003/568/JHA, as well as active and passive corruption involving officials of institutions of the Union or of the Member States, as provided for in Articles 2 and 3 respectively of the Convention on the fight against corruption involving officials;

(b) offences relating to participation in a criminal organisation, as provided for in Art. 2 of Framework Decision 2008/841/JHA, at least in cases where the offence has led to economic benefit;

…

(e) a criminal offence that is punishable, in accordance with the relevant instrument in Article 3 or, in the event that the instrument in question does not contain a penalty threshold, in accordance with the relevant national law, by a custodial sentence of a maximum of at least four years."

European Convention on Human Rights

It is axiomatic that legislation for asset confiscation must satisfy international human rights standards and the Rule of Law. The EC Directive contains a specific reservation in Art. 38 stating that the fundamental rights and principles recognised by the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), as interpreted in the case-law of the European Court of Human Rights (ECtHR) must be observed and respected.

Essentially, there are three human rights which are engaged in the context of asset confiscation. The first is fair trial right set out in Art. 6 of the ECHR, the second is a right against retrospectivity in Art. 7, and the third is Article 1 of Protocol 1 which protects a person's rights to property.

Article 6 provides that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, and the right to be presumed innocent.

This is followed by Art. 7 which stipulates that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

Article 1 of Protocol 1 guarantees that every natural or legal person is entitled to the peaceful enjoyment of his possessions. But most pertinently, in the context of NCB asset confiscation, Art. 1 Protocol 1 proceeds to state that:

No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

None of these rights is absolute and so the imposition of certain restrictions on them will be considered admissible by the ECtHR.

Against this background, in the light of the strong support afforded by the international conventions in favour of asset confiscation as an important weapon to be deployed the ECtHR has been slow to been slow to find that criminal and civil confiscation measures violate rights under the ECHR even where, even where NCB confiscation or the application of the reverse burden of proof have been in issue.

Generally, an asset confiscation measure is likely to be regarded as falling within a State's margin of appreciation where the rights under Article 6 are not infringed and, in particular, where any affected party has had an opportunity to challenge.

The leading case decided by the ECtHR in respect of NCB confiscation is *Gogitidze v Georgia*, App No 36862/05, ECtHR, 12 May 2015. The judgment follows a long line of cases which include *Allgemeine Gold- und Silberscheideanstalt AG (AGOSI) v UK*, (1987) 9 EHRR 1; *Raimondo v Italy*, (1994) 18 EHRR 237; *Air Canada v UK* (1995) 20 EHRR 150; *Welch v UK (*1995) 20 EHRR 247; *Phillips v UK* (2000) 30 EHRR CD 170; *Arcuri v Italy, ECtHR, 5 July 2001; Honecker v Germany, ECtHR, 15 November 2001; van Offeren v Netherlands*, ECtHR, 5 July 2005; *Frizen v Russia* (2006) 42 EHRR 19; *Geerings v Netherlands*, ECtHR, 1 March 2007; *Konovalov v Russia*, ECtHR, May 24, 2007; *Dassa Foundation v Liechtenstein*, ECtHR, 10 July 2007; *Barnham v. United Kingdom*, no. 19955/05, 23 September 2008; *Denisova and Moiseyeva v Russia*, App No 16903/03 ECtHR, 1 April 2010; *Waldemar Nowakowski v Poland*, ECtHR, 24 July 2012; *Silickienè* v Lithuania, ECtHR, 10 April 2012; *Paulet v UK, ECtHR, 13 May 2014; Dimitrovi v Bulgaria*, App No 12655/09 ECtHR 03 March 2015; and *Rummi v Estonia No. 63362/09, 15 January 2015.*

The effect of these judgments and decisions may be summarised as follows.

Criminal due process rights are not engaged

As a general principle, criminal due process rights are not engaged by asset confiscation provisions.

Although post-conviction confiscation orders may serve to punish offenders, they do not charge individuals with crimes, so as to trigger the more exacting procedural guarantees of Articles 6(2) and 6(3) of the ECHR.[7]

Civil confiscation orders are not treated as punitive within the meaning of Art. 7 of the ECHR if they merely remove the benefit from past wrongdoing.

The ECtHR cites a list of factors in justifying this non-criminal designation, with the absence of a clear pronouncement of guilt and the State's non-punitive (preventative and restorative) objectives being particularly persuasive.

The Court still reviews both conviction and civil confiscation orders under the civil limb of Art. 6(1) of the ECHR but it has tended (though not always) to find these

[7] However, in respect of criminal provisions, the ECtHR in Phillips v. United Kingdom, no. 41087, 5 July 2001 made it clear that Article 6(1) applies throughout the entirety of proceedings for "the determination of ... any criminal charge", including proceedings whereby a sentence is fixed. As a result protection against breach of the presumption of innocence and the different elements of paragraph 3 is afforded on the basis of ensuring that any hearing is "fair" for the purpose of paragraph 1.

proceedings fair. Reverse burdens of proof, civil standards of proof, and third party confiscation are permissible when accompanied by adequate procedural safeguards.

Moreover, 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 ECtHR as inconsistent with Art. 1 Protocol 1. With reference to new asset confiscation laws in Georgia, the Court observed in *Gogitidze v Georgia*:

> "… 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 … Furthermore, the Court reiterates that the "lawfulness" requirement contained in Art. 1 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 …"

However, such an approach would not be appropriate if 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.

Right to protection of property is engaged but interference is justifiable

Similar arguments support the contention that a confiscation order will not necessarily infringe a person's right to property where (a) the aim of the measure was to act as a weapon against a serious crime, (b) the sum involved corresponded to the amount which the 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.

Even where a confiscation is not imposed following conviction, the permanent deprivation of property by way of transfer to the State may still be compatible with Art. 1 Protocol No. 1 if such a measure forms part of a crime-prevention policy. Thus, it has been upheld by the ECtHR 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. As the Court recently stated in *Gogitidze v Georgia:*

> "105. 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 …, 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."

The ECtHR 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 been sufficient 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 be sufficient for the purposes of the proportionality test under Art. 1 Protocol 1.

The domestic authorities have also been afforded latitude 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 criminally obtained property informally on behalf of the suspected offenders, or who otherwise lacked the necessary bona fide status.

Is the application of a presumption consistent with a fair procedure?

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 Art. 1 Protocol 1 but also Art. 6(1) of the ECHR. In considering whether there has been a fair procedure, the ECtHR 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, the Court has emphasised the importance of reviewing how that presumption is applied in the specific circumstances of the case. The significant considerations in this regard 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.

As the ECtHR said 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) … 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."

But there must be some substratum of evidence to support the presumption

However, such a measure must not be based on mere suspicion and must be subject to an effective judicial guarantee of due process, 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. Thus, the failure to fulfill these requirements will lead to the taking being regarded as arbitrary and in violation of Art. 6(1) of the ECHR and Art. 1 Protocol 1.

The decision in *Rummi v Estonia* is a case in point where the ECtHR observed that:

> "83. … the 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 noted 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."

V. Existing confiscation Regimes in Ukraine

There are currently three confiscation regimes operating in Ukraine. Two of the three regimes are regulated through criminal justice legislation, namely the Ukrainian Criminal Code (CC) and the Criminal Procedure Code (CPC), while one is provided for through the Civil Procedure Code (CivPC), however still tied to criminal proceedings.

Criminal confiscation regime

Confiscation of property

In the criminal substantive and procedural law of Ukraine, the term "confiscation" has traditionally meant "confiscation of property" as a specific type of punishment consisting of imposing forfeiture on the property of the defendant, and not as a security measure aimed at remedying the negative consequences of an offence or a mechanism for precluding the commission of new ones.

Confiscation of property is currently provided under Art. 59 of the Criminal Code (CC) (конфіскація майна), among other types of punishments, as "forceful seizure of all, or a part of, property of a convicted person without compensation, in favour of the State." In case of partial confiscation, the court must specify in its verdict which part of the property or which specific property items are to be confiscated.

The CC confiscation regime is applicable for a range of serious crimes including:

- serious and especially serious[8] acquisitive offences;[9]

[8] Serious and especially serious criminal offences are defined by Art. 12 para 4-5 CC according to their respective ranges of punishment. Serious offences are punishable by a fine in the amount of not more than 25.000 × tax-exempt minimum incomes of citizens or imprisonment for a term up to ten years,

- offences against the principles of the national security of Ukraine (Chapter 1 in Special Part of CC) or that of human security (Art. 437 to 439 and paragraph 1 of Art. 442 CC);[10]

but only in cases specifically provided for in the Special Part of CC i.e, for criminal offences where confiscation of property is indicated among the applicable criminal sanctions. Confiscation of property, as a punishment, can only be imposed upon conviction.

Special confiscation

Implementation of a confiscation which follows the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism as well as the FATF 40 Recommendations[11] was carried out by introduction of a "special confiscation" regime to the CC in 2013[12].

Pursuant to Art. 96-1 and 96-2 of the CC, special confiscation (спеціальна конфіскація) is a mandatory measure that consists of "coercive non-refundable seizure, by a court decision and to the State property, of money, values and other property" which:

- have been obtained as the result of commission of a crime or constitute proceeds from such property (direct and indirect proceeds of crime);
- were intended (used) to induce a person to commit a crime, to fund and/or to otherwise materially supply the crime or to pay an award for commission of the crime;
- were the object of the crime (corpus) except for those to be returned to the lawful owner or holder;
- and which were procured, made, adapted or used as means or tools to commit the crime (instrumentalities and intended instrumentalities) except for those to be returned to the lawful owner or holder (who was not nor could not be aware of unlawful use thereof).

This measure is applicable to a broad range of criminal offences namely:

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while for especially serious offences, the fine would be more than 25.000 × tax exempt minimum incomes or imprisonment for more than ten years or a life sentence.

[9] There is no such category as "acquisitive offences" (корисливі злочини) in the Special Part of CC and furthermore, this term occurs nowhere else in the CC. There are, however, offences in case of which committing the crime "for mercenary motives" (the same adjective is used in Ukrainian: з корисливих мотивів) is a constitutive element of the offence or an aggravating circumstance, so there is some room to assume (without any certainty) that the lawmakers made reference to such offences.

[10] Categorization provided under Art. 49 (5) CC and elsewhere.

[11] See Art. 3(1) of CETS 198 or FATF Recommendation 4.

[12] By the amending Law No. 222-VII of 18.04.2013.

- all deliberate criminal offences provided for by the Special Part of CC where the principal punishment is set forth of imprisonment or fine of more than 3000 × tax-exempt minimum incomes;
- number of other offences listed in Art. 96-1 (1) which carry milder punishments than specified above yet considered relevant for the purposes of special confiscation.

The scope of the regime has been significantly enlarged since its introduction to the extent that it now covers practically all crimes.

Special confiscation, being not a punishment but a coercive measure, is applicable with or without a criminal conviction. It is to be applied mandatorily on the following grounds:

- conviction
- court's ruling discharging the perpetrator from criminal responsibility[13]
- court's ruling applying coercive measures of medical or educational nature (instead of punishment).

This measure can also apply if the perpetrator is not criminally liable due to not having reached the age of criminal responsibility. In case the item subject to special confiscation is excluded from civil circulation (cannot legally be subject of sale or purchase), it may also be confiscated by the court if the criminal proceedings have been terminated, by either the court or the prosecutor or investigator, upon any other grounds than mentioned above.

Special confiscation also applies, under special conditions, to *mala fide* third parties (Art. 96-2 [4] CC). This refers to cases where the third person acquires money, value or other property that s/he knows or should have known ("had to and was able to be aware") to meet any of the criteria for special confiscation listed under Art. 96-2 (1) CC (proceeds or instruments of crime etc.) and hence cannot be considered a good-faith acquirer. In such cases, third party special confiscation applies without regard to whether the property was obtained from the perpetrator (including those who cannot be held liable due to not having reached the age of criminal responsibility or to the condition of insanity) or from any other person, regardless whether the acquisition was a gift or was purchased either for the market price or above or below the market value.

[13] In special cases provided under Chapter 9 in General Part of CC the court, while establishing that a person had committed a criminal offence, may discharge this person from criminal liability upon a number of grounds, including effective repentance, reconciliation of the offender and the victim, admission by bail, or the expiration of the statute of limitation period.

Confiscation of substitute assets and value confiscation also apply for the special confiscation of criminal proceeds. In case the original proceeds have been partially or fully converted into other property, special confiscation shall equally be applicable to the converted property. In case the confiscation of the original proceeds is no longer possible (because they have been spent, alienated, cannot be separated from the lawful property or for other reasons) the court shall confiscate an amount of money corresponding to the value of such property.

Measures in the Criminal Procedure Code to secure confiscation/special confiscation

The general coercive measure in the CPC that is aimed at ensuring the enforcement of special confiscation and confiscation of property is the attachment of property (арешт майна – Chapter 17 of the CPC), and for urgent cases provisional attachment of property (попередній арешт на майно – Art. 170 [9] of the CPC) and the provisional seizure of property (тимчасове вилучення майна – Chapter 16 CPC).

Attachment of property consists of temporary deprivation of property rights (disposal, management and use) imposed by a ruling of the investigating judge or the court (depending on the stage of proceedings) in order to prevent the alienation, concealment, loss, and destruction of property, among others, regarding which there exists a totality of grounds or reasonable suspicion to believe that it is either a physical evidence of a crime or can be subject of special confiscation (from either the defendant or a third person) confiscation of property as a punishment (or equivalent confiscation from a legal entity) or its attachment is necessary for securing a civil claim (for compensation of damages caused by the offence) (Art. 170 [1] to [2] CPC).

The scope of this measure extends to movable and immovable (real) property, money in any currency in cash or non-cash form, including funds and valuables held on bank accounts or kept in banks or other financial institutions, debit transactions, securities, as well as proprietary or corporate rights (Art. 170 [10] CPC).

In case the attachment serves the purposes of special confiscation, it shall be imposed on the property of the defendant (suspect, accused, etc.) if there are sufficient grounds to believe that such property will meet the criteria prescribed in Art. 96-2 (1) of the CC while the same measure applies to the property of a *mala fide* third person in cases described under Art. 96-2 (2) of the CC. If the attachment is aimed at securing confiscation of property it shall be imposed on the property of the defendant (suspect, accused, etc.) or that of the legal entity in case this type of punishment is provided by the CC and there are sufficient grounds to believe (sic) that it will actually be imposed by the court (Art. 170 [4] and [5] CPC).

In case the attachment serves the purposes of special confiscation or confiscation of property, the motion for attachment can be filed by either the public prosecutor or, upon prosecutorial approval, the investigator with the investigating judge or court. The procedure for deciding upon this motion is different according to whether and which provisional measures have been taken:

> (i) Provisional attachment of property can solely be applied in urgent circumstances, for the sake of securing possible confiscation or special confiscation of property in criminal proceedings concerning a serious or especially serious crime, upon the decision of the Director or Deputy Director of the National Anti-Corruption Bureau of Ukraine approved by the public prosecutor to the property or funds on accounts of natural persons or legal entities. The provisional attachment lasts for a period of up to 48 hours but the public prosecutor must file a motion for the attachment of property with the investigating judge immediately but not later than 24 hours after the decision was made or else the provisional attachment shall be deemed revoked (Art. 170 [9] CPC).
>
> (ii) Provisional seizure of property means the deprivation of the suspect of the possibility to possess, use, and dispose of certain property until the issue of attachment or return of property is decided. Provisional seizure appears to primarily cover tangible assets ("property in the form of objects, documents, money, etc.") if there is sufficient grounds to believe that such property is physical evidence (having preserved signs of the commission of the criminal offence) or if it meets any of the criteria for special confiscation listed in Art. 96.2 (1) and (2) CC including not only property that constitutes criminal proceeds but also substitute assets (property into which the original proceeds have been converted, in full or in part)(Art. 167 CPC). This measure however does not serve for securing the confiscation of property. Provisional seizure of property may be implemented during the lawful apprehension of a perpetrator or as a result of search or inspection (Art. 168 CPC).

Motion for the attachment of provisionally seized property can only be filed with an investigating judge not later than the next day after the provisional seizure (or within 48 hours in case it took place during a search or inspection) otherwise the property has to be immediately released and returned (Art. 171 [5] CPC).

The motion is considered by an investigating judge or court not later than two days after it has been lodged, with participation of an investigator and/or public prosecutor, the defendant (suspect, accused) or other holder of property, as well as their defense counsel, legal representative and, if applicable, the representative of the legal entity (failure to appear by these persons however does not preclude the consideration of the motion). As an exception, a motion for the attachment of property that has not been provisionally seized may be considered without notifying the defendant, other holder of property or the defense counsels or legal

representatives mentioned above if this is necessary to ensure attachment of property (Art. 172 [1] to [2] CPC). An investigating judge or a court shall pass the ruling to attach provisionally seized property within 72 hours after the motion has been received, otherwise the property has to be returned." (Art. 173 [6] CPC).

Strengths and weaknesses of the criminal confiscation regime

Without going into a detailed analysis of the criminal confiscation regime outlined above, as it is not the topic of this paper, it can be commended for the following aspects:

- The special confiscation regime provides for a full coverage of FATF Recommendation 3 as far as various aspects of crime-related property, as targets of the confiscation regime, are concerned. Special confiscation applies to practically all criminal offences in the CC.

- Application of special confiscation is mandatory and not dependent on a criminal conviction. On the contrary, *in rem* special confiscation can be applied in a relatively broad range of cases where the perpetrator cannot be convicted.

- Provisional measures in the CPC provide for a timely and, if necessary, *ex parte* procedure with short deadlines for every participant, which ensures both effectiveness and the protection of *bona fide* third party rights.

That said, the regime also has several shortcomings, most notably:

- The CPC procedures for securing special confiscation or confiscation of property are overly complicated. For example:
  - There is no proper differentiation between the two provisional measures preceding the attachment of property (the provisional attachment and the provisional seizure of property) which implies an apparent overlap, both in terms of scope and deadlines. Provisional seizure appears to be limited to tangible property items but this feature is not at all explicit in the text;
  - Deadlines are determined either by days or by hours in a random manner (eg. in Art. 171 [5] of the CPC where reference is made to "the next day" and "within 48 hours" in the same paragraph) which may cause problems in effective application.
- Formulation of several key provisions is unclear and/or redundant, which leaves unnecessarily much room for interpretation by the reader. For example:
  - The scope of "property" to which the various measures are to be applied is defined in a rather incomprehensive and sometimes deficient manner. Confiscation of property obviously applies to all sorts of property, while special confiscation is applicable to money, values (valuables?) and "other property", which appears to extend the

scope to any sorts of property. Only the paragraph dealing with special confiscation from third parties that explicitly defines the term "values" to cover immaterial assets. Definition of property subject to attachment of property is the broadest definition which, however, is far from being convincingly in line with the scope of special confiscation (for the securing of which it can be applied);

- Cases where special confiscation and attachment of property apply to third persons are different (e.g. special confiscation applies, among others, to 3rd persons who obtained the property from an underage defendant (suspect, accused etc.) or from one who had committed the crime in condition of insanity – but this option is entirely missing from the scope of the respective CPC article on attachment of property, thus restricting its applicability) or irrelevant;
- It takes time to identify the actual list of criminal offences to which confiscation of property and/or special confiscation applies. As for the former, the CC fails to define "acquisitive offences" referred to under Art. 59. As for the latter, the general threshold of applicability, defined by minimum levels of punishment in Art. 96-1 of the CC, is so low that it practically equals to an all-crimes approach (the introduction of which would thus render the existing classification unnecessary).

The limitations of the existing CC and CPC regime lie in the fact that it does not provide a possibility for the reversal of the burden of the proof in appropriate cases, and a possibilities for an *in rem* criminal confiscation are likewise incomplete as do not cover situations when the defendant is dead or absconded. The Civil Confiscation Law is likely expected to bring changes in this field as it purports to introduce a reversed burden of proof for civil confiscation cases, and the ability to get to proceeds that belong to defendants in abscondment, albeit in a relatively limited number of potential cases.

Conviction-based civil confiscation regime

At this point, reference also needs to be made to an apparent civil confiscation regime introduced in 2015 through amendments to the Civil Procedure Code (CivPC). No information about this regime has been stated in the Explanatory Note to the Civil Confiscation Law, despite the similarities in the targeted results and in the scope of applicability.

The CivPC civil confiscation regime is outlined in Chapter 9, under the title "Special aspects of litigation in cases for the recognition of unjustified assets and their reclamation".[14] According to provisions of Chapter 9, a lawsuit for the recognition of unjustified assets and their reclamation is filed by a prosecutor against a convicted person within a set time period from the date of entry into force of a conviction. It

[14] Law № 198-VIII of 12.02.2015

can be brought against (i) individuals entrusted with the performance of the functions of the State or that of the local self-government, finally convicted for an offence of corruption or legalization (laundering) of proceeds of crime; or (ii) another person "connected to" such individuals, including a legal entity, as the owner or user of property having been received from, being used, or being (having been) disposed of by such a person. In case a lawsuit is filed against category (ii) persons, the prosecutor has to take steps to determine the property for which there is evidence that it was received from, or it is being used, etc. by such a person. The term "assets" extends to cash, funds or other property, as well as any property generated income (Art. 233-1 of the CivPC).

Should proceedings be initiated, the court has to examine the assets and establish whether they amount to unjustified assets (or cash funds used for purchasing such assets) or lawfully gained assets (Art. 233-2 CivPC). The legal consequence of determination that assets (or a portion thereof) are "unjustified" is their recovery into the State revenue. In cases the assets determined to be unjustified cannot be collected, the defendant is obliged to pay the value of such assets (Art. 233-3 CivPC). Other confiscation procedure related issues are not dealt under Chapter 9 of the CivPC.

VI. Analysis of the Civil Confiscation Law

As noted earlier, the Civil Confiscation Law aims at making amendments and additions to several pieces of legislation, including the CivPC, CPC, CC, Law on Free Legal Aid (LFLA) and Law on Court Fees (LCF). The main objective of the Civil Confiscation Law is to further improve the system/s of recovery of unjustified assets into the revenue of the State. It looks to cover assets that have been discovered during criminal proceedings on corruption-related charges and will be applicable to individuals entrusted with the performance of the functions of the State or that of the local self-government. The existing system/s purports to be improved through introduction of non-conviction based (NCB) civil forfeiture where the "unjustified assets," i.e. assets that are effectively owned (used, disposed) by an individual suspected of having committed corruption-related crimes and the lawful origin of which cannot be demonstrated, are to be recovered into the revenue of the State until the end of the criminal proceedings. The terms of the proposed changes are not easy to follow.

In general, the proposed legislative objective of introducing the NCB confiscation is consistent with measures contemplated in international conventions which signatory States should implement in the battle against money laundering, serious crime and corruption. The Civil Confiscation Law also appears to reflect a number of possible human rights concerns:

- NCB asset confiscation will take place only after judicial process has been observed. The legislation establishes a procedure for initiating and proceeding with a confiscation claim. The provisions establish a framework for the prosecutor to articulate the claim, adduce supporting evidence, afford the suspect and/or his nominee an opportunity to defend the claim with the benefit of legal aid if sought, protect third party interests and appeal to a higher court where necessary;
- The reversed burden of proof and inferences to be drawn where there is inconsistency between the value of assets and declared income is not problematic in itself since the suspect and/or his nominee is afforded an opportunity to present evidence in rebuttal;
- In addition, the persons against whom NCB confiscation proceedings can be brought are narrowly targeted to those with whom the international conventions are principally concerned, and in particular, the UN Convention against Corruption;
- The scope of the NCB confiscation process is also relatively limited. The proposed NCB confiscation process is inextricably linked to assets identified during the course of a criminal investigation and is contingent upon it. The new Chapter 10 does not seek to establish a free-standing cause of action in the civil courts which would stand independently of a criminal investigation similar to the process in the UK under Part 5 of the Proceeds of Crime Act 2002;
- The definition of assets is narrowly described to exclude property in the sense of real estate and personal property such as expensive cars and planes, the accoutrements of bribery.

That said, with such a narrow scope, the Civil Confiscation Law represents more of an add-on to the existing legislation on confiscation, without really building upon it. As a result, it fails to provide a more comprehensive approach seen in developing international standards and furthermore omits to address the deficiencies of the existing criminal and civil confiscation regimes identified in the preceding section of this Opinion. A number of proposed solutions moreover give rise to issues of compatibility with the existing provisions of the CPC and the CivPC.

On the policy level, it would be advisable for authorities to take a more comprehensive approach to improving the Ukrainian asset recovery regime. In the interim period, it would be paramount to resolve the issues of compatibility of the Civil Confiscation Law with the CPC and the CivPC, discussed in more detail below, in order to ensure the overall coherence of the legislation in this field.

Civil confiscation *in personam* or *in rem*

Civil proceedings for the confiscation of illicit assets show a significant variety in different jurisdictions. One of the main options is the civil confiscation *in personam* meaning a civil action against the person regarding whom there is evidence that he/she has committed a proceeds-generating criminal offence and holds property the volume and value of which is not in line with his/her legitimate incomes. Such evidence might be (but not necessarily is) a criminal conviction for the said offence but in any case, it must provide a solid basis that connects the person to the commission of the offence. The civil action would thus be based on the person's involvement in the criminal offence together with the fact that he/she holds significant property which is not likely to originate from a lawful source: all these factors give rise to reverting the burden of proof at this stage so that the defendant prove the legitimate origin. Indeed, a similar approach may occur in criminal jurisdiction as well (in case of "extended confiscation" or similar mechanisms) especially in case of involvement in serious proceeds-generating criminality committed over a period of time. Another option is the civil confiscation *in rem* where action is brought not against a person who is proven to be a criminal but in respect of assets proven to constitute proceeds of crime. In such case, no criminal conviction is needed but the plaintiff (typically the prosecutor) is required to prove that the property was involved in criminal activity.

The solution stipulated by the Civil Confiscation Law appears to be a specific mixture of the two options. It targets exclusively corruption-related offences and requires a person who has been suspected of such an offence. The mechanism does not focus on actual bribes or other direct proceeds (these can easily be captured by special criminal confiscation) as it rather targets property that belongs to the offender without any apparent link to the offence, with the presumption (but not hard evidence) that it has also been derived from crime. As a result, there is no room for *in rem* confiscation proper as the starting point is the opposite. It is only at a subsequent point that the issue of proving the illicit character of assets held (directly or indirectly) seemingly gives room for an *in personam* civil confiscation. Although there is already a conviction-based civil confiscation regime stipulated in Section III Chapter 9 of the CivPC that could and should have been improved through amendments to increase its effective applicability, the drafters opted to introduce a parallel regime of civil confiscation which seems to introduce a lowered level of proof regarding the defendant as the potential perpetrator (instead of a criminal conviction for the corruption-related offence, a mere suspicion seems sufficient). This approach may be highly welcome by the prosecution, but raises serious issues as described below.

The defendants and the legal basis for confiscation

One of the peculiarities of the draft civil confiscation regime is the bifurcation of the procedure and evidencing depending on whether the defendant is a suspect in the underlying criminal proceedings in which assets owned by the same person were uncovered (and secured) or is someone else who allegedly acts as a nominee owner of assets uncovered in the aforementioned criminal proceedings while the assets actually are the (beneficial) ownership of the suspect. Proceedings can thus go in two different directions which practically implies two alternative procedures. This feature immediately raises at least two major conceptual issues. First, the significant difference in terms of facts/circumstances that needs to be proven in two different procedures so that assets labelled as "unjustified" can be confiscated. Second is the absence of a connection between the two procedures, particularly the lack of any input from proceedings against a nominee to the other one against the suspect. It would seem easier if the proposed legislation envisaged having the suspect of the underlying criminal proceedings as a defendant in the civil case.

The major problem with the notion of a "suspect/defendant" is that it automatically presupposes a "suspect/defendant in absentia" in the context of the Civil Confiscation Law. It is one of the main prerequisites to the applicability of the regime entire regime. While this requirement does actually address the previous lack of measures available to confiscate proceeds from suspects (accused) in abscondment, it raises a number of practical issues worth to be considered for further improvement of the current draft:

- why there is a need for an international arrest warrant in addition to the national one and why the prosecutor needs to wait 2 months before submitting the lawsuit;
- what if the arrest warrants has been issued but the defendant (suspect) can subsequently explain and prove that he/she had been available all along i.e. had not been "hiding" (e.g. the prosecution made a mistake when issuing summons etc.), thereby questioning the legal basis of the proceedings.

Whereas the 2 months pause might have been added with a view to alert the suspect/defendant to the prospect of the proceedings being initiated (which would also be necessary for the purpose of the right of access to court under ECHR Art. 6[1]) this purpose might be better served by stipulating e.g. in the proposed Article 233-5(6) CivPC that the suspect/defendant shall be deemed to have been properly informed about the commencement of the proceedings from the moment of their

publishing in national mass media and of the websites of the judiciary of Ukraine and of the PPO (cf. Art. 74 [9] CivPC15).

Equally, it is entirely unclear what implications would the capture of the suspect/defendant (after having actually been hiding from prosecution and having been arrested as a result of the arrest warrant) have on the civil proceedings, if any. This would all need to be further regulated in the proposed piece of legislation.

Separate set of issues are likely to arise in cases against nominees. Here, the goal of the proceeding is to unveil proxy ownerships for the purpose of confiscation. The prosecutor therefore also has to present evidence that give reasonable ground to believe that the nominee is the formal owner of the property uncovered during criminal proceedings and that the suspect is the actual owner, while the defendant nominee has to refute this claim showing that the suspect cannot directly or indirectly perform ownership rights over the assets. The problem with this constellation is related to cases where the prosecution would successfully prove that the assets have been and are actually owned by the suspect in the criminal proceedings. The court would thereafter consider the assets as "unjustified" and would decide on their recovery to the State (see Art. 233-11 [1] together with Art. 233-9 [3]2). In such circumstances, the suspect/defendant in criminal proceedings, who is proven to be the actual owner of the assets, would not have any opportunity to get engaged in proceedings and give account of his/her ownership and the lawful acquirement of the assets, as would be the case if he/she was the civil process defendant from the outset. It would not be appropriate to leave this solution as is and to allow for recovery of assets solely because they had been linked to a nominee without providing any opportunity for the actual owner to bring evidence confirming the lawful origin of the property as it is likely to raise the issue of constitutional rights of the suspect/defendant, as well as their rights under the ECHR Art. 6(1) and Protocol 1 Art. 1.

The major conceptual question associated with the Civil Confiscation Law is why it is only applicable to suspects/defendants in absentia and not to all suspects/defendants. If the starting point is allow for a regime that can capture a wider range of assets than the existing mechanisms for criminal and civil confiscation, it would be essential not to restrict this additional opportunity to cases where the suspect cannot take part in the proceedings. In fact, there are no peculiarities of the entire proposed civil procedure that would automatically limit its applicability to *in absentia* cases. Furthermore, the Civil Confiscation Law fails short of specifying whether and to

[15] According to Art. 74(9) CivPC the defendant, whose place of residence (or stay) or seat (in case of legal persons) or place of employment is unknown, shall be summoned to court through announcement in the media. By the publication of the announcement of the summoning, the defendant is considered to be notified about the time and place of the court hearing.

what extent the general rules on judicial consideration of the civil case *in absentia* (Section III Chapter 8 CivPC) are applicable to draft Chapter 10. The drafters may therefore wish to consider extending the system to cover all possible suspect/defendant scenarios and to address the relation between the general civil procedure rules on *in absentia* proceedings and the newly introduced system.

Consideration ought also to be given in the Civil Confiscation Law to situations in which the suspect/defendant does not participate in the proceedings at all, not even by taking advantage of the right to free legal aid (considering that rendering free legal aid under Art. 233-10 is only possible upon the motion of the defendant). This would presumably lead to a default judgment, which is not in principle incompatible with ECHR Art. 6(1). The possibility of appeal would also offer a potential remedy for an adverse ruling. However, in the context of the Draft Law's focus only on in absentia cases it might be expected that its provisions include a specific obligation on the court handling the case to verify whether the defendant had been given a reasonable opportunity to have knowledge of and comment on the observations made or evidence adduced by the prosecution and to present his or her case under conditions that did not place him or her at a substantial disadvantage vis-à-vis the prosecution. [16]

The Civil Confiscation Law also fails to regulate situations where the suspect, whose assets have been labelled unjustified and recovered by a court ruling, is subsequently discharged from criminal liability or even acquitted of corruption-related charges in criminal proceedings. In classic forms of "*in rem*" civil confiscation, where "guilt" is assigned to the property and the prosecutor must only prove that such property was involved in illegal activity, the question whether a concrete person can be found guilty for such activities might have less importance. However, in "*in personam*" systems similar to this, and particularly where the service of "notice of suspicion" (or the issuance of an arrest warrant) in the criminal proceedings can be considered sufficient to apply attachment and recovery of the property of the said individual, any subsequent decrease in the level of initial suspicion (including acquittal) must have due consequences. Procedures in such cases therefore need to be clearly set out in the legislation (particularly as the assets are to be recovered on a permanent basis.

Consideration should be given to extend the scope of the draft proceedings to *mala fide* third parties (primarily family members) who otherwise would not meet the criteria of a nominee holder (reference can be made to the concept of "connected person" in Section III Chapter 9 of the CivPC).

[16] Cf. Larin v. Russia, no. 15034/02, 20 May 2010

Third parties

Whilst the proposed legislation addresses the protection of third party rights, it would be wise for the protection to be expanded with a requirement resting on the prosecutor and the suspect and/or nominee to serve notice of the proceedings on any third party who might be affected by any order for asset confiscation which the Court may make. The right of a third party to be heard and adduce evidence, with the benefit of legal aid if necessary, needs to be explicitly stated.

Proving unjustified assets

The definition of assets requires clarification. Are all assets whose value exceed 1000 times the minimum monthly wage captured, or does this threshold apply only to the value of precious metals and precious stones? The language needs to be clarified.

What the prosecutor needs to prove in relation to assets to be confiscated is equally not clear. As far as the lawsuit is concerned, it only requires the plaintiff to show that such assets were uncovered within the framework of criminal proceedings and that the suspect is the owner of these assets. That said, at the preliminary hearing, the prosecutor also has to prove a different matter, namely that there are reasonable grounds to believe that the value of the assets does not correspond to the defendant's overall annual income as detailed in Art. 233-6 (3). This is a reasonable test indeed, but this requirement is still somewhat strange as the Civil Confiscation Law does not require the prosecution to provide any information in the lawsuit about either the value of the assets or the legitimate annual incomes of the suspect. This requirement also has certain technical implications:

- absence of determination of the value of assets subject to recovery is problematic as it is directly tied to the value thresholds associated with confiscation posed by the proposed legislation;
- there is no stipulation on who, when, and how determines the value of the assets (particularly in case of precious metals and stones);
- it is also not specified how and based on what the defendant's overall income is to be calculated: what "official sources" represent; whether the incomes are to be determined based on the salary or tax returns; what if the defendant proves that he/she had other incomes that are not included in these "official sources" yet do not constitute a criminal offence (e.g. gifts), etc.;
- the term "not in correspondence" is rather vague and does not sufficiently express that property that belongs to the suspect could not have been covered by his/her legitimate incomes;
- what should be done with assets (property items such as a very expensive gemstone) the value of which exceeds the respective annual income of the

defendant, but he/she argues and proves that its price was covered through yearly instalments over a certain period of time.

Indeed, the key issue for recovery of the assets is the disproportion between their value and the legitimate incomes of the suspect. It is therefore unclear why this factor is only covered at the preliminary hearing, whereas the main hearing is to concentrate on whether or not the suspect is to be considered the actual owner of the assets and whether he /she can prove the lawful origin of such assets.

What the proposed solution expects from the defendant to prove is practically the opposite of what is expected from the prosecutor. At the preliminary stage, he/she has to refute that there are grounds to believe that his/her overall income does not correspond to the value of the assets (even though "belief" is not the proper term here as there are only figures, both for the value and the income, that can simply be compared to test correspondence) and in the later stages, he/she is obliged to prove his/her ownership of the respective assets, as well as the lawful origin of the same assets.

The burden of proof

As noted above, reversal of burden of proof is not at all unusual in proceedings aimed at confiscation of proceeds according to civil standards. Regardless of the standard of proof and the circumstances that are to be proven, it is commonplace in any such regime that once the prosecutor has brought evidence that an individual has committed a proceeds-generating crime or participated in a criminal organisation and the same person does actually have property the value of which appears to exceed his legitimate incomes, such an individual can be asked to prove that his/her property has not been derived from crime but from lawful sources (proceedings *in personam*). Other options include that to have the prosecutor prove that certain assets are derived from a criminal offence and then to ask the holder of such assets to prove either the opposite (i.e. the property was not involved) or, if applicable, that he/she has acquired the assets in good faith (proceeding *in rem*). In both cases, there must be sufficient grounds at the outset to presume that the person is a criminal and that the assets are proceeds, respectively.

Contrary to this, what is visible in the Civil Confiscation Law cannot strictly be qualifies as reversal of the burden of proof but rather sharing thereof between the prosecution and the defence. Art. 233-9 (1) is crystal clear in prescribing that the burden of proof in respect of every circumstances indicated in the lawsuit lies with the prosecutor, save the circumstances established in the attachment order which need not to be proven again. Notwithstanding that, the defendant is also obliged to prove certain circumstances to the court, practically the opposite of what has already been demonstrated by the prosecutor, such as the lawful origin of the assets or that

he/she is not a nominee owner (Art. 233-9 [2] and [3]). The envisaged system of the shifting of the burden of proof is not problematic. Possible problems lie more with how the idea has been developed for implementation purposes.

According to the general provisions of the CivPC, the rules for bringing evidence are quite straightforward: each party must prove the circumstances which he/she refers to as grounds for its claims and objections, the evidence is to be submitted by the parties and others involved in the, case and the proof may not be based on assumptions (Art. 60). The regime introduced by the Civil Confiscation Law obviously and unavoidably differs from these standards, but the proposed legislations lacks language providing justification of such departure and elaboration on it.

Furthermore, as noted earlier, the general rule of the proposed solution is that all circumstances indicated in the lawsuit have to be proven by the prosecutor. This principle turns into a shared burden of proof during the preliminary hearing stage where the prosecutor is expected to prove while the defendant has to refute the same circumstances (although it is entirely unclear what happens if the prosecutor fails to prove his part while the defendant also fails or refuses to refute the same). However, Art. 233-11, related to the judgement, extends the scope of the defence burden by stating that the court will consider the assets as unjustified, and rule on their recovery, should the defendant fail to prove the circumstances "referred to in Art. 233-9" or fail to provide the court with information or evidence corroborating the same circumstances. Art. 233-9 does not only contain circumstances that would normally have to be proven by the defendant (para [2] and [3]) but also refers to those included in the lawsuit which should normally be proven by the prosecutor (para [1]). This provision maximizes the burden of the proof laid on the defendant. Even if this is a potential drafting error, and thus reference was meant to be made only to para (2) and (3), it nevertheless appears that despite any previous provisions stating the opposite, any ultimate court decision would be based on evidence brought by the defendant and not by the plaintiff. Given the lack of clarity on this issue when multiple provisions regulating the same issue are taken into account, it would be advisable for the scheme to be reconsidered and substituted with more precise and balanced placement of the burden of proof.

Furthermore, the defendant (both the suspect and the nominee holder) is also being required to prove "existence of ownership of the assets indicated in the lawsuit of the prosecutor", which is an issue that is an integral part of the lawsuit and should therefore have already been proven by the prosecutor by virtue of Art. 233-9 (1), as quoted above. As a consequence, Art. 233-9 (2)1 and (3)1 (which require the defendant to prove the same) clearly goes contrary to Art. 233-9 (1). On top of this, the issue of the actual ownership of the assets would only matter in cases involving

alleged nominee holders (who denies that the assets are actually owned by someone else), whereas such question are not likely to arise if the lawsuit is brought against the suspect/defendant as the owner of the assets.

Standard of proof

Civil confiscation proceedings are traditionally applied in other jurisdictions to obtain a lower evidentiary standard, such as "clear and convincing" or "balance of probabilities" instead of "beyond a reasonable doubt", required to justify the civil claim and to recover the assets that constitute proceeds. It is not problematic *per se* that the Civil Confiscation Law applies different standards of proof at different stages of proceedings, requiring a lower standard for a preliminary decision (reasonable grounds to believe that the respective circumstances exist) and a higher standard of proof for bringing a decision upon the hearing on the merits of the circumstances (reasonable grounds to believe that such circumstances exist beyond reasonable doubt). The requirement of proving circumstances "beyond reasonable doubt" may however raise questions as this is definitely not a standard of proof that would normally be applied in a civil law context. Instead, it is a typical standard for criminal procedural law, and is so applied in the criminal legislation of Ukraine as well, both in the CC and the CPC. It is already problematic that that the prosecutor as the plaintiff has to prove facts against a criminal law standard in a civil case, but the complication becomes greater as the same standard appears to apply to both parties, even in case of negative circumstances expected from an alleged nominee owner by virtue of Art. 233-9 (3).[17]

In discharging of the envisaged burden of proof, there is no reason why the prosecutor cannot rely on circumstantial evidence to prove that the assets were acquired as a result of criminal activity. The absence of legitimately obtained income which would support the acquisition of assets in question is material evidence from which an inference can properly be drawn. As an English court explained long ago (*Teper v R* [1952] AC 480 at p.489) when considering the application of circumstantial evidence to satisfy the burden and standard of proof:

> "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion on another. Joseph commanded the steward of his house, "put my cup, the silver cup, in the sack's mouth of the youngest," and when the cup was found there Benjamin's brethren too hastily assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are

[17] The defendant is expected to prove, beyond reasonable doubt, the non-existence of circumstances that, according to the prosecutor's lawsuit, give reasonable ground to believe the opposite.

> no other co-existing circumstances which would weaken or destroy the inference".

In *Shepherd v R* [1990] 170 CLR 573, the High Court of Australia examined the admissibility of circumstantial evidence. Two of the Judges explained the position as follows:

> "Ordinarily, in a circumstantial evidence case, guilt is inferred from a number of circumstances – often numerous – which taken as a whole eliminate the hypothesis of innocence. The cogency of the inference of guilt is derived from the cumulative weight of circumstances, not the quality of proof of each circumstance" - per McHugh J at pages 592 – 593
>
> "[T]he prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It does not mean that every fact – every piece of evidence – relied upon to prove an element by inference must itself be proved beyond reasonable doubt" - per Dawson J at pages 579 – 580

Limitations to the applicability of the regime

Whatever objective is intended to be achieved by the regime set forth in the Civil Confiscation Law, a number of factors appear to limit its applicability significantly. Some of these limitations are described in the Explanatory Note as having been introduced with a purpose, but others appear to have occurred inadvertently.

Limitation to corruption-related crimes

As noted above, this legal institution is only applicable to assets uncovered in course of criminal proceedings for corruption-related crimes against individuals entrusted with the performance of the functions of the State or that of the local self-government. The Explanatory Note points out that this approach serves to narrow down the scope of the proposed legislation to the "most frequent cases" of the respective offences (para 3.2).

It is certainly understandable that high-scale corruption is considered the most significant criminal threat in Ukraine today and therefore majority of resources must be allocated to fight this phenomenon. There is however no reason not to extend the scope of the proposed system to property uncovered during the criminal investigation into any sort of serious, organised and/or proceeds-generating offence. This would allow for the effective testing of civil confiscation beyond the range of corruption-related crimes and would also enable greater effectiveness in the fight against all types of serious crime. Placing limitations on the proposed system in light of the fact that the existing civil confiscation regime in Section III Chapter 9 of the CivPC provides for such a broader coverage seems unjustifiably hampering.

On a technical level, the Civil Confiscation Law falls short of defining the term "corruption-related crimes", the term also used in the existing Chapter 9 of the CivPC also without any explanation. Reference is likely to be made here to the definition of corruption-related crimes in the CC (see the Note attached to Art. 45 CC[18]) but the CivPC fails to provide a clear connecting clause in this respect. This omission would need to be addressed.

Limitation to a specific list of property items

Art. 233-4 (2) provides that the new legal tool can only be applied to assets in the form of "cash and non-cash national and foreign currency funds, securities and other financial instruments, precious metals and precious stones (hereinafter for the purposes of the present Chapter – the "assets"), in case their value exceeds 1000 times the minimum monthly wage". The Explanatory Note makes it clear that this restriction was suggested due to the possibility of rapid disposition and transformation of the aforementioned sorts of assets by use of modern instruments in the banking and financial sector as well as the possibility of their relocation and, as a result, the high risk of their concealment by the suspects (para 3.3).

Although it is appreciated that it is easier for liquid assets to have been the subject of a seizure order and frozen pending the outcome of the criminal proceedings, there is no justifiable reason why this definition should be necessarily confined. It would be a missed opportunity not to address, at least in the legislation, all sorts of assets that can potentially be considered, fully or partially, as direct or indirect proceeds of crime. Cash, bank account money, securities and other financial instruments are usually the most liquid forms of assets that can almost immediately be concealed, transferred, transformed or dissipated and in most of the cases. Connecting some of these assets (cash and precious metals or stones) to a specific owner or, in case of an alleged nominee owner, to a specific beneficial owner might be challenging if the circumstances of their identification fail to provide sufficient grounds in this respect.

It would therefore be advisable to extend the scope to cover also other, material forms of property to which the original proceeds of crime would, normally and traditionally, be transformed, such as real estate (including any right or interest thereto) as well as property items, including but not restricted to vehicles or pieces of artwork. This could also include immaterial assets such as corporate shares or rights, which, if not recovered, might prevent the prosecution from extending its civil claims

[18] "The corruption offences under this Code shall be the offences under the Articles 191, 262, 308, 312, 313, 320, 357, 410, if they have been committed through abuse of official position and offences under the Articles 210, 354, 364, 364-1, 365-2, 368-369-2 of this Code".

to property invested into corporate entities.[19] This gap could also be closed by introduction of the term "other types of property", without any specification (as it is provided for the purposes of the conviction-related civil confiscation under Section III Chapter 9 CivPC).

Asset threshold

The text of the proposed legislation is very unclear which assets have to meet the threshold of 1000 × minimum monthly income. This standard might equally apply to:

- the total value of assets uncovered in course of the respective criminal proceedings;
- the total value of assets uncovered, but only in relation to a specific individual;
- the value of assets the court has found "unjustified" and decided on their recovery (either in totality or for one single individual).

This would require more precise wording.

Furthermore, the value threshold mentioned above appears entirely out of context of the draft Section III Chapter 10 of the CivPC. The value of the assets is not listed among the mandatory contents of the lawsuit[20] and neither is it a factor that the court has to consider when deciding on the commencement of the proceedings (Art. 233-5 [3]). That is, the plaintiff does not have to demonstrate at all that the respective assets actually exceed the value threshold in Art. 233-4 (2). Looking from the implementation perspective, even if such a requirement were to exist, it would still remain unclear how the value of assets would be determined (especially in case of precious metals and stones) and what the reference time would be for counting the monthly income.

Lastly, even if the court were to consider this issue, albeit implicitly, at the beginning of the proceedings, the Civil Confiscation Law does not provide for any legal consequence in cases when the value of the assets subsequently drops below the threshold, particularly if only a portion of the attached assets are finally considered as "unjustified" by the court (e.g. some part of the assets proves not to belong to the suspect or it proves to be lawfully acquired).

All of the above issues warrant further legislative drafting and improvement.

[19] The legal entity itself, as a potential nominee owner, may be summoned as a defendant but it would not solve the lacuna mentioned above as company shares the suspect has in the legal entity would remain out of context.
[20] Which only contains the list and type of assets – Art. 233-8 [1]

Limitation to property attached in the criminal proceedings

In the context of the CPC, the attachment of assets is a helpful measure to secure property, among others, for the purpose of special confiscation. It does not mean, however, that special confiscation of a certain property item can only take place if the same property item has already been attached by a previous court decision. Such an approach would obviously prevent the court from establishing the existence of assets beyond the property that could have successfully been secured by an attachment order. This would, for example, be in case of assets that can be identified but not found (e.g. movable property such as vehicles, the existence and ownership of which can be established through public documents which could be hidden by the perpetrator) or, more typically, if assets are located abroad (ranging from villas in Mediterranean coast to deposits held in foreign bank accounts; their existence and ownership, but also their location can be established in the course of domestic proceedings). If the judge is permitted to identify and establish unattached assets, nothing prevents such assets from being identified and considered as proceeds from crime to be subject to special confiscation. Certainly, this measure can only be enforced if such assets not only exist but can also be found and recovered, but such practical considerations should not limit the applicability of the measure.

This feature is entirely missing from the mechanism introduced by the Civil Confiscation Law. A court ruling on the attachment of the property to be confiscated is a prerequisite for the prosecutor's lawsuit pursuant to Art. 233-8 (2) and is one of the conditions listed under Art. 233-5 (3) that the court has to consider when deciding on the commencement of proceedings. Should any of these preconditions not be met, the proceedings cannot commence (Art. 233-5 [5]). This means that property not secured by an earlier attachment order cannot be subject of unjustified assets recovery pursuant to the proposed legislation.

Furthermore, it is obvious that the draft mechanism would only target property that: (i) can actually be found; and (ii) it can be found in Ukraine and not in a foreign country. First, the prosecutor has to specify in the lawsuit the location of the assets subject to recovery (Art. 233-8 [1]1). Failure to do so implies a deficiency of the submission. Second, the location of the assets determines the jurisdiction of the court (Art. 233-7 [1]) and there appears no procedure for appointing the competent court in case the recoverable assets can only be found abroad.

It is recommendable that the above two deficiencies of the proposed legislation are remedied by taking out the limitation regarding the scope of assets that would be subject to recovery.

Issues of timeliness and deadlines

"Until the end of criminal proceedings"

Throughout the text of the Civil Confiscation Law this expression is systematically attached to the term that denotes the civil confiscation measure described in the draft Section III Chapter 10.[21] The frequency of this term makes it unclear why the proposed text lacks a clear definition of what needs to take place "until the end of the criminal proceedings" and, more generally, when the criminal proceedings would be considered to have come to an "end". Only the Explanatory Note explains that, in this context, reference to "criminal proceedings" actually means proceedings in course of which the assets had been uncovered and attached (para 2).

Considering the deadlines described below, as well as the unpredictability regarding the actual completion or termination time of the underlying criminal proceedings, it appears more likely that the civil confiscation procedure should be initiated (but not necessarily completed) before the criminal proceedings have come to an end. This is, however, just a presumption based on the name (!) of the aforementioned civil confiscation measure, without support in the available legal text. Furthermore, as the person in the position of the defendant in the underlying criminal proceedings is systematically referred to as "suspect" (not an "accused"), it is also likely that the term "criminal proceedings" could also refer to the investigative stage of the criminal procedure. But again, this is yet another presumption without any solid foundation in the legal text.

As a result, it is unclear from the Civil Confiscation Law whether and what relevance the end of the criminal proceedings (or investigation) has on the civil confiscation procedure, particularly as the prosecutor is not required to provide information regarding the status of the criminal case in the civil lawsuit and neither is the court obliged to consider such information when making their decision.[22] The drafters would be advised to remedy this shortcoming. In addition, there will need to be care in the conduct of the forfeiture proceedings that the suspect/defendant is not asserted to be guilty – whether directly or by implication – of the offences concerned as this could be seen as breaching the presumption of innocence in connection with the still to be determined criminal proceedings in respect of them.

[21] "Unjustified assets recovery into the revenue of the State until the end of the criminal proceedings."

[22] Pursuant to Art. 233-5 [3] the court only examines whether such assets had been uncovered and attached within the framework of the underlying criminal proceedings involving corruption-related crimes, etc.

Statute of limitations

Art. 233-4 (1) provides that the prosecutor's lawsuit can only be filed "within the general statute of limitations from the first day of the seizure of assets, indicated in the lawsuit, under the rules provided for by the Criminal Procedural Code of Ukraine". It is entirely unclear (and is neither clarified by the Explanatory Note) what limitations are meant here. In case reference is made to the limitation periods provided in Art. 49 CC, the expiry of which results in discharge from criminal liability, there is no explanation why such limitation should be considered in a civil procedure and what impact it would have on the validity of the property claim included in the lawsuit. This provision would require further reconsideration.

Questions about urgency

The Civil Confiscation Law falls short of providing an explanation about the contradiction between the overall urgency applicable to civil proceedings on the one hand, and the 2 months that the prosecutor has to wait before submitting the lawsuit against the defendant on the other. There is no need for this lag period and should be reconsidered.

Also, according to Art. 233-7 (2), all cases of unjustified assets recovery must be resolved "within a reasonable time, yet no later than within three months of the date of commencement of proceedings". Providing 3 months for the entire procedure to be completed can be considered an extremely short deadline in itself (particularly in civil procedure). In cases of complexity, more than 3 months will almost certainly be required for trial preparation and the fairness of proceedings is vulnerable to criticism on this basis (Article 233-7(2)). Instead of setting an arbitrary time limit, the proposed legislation could require the resolution of a NCB confiscation to be resolved within a six month period, with liberty to the parties to apply to the Court for an extension to the six month period where necessary in the interests of justice.

That said, the analysis of relevant provisions suggests that the timeframe that is actually available for the court is even shorter. The civil proceedings start with the issuance of the prosecutor's lawsuit which is then followed by the court's decision on the commencement of the proceedings. The day when this decision is issued is considered the starting day of the aforementioned three-month deadline. The decision on the commencement of proceedings has, however, to be published in printed media and on the Internet pursuant to Art. 233-5 (6) before any further action. The Civil Confiscation Law nonetheless fails to set any deadline for this publication, which is an apparent shortcoming of the regime, considering that having

that information published (and particularly in printed media) might take anything from couple of days to weeks or longer in the absence of a strict deadline.[23]

The next step is the preliminary hearing that must be scheduled and held within 45 days from the publication. Considering the extent of preparation associated with scheduling and holding the hearing, it is not unlikely that courts will actually make use of the whole period available, holding the preliminary hearing on a day close to the 45th day from the publication. From here on there is no further deadline prescribed for scheduling and holding the hearing on the merits of the case, while the ultimate deadline of 3 months is applicable. Taking into consideration the time "spent" on previous stages, it transpires that even in best case scenarios (where the proceedings are not further prolonged) the court is likely to have less than 45 days (realistically about 35-40 days maximum) to schedule and hold the merits hearing and reach the decision in the case. Such a short period of time raises serious concerns about the prudence and thoroughness of the decision making procedure.

Whereas the rationale behind such short deadlines is obviously to prevent, in a timely manner, the dissipation or concealment of the criminal proceeds, other parts of the same Draft Law do not reflect the same level of urgency. One of the preconditions for bringing the lawsuit is that the suspect in the underlying criminal proceedings must be hiding from investigating authorities and the court in order to evade criminal responsibility and must have been placed under a national and trans/international arrest warrant for at least two months prior to the filing of the lawsuit (Art. 233-8 [1]5). Not only allowing the perpetrator to spend 2 months in abscondment before the lawsuit can be issued but in fact but requiring the prosecutor not to start proceedings before this time has expired appears an unnecessary delaying factor. The attachment of assets for ensuring the recovery could already be available as a tool at the time when the arrest warrant is issued against the suspect (Art. 174-1 [1]2 CPC).

Specific issues of compatibility in the context of the CPC

Issues regarding the parallel applicability of criminal and civil measures

The Civil Confiscation Law contains an internal contradiction on the issue of applicability of the proposed regime for assets considered under the current CPC regimes, which is not necessarily warranted. Thus, Art. 233-4 (3) states that the procedures and conditions for recovery of unjustified assets under Section III Chapter 10 "shall not apply to the objects of special confiscation or confiscation (of property) in the criminal proceedings, that had been uncovered in the latter". This

[23] In addition, the Draft Law falls short of specifying whether the court or the prosecutor is responsible for the publication and it is also unclear when and how the Cabinet of Ministers will define which channels of printed media are to be used, which are all potential delaying factors.

appears to mean that special confiscation and confiscation of property have priority over the civil confiscation (recovery of unjustified assets), and thus property items seized and attached pursuant to the special confiscation regime or the confiscation of property regime cannot be recovered according to Chapter 10.

On the other hand, the specific attachment rules in the draft Art. 174-1 of the CPC, as introduced by the same proposed legislation, can clearly be applied to assets that have previously been subject to attachment (and thus seizure) under other provisions of the CPC in which case the subsequent court ruling on the application of specific attachment shall prevail. In this context, the unjustified asset recovery rules will apply to property that had originally been attached under the special confiscation or confiscation of property regime, but the original decision was overturned by the subsequent court decision pursuant to Art. 174-1 (4) of the CPC. The draft CivPC and CPC provisions are in clear contradiction on this point.

In reality, since the confiscation of property operates as a punishment, the actual scope of which cannot be known for sure before a conviction is rendered, while the recovery of unjustified assets is to take place before the end of the criminal proceedings, collision of the two systems should not be technically possible. The situation referred to under Art. 233-4 (3) is thus highly unlikely to occur in respect to objects subject to confiscation of property. Such collision is however possible in case of possible objects of special confiscation where priority is rightfully given to criminal proceedings. However, even in this case, these can only be "potential" objects of special confiscation, currently being under attachment, at best.

Furthermore, the Civil Confiscation Law fails to provide any legal possibility for the subsequent civil recovery of property that the prosecutor had originally identified and attached, in the underlying criminal proceedings, for the purpose of special confiscation (e.g. as proceeds of crime) but the court, for any reasons, does not rule on the special confiscation of such assets in its final verdict. In such cases, even if that property clearly belongs to the suspect/defendant, it cannot be subject to asset recovery proceedings pursuant to the Civil Confiscation Law because such proceedings must be initiated before the investigative phase of the underlying criminal procedure comes to an end. As a result, assets that had been identified and secured as objects of special confiscation throughout the criminal procedure but, finally, are not confiscated by the criminal court can neither be recovered through the draft NCB confiscation mechanism.

It would thus be good to reconsider the language of the provisions in light of the actual remits of the CPC and the Civil Confiscation Law regimes.

Other technical issues

As discussed above, the suspect's/defendant's absence (i.e. abscondment) is a prerequisite for proceedings under Section III Chapter 10 CPC. The prosecutor is therefore required to prove not only that the suspect is hiding from investigating authorities and court to evade criminal responsibility, but also that he/she has already been under a warrant, including transnational and/or international ones, for at least two months prior the issuance of the lawsuit. The prosecutor is also required to provide in the lawsuit information on the implementation of the special pre-trial investigation or *that the investigating judge refused the motion on the implementation of such a special pre-trial investigation* (Art. 233-8 [1]5). That said, according to the rules on special pre-trial investigation in absentia, to which the aforementioned paragraph gives reference, namely Art. 297-4 of the CPC, the investigative judge refuses the motion for such a pre-trial investigation if the public prosecutor or the investigator fails to prove that the suspect is in abscondment and has been placed on the interstate or international wanted list.

Considering that refusal of the motion necessarily means it cannot be proven that the suspect is actually fleeing justice, there is practically no way to proceed with a lawsuit pursuant to Art. 233-8 if the investigating judge has previously refused the motion to implement special pre-trial proceedings. The last phrase of paragraph (1)5 is therefore incorrect on this point and should be revised.

Specific issues of compatibility in the context of the CivPC

Differences between the two civil confiscation regimes

Absence of harmonization between the pre-existent conviction-based civil confiscation regime in Section III Chapter 9 and the proposed Chapter 10 of the same law is obvious and in some aspects beyond the limits of the current paper. The key stumbling point lies in the difference in approaches taken with the two regimes.

Some of these differences cannot be explained and are unnecessary:

- Chapter 9 does not only extend to proceeds from corruption but also to those from money laundering (Art. 233-1 [2]1);
- Chapter 9 covers a significantly broader range of proceeds (by simply making reference to "other property" and related income in Art. 233-1[3]1);
- Chapter 9 (Art. 233-1 [2]2) applies to persons convicted of corruption or money laundering but also to individuals "connected to" such persons (which is a broad term potentially covering family members and other *mala* fide acquirers not necessarily being nominee holders, whereas Chapter 10 only focuses on suspects and their nominee owners);
- Chapter 9 does not require that assets subject to civil confiscation must previously be attached and it does actually cover cases where assets

recognised as unjustified cannot be collected obliging the defendant to pay the value of such assets (value confiscation – Art. 233-3 [3]3).

In these fields, Chapter 9 appears to have a significantly broader coverage and is a more proactive and effective approach than the proposed Chapter 10. The new Chapter 10 measures could therefore profit from replicating the same system in the above stated aspects as the current textual arrangement does not provide for that option.

Chapter 9, Art. 233-1 (3)2 also contains a definition of "individuals entrusted with the performance of the functions of the State or that of the local self-government" with clear reference to Art. 3 (1)1 of the Law of Ukraine "On prevention of corruption." Considering that this term is equally (and rather frequently) used in both Chapter 9 and the proposed Chapter 10, it may be problematic that the aforementioned definition only applies to Chapter 9 proceedings and not to Chapter 10 ones, which do not contain a similar definition.

On the other hand, the mechanism regulated in Chapter 9 does not provide for any particular rules for court proceedings, which is remarkably different from the regime in Chapter 10, where such procedural aspects are stipulated in details (also bearing in mind that the general provisions of CivPC are not necessarily fully applicable to cases of civil confiscation). This apparent deficiency of Chapter 9 could or should have been remedied by the proposed draft or, at least, the new regime of attachment should have been extended *mutatis mutandis* to Chapter 9.

Issues regarding the applicability of basic principles and other general rules of the CivPC

As noted above, the draft Section III Chapter 10 is a *lex specialis* to the general provisions of the CivPC. It is therefore expected to differ from general rules of procedure. What however raises concerns is that there is no sort of indication, either in Chapter 10 or elsewhere in the proposed draft, on which articles or chapters of the general provisions of the CivPC are not to be considered applicable to the draft procedure for the recovery of unjustified assets. While the "*lex specialis derogat legi generali*" principle might solve some of the questions arising from the parallel application of general and special provisions, it is not at all self-evident in matters that are not redefined or differently in Chapter 10 but whose applicability would appear odd in the context of the Draft Law, such as:

- Procedural rights and responsibilities of the parties (Art. 31) (e.g. the plaintiff is entitled to change the subject of the action or to reject it, while the defendant is entitled to accept the action in full or in part and retaliate);

- Replacement of an improper defendant, involving defendants (Art. 33) (e.g. the court, under the petition of the plaintiff, replaces the initial defendant by a proper one if the action has not been brought to the person); and
- Procedural succession (Art. 37) (e.g. in case of death of a physical person or dissolution of a legal person that was party or third party to the case, the court involves his/her/its successor in the case).

In light of the above, it is recommended that the Civil Confiscation Law address possible issues relating to applicability of regimes with clear language setting out the position of Chapter 10 versus the general CivPC rules.

VII. Conclusion

The Civil Confiscation Law is the latest result of a lengthy development in Ukrainian legislation aimed at finding the proper means to identify, secure, and recover the ill-gotten property of corrupt state officials. This purpose is well understood, as is the urge to find the most effective means to prevent such assets from concealment or dissipation, and particularly if ordinary means of criminal procedure and confiscation cannot be applied, for example in cases where the perpetrator has absconded. In that sense, the legislative objective behind the current initiative is fully consistent with measures contemplated in international conventions which signatory States should implement in the battle against money laundering, serious crime and corruption. That said, the Civil Confiscation Law appears to be a mere addition to existing legislation on confiscation, without really building upon it. For example, it omits to set out a more comprehensive approach to asset recovery seen in developing international standards, while at the same time failing to address the deficiencies of the existing criminal and civil confiscation regimes. It moreover sets out a number of solutions that are not harmonized with the existing provisions of the CPC and the CivPC.

In the long-run, it would be advisable that Ukrainian authorities take a comprehensive approach towards improving the asset recovery regime as a whole. More immediately, it would be paramount to resolve the issues of compatibility of the Civil Confiscation Law with the CPC and the CivPC outlined in Section VI of the Opinion in order to ensure the overall coherence of the legislation in this field.

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