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**TECHNICAL PAPER/EXPERT OPINION**  
**Draft law "On amendments to the Criminal Code**  
**and Criminal Procedure Code of Ukraine**  
**(regarding improvement of confiscation procedures)"**  
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## 1. INTRODUCTION

I have been requested by the Council of Europe to provide an opinion on the draft Law on amendments to the Criminal Code (CC) and Criminal Procedure Code (CPC) of Ukraine dealing with confiscation of proceeds from crime and instrumentalities. Views and opinions expressed in this work are personal, and do not represent official views or positions of the Republic of Slovenia or views and positions of the institutions and Law office I regularly work for in my country.

With this proposed draft law Ukraine has rightly decided to follow the modern approach in the area of confiscation and provisional measures.

The main goal of criminal offences and especially the main goal of the organised crime is to generate profit and obtain financial gains. Provisional measures and confiscation are the main tools to tackle organised and economic crime in the core. However when establishing adequate grounds for confiscation of property obtained through or with a criminal offence, we should have in mind that these measures must be in accordance with the basic human rights standards in the area of the right to private property and in accordance with standards and principles of criminal law and criminal procedure law.

The goal is to achieve a proper balance between a wide range of tools/measures which can be on one hand used to identify proceeds from crime, to follow the path of dirty money and to confiscate proceeds/instrumentalities and on the other hand to respect human rights standards and the principle of due process. These two approaches are often contradictory but the respect of basic human right standards and basic procedural rights in criminal proceedings should be ensured in democratic societies.

## 2. GENERAL OBSERVATIONS

In order to remain as practical as possible, without entering in theoretical discussions and argumentations related to the common traditional principle: *“that nobody shall retain the pecuniary gain acquired through or owing to the committing of a criminal offence”*, I will generally limit myself to the basic theoretical principles and to the comparison of the draft law to relevant international documents. I will bear in mind fundamental principles of criminal law stemming from the civil law tradition and the fundamental principles of the relevant international documents dealing with confiscation.

The area of confiscation of goods or other gains acquired through or owing to the committing of a criminal offence is recognised as complex and controversial and is an issue for a number of countries, not only for so-called transitional countries. Different solutions are proposed by various countries around the world.

However, it is clear that for a number of criminal offences, especially those related to organised crime, corruption and money laundering and of course traditional offences against property, countries should provide for adequate legal tools in view of confiscation to ensure that nobody retains the pecuniary gain acquired through or owing to the committing of a criminal offence.

Having in mind this basic principle, the existing Ukrainian legislation covers the issue to a certain extent but requires a deeper theoretical/conceptual approach.

I believe that the proposed legislation is systematic, but it is desirable to find better solutions. Some confusion appeared as to the wording of the draft. Problems concerning individual aspects are pointed out in my specific comments, especially those related to particular amendments.

### **3. THEORETICAL COMMENTS ON PROPOSED AMENDMENTS**

As stated above, serious crime is largely driven by acquiring economic benefits. Targeting proceeds from crime in combating corruption, money laundering, organised crime and other forms of economic crime through financial investigations leading to identification, seizure and confiscation of the proceeds from crime is therefore an integral part of any comprehensive strategy against this kind of criminal offences. However, it must be acknowledged and recognised that the major challenge is not in the legal norms but in the implementation of this legislation in practice. Integrated financial and criminal investigation aimed at confiscation of proceeds from crime is fundamental.

The main purpose of many criminal offences is to obtain material gain. The aspiration of material benefit makes offenders commit different types of illegal actions: crimes, misdemeanours, petty offences and so on. However, the gain is not only the result of the illegal deed. Especially regarding organised crime, the illegal gain is also the material basis for developing further criminal activities, committing other crimes and launching new attacks against the public order or even starting the legitimate and lawful business with the illegal funds.

Thus, the illegal gain has multiple meaning: it is the aim and the tool. For this reason, the idea of confiscation of proceeds from crime also has multiple rationales. The first objective is to ensure the respect of the principle that nobody shall retain the pecuniary gain acquired through or owing to the committing of a criminal offence. It is not a punishment but the restoration of the previous condition. Confiscation of proceeds from crime has clearly a dissuasive function. The second objective of confiscation (precisely forfeiture) is equally important and has a preventive role. The forfeiture of criminal benefits, especially if it concerns organised crime groups, effectively decreases the perpetrator's ability to reorganise the "criminal enterprise" and execute new illegal / criminal actions. The forfeiture of crime-related proceeds can also be, and often is, used in many different ways as a source of state revenues. For example in Italy or in Sweden confiscated property is used to create a special solidarity fund for victims of crime. Hence, effective forfeiture of proceeds from crime is one of the most effective measures to counteract criminal activities. This is well-known among judges, prosecutors, police officers and public servants. However the forfeiture may entail human rights abuse. A democratic State should respect the principle of the rule of law while criminals do not respect laws. The State must act in accordance with appropriate legal procedures and comply with basic human rights standards. The Universal Declaration of Human Rights (UN GA 217 (III) 10. December 1948) states in Article 17 that everyone has the right to own property alone as well as in association with others, while no one shall be arbitrarily deprived of his property. Therefore the law enforcement must constantly look for new, effective measures to counteract crime and steadily improve existing ones while not breaching the fundamental human right standards and state obligations.

In the view of the above, I wish to underline once more that criminal organisations are most sensitive and vulnerable in the segment of benefits obtained by a criminal offence. At a certain point, these financial gains must enter a legalisation (laundering)

process (i.e. be used for some legal purposes). At this stage financial investigations become particularly relevant. Forfeiture, seizure and confiscation of proceeds from crime are essential parts of many criminal procedures and result from financial investigations. A very important instrument in this area is the Council of Europe (CoE) Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime<sup>1</sup> (CETS 141), ratified by Ukraine. The Convention contains provisions not only on money laundering but also – of equal importance – on search, seizure and confiscation of the proceeds from crime. In this respect, the most important articles of the Convention include:

*Article 2 – Confiscation measures*

*1. Each Party shall 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.*

*Article 3 – Investigative and provisional measures*

*Each Party shall adopt such legislative and other measures as may be necessary to enable it to identify and trace property which is liable to confiscation pursuant to Article 2, paragraph 1, and to prevent any dealing in, transfer or disposal of such property.*

*Article 11 – Obligation to take provisional measures*

*1. At the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request.*

The obligations for the parties to the Convention are obvious. Not only do parties have to be able to execute mutual legal assistance (MLA) requests for seizure, forfeiture and confiscation, but they must also be able to:

- demonstrate that crime does not pay (to the offender and in general);
- compensate harm and damages;
- prevent the use of these benefits for facilitating the commission of future crimes;
- prevent investments in legal business/money laundering; and
- justify criminal proceedings economically.

However one of the biggest obstacles to effective confiscation is the requirement to prove the connection between the crime and the gain. Courts all over the world find it difficult to prove that the offender's property is the result of his or her criminal activity. The rule "nulla poena sine crime" ("no punishment without crime") in the area of confiscation and seizure means that: "No confiscation shall be imposed unless it is doubtlessly proven that the property of the offender is the proceeds of the particular crime for which he or she has been judged and sentenced". The second basic rule of criminal proceedings that is of interest is the burden of proof. Throughout criminal proceedings, the onus is on the public authorities. The prosecutor should gather and submit the evidence to prove the guilt and the court should find the material truth. The accused need not to undertake any activity during the trial. However, as

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<sup>1</sup> A new updated text – Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS 198) entered into force in May 2008. It has been signed but not yet ratified by Ukraine

aforementioned, confiscation is not a punishment, its meaning and role is much broader. Moreover, like any other penal measure, confiscation may be imposed only (exceptions are possible) after a court has delivered a guilty verdict.

These two rules have recently changed for the purpose of forfeiture. Sometimes in criminal proceedings it is quite easy to prove that the offender has committed the crime but much more difficult to establish the total gain of the crime, benefits from the criminal activity and the origin of the property. Very often the *actus reus* and *mens rea* of a crime are established, but there are no means of proving that the property comes only from these crimes.

The real problem is to balance the adoption of adequate legal framework for confiscation and the necessary respect for human rights standards.

#### **4. COMMENTS ON SPECIFIC PROVISIONS - AMENDMENTS TO THE CC AND CPC**

##### **4.1**

As stated above confiscation is more a tool for the restoration of the previous condition than a punishment. Therefore I recommend to delete the words "(7) forfeiture of property" in Article 51 of the CC and delete the whole Article 59 - Forfeiture of property and replace them with a completely new chapter (see appendix). If Articles 51 and 59 remain in the text, Art. 59 should be reworded in any case. Gravity of an offence (grave or special grave offences) has no relevance in the restoration of the previous conditions. All pecuniary gain acquired through or owing to the committing of a criminal offence shall be confiscated. Currently the Criminal Code provides for forfeiture as a type of punishment as the State can seize all, or a part of, property of a convicted person without compensation. However such a punishment could be unproportional and violate the Universal Declaration of Human Rights and Council of Europe Convention on Human Rights. If the forfeiture as a type of a punishment remains in the Criminal Code, more detailed legal framework (on when, where and against whom may this type of punishment be applied) should be enacted.

##### **4.2**

The second concrete but still general observation to the proposed draft law in my view is the lack of clear definitions of confiscation and provisional measures. Confiscation as such is a mandatory institute which should be imposed for all crimes that generate benefit - pecuniary gain acquired through or owing to the committing of a criminal offence.

There is no need to implement any kind of new compulsory measure as proposed in Article 91. Better legislative approach would be that confiscation and other related measures are written and regulated within the separate chapter or few new articles. The current amendments do not fit in Article 91 from the systemic point of view. Confiscation is not a compulsory measure of this kind and because of this reason should be in a separate article or chapter. The proposed text of this chapter is elaborated in the last section of my opinion.

I recommend to delete the newly proposed point three (special confiscation) in Article 91 of the CC.

Article 96 of the CC should be regulated individually (as stated above) in its own chapter. Term "special confiscation" should also be abolished and replaced with the

term “confiscation”. This terminology should be used in the CC and in the CPC consistently.

#### 4.3

My comment with regard to the proposed amendments to Articles 158 to 363 of the CC where provisions dealing with forfeiture and confiscation for individual offences are abolished is that these amendments should not be adopted. Although it looks that these provisions are unnecessarily doubling the regulation of the issues under investigation, the more precise analysis shows us that this is not the case.

First of all we have to make a distinction between confiscation and forfeiture. Confiscation is the act by which the estate, goods or chattels of a person who has been guilty of crime is declared to be forfeited for the benefit of the public treasury. According to Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime “confiscation” means 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. Whereas forfeiture in the Ukrainian legal system is a distinct punishment for the commission of certain groups and types of crimes. To make a clear legal distinction: a confiscation is a measure - a tool for the restoration of the previous condition whereas forfeiture is a type of punishment. This distinction should consistently be applied through the CC and CPC.

Existing norms in the Criminal Code of Ukraine don't “double regulate” the same legal issue. Should provisions concerning confiscation as such be adopted the need for the specific type of punishment still remains. This is because confiscation is not a punishment and because in some cases proof of connection between the crime and the gain is hard to establish. Therefore the existing regulation where a specific measure is an integral part of an individual criminal offence is still a very good option and a legal tool which in my opinion should not be abolished.

#### 4.4

Concerning the proposed amendments to the provisions of the CPC we have to clarify and make a distinction as stated above, between confiscation and forfeiture on one hand and securing the objects related to the commission of a criminal offence which can be used as exhibits on the other hand. Because of that distinction Article 79 of the CPC should not include words “property obtained due to commission a crime”. Property obtained due to the commission of a crime is confiscated under the confiscation or forfeiture provisions. Article 78 should tackle the questions of exhibits and should not deal with confiscation of property. The purpose of this article is only to seize/take away the exhibits which can help resolving a crime - find the material truth of the case. Therefore I suggest the following wording:

*Exhibits include objects which were instruments of crime, retained traces of crime ~~or were a target for criminal actions, money, valuables, and other property obtained due to commission a crime,~~ as well as all other objects which can help resolving a crime and identifying those guilty or denying charges or mitigating liability.*

In addition the Criminal Code should be amended accordingly so that there will be no doubt that objects which are used / intended to be used or gained through the committing of a criminal offence may be confiscated as well.

The proposed article shall be read as follows:

- (1) Objects used or intended to be used or gained through the commitment of a criminal offence may be confiscated if they belong to the perpetrator.*
- (2) Objects under the preceding paragraph may be confiscated even when they do not belong to the perpetrator if that is required for reasons of general security or morality and if the rights of other persons to claim damages from the perpetrator are not thereby affected.*
- (3) Compulsory confiscation of objects may be provided for by the statute even if the objects in question do not belong to the perpetrator.*

As stated above the term “special confiscation” should be changed to “confiscation” and applied consistently through the CPC.

4.5

See appendix enclosed.

## **5. CONCLUSION**

I strongly support the introduction of amendments to the Criminal and Criminal Procedure Codes regarding confiscation. However I propose to introduce clearer and more concise definitions and make a consistent distinction between specific measures in order to comply with the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and other relevant international documents.



## 6. APPENDIX

### **Proposal of a separate chapter to regulate confiscation in the Criminal Code (inspired by the Criminal Code of Slovenia) :**

#### CONFISCATION OF PECUNIARY GAIN ACQUIRED BY A CRIMINAL OFFENCE

##### *Grounds for Confiscation of Pecuniary Gain*

###### *Article XX*

(1) *Nobody shall retain the pecuniary gain acquired through or owing to the committing of a criminal offence.*

(2) *The pecuniary gain shall be confiscated by a court decision, with which it was established according to the conditions laid down in the present Code, that the criminal offence was committed.*

##### *Method of Confiscation of Pecuniary Gain*

###### *Article XX*

(1) *Money, valuables and any other property benefit gained through or owing to the commission of a criminal offence shall be confiscated from the perpetrator or other beneficiary; when confiscation cannot be carried out, property equivalent to the property benefit shall be confiscated from them.*

(2) *When the property benefit or property equivalent to the property benefit cannot be confiscated from the perpetrator or other beneficiary, the perpetrator shall be obliged to pay a sum of money equivalent to this property benefit. In justified instances, the court may allow the sum of money equivalent to the property benefit to be paid by instalment, whereby the period of payment may not exceed two years.*

(3) *A property benefit gained through or owing to the commission of a criminal offence may also be confiscated from persons to which it was transferred free of charge or for a sum of money that does not correspond to its actual value, if such persons knew or could have known that this property had been gained through or owing to the commission of a criminal offence.*

(4) *When a property benefit gained through or owing to the commission of a criminal offence has been transferred to close relatives of the perpetrator of the criminal offence or when, for reason of the prevention of confiscation of property benefits under the first paragraph of this Article, any other property has been transferred to such persons, this property shall be confiscated from them unless they can demonstrate that they paid its actual value.*

##### *Protection of the Injured Party*

###### *Article XX*

(1) *If the injured party has been awarded his claim for damage by the Criminal court, the latter shall order the confiscation of property only insofar as such property exceeds the adjudicated claim of the injured party.*

(2) *The injured party which has been committed by the criminal court to bringing its claim for the recovery of damages in a civil action may satisfy its claim from the value of the confiscated property, provided that it brings a civil claim within six months from the judgment directing it to bring a civil action and under the further condition that it claims settlement from the value of*

*the confiscated property within three months from the judgment awarding its claim.*

*(3) Any injured party which has not brought its claim for compensation in the form of damages in the course of the criminal proceedings may satisfy its claim from the value of the confiscated property, provided that it brings a civil action for the adjudication of its claim within six months from the day it became aware of the ruling confiscating the property and with the further proviso that it claims settlement from the value of the confiscated property within three months from the judgment awarding its claim.*

#### *Confiscation of Pecuniary Gain from Legal Person*

##### *Article XX*

*Any pecuniary gain acquired by a legal person through or owing to the committing of a criminal offence shall be confiscated. A property benefit or property equivalent to the property benefit shall also be confiscated from legal persons when the persons referred to in the first paragraph of Article XX of this Code have transferred this property to the legal person free of charge or for a sum of money which does not correspond to its actual value.*

#### **Proposal of a chapter in the CPC (inspired by the Criminal Procedure Code of Slovenia) :**

##### *Article XX*

*(1) Objects which pursuant to CC may or have to be seized shall be seized even when criminal proceedings do not end in a verdict of guilty if there is a danger that they might be used for a criminal act or where so required by the interests of public safety or by moral considerations.*

*(2) A special ruling thereon shall be issued by the agency before which proceedings were conducted at the time when proceedings ended or were discontinued.*

*(3) The court shall render the ruling on the confiscation of objects from the first paragraph of this Article even where a provision to that effect is not contained in the judgment of conviction.*

*(4) A certified copy of the decision on the confiscation of objects shall be served on the owner if his identity is known.*

*(5) The owner of the objects shall be entitled to appeal against the decision referred to in the second and third paragraphs of this Article if he considers that statutory grounds for confiscation do not exist. If the ruling from the second paragraph of this Article was not rendered by the court, the appeal shall be heard by the panel of the court which would have had the jurisdiction to adjudicate in first instance.*

##### *Article XX*

*(1) Property benefits acquired through the commission of a criminal offence or by reason of the commission thereof shall be determined in criminal proceedings ex officio.*

*(2) The court and other agencies conducting the proceedings shall be bound to gather evidence and inquire into circumstances material to the determination of property benefits.*

*(3) If the injured party has filed an indemnification claim to recover the objects acquired by the commission of a criminal offence or to receive the monetary equivalent thereof, the property benefit shall be determined only for that part which exceeds the indemnification claim.*

##### *Article XX*

*(1) Where the confiscation of property benefits from another recipient of benefits is indicated*

*that person shall be summoned for questioning in preliminary proceedings and at the main hearing. If a legal entity is involved, summons shall be served on its representative. The latter shall be informed that proceedings may be conducted in his absence.*

*(2) The representative of a legal person shall be examined at the main hearing, after the defendant. The same shall apply in respect of another recipient of property benefits if he was not summoned as a witness.*

*(3) The recipient of property benefits and the representative of a legal person shall in connection with determination of property benefits be entitled to move for evidence to be taken and, with the permission of the presiding judge, to put questions to the defendant, witnesses and experts.*

*(4) The exclusion of the public from the main hearing shall not apply in respect of the recipient of material benefits and the representative of a legal person.*

*(5) If the court finds only at the main hearing that the issue of confiscation of property benefits demands to be considered it shall interrupt the main hearing and summon the recipient of the benefits or the representative of the legal person.*

#### *Article XX*

*The court shall fix the amount of property benefits using its discretion if an accurate determination would entail undue difficulties or the proceedings would thereby be unduly protracted.*

#### *Article XX*

*(1) Where confiscation of property benefits is warranted the court shall on its own authority order temporary securing of the claim pursuant to provisions applying to the enforcement procedure.*

*(2) The court may also order such security in the pre-criminal procedure.*

#### *Article XX*

*The legal person and the recipient of property benefits may request the reopening of criminal proceedings in regard of the provision on confiscation of property benefits.*

#### *Article XX*

*The court which ordered the storage of seized items or the temporary securing of request for the seizure of property benefits or property to the value of the property benefits, shall be obliged in such instances to proceed particularly quickly and to operate economically, rationally and as a good manager with the seized items and property serving as temporary security for the request.*

#### *Article XX*

*(1) Unless stipulated otherwise in this chapter, other provisions of the CPC shall apply mutatis mutandis to proceedings for the application of security measures, confiscation of property benefits, bribes and money or property of unlawful origin.*

*(2) Confiscation of money or property of unlawful origin, bribes and other property benefits shall apply mutatis mutandis to the confiscation of property of a value which matches the property benefits.*

*(3) The provisions shall apply mutatis mutandis to the pre-criminal and investigative procedure.*