The Forfeiture of Unexplained Assets in Proposed Ukrainian Civil Law Amendments: Compatibility with Human Rights Law

1. Introduction

This memorandum concerns the draft legislation providing for the civil forfeiture of the unexplained assets of public officials in Ukraine (the draft law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine Concerning the Confiscation of Illegal Assets of Persons Authorized to Perform Functions of the State or Local Self-Government and Penalty for the Acquisition of Such Assets”). The use of civil asset forfeiture in connection with acts of corruption is consistent with international laws and standards that address corruption and money laundering (e.g. UN Convention against Corruption, Articles 31, 54). A significant body of international instruments recommend the confiscation of unexplained wealth, even in the absence of a criminal conviction, and other states have adopted this approach (e.g. Georgia, Arts. 21(4)-(11) Code of Administrative Procedure). This memorandum describes the key aspects of the draft legislation (Part 2), and then assesses its compliance with human rights law, in particular the European Convention on Human Rights (ECHR) and Protocol No. 1 (Parts 3, 4). The legal analysis in the memorandum confirms that this draft legislation pursues the goal of combating corruption in Ukraine in a manner that is compatible with the human rights of defendants in forfeiture proceedings.

2. Key Aspects of Draft Legislation

Draft Article 290 of the Civil Procedure Code (CPC) grants the Specialized Anti-Corruption Prosecutor’s Office (SAPO) the capacity to bring lawsuits for the recognition of assets as unexplained and their forfeiture to the state of Ukraine (Art. 290(1)). The scope of Article 290 is limited in a number of respects. First, the provision applies to the assets of public officials, namely “persons authorized to perform functions of the state or local self-government” (CPC Art. 290(4), 290(8)(3)). The assets of a third party may also be the subject of a forfeiture order when a natural or legal person acquires or owns such assets “at the expense or per the orders” of the public official (a knowing third party) (CPC Art. 290(4)). Second, the provision applies to circumstances in which the discrepancy between a public official’s legal income and the value of his or her assets is above a minimum threshold, but below the threshold for the crime of illicit enrichment (CPC Art. 290(2)). The minimum threshold for such a discrepancy is five hundred times the minimum subsistence for able-bodied persons as of the day the law enters into force (UAH 960,500 as of the date of this memorandum). The upper limit consists of a discrepancy of “more than fifteen thousand non-taxable minimum incomes of citizens” (UAH 14,407,500 as of as of the date of this memorandum). The crime of illicit enrichment applies to discrepancies above this upper limit of UAH 14,407,500 (Criminal Code (CC) Art. 368). Finally, the temporal scope of this provision covers unexplained assets acquired by public officials after the law’s entry into force, as well as assets acquired by them during the three years prior to the law’s entry into force. Assets acquired during this three-year period must still be owned by the public official (or a third party who has knowingly acquired them from the public official) on the date of the law’s entry into force (CPC Art. 290(2)).

Lawsuits concerning unexplained wealth under CPC Article 290 are subject to rules of evidence that are appropriate for civil proceedings. With respect to the burden of proof, SAPO bears the initial burden of proving that a discrepancy exists between a public official’s legal income, and their assets (CPC Art. 81(2)). Once SAPO has demonstrated this discrepancy, then
the burden of proof shifts to the public official or knowing third party, who must refute the claim that his or her assets are unexplained (CPC Art. 81(2)). The standard of proof requires the High Anticorruption Court to decide in favour of the party whose evidence was ‘more convincing’ (CPC Art. 89).

If the High Anticorruption Court finds that a public official or a knowing third party possess unexplained assets, then it orders the forfeiture of those assets to the state (CPC Art. 292(1)-(2)). The draft legislation further provides for the dismissal or termination of employment of public officials who are the subject of an order for the forfeiture of unexplained assets (CPC Art. 272(8)). By contrast, a conviction for illicit enrichment results in a deprivation of the right to occupy certain public functions, imprisonment of a term of five to ten years, and confiscation of assets (CC Arts. 96-962, 3685).

3. The Right to a Fair Trial and the Principle of Legality

The ECHR requires states parties to respect certain procedural rights of defendants in criminal proceedings. These procedural rights include the right to a fair trial (ECHR Art. 6) and the right not to be punished without law, also known as the principle of legality (ECHR Art. 7). These procedural guarantees do not apply to civil asset forfeiture proceedings, so long as these proceedings are genuinely civil rather than punitive in character. The European Court of Human Rights (the Court) has developed a set of criteria for determining when a given measure is reparative or preventive and therefore civil, rather than criminal or punitive in character (G.I.E.M. v. Italy para. 211). The criteria consist of: (1) whether the measure was imposed following a conviction for a criminal offence; (2) the classification of the measure in domestic law; (3) the nature and purpose of the measure; (4) the severity of the effects of the measure; and (5) the procedures for the adoption and enforcement of the measure. According to the Court’s well-established case law, asset forfeiture proceedings that do not stem from a criminal conviction or sentencing generally qualify as civil rather than criminal proceedings (Gogitidze v. Georgia para. 121).

In the case of Ukraine’s draft legislation, the application of these criteria leads to the conclusion that civil forfeiture is civil rather than criminal in character:

1) The legislation provides for forfeiture in the absence of a criminal conviction. The forfeiture of unexplained assets is not dependent on a conviction for illicit enrichment, as is the case in some jurisdictions. Instead, illicit enrichment and the forfeiture of unexplained wealth have different scopes of application, as explained above.

2) The legislation classifies the forfeiture of unexplained assets as civil by virtue of including this measure in the Civil Procedure Code, rather than the Criminal Code.

3) The primary purpose of the forfeiture of unexplained assets is reparative rather than punitive. Forfeiture aims to repair the damage to the state of Ukraine as a result of the corrupt conduct of a public official. The forfeiture of unexplained assets also has a preventive purpose because ensuring that corrupt public officials do not benefit from the proceeds of their corrupt conduct may help to deter such conduct in the future.

4) The severity of a forfeiture order is moderate, as it involves asset confiscation and the removal of the public official from office, but not imprisonment or a fine.

5) The procedures for asset forfeiture are governed by the Civil Procedure Code and include the shifting of the burden of proof and a standard of proof typical for civil proceedings. Asset forfeiture is also ordered by the High Anticorruption Court, which
will be responsible for both civil and criminal forms of accountability for corruption (The Law of Ukraine On the High Anticorruption Court Arts. 3-4).

In addition, the forfeiture of unexplained assets does not violate the procedural guarantees set out in the ECHR, regardless of whether such forfeiture is classified as civil or criminal. This analysis focuses in particular on the right to the presumption of innocence and the right to remain silent, which are not absolute rights (ECHR Arts. 6 and 7). Shifting the burden of proof to the defendant, for example, does not necessarily violate the right to the presumption of innocence, so long as such burden shifting is confined within reasonable limits and takes into account the rights of the defendant (Salabiaku v France para. 28; Phillips v. UK para. 43). In the case of the draft legislation, shifting the burden of proof to the defendant may be considered reasonable because SAPO must demonstrate first a link between the assets and the public official (or a knowing third party) and then the existence of a significant discrepancy between the assets and legal income. Once SAPO has presented sufficient evidence to demonstrate a link and a significant discrepancy, then this creates a presumption that may be rebutted by the defendant. In order to rebut the presumption that such unexplained wealth has illicit origins, the defendant must satisfy a relatively low evidentiary burden by ‘reasonably’ refuting the plaintiff’s evidence.

Similarly, the right to remain silent is not absolute insofar as a domestic court may draw adverse inferences where the evidence against the defendant calls for an explanation (Murray v UK paras 51, 54). With respect to the forfeiture of unexplained assets in Ukraine, it would not be unfair for the High Anticorruption Court to draw adverse inferences where a defendant fails to provide a reasonable explanation for a significant discrepancy between his or her assets and legal income. It is reasonable to expect a public official to be able to explain the source of assets that significantly exceed his or her legal income. Moreover, Article 88 of the Criminal Procedural Code provides an additional guarantee for defendants, by prohibiting the use of any evidence obtained from the defendant in civil forfeiture proceedings for the purpose of criminal proceedings (e.g. prosecutions for illicit enrichment).

4. Right to Property

The forfeiture of unexplained assets interferes with the right to the peaceful enjoyment of possessions under Article 1 of Protocol No. 1 to the ECHR, to which Ukraine is a state party (Gogitidze para. 94). Such forfeiture is only in keeping with the right to the protection of property if it is lawful, serves a legitimate, public interest, and is proportionate (Protocol No. 1, Article 1). The criterion of lawfulness means that there must be a legal basis for any interference with the peaceful enjoyment of possessions. This legal basis must, in particular, be precise, foreseeable, and non-arbitrary (Dimitrov v Bulgaria paras. 44-45). The criterion of proportionality means that any interference with an individual’s right to the peaceful enjoyment of possessions must be reasonably proportionate to the public interest that the measure aims to serve. States parties to the ECHR and Protocol No. 1 have broad discretion in determining how these criteria are interpreted and applied when implementing political, economic, or social policies such as anti-corruption measures.

In the case of Ukraine’s draft legislation, each of these criteria would likely be fulfilled. First, the forfeiture of unexplained assets may be qualified as lawful because the draft legislation clearly establishes the circumstances in which assets may be forfeited and the procedural rules governing such a measure. Even though the legislation applies retroactively to
assets acquired up to three years before the entry into force of the legislation, it may still be qualified as foreseeable and non-arbitrary. As in the case of Gogitidze v. Georgia, this draft legislation does not represent the first piece of legislation holding Ukrainian public officials accountable for their unexplained assets through the forfeiture of those assets (e.g. Ukraine Crim. Proc. Code Art. 100(9)(6) and Civil Proc. Code Chapter 9; Gogitidze para. 99). Instead, these amendments regulate anew this aspect of accountability for corrupt conduct by public officials.

Second, the forfeiture of unexplained assets pursues a legitimate, public interest, namely, combating corruption in the public sector in Ukraine. The draft legislation serves this larger purpose by ensuring that damage caused to the state is repaired, and by deterring such corrupt conduct in the future. The legitimacy of this legislation is significantly bolstered by the fact that a number of international instruments specifically encourage the confiscation of property linked to serious offences, including corruption and money laundering.

Finally, the means by which the draft legislation pursues this aim are proportionate. The means involve an adversarial procedure in which the public official has a reasonable opportunity to rebut the evidence presented by SAPO. The shifting of the burden of proof is reasonable and fair to the public official, given that SAPO must demonstrate first a link between the assets and the public official (or a knowing third party) and then the existence of a significant discrepancy between the assets and lawful income. Likewise, the use of a lower, civil standard of proof is also fair, as both SAPO and the public official are held to this standard, which is appropriate for civil proceedings. Moreover, the retrospective application of the legislation is reasonable and non-arbitrary in light of the history of Ukrainian legislative provisions that hold public officials accountable for their unexplained assets. Lastly, the draft legislation guarantees the non-arbitrary confiscation of the assets of knowing third parties, as well as public officials. SAPO is required to make the same evidentiary showings in cases against knowing third parties, as opposed to public officials, and such third parties are given reasonable opportunity to put their arguments before the High Anti-Corruption Court, just like public officials themselves (e.g. Silickienė v Lithuania para. 68). The proportionality of this draft legislation is further assured by the broad discretion that Ukraine enjoys in formulating laws and policies to combat corruption in the public sector. The means employed by Ukraine are reasonable, particularly when measured against the critical importance of combating corruption.

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2 See e.g. United Nations Convention against Corruption, Art. 31(1)(a) (‘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… Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds’); Art. 31(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’); Art. 54(1)(c) (‘Each State Party, in order to provide mutual legal assistance… shall, in accordance with its domestic law:… 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’);

Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Art 3(4) (‘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');

Financial Action Task Force (FATF) Recommendations: International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation (adopted February 2012, updated June 2019) Recommendation 4(3) ('Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), 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.)


7 John Murray v. United Kingdom, Application no. 18731/91, Judgment, 8 February 1996.


9 Silickienė v Lithuania, Application no. 20496/02, Judgment, 10 April 2012.