



U.S. Department of Justice

Criminal Division

Asset Forfeiture and Money Laundering Unit

Washington, D.C. 20530

September 14, 2015

Ms. Daria Kaleniuk
Executive Director
Anti-Corruption Action Center

Mr. Vitaliy Kasko
Deputy Prosecutor General
Office of Prosecutor General of Ukraine and
Head of Interagency Group on Asset Recovery Reform

RE: Concerns regarding the proposed law "On Special Confiscation Proceedings"

Dear Ms. Kaleniuk and Deputy Prosecutor Kasko:

We have reviewed the draft legislation developed by your interagency group for asset recovery and asset management and disposition in accordance with international standards and best practices, including draft law nos. 2540a, 2541a and 3040. I will send my comments concerning this package of laws in a separate letter.

We have also recently had the opportunity to review a proposed Law of Ukraine no. 3025 entitled "On Special Procedure of Property Confiscation." Below are some significant concerns we have about the law establishing a special procedure of property confiscation. In sum, in its present form, we have significant concerns that this law does not incorporate sufficient protections of human rights and democratic principles.

First, let me clarify that the United States does have legislation in place to provide for freezing and arrest of property to preserve it for possible confiscation which does not require a criminal conviction of the owner as a prerequisite. The focus in these cases is on whether the property can be linked to certain offenses. We understand that this option is one which draft law no. 3025 proposes to establish for Ukraine. As set forth below, however, this proposed legislation does not closely mirror such U.S. asset recovery laws. U.S. laws and procedures do not allow for the summary nature of the proceedings envisaged in this law, and provide for greater protections of due process rights of property holders. We also believe other foreign laws generally provide for greater protections than appear in draft no. 3025.¹

¹ U.S. law also provides for blocking and freezing of certain assets based on Executive Orders, without prior court orders. However, these procedures do not allow for the termination of the rights of the property holder. Such laws also provide for an opportunity to seek review of such decisions before a court under a specific set of procedural rules.

Absence of Application of or Reference to Clear Procedural Rules:

Significantly, the draft law appears to provide for no established rules of procedure which should be followed by the government and the court to consider either a request for arrest or for confiscation. It should specify the key procedural rules that apply to guarantee fundamental fairness, including especially with regard to the 1) notice to be provided for property holders of the initiation of such an action, 2) standards for the quality and nature of the evidence which the court may consider, 3) opportunities to present evidence in support of the property owners' claims and challenge the government's evidence; 4) standard by which the court must be convinced by the government in rendering a decision to arrest or confiscate assets, and 4) provide an opportunity to object to any court orders.²

Insufficient Notice Requirements:

We see no specific requirement that notice be given to the property owner of the existence of such a petition at any stage, unless the Prosecutor refuses to file a petition as requested under Article 3, paragraph 2.³ We agree with the need to be able to provide evidence and arguments sufficient under certain circumstances for court permission to arrest property without prior notice as described in under Article 3 sub paragraph 4. U.S. law provides for such procedures, but in contrast to U.S. laws, we see no specific provision requiring sufficient notice to be provided even after an arrest order is issued. Nor is there an express requirement for sufficient notice of the filing of the petition to persons who may have an interest in the property, if temporary arrest is not sought under Article 3. Notice and a meaningful opportunity to challenge the nature and sufficiency of the evidence is critical to fundamental fairness and democratic principles.

U.S. law requires prosecutors to make reasonable efforts to provide direct notice to people or entities who have or reasonably may have an interest in the property to be confiscated through combinations of official mail, email and messenger delivery services to the property holder, and their counsel, if any. U.S. legislation also requires that we provide notice by publication in newspapers or using an internet site established specifically for this purpose. Generally, the notice provides that potential claimants who are notified directly of the proceedings must file claims within 35 days after the notice was sent. Persons to whom the government does not provide direct notice must file a claim within 60 days of the date the government first provides internet notice. In determining whether to grant confiscation orders, courts consider whether

² We are not presently in a position to opine on whether or not the Code of Civil Procedure of Ukraine, if made applicable, would provide these guarantees to a sufficient degree. Often additional procedural rules are necessary to address the specific circumstances of arresting and confiscating property.

³ There may be some meaning lost in the translation process, but it appears that the petition must be supported unanimously by Secretary of National Security and Defense Council of Ukraine, the Deputy Prosecutor General of Ukraine, the Head of National Security and the Ministers of Interior and Justice. If such unanimity were required to support a petition for special confiscation, this may provide a level of protection against abuse of discretion by the Prosecutor General. However, it is unclear if this unanimity is intended.

efforts to provide notice to all possible claimants were reasonable and sufficient to provide a reasonable person with notice of their rights.

By contrast, under the proposed law, even if a person obtains knowledge of the existence of a proceeding against their property, there appears to be insufficient time for the property holder to appear and raise objections. Article 4 paragraph 2 provides for entry of an arrest order within one day of the filing of the petition if the government has established the requisite need to prevent its concealment, damage, destruction, transformation, alienation or other consequences that may result in the loss of the property. However, the draft does not specify the notice procedures to be followed by persons with interests in the property to contest the petition itself nor does it set a reasonable time to file objections to the petition to confiscate before the court can consider the petition and terminate the property owner's rights.

Need for Specification of the Types of Competent Evidence and Standards of Proof:

Non-conviction based seizure and confiscation under U.S. law requires the government to establish by a preponderance of evidence specific facts linking the property to the alleged crimes. U.S. law further provides that the evidence must be of the type and quality admissible under the Rules of Civil Procedure which generally prohibits "hear say" or out of court statements where the declarant cannot be subjected to cross examination, except where the parties have raised no material dispute as to the facts. Our law further provides for procedures for the exchange of evidence by the parties in the process. In most circumstances, the claimant to the property is entitled to compel production of evidence supporting and undercutting the government's claims from the government, and the government can obtain evidence from the claimant. The parties may also compel the sworn testimony of certain witnesses regarding critical issues in the case. These steps often focus on the evidence tracing the criminal proceeds to the assets sought to be seized and the specific evidence that crimes linked to the assets were in fact committed.

The proposed law, without making reference to any established rules of evidence or civil discovery procedure appears to permit the possibility that someone would be deprived of their property without a full and fair opportunity of notice to object, and to challenge the evidence used to cut off property rights in a meaningful way. Indeed, Article 3 does not even appear to require certified copies or sworn statements which may substantiate the allegations of the petition, and carry penalties for false or intentionally misleading or incomplete presentation of the facts.

Distinction In Remedy Available - Substitution of Assets in Non-conviction Based Proceeding:

The proposed law and U.S. law also differ significantly because proposed law no. 3025 permits in Article 96 subparagraph 3 that the court may substitute an amount of cash for the assets linked to the crime, if the assets cannot be easily confiscated. Civil confiscation actions under U.S. law are directed at the property linked to the crime because it represents proceeds of the offense or because it represents property involved in the offence.

U.S. courts may not order in civil confiscation proceedings that cash or other assets be substituted for the assets directly linked or linked through a series of transactions to the crimes committed. Substitution of assets is only permitted in criminal confiscation proceedings where

the crimes alleged must be proven by the government beyond a reasonable doubt, the highest standard in our law.

U.S. law also provides courts in civil confiscation proceedings with discretion to release funds to provide for payment of criminal defense attorney's fees or other hardships which do not appear in proposed law no. 3025. While some other countries allow for this substitution of assets in civil cases, and do not allow for the same range of hardship exceptions as in the U.S., these are additional ways in which U.S. courts' powers are more limited in non-conviction based confiscation proceedings for the protection of property rights.

No Remedy Specified for Property Owner Based on Court's Finding That Government Has Not Met the Standard for Confiscation:

As a check against the improper exercise of the government's power to confiscate property, U.S. law allows for the possibility that if the court finds the government has not met its burden to establish the link between the crimes alleged and the property sought to be confiscated, the court may award the property owner attorneys' fees incurred as a result of the government's actions. This obligation is imposed only after all appeals have been exhausted. Proposed Law no. 3025 appears to provide no similar remedy.

Uncertainty of Enforcement by Foreign Courts of Orders Under This Procedure:

Of course, it is not possible to prejudge the outcome of any specific request for enforcement of any order entered pursuant to the procedures outlined in draft law no. 3025. However, under U.S. law, the criteria which the Attorney General must consider in authorizing a request be made to a U.S. court, and which the district court must consider in determining whether to enforce the order include, among other factors, whether the court had jurisdiction to enter the order, and whether the order was entered under circumstances that ensure due process equivalent to U.S. standards. These include considerations of whether or not the person with an interest in the proceedings was given sufficient notice and opportunity to enable him or her to defend their interests.

As written, for the reasons discussed, it does not appear likely that an order issued under the procedure established under law no. 3025 would meet this criteria for enforcement under US law. Accordingly, such an order to arrest assets or confiscate assets issued by a Ukrainian court may be unlikely to be enforced against assets in the U.S. by a U.S. court. In considering this legislation, it may be worth considering what the outcome might be in other jurisdictions. Obtaining judgments against assets abroad which are unlikely to be enforced by foreign courts does not seem to be an efficient use of resources.

We are available to provide additional information and reference materials concerning non-conviction based confiscation laws and proceedings. We note that while we do think there are many advantages to having as one option, non-conviction based confiscation proceedings, there must be public confidence in the fairness and integrity of the judiciary to ensure fair and even handed enforcement of such laws.

Sincerely,

A handwritten signature in black ink that reads "Mary Butler". The signature is written in a cursive, slightly slanted style.

Mary K. Butler
Deputy Chief,
International Unit