



U.S. Department of Justice

Criminal Division

Asset Forfeiture and Money Laundering Section

Washington, D.C. 20530

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Mr. Vitaliy Kasko
Deputy Prosecutor General
Office of the Deputy prosecutor General of Ukraine
Head of Interagency Group on Asset Reform
Riznytska St.
Kyiv, Ukraine

Re: Comments regarding the proposed law "Establishing the National Agency of Ukraine for Tracing and Management of Proceeds from Corruption and Other Offenses"

Dear Deputy Prosecutor General:

We appreciate the opportunity to review and provide comments on the proposed law "Establishing the National Agency of Ukraine for Tracing and Management of Proceeds from Corruption and Other Offenses."

Overall, in our view, the legislation meets a critical need for Ukraine to ensure the inevitability of the disgorgement of profits of crime, and to disrupt the facilitation of crime through criminal proceeds. The law incorporates an efficient and practical method of increasing effective asset tracing and asset management which should lead to more recoverable assets while ensuring the maximum net value of those recoveries. We note the draft also incorporates critically important safeguards against abuses of power and self-dealing. These include the audit provisions in Articles 12 and 22, judicial approval for liquidation of perishable or bulky uniform commodities in Article 19, a national registry of restrained assets in Article 25, and requirements for public control and input in Article 12. We also raise the following specific issues for your consideration.

Establishment of a Specialized Agency:

Whether or not a separate agency is needed to perform these functions rather than a specialized unit within an existing ministry should of course be decided in the context of Ukrainian realities. It does appear to us that a strong justification can be made for a small agency with appropriately limited powers to ensure that decisions can be made and carried out promptly and transparently to maximize recoveries of proceeds of crime and to ensure their transparent and accountable disposition.

Power to Sell Restrained Assets:

Although we are aware of alternative proposals, we think that Article 19 properly limits the otherwise unchecked power of the Agency to determine to sell valuable restrained property which it deems perishable to too bulky to store so that only the proceeds must be retained for final forfeiture proceedings. We think the proposed law properly requires either the consent of the owner confirmed by records of the consent given or court approval. This limits the possibility of radically changing a person or legal entities' property rights in a summary fashion. It also limits the possibility of disputes over the actual amount of goods seized or the quality of goods seized or that the sale did not take place under procedures sufficient to maximize revenues and free of conflicts of interest in the sale.

In practice, in the United States we follow a similar procedure. There are rarely any circumstances where the owner's agreement cannot be solicited or the court's consideration cannot be obtained swiftly, if the circumstances justify the sale on the merits. Indeed, where the objective facts establish that a sale is needed to maximize revenues or to limit storage charges, owners or their legal representatives will often agree to their sale.

Other Accountability Requirements:

In an apparent effort to ensure that the work of the agency and the prosecution generally moves swiftly in the area of tracing and confiscation, Article 17.1 sets short deadlines within which the agency staff must act and others must respond. While we think presumptive deadlines which can be extended for good cause are positive elements, we think the possibility for additional extensions may need to be considered to allow for the possibility that additional rounds of records may be needed to follow the money and to complete the necessary tracing. Additionally, in our experience, 20 days may be insufficient for most requests from foreign governments, particularly if the information needed requires compulsory process in the requested country. For example, at least thirty days is usually required to obtain account records from a bank in the U.S., and we would usually need a formal MLA request to compel the production of such records.

We also note that the legislation provides for annual audits of the operations of the agency. This is a very important safeguard. We assume this includes audits of the bank accounts opened by the agency. Also, we assume that the law intends that regulations will be established to provide that only certain officials are authorized to establish bank accounts and incur expenses and authorize financial transfers on behalf of the agency. If there is any question about either of these issues, we suggest making it more explicit.

We see that the law requires the creation of a national registration database of assets arrested by Ukrainian authorities in Article 25. This is also a critical component for ensuring transparency and public accountability of the arrest and disposition of assets.

Ability to Make Referrals of Administrative or Law Violations:

We note that the Agency's ability to make referrals to the prosecutor general's office or to the courts incorporated in Article 10 and referenced elsewhere is an important tool to ensure the effective operation of the agency. However, the law does not provide for who within the agency will be responsible for such investigations and referrals. We recommend that you consider legislation providing that these functions be carried out by an Inspector General for the agency ("IG"). The IG would be a senior agency employee with a small staff and report only to the highest

levels of the agency. The IG would be responsible to ensure that the agency's investigations and referrals for sanctions against government employees within or outside of the agency were conducted thoroughly and on a consistent basis, and would not interfere with the other duties of the agency employees to trace and recover assets. Most federal government agencies in the United States have an office of the inspector general associated with them to prevent waste, fraud and abuse and to make appropriate referrals of alleged criminal misconduct.

Additional Implementing Regulations and Legislation:

We note that the legislation anticipates that additional legislation and regulations will need to be developed and adopted within several months after the passage of the legislation. These include the system for managing assets valued at less than 200 times the minimum salary, and establishing the system for contracting for services needed by the agency for appropriate storage, maintenance, appraisal and liquidation or sale of arrested and confiscated assets. This area is one for which there are high risks for corruption coupled with a need for swift action to maximize the value of recovered assets.

We recommend that these laws provide for entering into relatively long term contracts awarded on a competitive basis to provide such services as needed at set (pre-negotiated) prices as much as possible. For example, you may want to consider a competitively bid services contract to provide residence appraisals without the contents of a house at a set price and a residence appraisal with its contents at another set price for a specific period of time. The same could be done for car or jewelry appraisals (i.e. set prices for various types of pieces). This will reduce the risk that contracts will be let non-competitively at inflated prices in urgent circumstances, and help to ensure that the services will be readily available as needed. Taking into account the complexity of the rules and procedures which must be developed, the three month time period may need to be extended.

We also note in Article 7 that the head of the agency has specific duties and authorities. We think it might be important for practical reasons for him or her to be able to specifically delegate certain responsibilities. If this is not allowed by the legislation, we suggest you authorize the head or his/her designee to undertake these various actions.

Disposition of Recovered Assets:

It is our understanding that Article 24 is intended to provide that the agency will have access to 25 percent of the net balance of recovered funds for operating expenses of the agency from a special fund of the general treasury into which forfeiture proceeds will be deposited. An ability to provide a continuous source of funding for ongoing activities of the Agency is critically important. It is also our understanding that Article 24 anticipates repatriation by Ukraine of assets linked to corruption or other offenses to foreign countries.

At the same time, the law appears to be silent on how funds repatriated by foreign countries will be repatriated to Ukraine. We note that several countries, including the United States, appear to be working to try to recover assets linked to corruption or other offenses to be returned to Ukraine. While Ukraine continues to make strides in open and accountable government, there may be strong interest from foreign governments with substantial assets to repatriate those assets through agreements governing the return of those funds. The cornerstone of such agreements would likely be provisions for adequate specific assurances about the transparent and accountable use of the funds rather than simple direct transfers to the general treasury.

While it may be beyond the scope of this law, as you are focused on this issue of recovering assets domestically and abroad linked to crime, this would seem like an appropriate time to consider who would be authorized to participate in such international negotiations and to enter into binding commitments on behalf of Ukraine governing the use of funds confiscated and repatriated from abroad.

Again, thank you for the opportunity to review and provide comments on this proposed legislation. We are available to further explain our comments or provide additional assistance.

Sincerely,



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