Frequently Asked Questions on European Standards and Comparative Practices in Confiscation and Recovery of Proceeds of Crime

1. What is the overall justification of the proposed legislative package (Draft Laws 2540a, 2541a, 3040)?

In each of larger European jurisdictions (Germany, France, Italy, U.K. etc.), the actual degree of proceeds of crime is estimated by various observers to amount to hundreds of billion euros per year, while the amounts confiscated are actually measured only in hundreds of million euros annually. Ukraine affairs are even worse than most of European countries, as only a very small proportion of relevant cases of organised crime and corruption are prosecuted, while even less contain confiscation measures. Offenders hide their assets abroad or transfer them to third parties, such as relatives or companies.

The main idea behind the freezing and confiscation of instrumentalities¹ and proceeds of crime is to put in place severe legal consequences for committing a crime in addition to sentencing – notably by targeting the ‘benefit’ derived by the perpetrator from the offence. Confiscation tools also contribute to implementing anti-corruption policies and the fight against terrorism, particularly by addressing the question of terrorism financing.

2. What are the relevant international and European provisions?

The EU Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union adopted in 2014, is setting the minimum requirements for EU Member States. It foresees, among others, extended confiscation, third party confiscation, value-based confiscation and confiscation when the suspect or accused person is too ill to stand trial or has fled the jurisdiction, and a criminal conviction cannot be achieved. The Directive also includes provisions on asset management, requiring EU Member States to properly manage frozen assets so that they do not lose economic value before they are eventually confiscated. The Directive provides a list of extensive safeguards in order to ensure that actions taken to freeze and confiscate assets are backed by strong protections of fundamental rights, in line with the EU Charter and the European Convention on Human Rights.

The Council Decision 2007/845/JHA requires each EU Member State to set up or designate a national Asset Recovery Office.

The Visa Liberalisation Action Plan (VLAP) requirements for Ukraine were formulated as follows:

2nd Progress Report in 2012: Strengthen the framework for seizure, confiscation and asset recovery, including on matters such as value-based confiscation, third party confiscation, value-based confiscation and confiscation when the suspect or accused person is too ill to stand trial or has fled the jurisdiction, and a criminal conviction cannot be achieved. The Directive also includes provisions on asset management, requiring EU Member States to properly manage frozen assets so that they do not lose economic value before they are eventually confiscated. The Directive provides a list of extensive safeguards in order to ensure that actions taken to freeze and confiscate assets are backed by strong protections of fundamental rights, in line with the EU Charter and the European Convention on Human Rights.

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism provides in Article 6 (Management of Frozen or Seized Property: “Each Party shall adopt such legislative or other measures as may be necessary to ensure proper management of frozen or seized property in accordance with Articles 4 and 5 of this Convention.”

¹ instrumentalities’ means any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences; ‘proceeds’ means any economic advantage derived directly or indirectly from a criminal offence; it may consist of any form of property and includes any subsequent reinvestment or transformation of direct proceeds and any valuable benefits;
The Council of Europe Group of States against Corruption (GRECO) recommended in its recent Report on Ukraine to introduce regulations on the management of seized property, which can be applied in a flexible way in order to sufficiently preserve the value of such property.

Relevant provisions are also to be found in the UN Convention against Corruption.

In this regard, the decision to adopt the legislation on 'special confiscation', third party confiscation and set up the Asset Recovery Office in Ukraine is to be considered as a step towards greater compliance with EU and international standards, and address the visa dialogue (VLAP) recommendations.

3. Do similar measures, as the ones proposed in Ukraine, exist in other European jurisdictions?

Yes. Moreover, significantly more intrusive mechanisms exist elsewhere in Europe to provide potentially more effective tools to recover instrumentalities and proceeds of crime. These tools include assumed criminality (‘criminal lifestyle’ test) with reversal of burden of proof against the offender to show lawful origin of his assets and preserve his property from confiscation (Finland, France, Italy, Lithuania, Netherlands, U.K.), non-conviction based confiscation and civil recovery (Italy, U.K.), compulsory court-orders to disclose all worldwide assets in return of threat of being held in contempt of court (U.K.), penalties and fines in addition to the confiscation measures (Netherlands), default prison sentence for failure to pay the court-ordered amount (U.K.) etc.

By reference to the above European practices, it can be said that, in proposing measures by way of the above draft laws, the Ukrainian authorities are very cautious in, on the one hand, suggesting new methods of dealing with proceeds of crime while, on the other hand, balancing the new approaches against the realities of the state of affairs with the competence and accountability of national justice and law enforcement institutions.

4. To which crimes such intrusive tools can apply?

The key element is the existence of ‘benefit’ or ‘advantage’ that the offence brings the perpetrator. The general trend in most European jurisdictions is to not only prosecute the offender for a crime but rather deprive him of financial gain made from it. The EU Directive 2014/42/EU establishes the minimum list of offences to be covered by its provisions, including corruption, money laundering and certain other serious financial crimes, drug and human trafficking, terrorism, sexual offences against children etc.

5. What is extended confiscation? Is it being introduced in Ukraine?

Some elements of extended confiscation are to be found in the proposed concept of ‘special confiscation’. Extended confiscation as construed by EU law refers to assets which belong to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit and in relation which the criminal origin of assets may be assumed with regard to crimes that are unlikely to be committed on a one-off basis, such as drug trafficking or money laundering; only a court may decide upon such measure when, 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. Most importantly, the burden of proof is reversed against the offender convicted for a serious criminal offence to show legitimate nature of obtaining his property and expenditure. In the proposed ‘special confiscation’ system in Ukraine, it will still be for a prosecutor to prove the illicit origin of the offender's assets, while no inquiries into the expenditure of the offender will be made.

6. Can the offender lose his old property?

Yes. Statutory assumptions of illicit nature of all assets of the convicted person date back to 6 years prior to the commission of the offence (Netherlands, U.K.), while in some European countries all property could be confiscated (France) by way of extended confiscation tools.

7. Can a third party lose his property because of the actions of the offender?
Yes. According to EU law, in order to protect his status of *bona fide* purchaser, the third party should carry out additional steps of *due diligence*, and he/she may risk an interference with his title where he/she purchased the property *below market value* and where he/she *could suspect* as a *reasonable observer* that the property could be derived from crime. At the same time, procedural safeguards should be put in place to give any affected *third party* clear *procedural standing* in confiscation proceedings, with rights akin to those of the defendant, including legal aid.

8. Can assets be seized by law enforcement services without a court order?

Yes. At the same time, according to EU law, *court order* should be sought retroactively *as soon as possible*. Based on comparative European practices, evidential standards for *seizure* (restraint, freezing) could be as low as ‘reasonable suspicion’ of the origin of the relevant property being derived from crime.

9. Is it necessary to establish an asset recovery agency?

EU law *requires each Member State* to set up or designate a national Asset Recovery Office. Some European countries have a dedicated agency, and some have a designated department within a law enforcement, government or prosecution authority, as different criminal justice and law enforcement bodies share the roles required by EU law. The key elements in the effective work of complex investigations of organised crime and corruption are the needs to *coordinate* activities of different law enforcement bodies nationally and abroad, *exchange data and seek information* by way of automated means (including from the private sector, such as banks), ensure specialisation and *leadership* by prosecution or other competent services, introduce effective *risk management* and research/analysis capacities supported by greater use of *statistics* (including from the courts).

For a more extensive list of challenges faced by various competent EU bodies please see the European Commission *Report concerning cooperation between Asset Recovery Offices*.

10. Is it standard practice to allow the asset recovery agency to retain part of the confiscated assets (special fund provision)?

Justice sector and law enforcement institutions *generate revenue* for the state in all European jurisdictions. This holds true not only for agencies performing a role in asset recovery, but also the courts who charge fees for access to justice, for instance. According to modern approaches of results-based (performance-based) budgeting, the institutions are *incentivised* to *perform* their roles *better*. One of the ways of doing so is through setting up a special fund, where the *revenue* generated by the institution is *retained* and used for its *operational purposes*. One of the recommendations of the aforementioned EU Directive is for Member States to “consider taking measures allowing confiscated property to be used for public interest or social purposes. Such measures could, *inter alia*, comprise earmarking property for law enforcement and crime prevention projects, as well as for other projects of public interest and social utility”.

Цей проект фінансується Європейським Союзом