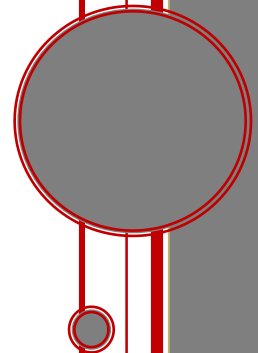


UKRAINE'S EXPERIENCE IN ASSET RECOVERY

The report is prepared by the Anti-corruption Action Centre for the
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Introduction

This report is prepared by the Anti-corruption Action Centre (AntAC), Ukrainian non-government non-profit organisation. The AntAC works on tackling grand political corruption. The mission of the organisation is to ensure unavoidable liability for misuse of public funds. Organization believes that recovery of proceeds of corruption and their subsequent transparent and effective use for social needs is a powerful preventive mechanism against grand political corruption, capable of overcoming officials' impunity and implementing the principle of inevitable punishment for corruption offences. Accountable asset recovery is one of the key priorities of from the moment of its founding in 2012. However, the real work on asset recovery started in 2014 with a pressing need to return billions stolen from the state once the former President Viktor Yanukovich and his close associates (so called "Family") had fled the country.

Viktor Yanukovich and the "Family" were known for notorious corruption schemes aimed at personal enrichment and lavish lifestyle. The exact amount of stolen by Yanukovich is still unknown. The estimated damage to the state budget varies up to 40 billion USD. Although some of their assets are still in Ukraine, it is widely believed that most of the money is hidden in the foreign jurisdictions. Thus, the primary expectation of Ukrainian people is return of stolen assets from abroad as well as due prosecution for corruption crimes. This is reflected in Ukrainian Anti-Corruption Strategy for 2014-2017 which defines asset recovery as one of the main benchmarks of ongoing anti-corruption reform.

This report is based on the AntAC's experience in the sphere of asset recovery both on the national and international level. The AntAC constantly performs monitoring work on all asset recovery cases related to Ukraine. Organisation is also actively involved in drafting and advocacy of the new legislation aimed at optimization of the existing experience work monitoring. AntAC's experts on a daily basis analyse Ukrainian legislation and its implementation, court practice and publicly available information regarding the state of asset recovery in Ukraine. Special attention is paid to the court cases concerning Yanukovich and his associates.

1. COUNTRY OVERVIEW

Legal framework

In 2015-2016, Ukrainian legislation on asset recovery has undergone extensive changes to speed up the asset recovery process and comply with international standards, first and foremost UN Convention against corruption.

The Criminal Procedure Code (CPC) of Ukraine allows freezing assets at any stage of investigation if assets may be evidence, proceeds or means of crime, or may be the further subject of confiscation or compensation for a committed crime. The law allows freezing of assets belonging to individuals and legal entities. Court freezing orders can be executed abroad under the general framework of execution of court decisions in foreign jurisdictions.

Criminal Code of Ukraine (CCU) provides for two types of confiscation: confiscation under Art. 59 of CCU, which means confiscation of all or part of property directly belonging to the convicted person (no matter of the origin of assets), and special confiscation under Art.96-2 of CCU, which means confiscation of proceeds and means of crime. Special confiscation under Art.96-2 of CCU applies to all the crimes which are punishable by imprisonment or fine more than 3000 minimum wages, also certain crimes directly prescribed by Art.96-2 of CCU. Confiscation under Art. 59 of CCU applies to grave and especially grave crimes and should be directly envisaged as punishment for specific offence by CCU. Such duality of confiscation under Ukrainian law may be a reason for certain terminology confusion especially in attempts to provide corresponding foreign terms. However, regarding procedures Ukrainian legislation on confiscation corresponds international standards. Also, there is no sufficient court practice on special confiscation as it was introduced only in 2016 to assess its application by courts.

Ukrainian law allows trial in absentia that can be used as a mechanism for asset recovery in case an accused person. However, there is still no sufficient court practice of application of trial in absentia in corruption cases.

Ukraine is part numerous conventions and agreements on mutual legal assistance in criminal matters that allows co-operating during criminal investigations and execution of court judgements with a wide range of countries including all states-member of Council of Europe.

Institutional strengths and weaknesses.

The General Prosecutor's Office of Ukraine (GPO) is in charge of the investigation, prosecution and subsequent asset recovery of corruption crimes committed by Yanukovich and his associates. There is a high probability of political influence over the investigations given the fact that during 2014-2016 there have been four changes of General Prosecutors and current General Prosecutor, Yuriy Lutsenko considers himself more a politician than a prosecutor¹. This negatively influences the resourcing and pace of the investigations. The Special Investigative Department designated to investigate those cases undergone several restructures during 2015-2017². Some cases were transferred between the investigative departments several times, for instance, the part of corruption cases was transferred to the Military Prosecution (the GPO department) without giving any justification for such actions to the general public³. This adds to the unreformed system of the judiciary (which is also understaffed), which contributes to the fact investigations being stuck in courts due to various procedural delays.

The Ministry of Justice of Ukraine (MoJ) is in charge of asset recovery matters on the stage of execution of court decisions. So far there has been no court decisions in Ukraine prescribing execution of confiscation of “Yanukovich’s” assets abroad. Thus, the MoJ is not yet actively involved in the asset recovery process.

In 2014-2015, new anti-corruption authorities were created to order to fasten the anti-corruption reform, namely *National Anti-corruption Bureau of Ukraine (NABU)* and the *Specialised Anti-corruption Prosecution (SAP)*. They are not investigating Yanukovich’s crimes, but focusing on the cases of grand political corruption and misconducts of acting officials. They will become fully functional once a specialised system of anti-corruption courts is established.

In 2016, the National Asset Recovery and Management Agency (ARMA) was created in order to facilitate the activities of NABU and SAP. It is tasked with tracing illicit assets, proper management of seized and confiscated assets, and together with MoJ supporting the recovery

1 <http://www.icps.com.ua/en/studies-icps/internal-policy/the-results-of-the-year-of-general-prosecutor-yuriy-lutsenko/>
2 <https://www.5.ua/suspilstvo/hpu-stvoryla-okreme-upravlinnia-shcho-zaimetsia-rozsliduvanniam-velykoi-spravy-yanukovycha-129250.html>

3 https://ua.censor.net.ua/news/417325/spravy_spilnykiv_yanukovycha_bezpidstavno_peredaly_viyiskoviyi_prokuratu_ri_gorbatyuk

of stolen assets from abroad. ARMA is not yet fully functional. Currently, it is on the stage of staff recruiting and training⁴.

Overall assessment of political will

The public demand to return Yanukovych's assets is very high. However, the general political will is targeted at showing quick results that can gain political gains but not bring actual criminals to justice. This transforms into the slow pace of investigation and prosecution of corruption cases, limited resources allocated, the resistance of judiciary, and low reporting to the public about the course of asset recovery.

Transparency and involvement of civil society

Anti-corruption Action Centre and Transparency International Ukraine are the most active and influential CSOs working in the field of asset recovery in Ukraine. Since 2014, the governmental cooperation, mostly of the GPO, with CSOs in regard to asset recovery went from active seeking of support and expertise to alienation and accusation of misinformation. Meantime, CSOs are actively performing the tasks of corruption investigation or enforcing existing journalist investigations, advocacy for anti-corruption reforms of law enforcement and judiciary, and improvement of asset recovery mechanisms. So far there are no established legal mechanisms to actively involve the CSOs to process of asset recovery.

There is no comprehensive and reliable statistics and reports on the asset recovery matters made by the government. Each governmental agency has own methodology of gathering and provides different set of data. The most comprehensive and full reports are provided by NABU⁵. In order to get information on the asset recovery matters CSOs have monitor the court registry and to submit information requests or MP's requests regarding each separate case. However, the information provided is not always full.

2. DOMESTIC ENFORCEMENT OF CORRUPTION CASES

Resolved cases

Despite the number of investigations in recent years, Ukraine does not have any case of conviction for grand corruption. In 2016, there were 362 convictions in corruption cases prosecuting only low or middle-level public officials, out of whom only approx. 1,5% received

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<http://www.oecd.org/corruption/acn/firsttrainingonassetrecoveryforukrainesnewassetrecoveryandmanagementagency.htm>

⁵ <https://nabu.gov.ua/en/reports>

imprisonment sentence⁶. None of those cases involved any major asset recovery. During five months of 2017, there were only 146 convictions in corruption cases. The prosecuted persons were only low or middle-level public officials as well⁷.

Other cases

In total, there are approximately up to 20 investigations⁸ concerning the corruption of Yanukovich and his associates. The total number is unknown as the GPO does not provide timely reports on the course of those investigations or amount of frozen assets. The time frame and perspectives of those investigations are hard to predict as well.

At the same time, there are few investigations which were dropped due to inactivity or malfunctioning of the GPO. The most famous ones are the cases of Zlochevsky and Ivaniushchenko.

Zlochevsky's case. In April 2014, British Serious Fraud Office started a preliminary investigation of money laundering in the amount of 35 million dollars allegedly committed by Mykola Zlochevskyi, former Minister of Environmental Protection of Ukraine. In this criminal case, the British law enforcers blocked 23.5 mln USD on the accounts of the companies beneficially owned by Zlochevsky. In late July 2014, when the GPO received a request for mutual legal assistance from the British counterparts and opened their own investigation. At the same time, the investigators issued several letters to the defence attorney of Zlochevsky stating that there were no investigations regarding him in Ukraine. The letters were used by attorneys during court hearings in London on Dec 3-5 2014. The London Court drew conclusion that no new sufficient evidence were collected during 8 months of investigation to prove the necessity of seizure. The absence of such evidence might be the result of the GPO's inaction, which did not investigate in Ukraine the origin of 23.5 mln USD on the accounts of Zlochevsky's companies. Later the case was closed in Ukraine in November 2016⁹.

Ivaniushchenko's case. Yuriy Ivaniushchenko was MP during Yanukovich's Presidency and one of his closest allies. In 2014 he was included in the EU sanction list. The GPO investigated illegal enrichment regarding 72 million Swiss francs, which were found in his accounts, Ivaniushchenko received notification of suspicion (meaning official charges). Since the moment of issue of notification, there were few investigative actions carried out by the GPO, the indictment was not prepared. As a result, lawyers asked the court to close criminal proceedings

6 <http://nashigroshi.org/2017/02/23/habari-2016-koho-posadyly-i-za-scho/>

7 <http://nashigroshi.org/2017/06/27/pyat-misyatsiv-2017-ho-rezultaty-borotby-z-habarnykamy/>

8 <http://assetconf.antac.org.ua/en/asset-recovery-report/>

9 <https://antac.org.ua/en/analytics/burisma-group-of-companies-are-still-under-criminal-investigation-in-ukraine-despite-case-against-mykola-zlochevskyi-was-dumped-by-the-general-prosecutor-s-office/>

against Ivaniushchenko. On 27 January 2016, the court ordered the prosecutors to close the case. Such a decision can not be appealed. However, during the year the GPO tried to challenge it under made up causes. On 16 February 2017, the Supreme Court finally dismissed the GPO's attempts to cancel the former decision of the court. Around 200 million USD on the accounts of companies of Ivaniushchenko were previously seized in Monaco and Switzerland. Probably the seizure is cancelled as on 3 March the EU lifted sanctions from Yuriy Ivaniushchenko presumably due to the absence of investigation in Ukraine¹⁰.

Availability and ease of access to information

Overall availability is moderate. The GPO does not give reliable and full information referring to the secrecy of investigation. Several high-profile cases were closed with secret settlements. All the information is accessed either through requests of MPs or received through the open court registry.

3. EXPERIENCE IN RELATION TO FREEZING, SEIZING AND CONFISCATION OF ASSETS:

Overall picture

In 2014, in response to the situation in Ukraine several countries imposed personal sanctions and asset freezing orders over Yanukovich and his associates, namely there are sanctions imposed by US¹¹, EU¹², Switzerland¹³, and Canada¹⁴. However, these countries do not provide information on the amount of frozen asset in each jurisdiction or information on the cases of unfreezing those assets. The GPO does not provide the information either referring to its international obligations.

Examples of specific proceedings

On 28 April 2017, the GPO informed about confiscation of approximately of 1.5 bln USD held in governmental bonds previously frozen during the investigation of corruption crimes of Yanukovich and his associates¹⁵. The bonds were confiscated using the plea bargain deal with a nominal director of one of the companies involved in money laundering schemes of the Yanukovich's group. There was no formal court hearings of the case, and the nominal owners of the bonds (offshore companies) could not present their case in court. However, the GPO used

10 <https://antac.org.ua/en/announces/for-media-activists-will-bring-to-poroshenko-bloody-tushky-chicken-corpse-as-a-gift-from-yuriy-ivaniushchenko-who-was-excluded-from-the-eu-sanction-list/>

11 <https://www.admin.ch/gov/en/start/dokumentation/medienmitteilungen.msg-id-54221.html>

12 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2014:066:0001:0010:en:PDF>

13 <https://www.admin.ch/gov/en/start/dokumentation/medienmitteilungen.msg-id-54221.html>

14 <http://canadagazette.gc.ca/rp-pr/p2/2014/2014-03-26/html/sor-dors44-eng.php>

15 <https://www.kyivpost.com/ukraine-politics/lutsenko-confiscated-1-5-billion-yanukovich-teams-funds-transferred-ukraines-budget.html>

the legal loophole limiting the right of the parties to appeal the plea bargain conviction. The text of the relevant court decision itself is not available to the general public due to the GPO prohibition¹⁶. The same mechanism was used to confiscate Odessa Port Refinery on 19 June 2016 which previously belonged to the business group of Serhiy Kurchenko, one of Yanukovich's associates¹⁷. The use of such mechanism is non-transparent and impose high chance of successful appeal with the European Court of Human Rights in the future.

4. EXPERIENCE OF REPATRIATION:

Overall

Between 2014 and 2017 there was only one case reported of assets repatriated from abroad. On 15 June 2017, the GPO informed about repatriation of 0,5 mln USD from the US¹⁸. According to the GPO, the US Department of Justice concluded a secret settlement with one of the US law firms that signed a fictitious agreement on provision of services with former leadership of the MoJ during the presidency of Yanukovich aimed at embezzlement Ukrainian state funds. The other details of the settlement are unknown. There was no official confirmation of this information from the US Department of Justice.

Current debates

Ukraine made several attempts to introduce the non-conviction based confiscation. However, the relevant draft laws were blocked by the Parliament due to the lack of due process safeguards and procedural protection rights of the third parties¹⁹.

5. CSO RECOMMENDATIONS AND EXPECTATIONS:

Key asks

- Active involvement of so-called “transit states” (such as European law tax jurisdictions, e.g. Cyprus, Austria, Lichtenstein) in investigation of corruption cases and assistance in asset tracing and freezing
- Disclosure of the exact number of criminal proceedings both in Ukraine and abroad concerning Yanukovich and his associates

¹⁶ <https://www.epravda.com.ua/news/2017/06/13/625944/>

¹⁷ <http://en.interfax.com.ua/news/economic/429888.html>

¹⁸ <https://www.ukrinform.net/rubric-polytics/2248242-prosecutor-general-lutsenko-reports-on-return-of-over-500000-withdrawn-from-ukraine-during-presidency-yanukovich.html>

¹⁹ <https://antac.org.ua/en/analytics/to-confiscate-less-to-lose-more-ukrainian-government-selects-wrong-way-to-recover-yanukovich-assets/>

- Disclosure of amount of assets frozen abroad under the foreign sanctions imposed Yanukovich and his associates

- Disclosure of amount of assets frozen abroad and domestically in the course of criminal investigations of corruption crimes of Yanukovich and his associates

Expectations:

- Commitment from Ukrainian government to enforce and speed up the reform of prosecution and judiciary as well as introduction of anti-corruption courts

- Commitment from Ukrainian government to intensify investigations of corruption crimes of Yanukovich and his associates and provide timely and comprehensive reports on the course of those investigations

- Commitment of foreign government to disclose the information on frozen assets in their jurisdiction, facilitate investigations performed by Ukrainian authorities and/or initiate their own criminal proceedings Yanukovich and his associates

- The commitment of Ukrainian government to include CSOs in the process of asset recovery and decision-making process over the use of recover assets.