

The effective return or the black hole for stolen assets from Servants of the People?

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In May, the Parliament voted in the first reading for the draft law No.3304, which, according to [authors](#), is developed to finally return the illegally withdrawn billions from Ukraine.

The picture described by Members of Parliament looks fabulous and tempting. Namely: Ukrainian law enforcement agencies will attract the best foreign lawyers who will start lawsuits abroad, where criminal assets of Ukrainian origin were found.

The main thing is that it will not cost a penny for the state budget, because the work of foreign lawyers will be financed by special investment funds, the so-called litigation funds. These funds will invest their money in the work of their own highly qualified lawyers. And then if assets are successfully returned to Ukraine, they will receive interest. We are implementing the best world practice in Ukraine and we are not losing anything.

The described prospects look cosmic, so it is important to professionally compare them under the microscope with the text of the proposed draft law.

Only foreign lawyers and respected funders from Britain?

According to part 2 article 26 of the draft law, for the sake of purposes of returning assets new powers are granted to the National agency of Ukraine for finding, tracing and management of assets derived from corruption and other crimes (hereinafter ARMA), namely, the right to:

“2) enter into civil law agreements with legal entities and individuals (legal advisers) regarding representation and protection of rights and interests of Ukraine in foreign jurisdictional bodies;

3) enter into agreements with business entities established and registered according to the legislation of Ukraine or the legislation of foreign states regarding the provision of services by them of full financing of measures necessary to perform tasks specified in part one of this article with their subsequent payment at the expense of part of assets that were, in fact, returned to Ukraine”.

These norms show that not only well-known foreign funds, but also Ukrainian companies will be able to finance lawyers-advisers in lawsuits abroad. ARMA will enter into separate agreements with legal advisers who will provide legal representation in foreign jurisdictions.

There is no guarantee that foreign highly professional and honest lawyers will be selected by such advisers. The draft law modestly conceals the procedure and criteria for selection of both funders and advisers. All details should be developed in bylaws by the Cabinet of Ministers.

In practice, this will mean that at the request of the head of ARMA Cypriot ski instructors, funded by Ukrainian oligarchs, will be able to get the right to represent interests of Ukraine in foreign courts instead of cool foreign lawyers and reputable British investment companies-litigation funds.

Similarly according to provisions of the draft law, Ukrainian law firms will be able to represent interests of the state of Ukraine. For instance, firms controlled by subjects of criminal cases regarding withdrawal of such assets. It is unlikely that such firms will care much about their reputation and prestige. There are no safeguards in the draft law that will prevent such scenario.

The draft law also does not clarify how the percentage of fees for advisers and funders will be determined from the amount of money returned from abroad. It also opens the wide field for possible abuses and puts it in hands of the head of ARMA. Moreover, the head of ARMA is likely to be selected in the coming months by very dubious commission, [approved](#) by the Anti-Corruption Committee of the Verkhovna Rada.

The important legal nuance in this whole thing is that ARMA is not even the law enforcement agency. Namely, it does not have authority to collect evidence of criminal assets in criminal proceedings. The agency is established and acts as the subsidiary body for prosecutors and investigators. And, at their request, it searches for assets and manages the seized property.

However, the project turns the agency into the independent player and full-fledged side of the process. Moreover, during 3 years of its existence ARMA has failed the main function of property management, and it has been caught more than once as the subject of [corruption](#) scandals. How can the agency, that has failed to organize effective [management](#) of Mezhyhirya which is right in front of us, be entrusted with the sensitive tool to represent interests of the state in foreign courts?

We do not lose anything because we do not pay anything from the budget!

In fact, there are huge risks. And the draft law could significantly complicate the process of returning illegal assets and bringing to responsibility top officials and oligarchs.

After adoption of such project in practice there will be many situations where lawyers, selected under uncertain procedures, will have to make specific decisions during court proceedings. These decisions may not be consistent with interests of the state at all. For instance, in such civil case the involved lawyers may decide to enter the plea bargain with the defendant-oligarch, according to which the amount of assets returned to Ukraine will be significantly reduced. This will make further confiscation impossible, and the state will be left with nothing after paying for the work of such “assistants”.

Authors of the project do not take into account cases when, in addition to the state, there is specific victim of criminal acts in the case, namely, state company, such as Naftogaz, or Privatbank, or any individual or legal entity who suffered losses. If the draft law is adopted in this form, in practice there will be conflict between claims of the state and the victim.

Now, victims in Ukraine can file the civil lawsuit as part of the criminal process, which is resolved simultaneously with the criminal case. But authors see it appropriate to initiate civil proceedings abroad separately from criminal cases in Ukraine, therefore, in each case the view of victim, prosecutor, ARMA and legal adviser may be different in terms of losses, prospects and other details. As the result, such process abroad apart from criminal proceeding can become vivid example of the fable about swan, pike and crawfish. In the end, no one will receive benefit from the case.

And the most important thing is that in order to start such process the agency along with dubious advisers will be able to receive access to evidence collected in the criminal proceeding. How to guarantee non-disclosure of this information? These issues are also not disclosed in the project.

Recovering assets obtained by criminal means is not an easy process even in Western jurisdictions, namely in the United States, Italy, or the United Kingdom. And sometimes it takes decades to secure it for law enforcement officers. This is painstaking and hard work. At the same time, in Ukraine we have not yet learned to use the existing basic instruments in the form of confiscation according to the court decision.

The new tool of “civil confiscation” of unjustified assets of officials, which should work in the coming years, has appeared in Ukraine recently. All this has already been implemented and we have to feel results with first decisions of the High Anti-Corruption Court.

Instead, ill-considered asset recovery initiatives that promise fabulously easy results can ultimately hurt and deprive us of the chance to return assets that are investigated by law enforcement officers today.