

Mutual recognition of judicial decisions on confiscation: the way forward

1. Introduction

Confiscation of assets derived from criminal activities, organized crime and corruption in particular, has been a topic issue for several years. In the contemporary theory and practice, it is established that in order to effectively combat serious criminality of the above mentioned types confiscation of proceeds of crimes is indispensable. Classical methods of criminal prosecution fall short of achieving the objectives of dismantling criminal enterprises. As in any enterprise, the main objective is to accumulate wealth. Depriving criminal enterprises of their main *raison d'être*, which also puts into inability the criminal enterprise stripped of its funds to function, is the focus of contemporary efforts of the law enforcement community. However, often serious organized criminal groups and corrupt officials hide the ill gains in other jurisdictions. Within the EU, with the free movement of people and money, it is particularly easy which calls for special attention on behalf of the MS. EU have already taken measures to counter this vulnerability. Yet, the legislative framework and practices bear further improvement.

Prior to discussing the specific issues related to mutual recognition of judicial decisions on confiscation, it is worth recalling that in the confiscation process, there are three distinct policy objectives that confiscation of criminal proceeds need to address:

- To counter organized crime
- To address issues related to rights of victims and deprived communities
- To maintain public confidence in justice systems.

These priority areas are already identified by previous analysis and well summarized by the 2012 Rand Study for an impact assessment on a proposal for a new legal framework on the confiscation and recovery of criminal assets identify the objectives behind confiscation of criminal assets. Thus, deprivation of criminal enterprises and corrupt officials of their illegal gains is the first step. However important it is, mere confiscation shall not achieve its full purpose if disposal of confiscated property is not done in a manner that achieves the entire realm of functions vested in this activity.

Bearing into consideration the above, the following intervention does not strive to canvass the plethora of issues related to mutual recognition of judicial decisions on confiscation, but strives to address selected issues that relate to each of the above identified objectives through focusing on some selected issues that the author considers of prime importance.

2. When mutual recognition of judicial decisions on confiscation became an issue at EU level

At policy level, the topic of mutual recognition of judicial decision on confiscation of criminal asset was clearly identified as a separate issue in the Stockholm Program. It calls on the EU to work for improve effectiveness of confiscation of criminal assets. Although Hague Program also discussed issues related to asset confiscation, the identification of issue the pertinent to this study matter is clearly outlined in the Stockholm Program. It should also be recalled that stated that the 1999 Tampere European Council expressed determination to ensure that EU takes concrete steps to trace, freeze, seize and confiscate the proceeds of crime.

At legislative level mutual recognition of judicial confiscation order first became a topic in the EU with the adoption of the 1990 Council of Europe Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ratified by all EU MS. In line with the general trend in the policy developments in the EU Justice and

Home Affairs field at the time, Council of Europe conventions have important role for the cooperation in the then Third Pillar. This international legal instrument was superseded by the 2005 the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005 Council of Europe Convention)¹. The issue with the 2005 Council of Europe Convention is that it is ratified by 15 of the MS. Austria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Lithuania, Luxemburg and UK has not ratified it. Henceforth, those MS continue to apply the 1990 Council of Europe Convention.

The first secondary EU legislative acts on asset recovery is the Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. It builds on the legal basis established with the 1990 Council of Europe Convention. It is followed by several Council Framework Decision of which Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, as amended by Council Framework Decision 2009/299/JHA of 26 February 2009, which is of relevance for this presentation. Recently adopted Directive 2012/42/EU of the European Parliament and the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union does not address the matter.

The above outlined legal framework in the EU on mutual recognition of judicial decisions on confiscation demonstrates that MS relies on Framework Decision 2006/783/JHA and the Council of Europe Conventions, with the caveat of the limited ratification among EU MS of the 2005 Council of Europe Convention. This brings us to the first major issue related to mutual recognition of judicial decisions on confiscation related to judicial cooperation with MS that employ non-criminal confiscation.

3. Criminal v. non-conviction civil based confiscation

The StAR Initiative of the World Bank and UNODC 2011 Report entitled Barriers to Asset Recovery; An Analysis of the Key Barriers and Recommendations for Action notes that “[n]on-conviction based confiscation most often takes place in one of two ways. The first is confiscation within the context of criminal proceedings but without the need for a conviction or finding of guilt. In these situations, non-conviction based confiscation laws are incorporated into existing criminal codes, as well as anti-money laundering acts and drug laws, and they are regarded as “criminal” proceedings to which criminal procedural laws apply. The second means is confiscation outside criminal proceedings, such as in a civil or administrative proceeding. This is a separate proceeding that can occur independently of or in conjunction with any related criminal proceedings. In a number of jurisdictions, this means of confiscation is called “civil confiscation” or “civil forfeiture”.²

As noted, Framework Decision 2006/783/JHA is the leading legal instrument on mutual recognition of judicial decisions on confiscation, mutual recognition of judicial decisions on confiscation issued by a non-criminal court is confronted with significant difficulties. Article 1 (Objective) indicates that “[t]he purpose of this Framework Decision is to establish the rules under which a Member State shall recognize and execute in its territory a confiscation order issued by a court competent in criminal matters of another Member State.” (Emphasis added.) This clearly leaves MS that rely on confiscation outside criminal proceedings unable to cooperate under this instrument.

Among MS that confiscate assets outside criminal proceedings are Bulgaria, Ireland, Italy, Romania, Slovakia, Slovenia and the UK. Bulgaria confiscates all criminal

¹ Article 49.6

² Pp. 66-67 of the Report

assets, apart from instrumentalities of a crime, under non-conviction based confiscation regime in civil proceedings. Ireland employs civil confiscation under the Proceeds of Crime Act 1996-2005. Italy utilizes civil confiscation as a preventive measure. Romania does so in cases under the jurisdiction of the National Integrity Agency. Confiscation is done in administrative proceedings leading to civil seizure³. Slovenia applies non-conviction based confiscation since May 2012 under the Forfeiture of Assets of Illegal Origin Act. In the UK proceeds from crime confiscation is regulated by the 2002 Proceeds of Crime Act, which provides for confiscation under civil recovery proceedings.

It is worth noting that the 2012 RAND Report suggests that non-conviction-based orders could be executed under Brussels I Regulation, which lays down rules for recognition and enforcement of civil and commercial judgments. The report notes that “[a]lthough this regulation was apparently not written with quasi-criminal judgments in mind, NCB orders are not amongst the types of orders explicitly excluded from the definition of ‘judgment’ as ‘any judgment given by a court or tribunal of a Member State, whatever the judgment may be called’. Nevertheless, incoming orders need to be recognized via an exequatur procedure, and this may raise difficulties where civil courts in the Member State of enforcement simply lack jurisdiction to make an order of this type.” The 2012 RAND Report however correctly concludes on the matter that “[i]t is also worth noting that the Brussels I Regulation contains a ‘contrary to public policy’ basis for non-recognition.”

MS in which judicial decisions on confiscation are issued by non-criminal courts will have to resort to the Council of Europe Conventions. Article 23 of Section 4 (Confiscation) of the 2005 Council of Europe Convention reads that “a Party, which has received a request made by another Party for confiscation concerning instrumentalities or proceeds, situated in its territory, shall:

- a enforce a confiscation order made by a court of a requesting Party in relation to such instrumentalities or proceeds; or
- b submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, enforce it.”

Apart from the caveats in article 24 related to EU MS similar to the one in the 1990 Council of Europe Convention, the matter is further complicated by the fact that almost half of the MS has not ratified the 2005 Council of Europe Convention.

The final option is the 1990 Council of Europe Convention to which all MS are parties. However, as pointed out in the Preamble of point 3 of the Framework Decision 2006/783/JHA “[a]ll Member States have ratified the Council of Europe Convention of 8 November 1990 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. The Convention obliges signatories to recognize and enforce a confiscation order made by another party or to submit the report to its competent authority for the purpose of obtaining an order to confiscate, and if such order is granted, enforce it. The Parties may refuse requests for confiscation *inter alia* if the offence to which the request relates would not be an offence under the law of the requested Party, or if under the law of the requested Party confiscation is not provided for in respect of the type of offence to which the request relates.” (Emphasis added.) Thus, the issue of *ordre publique*, as discussed with respect to Brussels I Regulation, comes into play with the application of this tool by MS that do not employ conviction based confiscation. This is not only a concern that could be theoretically identified but is clearly stated in the Framework Decision 2006/783/JHA.

This in practice makes non-criminal confiscation orders, including non-conviction based confiscation orders, uncertain if not unlikely to enforce at EU level. As noted

³ Confiscation is done pursuant to Act 115/1996 for the declaration and control of assets of the officials, magistrates, of persons holding management and control positions and of public officials and Act 176/2010 regarding the integrity in exercising the public officials and dignities

above, despite high expectations Directive 2014/42/EU does not address the matter. As recognition of confiscation orders, under EU secondary legislation is done only with respect to those issued by a criminal court, mutual recognition of judicial orders on confiscation encounters issues. The 2012 Basel Institute for Governance Report entitled *The Need for New EU Legislation Allowing the Asset Confiscated from Criminal Organizations to be Used for Civil Society and in Particular for Social Purposes* agrees that “even though several EU countries do provide for non-conviction based forfeiture there is no legal instrument encouraging non-conviction based forfeiture within the EU.”

Recommendations of experts on confiscation are that non-conviction based confiscation is to receive wider introduction, including in the area of mutual recognition of non-conviction based judicial decisions are clear. The Camden Asset Recovery Inter-Agency Network has made such a recommendation in the period 2005-2010. FATF 2012 Recommendation 4 agrees with this opinion.⁴ Similar recommendations appear in the 2012 Basel Institute for Governance Report and in Recommendation 3 (Introduce Legislative Reforms that Support Authorities’ Capacity to Restrain and Confiscate Stolen Assets) of the 2011 StAR Initiative of the UN and UNODC Publication entitled *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*. An element of the recommendation in the latter report is to “allow for direct and indirect enforcement of foreign non-conviction based asset confiscation orders”⁵ It makes the policy recommendation that “[w]here non-conviction based confiscation regime does not exist, jurisdictions that have not already done so should pass and implement legislation that allows them to respond positively to requests to confiscate suspected stolen assets in the absence of a conviction.”

It is to be mentioned that in the legislative process on the new Directive 2012/42/EU the proposals of the LIBE Committee, which was the leading one in the European Parliament strived to incorporate these recommendations and address the issue. This position was to a certain extent supported by the Economic and Social Committee. On the other hand, at the outset of the discussion on this piece of legislation in the Council there was no unanimity on the matter. Similarly, Committee of the Regions emphatically opposed introduction of non-conviction based asset confiscation in the new Directive. Obviously, the matter is highly contentious and far from summoning broad political support.

Nevertheless, it seems that the matter needs to be addressed adequately as soon as possible. As indicated above it is clear that MS that adhere to non-conviction based asset confiscation outside criminal proceedings cannot effectively cooperate and does not have the full benefit of the mutual recognition of judicial orders on confiscation.

4. Social reuse of confiscated assets

The issue of mutual recognition of judicial decisions on confiscation is related to the topic of social reuse of confiscated assets, although not as directly as the one on non-conviction based judicial confiscation orders. The matter of social reuse of confiscated assets is extremely important in achieving the above-identified objectives of criminal asset confiscation to address issues related to rights of deprived communities and to maintain public confidence in justice systems. The question of social reuse of confiscated assets is the focus of the 2012 Basel Institute of Governance study carried out at the request of the Committee on Civil Liberties, Justice and Home Affairs of the European

⁴ Recommendation 4 reads: “Countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (non-conviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.”

⁵ P. 7 of the Analysis.

Parliament (the LIBE Committee). This study notes that only limited attention is attributed to the final destination of the confiscated assets. Currently, EU MS attribute more attention to the methods of disposal, which is due to the growing understanding of the system of objectives behind confiscation that span beyond the simple deprivation of criminal enterprises of their assets. There is growing awareness in the EU and the wider range of options that are available in MS, however recent study of the sale of confiscated assets is the leading option, as demonstrated by The Center for the Study of Democracy and Palermo University, Italian agency for administration of confiscated criminal assets, FLARE Network and United Nations Interregional Crime and Justice Research Institute (Palermo University-CSD Study).

EU legislation could also be instrumental in implementing social re-use of confiscated assets as a disposal option of greater applicability. The 2012 Basel Institute of Governance Report reads that "current EU regulation does not address the social re-use of confiscated assets." To address this matter the 2010 Report on organized crime in the European Union (2010/2309(INI)) of the Committee on Civil Liberties, Justice and Home Affairs "calls on the Commission to accept and support the urgent need for European legislation on the re-use of crime proceeds for social purposes..." The 2012 Basel Governance Institute report supports the also supports the idea of EU legislation on social re-use. It recommends "a Directive aiming at the establishment of coherent and transparent procedures in the MS, requiring an option for socially re-using confiscated criminal assets."

The matter is addressed by Framework Decision 2006/783/JHA. Paragraph 4 of Article 16 (Disposal of confiscated property) notes that "paragraphs 1, 2 and 3 apply unless otherwise agreed between the issuing State and the executing State." The wording indicates that any agreement whether preceding or following the order may replace this provision, which therefore in my opinion does not even establish mandatory minimal standards but instead is a dispositive provision.

Article 16, paragraph 2 of provides for execution of orders for confiscation of property and transferring it to the requesting MS without cashing it. It reads that [p]roperty other than money, which has been obtained from the execution of the confiscation order, shall be disposed of in one of the following ways, to be decided by the executing State:

- (a) the property may be sold. ...
- (b) the property may be transferred to the issuing State. ...
- (c) when it is not possible to apply (a) or (b), the property may be disposed of in another way in accordance with the law of the executing State." (Emphasis added.)

Thus, on its face the presented matter sounds as a non-issue. Although, transfer of property for social reuse is not a must-do option it is among the available disposal methods which the executing MS may chose.

However, paragraph 1 of the same article reads that "Money which has been obtained from the execution of the confiscation order shall be disposed of by the executing State as follows:

- (a) if the amount obtained from the execution of the confiscation order is below EUR 10000, or the equivalent to that amount, the amount shall accrue to the executing State;
- (b) in all other cases, 50% of the amount which has been obtained from the execution of the confiscation order shall be transferred by the executing State to the issuing State."

Henceforth, it is clear that if a MS uses sale as a disposal option it will receive 50 % of the funds, while if it opt for the transfer of property it will receive nothing. This has the potential to create lack of predictability in execution of court orders on confiscation.

Moreover, the above mentioned Palermo University-CSD Study demonstrated that social reuse has limited application in the EU MS. MS that have social reuse experience are Belgium, France, Italy, Luxemburg, Scotland and Spain. It should be noted that MS applying social reuse without cashing the property are further limited in numbers as Scotland cashes the assets and transfers them to CashBack to Community programs. Additionally, some MS apply social reuse only for moveable property (Greece and Hungary), while other MS (Italy) apply it to real estate. In some MS social reuse as a disposal option is limited to certain regions (Flemish region of Belgium).

Briefly, the MS adhere primarily to sale of confiscated criminal assets in the execution of judicial orders on confiscation. Thus, hampering the possibility for direct social reuse. It seems that there needs to be further review of the EU execution of confiscation orders in a manner that will open doors for social reuse of confiscated criminal assets, rather than the cashing of the property. This in turn will be conducive for the achievement of the full range of objectives behind confiscation, including public trust in the judicial system.

5. Institutional aspects

It is noteworthy that 2011 StAR Initiative Report identifies the direct communication on confiscation orders as a best practice⁶. The already mention Palermo University – CSD Study demonstrates that “[f]ollowing the requirements laid down in Article 3 of the Council Framework Decision 2006/783/JHA all countries are obliged to designate the national authorities competent for issuing and respectively for recognizing and executing foreign confiscation orders. In most Member States as national authorities competent to issue and recognize foreign confiscation orders have been designated either the territorially competent courts (Austria, Bulgaria, Czech Republic, Hungary, Latvia, Lithuania, Poland, Portugal, Slovenia, Spain and Romania) or the territorially competent offices of the public prosecution services (Belgium, France, Germany).”

However, according to the Palermo University –CSD report, in addition to that, some of MS have designated central bodies responsible for assistance and transmission of documents in cases where direct contact is not possible. This seems like a best practice that all MS should be encouraged to apply. The study correctly notes that some of the matters that are related to mutual recognition of confiscation orders are quite intricate and available assistance might be needed. As a rule in MS that apply this, the Ministry of Justice is the institution of choice⁷. Some countries have assigned a different central competent authority⁸.

6. Conclusion

Thus, three distinct areas are identified as bearing further improvement. One crucial element that deserves special attention at EU level is the issue of international cooperation in non-conviction based confiscation. It is mandatory that the EU address the broader matter of mutual recognition of non-conviction based asset recovery as recognition of confiscation orders issued by non-criminal courts and in MS that adhere to non-conviction asset confiscation. Lack of adequate regulation at EU level on non-conviction based asset confiscation in turn undermines the efforts to successfully cooperation among EU MS in the disposal phase.

⁶ P. 38 of the Report

⁷ As noted in that study such are Belgium, Bulgaria, Czech Republic, Ireland, Latvia, Lithuania, Poland, Romania and Slovenia.

⁸ Ibid. Cyprus, Finland, Malta and Sweden.

EU legislation could also be instrumental in implementing social re-use of confiscated assets as a disposal option of greater applicability. Such an approach will respond to the lack of EU norms on the matter. There are EU MS that have experience in social reuse and in numerous instances it could be the best option that yields positive results.

It seems that there are certain benefits in a centralized specialized body charged with the task of execution of foreign confiscation orders. Its benefits are clearly identifiable when it comes to encouraging proactive approach on behalf of MS in assignment of confiscated assets for social reuse. Therefore, EU legal instruments could promote the notion of establishment of such specialized central national authorities that could also provide guidance to the rest of the bodies involved in the asset recovery process and collect reliable data on criminal asset disposal. Such an approach would maximize the added value of any disposal method employed by the MS. Finally yet importantly, it would be conducive to making the process of international legal cooperation in the disposal phase clear and streamlined.