

CONFISCATION OF CRIMINAL PROCEEDS IN THE EUROPEAN UNION CRIMINAL LAW

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Abstract

The confiscation of proceeds of crime has long been seen within the European Union and beyond as an important tool in the armory of weapons to fight organized crime. The rationale for focusing on the confiscation of criminal proceeds is at least two-fold. First it addresses concerns that enormous criminal wealth, generated most notably by various forms of trafficking offences, risks destabilizing financial systems and corrupting. As such the confiscation of criminal assets seeks ultimately to reduce and prevent crime by making known that criminals will not be allowed to legitimate society. Second it attempts to undermine the "raison d'être" behind most organized crime activity, namely the maximization of profit by illicit means. As such the confiscation of criminal assets seeks ultimately to reduce and prevent crime by making known that criminals will not be allowed to enjoy their illicit wealth. By the same token, focusing on confiscation of criminal wealth can send an important message by removing negative role models from local communities.

Key words: criminal proceeds, confiscation, reduce and prevent, the European Union criminal law, Joint Action and Framework Decision

I. Confiscation is defined by the Council Framework Decision 2005/ 212/ JHA of 24th February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property¹, as a judicial order "resulting in the final deprivation of property". That includes property of any description "whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property" (Council Framework Decision 2003/ 577/ JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence).

Related Proceeds Instrumentalities and Property defines the notion of criminal proceeds as "any economic advantage from criminal offences". To avoid the likely dissipation of suspected criminal assets prior to a confiscation order, the latter is frequently preceded by the freezing of assets during the course of an investigation. Freezing means a court or other competent authority order "temporarily prohibiting the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property" (Council of European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism of 16 May 2005).

¹ Convention Implementing the Schengen Agreement.

II. Focusing on confiscation of criminal wealth can send an important message by removing negative role models from local communities.

As such the confiscation of criminal assets seeks ultimately to reduce and prevent crime by making known that criminals will not be allowed to enjoy their illicit means².

The rationale for focusing on the confiscation of criminal proceeds is at least two aspects:

- it addresses concerns that enormous criminal wealth, generated most notably by various forms of trafficking offences, risks destabilizing financial systems and corrupting legitimate society.

- it attempts to undermine the „raison d'être” behind most organized crime activity, namely the maximization of profit by illicit means.

The confiscation of proceeds of crime has long been seen within the European Union and beyond as an important weapon to fight organized crime.

III. The first serious attempt at international level to promote the confiscation of criminal proceeds was the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances, named the Vienna Convention, of 1988. While focused only on drug related crime, the Vienna Convention contains far-reaching and innovative provisions on the confiscation of criminal proceeds which have shaped and influenced many other instruments addressing criminal confiscation at international, regional and local and levels³. To enable confiscation to take place, the states of European Union who has been notified in November 1990, the Vienna Convention must ensure that bank, financial or commercial records are available and that bank secrecy is not an obstacle. It addresses issues of international cooperation and mutual legal assistance relevant to giving effect to confiscation orders issued by competent authorities of another state. It provides for confiscation of income derived from criminal proceeds and of the confiscation of property in proportions representing the value of illicit property, where criminal proceeds have been intermingled with legitimate assets. It raises the issue of sharing confiscation assets among authorities of different states who have combined efforts to ensure effective confiscation and the possibility that confiscated assets may be used for crime prevention or other measures designed to reduce crime. Perhaps most significantly the Vienna Convention raises the possibility that states may consider reversing the onus of proof regarding the lawful origin of alleged criminal proceeds⁴.

The United Nation Convention against Transnational Organized Crime⁵, named Palermo Convention, of December 2000⁶ is designed to promote cooperation to prevent and combat transnational organized crime more effectively. The Convention identifies the confiscation of criminal proceeds as an important means to achieve this aim. It requires states to introduce measures to allow the confiscation of property derived from

² Treaty on European Union.

³ Hague Programme for strengthening freedom, security and justice.

⁴ A.Weyembergh, Approximation of Criminal Law, The Constitutional Treaty and the Hague Programme.

Common Market Law Review, p. 1567-1574.

⁵ Council Decision setting up Eurojust-of 28.02.2001 amended by Council Decision of 18.06.2003.

⁶ Framework Decision on Euro Counterfeiting 2000.

criminal activity and raises the possibility of reversing the onus of proof in confiscation proceedings.

The United Nation Convention against Corruption, named UNCAC, of december 2005⁷ is designed inter alia to promote international cooperation against corruption including in asset recovery. It contains many of the confiscation related-provisions of the above United Nations Conventions. In addition the UNCAC sets out detailed provisions on recovery and return of confiscated assets including the obligation on states to adopt legislative measures to allow them to return confiscated property to the prior legitimate owners or to compensate the victims of the crime. The UNCAC also requires states (who ratified Convention) to consider taking any necessary measures to allow confiscation of property without a criminal conviction in circumstances where the offender cannot be prosecuted due to "death, flight, absence or in other appropriate cases"⁸.

The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, named the 1990 Strasbourg Convention, is a real milestone in promoting the confiscation of criminal proceeds. This Convention considered that one of the most effective measures to fight organized crime was the confiscation of criminal proceeds. With this objective the Convention seeks to promote international cooperation in the identification, tracing, freezing and confiscation of criminal assets. The states must adopt legislative measures to allow confiscation of proceeds of crime and provisional measures with a view to ultimate confiscation, they are obliged to cooperate to the greatest extent possible as regards investigations and proceedings aimed at confiscation and have to take provisional measures such as the freezing of bank accounts, with a view to confiscation⁹.

The Second Strasbourg Convention – May 2005 – has been supplemented by the Council of European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on Financing of Terrorism and are recognizing both the similarities and the distinctive features between money laundering and the financing of terrorism. But it has a wider scope and acknowledges that money used to support terrorist groups and carry out attacks does not necessarily have criminal origins. Like the First Convention (1990), the Second Strasbourg Convention allows for the possibility of an all crimes approach to confiscation but also allows¹⁰ states to make reservations. The Second Convention sends an important message that mandatory confiscation may be desirable as regards certain very serious offences such as people trafficking but does not go so far as to oblige parties to legislate to this effect. On the other hand, the Second Convention does require states, in respect of serious offences to adopt legislative or other measures requiring an offender to demonstrate the lawful origin of alleged criminal proceeds.

Another significant development in the Second Strasbourg Convention includes obligations on states parties of this Convention (European Union states) to provide information to requests from other states parties as to whether a natural or legal person

⁷ Framework Decision on combating terrorism 2005.

⁸ Convention of 15.05.1972 The Council of Europe Convention on Transfer of Proceedings of 15 May 1992.

⁹ Convention Implementing the Schengen Agreement.

¹⁰ Green Paper on Conflicts of Jurisdiction and the Principe ne bis in idem 2005.

who is the subject of a criminal investigation, has a bank account, to provide information on banking transactions and to monitor banking transactions¹¹. These provisions are largely drawn from the European Union Protocol of 16 October 2001 to the Convention on mutual assistance in criminal matters between the member states of the European Union. But there are more members in the Council of Europe, including such diverse country as Albania, Azerbaijan and Moldova and the potential impact of such provisions may go well beyond the European Union instrument from which they are inspired.

IV. The European Union Action Plan to combat organized crime of April 1997 stated: "The European Council¹² stresses the importance for each European Union states of having well developed and wide ranging legislation in the field of confiscation of the proceeds from crime...". Similarly three years later the Prevention and Control of Organized Crime: A European Union Strategy for the Beginning of the New Millennium, called European Union Millennium Strategy states that "The European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime"¹³.

So, the European Union has made important steps to highlight the role of criminal confiscation and to establish European Union states approach to freezing and confiscation of criminal assets.

The Joint Action of 3rd December 1998 adopted by the Council on the basis of Article K3 of the Treaty of European Union, on money Laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime was a first attempt to ensure an European Union wide implementation of the Council of Europe Strasbourg Convention. This Joint Action was modified by a Framework Decision of 26th June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. Taken together the purpose of the Joint Action and Framework Decision was to ensure a common minimum approach of states in terms of those criminal offences for which they should provide for confiscation¹⁴. The approach is generally that if an offence¹⁵ is punishable by imprisonment of a maximum of more than one year, it must be possible under national law, to order confiscation of proceeds generated by that offence. The Joint Action and Framework Decision also require European Union states to have in place a system of value confiscation and to ensure that all requests from other European Union states relating to asset identification, tracing, freezing and confiscation, are processed with the same priority as is given to such measures in purely domestic proceedings¹⁶.

¹¹ European Commission, Directorate General Justice Freedom and Security, Unit D 2 – Figh against Economic, Financial and Cyber Crime.

¹² Council Framework Decision 2005 – Council Framework Decision 2005 – 24th February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.

¹³ Council Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property of evidence.

¹⁴ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and Financing of Terrorism of 16 May 2005.

¹⁵ United Nation Convention against Corruption of December 2005.

¹⁶ Strasbourg Convention on 1990 – on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.

For example¹⁷, the Joint Action says that to promote mutual assistance¹⁸ in the European Union and the European Union states should prepare and regularly update "a user-friendly guide including information about where to obtain advice" on identifying, tracing, freezing and confiscating criminal assets, and the states¹⁹ "shall encourage direct contact between investigators... and prosecutors making appropriate use of available cooperation networks" to reduce where possible the number of formal requests for assistance. It is an apparent precursor to the Camden Assets Recovery Inter-Agency Network (CARIN) who is an informal network made up principally of European Union states experts working in the area of criminal asset identification and recovery and which aims to improve inter-agency cooperation in cross borders identification, freezing and confiscation of criminal proceeds²⁰.

The Council Act of 16 October 2001, establishing in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the member states of the European Union, requires European Union states to respond to a request from another state as to whether a natural or legal person who is the subject of criminal investigation, holds or controls one or more bank accounts on its territory²¹; to provide on request of another state the details of bank accounts and banking transactions and to request the monitoring of banking transactions.

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¹⁷ Second Strasbourg Convention – May 2005.

¹⁸ European Union Protocol of 16 October 2001 to the Convention on mutual assistance in criminal matters between the Member States of the European Union.

¹⁹ Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium 2000.

²⁰ Council Framework Decisions 2001-2008 International Review of Penal Law vol.77.

²¹ Ion Flămânzeanu, Criminal liability, p.69-73, pub. Prouniversitaria. Bucharest, 2010.

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