



*Special Committee on Organised Crime, Corruption and Money Laundering
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Thematic Paper on Organised Crime

**Asset Confiscation as an Instrument to Deprive Criminal
Organisations of the Proceeds of their Activities.**

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- *Noting the presentation made by the Head of the Criminal Assets Bureau of Ireland to the CRIM Committee on 19th June 2012*
- *Noting Framework Decision 2001/500/JHA¹, Framework decision 2003/577/JHA², Framework Decision 2005/212/JHA³, Framework Decision 2006/783/JHA⁴, and Framework Decision 2007/845/JHA⁵*
- *Noting 'Barriers to Asset Recovery: An Analysis of the Key Barrier and Recommendation for Action', World Bank, 2011*
- *Noting 'Stolen Asset Recovery: A good practice guide for non-conviction based asset forfeiture', World Bank, 2009*
- *Noting 'Estimating illicit financial flows resulting from drug trafficking and other transnational organised crime', United Nations Office on Drugs and Crime, October 2011*
- *Taking into account the following information, in part provided by the Irish Authorities:*

Introduction

The United Nations estimates that the total amount of criminal proceeds in 2009 was approximately USD 2.1 trillion, or 3.6% of global GDP⁶. Even though there are no definite figures for the European Union ('EU'), it is believed that organised crime generates billions of Euros in profits annually.

International problems and barriers to asset confiscation

Despite various international instruments⁷ aimed at promoting international cooperation in the field of asset confiscation, real difficulties remain.

¹ Framework Decision 2001/500/JHA lays down provisions on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime

² Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence extends the principle of mutual recognition to pre-trial orders freezing property or evidence

³ Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property. It further developed the rules governing the confiscation of proceeds of crime including rules in relation to the onus of proof regarding the source of assets held by persons convicted of certain offences including offences related to organised crime

⁴ Framework Decision 2006/783/JHA applies the principle of mutual recognition to confiscation orders

⁵ Framework Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime

⁶ United Nations Office on Drugs and Crime, 'Estimating illicit financial flows resulting from drug trafficking and other transnational organised crime', October 2011

⁷ United Nations Convention against Transnational Organized Crime, the United Nations Convention against Corruption, as well as two Council of Europe Conventions on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

Studies by the World Bank outline three broad barriers to effective asset recovery: institutional issues and general barriers, legal barriers and requirements that delay assistance, and operational barriers and communication issues.

What should be borne in mind in regard to each of the above barriers is that some of the barriers have a different weight attached in each respective country. Some barriers are more problematic in different countries. This disjuncture facilitates the movement and hiding of proceeds of crime on a trans-national basis.

For example, in Ireland, whilst its Criminal Asset Bureau may be viewed as a success because it uses the non-conviction model in freezing the proceeds of crime, it experiences considerable difficulties because of this. Other jurisdictions may be unable to assist with enforcing an Irish Order under Mutual Legal Assistance as such an Order does not fall under the required 'criminal' model. Similarly, Ireland has no mechanism for the recognition of non-conviction based orders obtained in other jurisdictions. Ireland and indeed Europe could benefit from a system that replicates the ease and speed at which European Arrest Warrants can be obtained. Whilst it is currently relatively easy to deprive a person of his or her liberty and move that person across borders, it is complex to civilly restrain assets in multiple jurisdictions even where that asset has no apparent owner.

Cooperation at European level

Recognising that the main motive for cross border organised crime is financial gain, the European Union, its institutions and Member States have promoted and pursued a policy of targeting proceeds of crime for more than a decade. Since the 1997 EU Action Plan to combat organised crime first gave expression to this policy, common European rules in this area have been established and improved upon and the principle of mutual recognition applied.

While significant progress has been made with regard to the development of a European Union legal framework, and much has been done by the Member States in putting in place supporting structures etc, it is acknowledged that further work needs to be done to achieve a common asset forfeiture regime that is truly effective. In this regard, the 'Stockholm Programme'⁸ highlights a number of strategic actions which are to guide work to be taken at European level with regard to the confiscation of assets. In particular, it states that the confiscation of assets of criminals should be made more efficient and cooperation between Asset Recovery Offices ('AROs') made stronger. It further calls on the authorities to identify assets of criminals more effectively and seize them and, whenever possible, consider re-using them wherever they are found in the Union. These strategic actions have further informed the current work programmes of the European Union institutions which include proposals for the improvement and development of the Union's forfeiture regime.

In order to be truly effective, and ensure that there is nowhere in the Union where those who thrive on the proceeds of crime can hide their illegal gains, it is vital that

⁸ 'The Stockholm Programme- An open and Secure Europe Serving and Protecting Citizens', Official Journal of the European Union C115/23, 4/5/2010

we ensure a swift and, where necessary, simultaneous response to the targeting of proceeds of crime wherever they may be in the Union. It is suggested that this can only be achieved through a common regime at European level that is built on the most effective method for asset forfeiture and through the deepening of cooperation amongst the Member States.

Information sharing – asset forfeiture

Building on the legislative framework that currently underpins the Union's asset forfeiture regime, a framework has been put in place to facilitate co-operation between the AROs of the Member States. Council Decision 2007/845/JHA⁹ ('the 2007 Decision') requires Member States to designate a national ARO and provides for the exchange of information, both upon request and spontaneously, between AROs. For the purpose of such information sharing the mechanism contained in Framework Decision 2006/960/JHA¹⁰ on simplifying the exchange of information (the 'Swedish Initiative') is used. The applicable data protection rules to such information sharing are those set out in Framework Decision 2008/977/JHA of 27 November 2008.

The 2007 Decision complements the work of the Camden Assets Recovery Inter-Agency Network (CARIN)¹¹ by providing a legal basis for the exchange of information between Asset Recovery Offices of all the Member States.

It is noted that the Commission recently reported on the implementation of the 2007 Decision¹². In preparing the report, the Commission consulted with the ARO Platform (informal EU Asset Recovery Offices Platform) and also embarked on a broader exercise examining aspects of the structure, powers and access to information of the designated AROs; the progress towards a secure information exchange system and the main challenges that AROs are facing.

The Commission Communication 'An Internal Security Strategy in Action' sets out a number of Commission proposals that are relevant to the concerns expressed by the AROs. In particular, the Commission proposes that Member States must by 2014 establish AROs equipped with the necessary resources, powers and training, and the ability to exchange information. It further indicates that the Commission will develop common indicators by 2013, against which Member States should evaluate the performance of these offices (initial proposals on effectiveness indicators have already been developed). Moreover, Member States should also by 2014 make the necessary institutional arrangements, for example by creating asset management offices, to ensure that frozen assets do not lose their value before they are eventually

⁹ Framework Decision 2007/845/JHA concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, Official Journal of the European Union L332

¹⁰ Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, Official Journal of the European Union 386/89

¹¹ CARIN was established on 22-23 September 2004 by Austria, Belgium, Germany, Ireland, Netherlands and the United Kingdom as a network of practitioners and experts with the intention of enhancing mutual knowledge on methods and techniques in the area of cross-border identification, freezing, seizure and confiscation of the proceeds from, and other property related to crime.

¹² COM (2011) 176 final of 12 April 2011

confiscated. In parallel, the Commission will in 2013 provide best practice guidance on how to prevent criminal groups from reacquiring confiscated assets.

It is clear that there is significant work planned in the short term on improving the operation of, and cooperation between, the various ARO agencies.

Mutual recognition – asset forfeiture

Mutual recognition is recognised as a fundamental principle underpinning judicial cooperation in civil and criminal matters between the European Union Member States. The principle of mutual recognition presumes that judgments to be recognised and enforced always comply with the principles of legality, subsidiarity and proportionality. It also presupposes that the rights granted to the parties or bona fide interested third parties will be preserved.

In implementing the principle of mutual recognition in the area of asset forfeiture the Council has adopted a number of mutual recognition instruments applying the principle to the freezing and confiscation of crime related proceeds. Framework Decision 2003/577/JHA extends the principle of mutual recognition to pre-trial orders freezing property or evidence. Framework Decision 2006/783/JHA applies the principle of mutual recognition to confiscation orders.

Both of these instruments make provision for mutual recognition in circumstances where the relevant order was issued by a judicial authority competent in criminal matters and where there is a direct nexus with a criminal offence. Put simply, a freezing request must be made in the context of criminal proceedings or a criminal investigation and there must be an intention to subject the property concerned to an order of confiscation after conviction.

The Union's framework for mutual recognition therefore builds on the common conviction based regime that has been adopted through the European legislative framework. However, there are now a number of Member States within the Union who have in place a non-conviction based regime. The question therefore arises as to whether the Union has confined itself in its ability to comprehensively and effectively target the proceeds of crime.

It is worth noting again the Commission Communication 'An Internal Security Strategy in Action' which includes a commitment to the effect that the Commission will propose legislation in 2011 to strengthen the EU legal framework on confiscation, in particular to allow more third-party confiscation and extended confiscation and to facilitate mutual recognition of non-conviction-based confiscation orders between Member States.

New proposal for a Directive

The Commission's Proposal for a Directive on the Proceeds of Crime is of vital importance as it represents the first legislative proposal in this field. Its principal aim is to strengthen the existing European legislative framework for the freezing and confiscation of proceeds of crime through further common harmonised rules.

Given the many varied confiscation regimes in place across the EU as well as the fundamental concerns held by a number of Member States with regard to the inclusion of non-conviction based measures applying the civil standard of proof in the instrument, negotiations on the Directive will be difficult. Negotiations will need to closely bear in mind the jurisprudence of the European Court on Human Rights and national constitutional courts with regard to confiscation measures, as well as the legal base.

The operation of non-conviction based measures in various Member States should provide solid case studies. In particular, in Ireland, the Proceeds of Crime Act establishing a non-conviction based model for the forfeiture of property has survived numerous constitutional challenges. Challenges based on a right to a fair trial under article 6 of the ECHR, protection of property under Article 1 of Protocol 1 of the ECHR, and no punishment without law under Article 7 of the ECHR, were successfully tackled.

Recommendations

In the context of the above:

1. Strongly supports the strengthening of the legal framework of confiscation, including much stronger cooperation across the Union through a model which would include non-conviction based orders being enforceable between Member States.
2. Recommends the example of Ireland, as set out in Appendix 1, as a possible framework for the creation of an EU wide Criminal Assets Bureau
3. Recommends that this matter be given urgent and ambitious attention
4. Recommends that seized assets be re-used for social purposes in Member States
5. Recommends that a mechanism be introduced for the recognition of non-conviction based seizure of asset orders between Member States, replicating the ease at which European Arrest Warrants can be obtained.

The report is indebted to the Criminal Assets Bureau and the Irish Department of Justice for their advice and assistance in some of the background details quoted.

Appendix 1

Non-conviction based model- Ireland

In general terms, Ireland operates two systems aimed at the forfeiture of criminal assets - a criminal forfeiture system and a non-conviction based system. The former acts *in personam* against a convicted person while the latter acts *in rem* on the property that constitutes the proceeds of crime.

The legislative framework underpinning the non-conviction based model is primarily contained in two statutes, the Criminal Assets Bureau Act 1996 and the Proceeds of Crime Act 1996. The Criminal Assets Bureau Act 1996 created a statutory body ('the Bureau') whose primary aim is to target the proceeds of crime. The objectives of the Bureau are –

- the identification of the assets of persons which derive, or are suspected to derive, directly or indirectly from criminal conduct;
- the taking of appropriate action under the law to deprive or to deny those persons of such assets or the benefit of such assets, and
- the pursuit of any necessary investigation or other preparatory work in relation to relevant proceedings.

The Bureau is founded on the multi-agency concept, drawing together law enforcement officers, tax officials, social welfare officials as well as other specialist officers including legal officers, forensic analysts and financial analysts. In operating the non-conviction based system for asset forfeiture the Bureau utilises the provisions contained in the Proceeds of Crime Act 1996.

In summary, the key remedies available to the Bureau through the provisions of the Proceeds of Crime Act are -

- an **interim order** – a court order which prohibits dealing with property and which may be obtained if the Court is satisfied, on the civil standard of proof, that such property is the proceeds of criminal conduct and has a value of not less than €13,000. Subject to any intervening proceedings, the order may stay in place for 21 days.
- an **interlocutory order** – a court order which, in effect, freezes the property until further notice, unless the court is satisfied that all or part of the property is not the proceeds of criminal conduct. An interlocutory order may be sought within 21 days of the granting of an interim order, although there is nothing to preclude the order being sought in circumstances where no interim order is in place. Subject to any intervening proceedings, the order may stay in place for 7 years.
- a **variation order** – a court order either discharging or, where appropriate, varying the interlocutory order on foot of an application made by the respondent or other person claiming ownership of the property. In general terms, a variation order may be made in circumstances where it is shown to the satisfaction of the Court that the property does not constitute, or was not acquired through, the proceeds of crime and or where the Court is satisfied that the order causes any injustice.

- a **disposal order** – a court order transferring assets, which have been the subject of an interlocutory order for at least seven years to the Minister for Finance for the benefit of the Central Fund.
- a **consent disposal order** – a court order similar to that of a disposal order but which is made with the consent of all parties in circumstances where the interlocutory has been in existence for less than seven years.
- a **receiver** may be appointed by the court either to preserve the value of or dispose of property which is the subject of an interim order or an interlocutory order.
- a court order may also be made directing a respondent to furnish **details of earnings** over the previous six years and to outline his or her assets.

Key safeguards

The Irish non-conviction based system includes a number of important safeguards, either expressly provided for in the Proceeds of Crime Act or through accompanying administrative measures, for example -

- Where an interim or interlocutory order is in place it is open to any person to seek to vary or set aside such an order if that person can satisfy the court that they have a legitimate right to the property and/or the said property is not the proceeds of criminal conduct.
- The Court is empowered to vary an interim or interlocutory order for the purpose of releasing property for any necessary legal, business and living expenses.
- The Court is empowered to make an order compensating any respondent should any order be shown to have been unjust.
- An administrative legal aid scheme has been established which ensures that all respondents have access to legal aid.
- The Act includes notice provisions requiring that notice be given to the respondent, and to any other person who the Court directs, of any application made for an interlocutory order. The Act also requires that the Court before deciding whether to make a disposal order, shall give any person claiming ownership of the property concerned an opportunity to be heard by the Court and to show why the order should not be made.
- The Act provides that the Court shall not make a disposal order if it is satisfied that there would be a risk of injustice.
- In circumstances where the Court has directed that a statement of earnings or assets be made, that statement cannot be used in any criminal trial so as to guard against a breach of a respondent's right against self incrimination in a criminal matter.
- While hearsay evidence is admissible under the Act it is for the Court to determine the weight to be given to the evidence.

Key concepts and features

In general terms the overall key concepts and features of the Irish non-conviction based model are -

- As it is non-conviction based it targets property believed to be the proceeds of crime rather than the person.

- It applies civil law rather than criminal law concepts. Therefore with regard to matters of evidence it is the civil law standard that applies i.e. ‘on the balance of probabilities’ rather than the criminal standard i.e. ‘beyond reasonable doubt’.
- It includes a number of important safeguards such as notice provisions, the opportunity for a respondent to seek to vary an order, the opportunity for any persons claiming ownership to be heard, provision for legal aid, provision for compensation etc
- The statutory agency is multi-agency using the multidisciplinary concept and is empowered to share confidential information. The agency has also effected nationwide coverage through the training of local law enforcement and tax officials in the identification of criminal assets.
- The statutory agency charged with the pursuit of the proceeds of crime is funded by the State’s central fund rather than the proceeds it confiscates and is not therefore open to the charge that its actions are selective or profit driven.

Monetary values for actions taken 1996 - 2010

Set out below are the monetary values for actions taken by the Bureau in 2010 and actions taken since its inception (1996-2010).

In 2010 the Bureau obtained;

- Interim orders to the value of over €7 million and Interlocutory Orders (final restraint orders) to the value of over 4.5 million.
- Taxes and interest demanded was €27.9 million with approximately €4 million collected.
- Social Welfare savings amounted to over €633,698, while €181,272 was recovered.

Since its statutory inception in October 1996 and up to 31st December 2010 the Bureau:

- obtained interim orders to the value of over €94 million.
- obtained “final” restraint orders to the value of over €46 million.
- taxes and interest demanded was over €188 million, with over €133 million collected
- assessed overpayments of almost €5 million and saved almost €4.9 million in social welfare payments.