

QUICK POLICY INSIGHT

Recovering Tunisian and Egyptian assets: Legal complexity challenges states in need

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Asset recovery is a competence of the Member States

Freezing assets is an EU competence; recovering them, on the other hand, is a competence of the Member States.

For the EU, recovering the assets of the ousted Tunisian and Egyptian regimes is an issue of political commitment and credibility, with the Union's reputation in Arab Spring countries partly at stake.

Following the Arab Spring revolutions, the EU promptly froze the assets of the ousted Tunisian and Egyptian regimes. While freezing assets in the context of restrictive measures is an EU competence¹, recovering and repatriating assets is a competence of Member States and must proceed according to national legal provisions. The judicial procedures to be followed are very complex, and there is no sufficient coordination between the countries seeking to recover assets and those hosting the financial institutions holding the assets.

Asset recovery has a strong symbolic significance, as well as economic weight, in the EU's overarching effort to build a strong partnership with Tunisia and Egypt. The country's new governments wish to recover the assets for reasons of social justice, and because they face serious economic challenges. For the EU and its Member States, the issue is primarily one of political commitment and credibility. At various levels, the Union has declared that it will do its utmost to facilitate the process. The EU's reputation as a privileged partner in the democratic transition would be severely tarnished if the Union and its Member States fail to respond effectively to legitimate demands for asset recovery.

The United Nations Convention against Corruption (UNCAC)

Asset recovery (Article 51) is a fundamental principle of the United Nations Convention against Corruption (UNCAC), which entered into force on 14

¹ The legal basis for the restrictive measures (freezing asset) is Article 215 of the Treaty on the Functioning of the European Union.

The United Nations Convention against Corruption (in force since 2005) makes clear that recovering assets is a priority in a coordinated international fight against corruption.

December 2005. The Convention contains effective asset recovery provisions that support countries' efforts to redress the most egregious effects of corruption while also issuing a warning to corrupt officials that they will find no place to hide their illicit assets. Egypt, Tunisia, the EU and all EU Member States have signed and ratified UNCAC (with the exception of Germany and the Czech Republic, who have signed but not yet ratified the Convention).

Article 43 obliges state parties to cooperate as fully as possible with one other in investigating and prosecuting offences defined in the Convention:

In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties².

In the cases of the regimes of Egypt's Hosni Mubarak and Tunisia's Zine El Abidine Ben Ali³, the assets were accumulated through the embezzlement of public funds, which is illegal in all EU Member States. The Convention therefore establishes a legal basis for cooperation between the competent authorities.

Legal and practical complexities

There exists a lack of efficient cooperation between 'requesting' and 'requested' states, as well as a paucity of reliable information about the amounts in question.

The actions taken by the Council of the EU to freeze the assets⁴ of the former Egyptian and Tunisian regimes are distinct from the subsequent endeavour to recover and repatriate these assets.

The judicial process for recovering and repatriating of assets is complex, lengthy⁵ and subject to the distinct legal requirements and systems of the 'requested state parties'. While the EU and its Member States consider that the rapid completion of this work constitutes a moral imperative, they also recognise that legal provisions should not be circumvented or individuals deprived of their legal rights. What is more, EU citizens and legal entities operating in the Union with an interest in these assets will be able to attempt every possible judicial remedy. EU Member States cannot simply transfer assets unless a court decision establishes that the assets were gained illegally.

² <http://www.unodc.org/unodc/en/treaties/CAC/>

³ So far, the most important development with regard to recovering Tunisian assets took place on 11 April 2013 with the return of 22 million Euros to the state of Tunisia from a bank account that the wife of the ousted Tunisian President held in Lebanon.

⁴ The EU adopted restrictive measures on 48 persons associated with the Ben Ali regime under Council Decision 2011/72/CFSP on 31 January 2011 and on 19 persons associated with the Mubarak regime under Council Decision 2011/172/CFSP on 21 March 2011.

The lack of reliable information about the amounts to be recovered further complicates the matter. In the case of Egypt, the Member States most implicated are the United Kingdom and Germany. In the case of Tunisia, France, Belgium, Spain and Italy are most concerned.

Steps already taken to facilitate the process

The EU Council has recently adopted a decision to make it easier to share information relating to Egyptian and Tunisian funds in the EU.

The EU Council has taken steps to facilitate the return of misappropriated funds to the Egyptian and Tunisian authorities. The new legislative framework adopted on 26 November 2012 authorises Member States to release frozen assets on the basis of judicial decisions recognised in EU Member States. Once the necessary judicial steps have been taken, this should allow the Member States to release funds frozen under EU sanctions against the former regimes, and then to return them to Egyptian and Tunisian authorities. The amended legislation should also facilitate the exchange of information between Member States and the relevant authorities in Tunisia and Egypt⁶.

Tunisian and Egyptian authorities have indicated that they face significant problems in identifying the appropriate procedure to follow in each Member State to advance the bilateral asset recovery dossiers.

For Tunisia, the EEAS has facilitated the Tunisian request by organising an expert seminar in June 2012 with 48 participants, including the Governor of the Tunisian Central Bank, senior members of the Tunisian judiciary, representatives from the World Bank, the UN Office on Drugs and Crime, other international organisations and delegates from France, Italy, Spain, Canada and Switzerland.

There are still many procedural problems to tackle, especially in the case of Egypt.

The Egyptian authorities' request was made via a *Note verbale* to all EU Member States (including the EEAS for the European Union). As this approach lacks the necessary focus on bilateral judicial demarches in each Member State rather than diplomatic demarches, the EU could do more to assist the Egyptian authorities along the legal path.

Learning from past experience and best practice

The United Nations' previous attempts to recover illegally misappropriated assets provide useful lessons. First, a team of qualified legal experts should be created to coordinate between all stakeholders involved. Given that asset recovery can only be achieved via bilateral judicial mechanisms, the EU can only play the role of a co-ordinator / facilitator in the process. To do so, the EU could set up a special judicial task force to explore practical ways to coordinate and exchange best practices among Member States. The cooperation between the

⁴ To judge from previous cases (in the Philippines), proper judicial processes may take up to seven or more years.

⁶http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/133818.pdf

An EU special task force could be set up to explore practical ways to better coordinate and exchange best practices between EU Member States and Tunisia and Egypt.

The UK is a frontrunner in establishing a central structure facilitating the legal proceedings to recover assets.

competent authorities of the 'requested [EU member] states' and those of the 'requesting states' should be improved, through, *inter alia*, study visits, exchanges and training courses focused on targeting experts such as judges, prosecutors and solicitors. The EU could create a pool of experts (specialist investigators) providing advice and assistance to the Tunisian and Egyptian authorities on the most appropriate way to pursue their requests. This could facilitate the various, complex judicial procedures that are applied in different Member States. This pool of independent experts could conceivably be self-financed, if the requesting states agree, with costs covered through the recovered assets.

The Member States concerned should also rapidly establish their own structures for effectively investigating and facilitating the judicial processes. In this regard, the UK government has begun to review its legal framework⁷. In September 2012, the UK Task Force on Asset Recovery was established, regrouping all the relevant UK agencies, including the Serious Organised Crime Agency, the Metropolitan Police and the Crown Prosecution Service, and working closely with Egyptian counterparts.

Policy options for the European Parliament

The European Parliament can send a clear signal of the EU's political commitment to helping Tunisia and Egypt recover their assets.

The issue of asset recovery is an important element of the EU's support of democratic transitions in Tunisia and Egypt. The European Parliament should welcome the practical and legislative steps that have already been adopted and should encourage the EU and its Member States to step up efforts to more effectively coordinate and process requests for the repatriation of misappropriated funds.

As the issue is a Member State competence, the Parliamentary Assembly of the Union for the Mediterranean might be the structure to raise the issue with national parliaments. Parliamentarians from both shores of the Mediterranean could be persuaded to actively promote legal measures to ensure a closer cooperation between the police and judicial authorities involved — a *sine qua non* for effective legal processes.

⁷ Jeremy Brown, Minister of State for Crime Prevention, leads the British efforts on asset recovery. He has underlined that there is political commitment from the highest level (the Prime Minister) to ensure that the UK is 'doing everything [it] can to assist transition countries like Egypt'. http://ukinegypt.fco.gov.uk/en/about-us/working-with-egypt/visits/jeremy_brown/851877082