

CONFISCATION AND RECOVERY OF ILLEGAL ASSETS

WHY CONFISCATION OF ILLEGAL/CRIMINAL ASSETS?¹

Confiscation and forfeiture of criminal or illegal assets are tools for active counteraction of serious crime that generates substantial economic gain for the perpetrator or for third persons. The relevance of this approach is in removing the economic gain from serious crime in order to hamper further investments of illegally acquired assets in future crimes.

The application of such mechanisms requires a firm political will and a particular governmental policy aimed at combating serious crime. The illegal/criminal asset confiscation reduces serious crime through forfeiture of benefits generated through crime.

The reasons behind the adoption of legislation for forfeiture of criminal and illegal assets vary from one country to another. The use of this specific tool should be taken as demonstration of clear political will against cumulation of assets whose legal origin cannot be proven or which derive from criminal conduct. Confiscation and asset recovery aim at crime prevention of and have dissuasive effect on criminal behaviour. It is grounded on the awareness of an existing high risk of growing organised crime and corruption and the perception for its negative effect on the governance and economic development of the country.

Unlike the classic confiscation of criminal assets the non-conviction based forfeiture is an useful tool in a variety of contexts, particularly when confiscation based on conviction is not possible, or when the proving of charges was unsuccessful or very difficult. The non-conviction-based forfeiture approach should be seen as an operational instrument for a quicker reaction of state authorities, as well as an effective tool for seizing and forfeiting the proceeds of crimes irrelevant from the outcome of the criminal proceedings in court. Because the non-

conviction-based forfeiture is an action against the asset itself, it can proceed regardless of death, flight, or any immunity the criminal or the corrupt official might enjoy. It is also applicable in cases when the assets were transferred to third parties in order to avoid confiscation.

WHAT KIND OF ASSETS CAN BE CONFISCATED?

Subject to forfeiture/confiscation procedure should be any asset (movable or immovable) derived from crime or whose origin could not be reasonably explained, regardless of the fact who is in possession of the asset.

WHO CAN CONFISCATE ILLEGAL ASSETS?

Different countries apply different approaches to illegal/criminal asset confiscation/forfeiture. In Romania, for example, the identification of assets is carried out by the Prosecutor's office, and for the public officials – by the National Integrity Agency (Agenția Națională de Integritate). In Italy the confiscation is up to the court. In Bulgaria for the purposes of forfeiture of illegal assets a special body is established - the Commission for Illegal Assets Forfeiture. The forfeiture of assets is made by civil court. The management of assets in Romania is in the competence of the National Agency for Fiscal Administration and confiscated property is made part of the state budget and usually is sold. In Italy there is a special Agency for Management of Confiscated Assets and in Bulgaria the special Intergovernmental Council for management of confiscated assets is in charge of management of illegal assets after their forfeiture.

¹ Additional information regarding the illegal asset forfeiture, as well as regarding the different models of confiscation procedures in Bulgaria, Romania and Italy can be found on www.confiscation.eu



ILLEGAL ASSETS FORFEITURE IN BULGARIA

Bulgaria is among the Member States of the EU applying the non-conviction-based confiscation model. The illegal assets forfeiture is regulated by a special law, in force since October 2012. The forfeiture is made by civil court. The non-conviction-based forfeiture procedure replaces and overcomes some of deficiencies of the conviction-based confiscation, which existed until 2012. The advantages of the non-conviction-based forfeiture approach are the possibility for a quicker reaction by the state authorities, better possibilities for more efficient preservation, significantly shorter terms for judicial procedures, as well as independence of the procedures from the outcome of criminal proceedings. The non-conviction-based forfeiture is an action against the asset itself, and not against the person, which means that criminal benefits can be confiscated regardless of the actual owner.

The first phase - identification of potential illegal assets - can only be initiated against a person with charges brought for a serious crime, among those listed in article 22 of the law. The second prerequisite necessary to launch the procedure is the discrepancy of 250 000 leva (€125 000) between the income and the expenditure of the person. In case these prerequisites are in place, the Commission for Illegal Assets Forfeiture starts the procedure before the court and participates in the judicial proceedings as a party.

Another ground to trigger forfeiture procedure is an administrative violation when it has led to generation of profit exceeding 150 000 leva (about €75 000).

Subject to forfeiture are the illegal assets - acquired through illegal activity and whose origin could not be reasonably explained, including gainings generated from use of illegal assets. There is also possibility to forfeit transformed assets or assets transferred to third parties, when they knew about their illegal origin.

In the period from freezing of identified illegal assets to their actual forfeiture in favour of the state the Commission for asset forfeiture is responsible for its preservation and management. After the forfeiture court decision a special Intergovernmental Council for Forfeited Assets Management, chaired by a deputy minister of finance, performs the management.

EXTENDED CONFISCATION PROCEDURE IN ROMANIA

Romania does not have a specialized law to regulate the confiscation of criminal assets. The provisions regarding confiscation can be found in several different legal acts. However three types of asset forfeiture procedures could be differentiated:

1) Confiscation led in criminal law procedure - as a result of commission of serious criminal offence, such as trafficking in drugs, trafficking in human beings, trafficking in arms and money laundering, organized crime, and offences related to corruption. Subject to confiscation are assets obtained by perpetration of a criminal offence as well as assets which were used in any way to perpetrate a criminal offence, when they belong to the offender or, in case they belong to a third person, if this person was aware of the criminal purpose of the assets. In addition, confiscation of the amount relevant to the amount of the assets is possible as well, and is provided for in cases when the assets is transformed, sold or destroyed.

2) Confiscation as a result of administrative procedure - is applied where administrative sanctions are imposed and illegal assets are obtained as result of commission of administrative offence.

3) Confiscation based on the Law no. 144/2007 establishing the National Integrity Agency - applied for high level public officials in office for more than three years. The law is applied in the case of a discrepancy between the income and expenditure which exceeds 10 000 euro. The confiscation is made by civil court.

ILLICIT ASSET RECOVERY IN ITALY

Italian legislative framework on confiscation is quite advanced: it has passed through several progressive amendments that helped to improve the set of measures to efficiently and severely contrast criminal organisations. However, it should be acknowledged that in addition to the positive effect these amendments led to overlapping of provisions and implementation difficulties.

Italy has a mixed system for the confiscation of assets: it is impossible to classify it under the traditional conviction or non-conviction based confiscation. On the one side there is a general procedure which is based on the criminal conviction; on the other side, special regulation - called precautionary confiscation - is applied for criminal organisations (mafia) for the purposes of confiscation of illegal assets gained by them and for a residual list of crimes, including corruption.

The Italian confiscation proceeding provides for different actors and responsibilities based on the different stages. Identification of the assets is made by the court on the initiative of the prosecution; the asset is seized in the preliminary phase: the court, through a delegated judge, assigns it to a judicial administrator, which is a key-figure of the whole process and manages the seized asset. When a first degree confiscation is made, the National Authority for the Seized and Confiscated Assets becomes responsible for the asset. However the judicial administrator continues to manage and be responsible for the assets until the entire procedure of confiscation is completed. It is then, when the asset finally comes into the Agency's control.

A remarkable aspect of the Italian law concerns the assignment of confiscated assets: the Agency must deliver the asset for social purposes to local organisations and associations and can decide to sell it only as a last possible option. Confiscated companies can be sold, even if, in practice, most of them go bankrupt or are cleared due to unsuccessful management after their confiscation.

This articulate proceeding is considered quite comprehensive. Otherwise, the length and complexity of such procedures risk undermining the value of the asset and its economic potentiality.



PROTECTION OF FUNDAMENTAL HUMAN RIGHTS

The forfeiture of illegal or criminal assets can affect human rights, if not applied with utmost care and attention. In the course of the identification of criminal or illegal assets the authorities gather and get hold of both publicly available and protected data, sometimes sensible or classified information. By doing this they can affect human rights and personal data protection. In addition, the freezing of assets leads to serious limits to the exercise of the right of property. In the case of confiscation, the illegal assets are forfeited in favour of the State and the person is deprived of the right to use the assets in question.

In the greater number of cases limitation of the exercise of some human rights can be explained, because it is made in view of protection of public interest and because no person can derive benefits from his/her illegal behaviour. But the limitation should be proportionate, fair and relevant to the achievement of the legitimate goal.

The legislation for confiscation of illegal/criminal assets should provide for sufficient guarantees both for the rights of the persons directly affected by the law, and the bona fide third persons.

- RIGHT TO HUMAN DIGNITY
- RIGHT TO PERSONAL LIFE
- RIGHT TO FAIR TRIAL
- PRESUMPTION OF INNOCENCE
- PROPORTIONALITY OF SANCTION IMPOSED
- DOUBLE CRIMINALITY PRINCIPLE (NON BIS IN IDEM)
- PROPERTY RIGHTS

EUROPEAN STANDARDS

A number of EU Member States have introduced in their national legislation the model of confiscation of illegal or criminal assets. The problem that significantly reduces the efficiency of national authorities is the transnational nature of crimes that trigger confiscation. In addition, the assets, subject to confiscation, are usually located on the territory of another state. Organised criminal groups operate without borders and increasingly acquire assets in other Member States or in the territory of third states. All this makes very difficult and sometimes virtually impossible the tracing and the confiscation of illegal and criminal assets. The need for efficient international cooperation in the context of identification, freezing and seizure of assets becomes more and more obvious. This is especially true for EU Member States.

It is acknowledged that criminal and financial investigations are often held simultaneously or in cooperation among several countries. However, the judicial procedures are still in the jurisdiction of a single state and are held according to its national criminal or civil legislation. The warrants and court decisions are subject to execution in a different country which makes it slow and inefficient. All these reasons lead to slow and inefficient cooperation among institutions in different countries, which lowers down significantly the possibility to confiscate illegal assets.

The adoption of minimum common European standards will lead to approximation of the national legislation for confiscation in the Member States, which will increase the mutual trust and make more effective the cross-border cooperation. This is especially needed in the context of freezing and seizure of assets by civil courts in Member States. The problem remains unsolved as far as the mutual recognition of judicial acts is concerned, and the situation did not improve much despite of the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union adopted on 3 April 2014, which only deals with confiscation of criminal (and not illegal) assets.

- ▶ STRENGTHEN THE PRACTICAL ASPECTS OF MUTUAL RECOGNITION OF JUDICIAL ACTS
- ▶ INCREASED INTER-INSTITUTIONAL COOPERATION BOTH IN INVESTIGATION AND ENFORCEMENT
- ▶ MINIMUM COMMON EU STANDARDS ON ASSET FORFEITURE APPLIED BY CIVIL COURTS



IDEAL MODEL

Confiscation and management of illegal and criminal assets are two related stages of a legal procedure in which illegal/criminal property is used to compensate victims of serious crimes and restore justice to society. This assumption is based on the court decision stipulating that certain assets, belonging to a particular person have criminal or illegal origin. The procedures involve several steps: identification, freezing, judicial procedures and court decision of confiscation/forfeiture, enforcement of the confiscation order/decision against particular assets and management of confiscated assets.

It is extremely difficult to create the ideal model that will make the confiscation of illegal/criminal assets working in smooth and efficient way. In any case such a model should be in compliance with the specifics of the relevant legal system, to ensure protection of fundamental human rights, to be fast, efficient, transparent and marked by integrity of the institutions involved. The swift exchange of information and simplified procedures for inter-institutional and international cooperation are crucial as well.

- ▶ PROTECTION OF HUMAN RIGHTS AND GUARANTEES FOR QUICK AND FAIR PROCEEDINGS
- ▶ IDENTIFICATION OF ANY ASSETS OF CRIMINAL OR ILLEGAL ORIGIN, REGARDLESS THE TERRITORY WHERE THEY ARE LOCATED OR THE PERSON WHO POSSESSES THEM
- ▶ QUICK SEIZURE ON THE ILLEGAL/CRIMINAL ASSETS, SO THAT THE PERSON CANNOT HIDE, TRANSFER OR DISPOSE IT
- ▶ EFFECTIVE MANAGEMENT AND PRESERVATION OF SEIZED ASSETS IN ORDER TO AVOID ITS IMPAIRMENT BEFORE ACTUAL FORFEITURE
- ▶ SHORT TERMS OF JUDICIAL PROCEEDINGS AND SHORT TERMS FOR ENFORCEMENT OF THE JUDICIAL ORDERS
- ▶ EFFICIENT MANAGEMENT OF CONFISCATED/ FORFEITED ASSETS IN PUBLIC INTEREST
- ▶ EFFECTIVE COOPERATION AMONG NATIONAL CONFISCATION AUTHORITIES
- ▶ EFFICIENT INTER-INSTITUTIONAL COOPERATION AT EUROPEAN AND INTERNATIONAL LEVEL
- ▶ MEASURES TO MAKE VISIBLE THE RESULTS OF ILLEGAL AND CRIMINAL ASSETS FORFEITURE TO GAIN TRUST AND SUPPORT OF SOCIETY

ENHANCING INTEGRITY AND EFFECTIVENESS OF ILLEGAL ASSET CONFISCATION – EUROPEAN APPROACHES

A PROJECT CARRIED OUT BY TRANSPARENCY INTERNATIONAL BULGARIA ITALY AND ROMANIA

The project “Enhancing Integrity and Effectiveness of Illegal Asset Confiscation – European Approaches” is a 24-month initiative implemented by three national chapters of the global coalition against corruption Transparency International. The project receives financial support from the “Prevention of and Fight against Crime” programme carried out by DG Home Affairs of the European Commission.

The overarching objective of the project is to enhance transparency, integrity, accountability and effectiveness of illegal asset confiscation procedures across Europe by exercising efficient civil society control on the functioning of authorities specialised in this area, which should lead to improvement of their cooperation at EU level.

ACTIVITIES

- Analysis of national, European and international legislation on forfeiture of illegal assets, and existing practices for its implementation.
- Publication and launch of the analyses of the existing legal framework and institutional practices in Bulgaria, Italy and Romania.
- Independent civil monitoring over the activity of the Asset Recovery Offices. The monitoring will take place simultaneously in the three partner countries, based on common methodology and assessment indicators.
- National roundtables and discussions with representatives of institutions involved in the process of confiscation of illegal assets.
- Publication and presentation to the European Commission and MEPs of a Comparative report on the practices for implementation of the procedure for illegal assets forfeiture in Europe.
- Policy paper publication. The document will present the main findings of the research, recommendations, and results of the conducted monitoring.
- International conference with the participation of leading European experts on the subject of forfeiture of illegal assets. Main project findings will be presented and possibilities for improvement of the common European legal and institutional framework discussed.



Signing of cooperation agreement between Transparency International Bulgaria and Commission for Illegal Assets Forfeiture



Launch of the legal research report in Italy



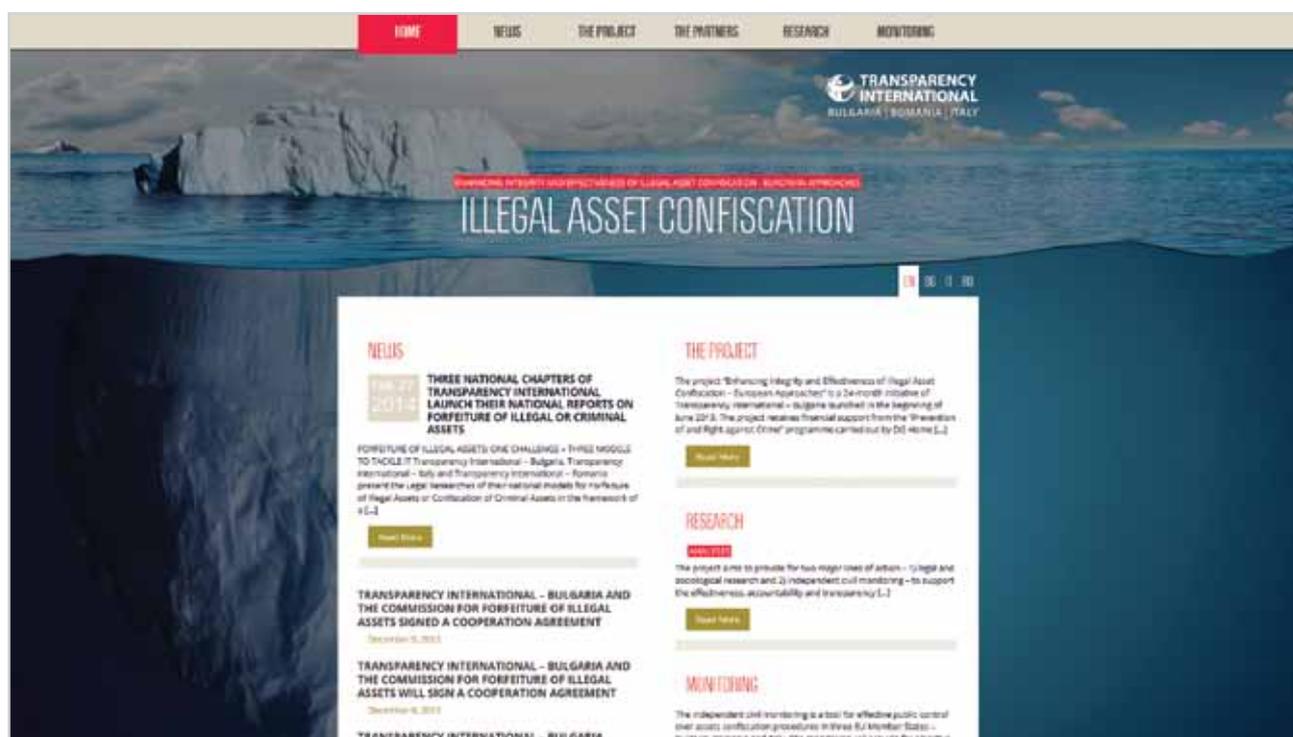
Launch of the legal research report in Bulgaria



Publications

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