THE SIRACUSA INTERNATIONAL INSTITUTE for criminal justice and human rights

EU AML / CFT
GLOBAL FACILITY

LEGAL APPROACHES TO EVIDENTIARY CHALLENGES IN MONEY LAUNDERING PROSECUTIONS AND CONFISCATION PROCEEDINGS

A CONSTITUTIONAL REVIEW

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FOREWORD

As we navigate the complex landscape of combating money laundering and countering the financing of terrorism, it is evident that many nations face formidable challenges on this front. The global community recognises that the relentless flow of illicit funds threatens the stability and integrity of societies worldwide. Addressing this menace requires multifaceted strategies that are both effective and respectful of fundamental rights. In this publication, we present the fruits of extensive research jointly conducted by the EU AML/CFT Global Facility and the Siracusa International Institute for Criminal Justice and Human Rights, aimed at uncovering innovative or non-traditional legal mechanisms to confront the evidentiary challenges in money laundering prosecutions and the confiscation of proceeds of criminal conduct.

Across the globe, countless countries grapple with the daunting task of combating money laundering, which is made even more complex by the ever-evolving tactics employed by criminals to conceal their ill-gotten gains. One of the central challenges in this endeavour is the difficulty in proving the illicit origin of assets. This difficulty can hinder the efforts of law enforcement agencies and prosecutors, allowing criminals to operate with impunity. A recent FATF report pointed out that, despite the establishment of far-reaching prevention measures, countries worldwide continue to face immense challenges in securing convictions and confiscation in money laundering and terrorism financing matters.

In response to these challenges, and following the impulse given by international conventions in that direction, many countries have introduced mechanisms that take a novel approach to that problem, which contrast with classical theories, for example in the field of criminal confiscation. However, it is essential to approach the broader adoption of these mechanisms with careful consideration of their compatibility with fundamental rights, chiefly the presumption of innocence and the rights of the defence. Indeed, these constitute crucial safeguards that protect individuals from wrongful prosecution and conviction.

While these mechanisms may be novel to many jurisdictions, others have already confronted constitutional questions regarding their implementation. These nations have struck a harmonious balance between prosecuting money laundering and confiscating the proceeds of crime while – crucially - upholding the rights of the accused or the defendant. Although each piece of national legislation is somewhat unique and the fruit of a country's legal tradition and experience, we feel that there are common principles – and important lessons – to draw from such experiences. The goal of this publication is not to recommend one approach over another, but to provide ideas on how the difficulty of proving the illicit origin of assets can be overcomed while respecting fundamental rights and constitutional principles.

This publication represents a significant milestone in our ongoing commitment to advancing the global fight against money laundering and terrorist financing. Within these pages, you will find a broad catalogue of legal mechanisms that have been devised by national legislators, and which have been reviewed by experts in the field.

This publication, accompanied by its annex—a catalogue of legal mechanisms—will serve as a valuable resource for policymakers, legislators, legal practitioners, and scholars around the world. We trust that the insights contained herein will empower nations to strengthen their national legal arsenals, enhancing their ability to confront the challenges posed by money laundering and terrorist financing.

Moreover, we envision this publication as a tool to facilitate international cooperation. In a world where financial crimes transcend borders, collaboration among nations is imperative. The legal mechanisms outlined in this catalogue can serve as a common reference, allowing countries with differing legal systems to work together effectively in the pursuit of justice.

It is our sincere hope that the research and insights contained herein will guide nations toward a future where money launderers are brought to justice and deprived from their ill-gotten profits, leaving no room for impunity.

Finally, we wish to thank all the experts and institutions who have contributed to this research. Particular gratitude to the members of the working group and the partners who hosted its meetings in Siracusa, Aqaba, Bucharest and Chisinau.

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Acronyms

AAR	Autonomous Republic of Adjara (Georgia)
AML	Anti-money laundering
CAB	Criminal Asset Bureau (Ireland)
CAP	Code of Administrative Procedure (Georgia)
CCP	Code of Criminal Procedure (Georgia)
CFT	Countering the Financing of Terrorism
DIA	National antimafia brigade (Italy)
DPP	Director of Public Prosecutions
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
EU	European Union
FATF	Financial Action Task-Force
FT	Financing of terrorism
GGIRA	Good Governance and Integrity Reporting Act (Mauritius)
HMRC	His Majesty's Revenue and Customs (UK)
IRSA	Integrity Reporting Services Agency (Mauritius)
MSB	Money service business
ML	Money laundering
NCA	National Crime Agency (UK)
NCB	Non-conviction-based (confiscation)
OAS	Organisation of American States
OAU	Organisation of African Unity
OCG	Organized Crime Group
OECD	Organisation for Economic Co-Operation and Development
POCA	Proceeds of Crime Act (Ireland, Mauritius, UK)
SAR	Special Administrative Region (Hong Kong)
UAE	United Arab Emirates
UN	United Nations
UNCAC	United Nations Convention Against Corruption
UNTOC	United Nations Convention against Transnational Organized Crime
UK	United Kingdom
US/USA	United States/United States of America
UWO	Unexplained Wealth Order (Mauritius, UK)

Key Takeaways

The purpose of this publication is to present an overview of existing legal mechanisms aimed at solving evidentiary challenges in the prosecution of money laundering and the recovery of the proceeds of crime. It is not meant to recommend one approach over another but rather to present existing options which legislators worldwide might seek to emulate, based on their own needs and national context, in order to reinforce their jurisdiction's legislation.

The proof of the illicit origin of assets often represents the greatest challenge in money laundering prosecutions and in confiscation procedures and the laws that are most commonly present across jurisdictions worldwide may not be sufficiently effective against the increasingly complex schemes deployed by money launderers.

Facing this challenge, many jurisdictions have introduced innovative mechanisms, in an international movement which still carries on today with the continuous promotion of these mechanisms at the international level and their progressive introduction in national legislations. While some of these mechanisms have long been in use in some jurisdictions, they may not exist everywhere.

Hence, countries where prosecution struggles in proving money laundering or the illicit origin of property may benefit from introducing them into their own legal processes. Indeed, those countries risk being overwhelmed by organised crime activities because of the "regulatory arbitrage" done by OCGs, who target States where they can find impunity.

Countries where these mechanisms do not exist face challenges in introducing them and in providing assistance to countries where they are used. Indeed, the EU AML/CFT Global Facility has observed first-hand that countries that could potentially benefit from those mechanisms may be reluctant to introduce them into their national legislation. This stems from their perception that some of these mechanisms are susceptible of breaching fundamental rights or may not be compatible with their national constitution or legal order. For the same reason, those countries struggle in providing legal assistance to requests from other countries based on mechanisms that do not exist in their own law.

The use of presumptions regarding the illicit origin of the goods or the mental element of offences has been increasingly accepted, provided that sufficient safeguards are in place, to solve this challenge. Importantly, those presumptions must always be rebuttable. Such presumptions have been included also in relation to the offence of money laundering in order to facilitate its prosecution.

"Countries where these innovative mechanisms do not exist face challenges in introducing them and in providing assistance to countries where they are used."

The constitutionality of offences including such presumptions, which may entail a shift of the burden of proof onto the defendant, has been assessed in several jurisdictions, as they have been challenged based on the perception that they violated fundamental rights, chiefly the presumption of innocence and the privilege against self-incrimination. In particular, this has been done in relation to the offence of illicit enrichment, whereby a disproportionate increase in a person's assets which is not justified by his legal income results in a criminal conviction if the accused does not prove the lawful origin of the goods. Case law in several jurisdictions has found that these mechanisms were compatible with fundamental rights. In those cases, the courts based their assessment on whether:

- the enforcement authorities needed to make a prima facie case beyond a mere formality, in order to trigger the presumption;
- the presumption rationally flowed from the proven facts;
- this exception to the presumption of innocence was justified by the general interest; and
- rebutting the presumption could be done by proving facts particularly within the accused's knowledge, for the burden placed upon him to be acceptable.

Similar rules and tests have been applied, with a less restrictive approach in favour of enforcement authorities, in confiscation matters.

Alternative remedies to classic criminal confiscation have also been introduced in various national legislations. Extended confiscation models, whereby part of the wealth of a person convicted for profit-generating offences is presumed to derive from criminal conduct, exist in several parts of the world and have passed tests of compatibility with fundamental rights, mainly because of the rational and rebuttable character of those presumptions. Of note, in Europe, a general confiscation mechanism (whereby the assets of a person convicted for specific and particularly serious crimes, regardless of their licit origin, can be confiscated) has been ruled compatible with fundamental rights.

According to almost universally accepted standards, confiscation can be divorced from the issue of guilt as, in general, countries increasingly move away from the perception that confiscation is a penalty. Indeed, in many jurisdictions, confiscation can be conceived as a measure that aims to restore the financial situation of the persons involved to what it would have been, had no offence been committed. It is applied in parallel with sanctions whose purpose is to punish the criminal conduct (such as fines or imprisonment). As a consequence, it is increasingly more accepted that confiscation can be ordered as part of a civil procedure, independently from criminal prosecution, and that the presumption of innocence does not apply to such procedures. Several models exist, including ones where the illicit origin of goods is presumed and whereby the defendant has to take an active role in defending his ownership by providing a justification of the lawful origin of his assets. Importantly, in most jurisdictions, statements used to justify the origin of assets cannot be used in criminal prosecutions against that person, in order to guarantee his privilege against self-incrimination.

The above applies to confiscation of goods that are considered to be the proceeds of crime (including through the use of presumptions or shift in evidentiary burden). Some types of confiscation can even apply to goods of demonstrably licit origin, for example when the specific goods identified as the proceeds of crime cannot be found among the assets of the defendant (equivalent value confiscation); or to punish an offender convicted for particularly serious crimes (general confiscation). In the latter case, it is considered as a penalty.

The presumption of illicit origin of the goods can be based on several elements, depending on the jurisdiction. A recurring element is, like in the case of the offence of illicit enrichment, the existence of a disproportion between the wealth enjoyed by the defendant and his lawful income, which he cannot justify. There exist systems where forfeiture can be ordered solely based on this unjustified disproportion, without the need to prove a connection between the goods and criminal activity. Some other jurisdictions go even further and only need to demonstrate that the defendant owns assets, after which he has to demonstrate, on the balance of probabilities, that the assets are not disproportionate to his lawful income, in order for those not to be confiscated.

Moreover, this publication also mentions how other tools, such as transparency obligations, can be used to facilitate the recovery of assets.

As a general conclusion, one can remark that, in many parts of the world, the most draconian of these mechanisms are intimately connected to countries' policies to fight against organised crime and corruption, which threaten the foundations of society, and this general interest goal is the justification behind many such reductions in the protection of individuals' rights. This research highlights the crucial character of reflecting on innovative approaches to bring perpetrators to justice while respecting fundamental rights, which can only be done by incorporating the appropriate safeguards; designing and applying them with the common interest in mind; and supporting them with a sound and democratic institutional framework. ■

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I. INTRODUCTION

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1. Note: the notion of proof under common and civil law

The burden of proof refers to the duty of a party in a legal dispute of proving an assertion or charge for it to be legally established. In criminal prosecutions, according to universally accepted principles of criminal law and procedure,[1] the burden of proof of the elements of the offence falls on the prosecutor. Similarly, in confiscation proceedings, the burden falls on the authorities requiring the confiscation of disputed property to prove that the requirements for confiscation are fulfilled (e.g. that the property is the proceeds of crime).

The concept of **"standard of proof"** refers to the degree to which the assertion or charge must be proven to be legally established, which may vary depending on the legal system of the jurisdiction in question and the type of action, legal basis and procedure used. Although a thorough comparison of the standards of proof used in different jurisdictions around the world goes well beyond the scope of this publication, it is important to consider the main trends in this area in order to provide context to the mechanisms described in the following pages.

Common law legal systems typically require different standards of proof, ranging between the following: [2]

1. probable cause or reasonable grounds to believe, often defined as slightly more than mere suspicion;
2. preponderance of the evidence or balance of probabilities, which typically means that a proposition is more likely to be true than not true.
3. beyond a reasonable doubt, which amounts to quasi-certitude.

Typically, common law countries require proof beyond reasonable doubt to obtain a criminal conviction and apply the balance of probabilities standard to civil cases.

On the other hand, civil law countries tend not to distinguish between the standards of proof and require, for a proposition to be considered as true, that the party who asserts it obtains the **"intimate conviction"** of the judge. More than a rigid standard of proof, intimate conviction is *"in essence, a flexible method to assess the available evidence, based on the conviction of the adjudicator, in contrast to a rigid system of rules of evidence (preuve légale, prueba legal/tasada, gesetzlicher Beweis)"* [3]. However, it *"entails a concept of conviction which comes close to certainty, leaving no reasonable doubts. In other words, the best possible explanation of certain facts is good enough to be considered as true. Thus, the necessary conviction is informed by the [beyond any reasonable doubt] standard."* [4]

In other words, and for the comparative aim of this publication, "intimate conviction" can be roughly equated to the beyond reasonable doubt standard.

These trends are not absolute and it is impossible to detail here every nuance present in all jurisdictions. These notions are also dynamic, as traditionally civil law countries such as Italy have undergone profound judicial reforms and now apply standards of proof similar to common law systems. Another example is the recent reform of the Civil Code of Belgium which introduced the possibility for the civil judge to reverse the burden of proof if applying the general rules of proof has "manifestly unreasonable" consequences. [5]

1. This is a corollary of the presumption of innocence, for more detail cf. Section 6.3.2.

2. See also T. S. Greenberg, L. M. Samuel, W. Grant, and L. Gray, *Stolen Asset Recovery – A good practices guide for non-conviction based asset forfeiture*, 2009, The International Bank for Reconstruction and Development, 58-63.

3. K. Ambos, «Intime conviction» in Germany. Conceptual foundations, historical development and current meaning, Quaestio facti. International Journal on Evidentiary Legal Reasoning, 2023 vol. 4 (1), 2.

4. Ibid., 21.

5. Y. Ninane, « Le droit de la preuve est modernisé et le Code Napoléon prend un coup de vieux ! », *Les pages – Obligations, contrats et responsabilités*, 2019 n.55.

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2. Evidentiary challenges in money laundering prosecutions

The last thirty years have seen a change in the approaches used to combat organised crime, a movement spearheaded, among others, by the drafters of international conventions such as the United Nations Conventions against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[6]; Transnational Organised Crime[7]; and Corruption[8]. The international community has extended its focus to include an additional strategy aimed at targeting the the proceeds of crime, which have to enter legal markets to be laundered and are therefore more vulnerable, to curtail the main driver behind criminal enterprises: profit. As a result of these international standards, also supported by the works of bodies such as the Financial Action Task-Force (FATF), the fight against organised crime, money laundering and corruption can be broken down to three main elements: prevention, suppression and confiscation.

This publication focuses on two key areas of this approach: the **prevention and suppression of money laundering through prosecution; and the recovery of proceeds of crime.**

One of the prerequisites for the effective **prosecutionof money laundering** is an appropriate legal framework. While most jurisdictions have made great progress in bringing their legislation in line with international standards on anti-money laundering and countering the financing of terrorism (AML/CFT), the implementation of that legislation remains challenging for numerous countries[9].

In practice, a major hurdle is the **difficulty for prosecution to prove money laundering offences**. Commonly, to obtain a conviction for money laundering, prosecution must prove that the property originate from a crime and that the defendant knew of that illicit origin. In some jurisdictions, the burden on prosecution is heavier and proof of the predicate offence is required. As the very objective of the money laundering process is to obfuscate the link between the predicate offence and its proceeds, and given the complexity of modern cases, proving the illicit origin of property and the *mens rea* as required can become a *probatio diabolica*.

The **"traditional" form of confiscation** presents a similar problem regarding the illicit origin of the targeted property. Typically, this form of confiscation intervenes after a conviction and sentence and aims at removing from the hands of the offender the instrumentalities utilised to facilitate the commission of and the proceeds generated by, that offence. However, it is just the purpose of money laundering to obfuscate the link between the proceeds and the offence that generated them, and these property are often mixed with others of perfectly lawful origin. Additionally, due to the strict requirement of a link between the property and the specific offence for which the offender was convicted, this form of confiscation may be unable to fulfill its purpose when dealing with criminal organisations involving multiple subjects and criminal offences.

> In the notorious case of the Cali Cartel businessman Franklin Jurado[11], the Luxembourg courts had to return some 100 million dollars seized despite a conviction for money laundering, because the legislation at the time only allowed for the confiscation of the proceeds of the offence for which the person was being prosecuted. In this case, the money was the proceeds of drug trafficking, not the money laundering offence for which he was prosecuted.

An edifying testimony of these difficulties can be found in a 1999 circular from the French Ministry of Justice on the fight against drug trafficking, which noted that "in the absence of identification of the traffickers' property and in the absence of prior protective measures taken during the investigation, the confiscation sentences handed down by the courts are most often limited to the confiscation of property seized at the time of the arrest or in the very near future."[12]

"'Money laundering, by its very nature, is very difficult to prove; for if the money launderers have done their job, the money appears to be clean."[10]

6. UN Economic and Social Council (ECOSOC), United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 19 December 1988, available at: https://www.refworld.org/docid/49997af90.html [accessed 24 July 2023]

7. UN General Assembly, United Nations Convention against Transnational Organized Crime : resolution / adopted by the General Assembly, 8 January 2001, A/RES/55/25, available at: https://www.refworld.org/docid/3b00f55b0.html [accessed 24 July 2023]

8. UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422, available at: https://www.refworld.org/docid/4374b9524.html [accessed 24 July 2023]

9. C.f. the key takeaways in FATF, "Report on the State of Effectiveness Compliance with FATF Standards", 2022, 5.

10. Justices Kennedy, O'Connor, and Scalia, dissenting opinion in United States Court of Appeal for the 9th Circuit, 22 June 1998, United States, Petitioner v. Hosep Krikor Bajakajian.

11. Court of Appeal of the Grand Duchy of Luxembourg, 22 January 1993, Public Prosecutor v. Jurado Rodriguez José Francklin and others.

12. Cir. CRIM. 99-07 G1/17-06-99.

3. Emergence of "legal innovations"

3.1. The international movement to solve evidentiary challenges around the illicit origin of property

The United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was the first global convention to address the difficulty of proving the illicit origin of property suspected of being the proceeds of crime. Already at that time, it recognised the tremendous difficulties faced by authorities in identifying, confiscating and retrieving the proceeds of crime and encouraged countries to introduce mechanisms that ease the burden of proof of the illicit origin of property. It does so using a very strong wording ("reversing the burden of proof") and its article 5 on confiscation reads as follows:

> *7. Each Party may consider ensuring that **the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation**, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.*
>
> *8. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.*
>
> *9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a Party.*

Likewise, article 12 of the United Nations Convention Against Transnational Organised Crime on confiscation states that

> *7. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.*
>
> *8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.*
>
> *9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.*

A similar formulation is also used in the FATF Recommendations which, while not binding, constitute the leading international standards on anti-money laundering and are one of the main drivers of reforms all over the globe.[13]

New offences have also emerged to capture elusive and dangerous criminal phenomena such as money laundering and corruption. Article 20 of the United Nations Convention against Corruption urges State Parties to introduce into their legal orders the offence of "illicit enrichment"[14], whereby the accused is required to prove the lawful origin of a significant increase in his property or is otherwise convicted. This article provides that

> *"Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, **a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.**"*

The drafters of the abovementioned instruments consistently mentioned that these innovations should only be introduced into national legal orders "to the extent where they are compatible" with their fundamental and constitutional principles. The introduction of this condition seems to acknowledge the perception by certain countries that these mechanisms might deviate so much from the general rules of evidence in criminal proceedings that they might breach those principles.

This international movement still carries on today with the continuous promotion of these mechanisms at the international level and their progressive introduction in national legislations. More recently, the importance of taking effective measures against money laundering and illicit financial flows has been recognised in Resolution 1/2018 of the Inter-American Commission of Human Rights, which formulated recommendations regarding the fight against corruption in the member states of the Organisation of American States, addressing the phenomenon from a human rights-based approach[15]. ■

13. FATF Recommendation 4 states that "countries should consider adopting measures 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".

14. This offence made its way into the UN Convention Against Corruption following its introduction at the regional level in the Inter-American Convention Against Corruption (Organisation of American States, 29 March 1996, article IX) and the African Union Convention on Preventing and Combating Corruption (African Union, 11 July 2003, article 1).

15. C.f. Organisation of American States, Resolution 1/2018. Corruption and Human Rights, https://www.oas.org/en/iachr/decisions/pdf/Resolution-1-18-en.pdf

16. Organisation of American States, Lima Commitment on Democratic Governance Against Corruption, VIII Summit of the Americas, 13-14 April 2018.

The same approach has been adopted in the Lima Commitment on Democratic Governance Against Corruption,[16] according to which States committed to further the adoption or strengthening of measures through relevant institutions to enable the freezing, seizure, and confiscation of proceeds of corruption as well as deepening the participation of member States in multilateral networks and initiatives against money laundering, by providing the broadest and most rapid assistance possible to identify, trace, freeze, confiscate, forfeit, and recover property. (Para. 41, 42).

3.2. Examples of innovations in national law

3.2.1. Presumptions

The **shift of the burden of proof** is the most straightforward legal mechanism to reduce the aforementioned legal obstacles to the prosecution of money laundering or the confiscation of criminal property. Although it is sometimes called a "reversal" of the burden of proof,[17] this description may be inaccurate. Indeed, rather than unconditionally requiring the accused or defendant to prove his innocence or the lawful origin of his property, these mechanisms typically require the authorities (e.g. the prosecutor) to prove to a certain degree that the property are of illicit origin, following which the defendant may be required to demonstrate the lawful origin of his property. Accordingly, the burden of proof is not reversed but shifts from the authorities to the defendant after a certain evidentiary threshold has been reached.

This shift is achieved through the use of **presumptions**. The offence of money laundering in the French Criminal Code contains such a presumption where *"property or income [is] presumed to be the direct or indirect proceeds of a crime or misdemeanour where the material, legal or financial conditions of the investment, concealment or conversion operation cannot have any other justification than to conceal the origin or beneficial owner of the property or income"* (cf. . Section 6.2).[18]

In some countries, such as the Netherlands and Belgium, the shift of the burden of proof in ML prosecutions (just like any other cime) derives from the interpretation of indirect or circumstantial evidence (cf. Section 6.1). If prosecution presents sufficient evidence and the defendant cannot verifiably rebut it, the property is presumed to derive from a crime. The presumption must be established based on facts and circumstances including, for example, an unjustified increase in assets. This presumption may lead to a conviction for money laundering.

In other countries, this mechanism for shifting the burden of proof has taken the form of a **separate offence**, which can be used by prosecution in cases where proving standalone money laundering is not possible. The offence of "illicit enrichment" is generally aimed at public officials who, in the course of exercising their official functions, have experienced an unjustified increase in their property. As mentioned above, this is an approach encouraged by the United Nations Convention against Corruption.[19] Several countries such as France or the United Arab Emirates have introduced offences similar to illicit enrichment which are not restricted to public officials (cf. Section 6.3).

Such presumptions may also be used in confiscation matters. In such procedures, **the property of a person convicted of an offence may be presumed to derive from that offence** of a person convicted of an offence may be presumed to derive from that offence (or even other offences, in case of extended confiscation, cf. Section 6.6.2). For example, in many countries, the law provides that, in the event of a conviction for serious crimes such as drug trafficking, money laundering or participation in a criminal association, property in the possession of the person convicted must be confiscated if it is not commensurate with their declared income, unless the offender establishes their lawful origin. This type of legal presumption is frequently included in national legislation, whether or not in conjunction with one of the other mechanisms described in this document. In fact, presumptive evidence is not in itself a new mechanism in legal systems.

3.2.2. Alternatives to criminal confiscation for asset recovery

Civil forfeiture or preventive confiscation, among others, have instituted more streamlined mechanisms to respond in real time to mafia threats, or to divorce the issue of guilt from that of the illicit origin of property. Another similar type of measure is general confiscation. While being part of the general framework of the criminal trial, it avoids having to demonstrate the illicit origin of property by allowing, in a number of cases, the confiscation of property, even if of lawful origin, of a convicted person. These mechanisms will be discussed in detail in Section 6.7.

Confiscation in rem is a legal construction mostly present in common law countries, which focuses on the nature of the asset rather than the issue of guilt, thus avoiding the criminal law evidentiary standard. As this is a civil procedure, the standard of proof is lower than in criminal proceedings. Moreover, it requires neither a prosecution nor a conviction, and the innocence of the owner or possessor cannot be invoked as evidence of the innocence of the property.

For example, in Ireland (cf. Section 6.7.4), the Criminal Asset Bureau, when filing an application to the High Court for a freezing order, must prove, to the civil standard of proof (which is, on the balance of probabilities) that the property in control of a person constitutes (directly or indirectly) the proceeds of crime. If it is shown to the satisfaction of the court that the property in question is the proceeds of crime, it may issue an interim order freezing the

17. E.g. in article 5 of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, cf. supra.

18. Article 324-1-1 of the Criminal Code, as amended by Law n°2013-1117 of 6 December 2013.

19. Article 20 of the Convention.

property for 21 days. The respondent then has the opportunity to provide evidence of the legitimate origin of the property, otherwise the property remain frozen until its eventual disposal to the state. The law provides two other safeguards to protect innocent persons: firstly, every person that claims to own part of the property must have the opportunity to present evidence that it should not be confiscated; and secondly, the court has the discretion not to issue a disposal order if there is a "risk of serious injustice".

Other countries have a preventive system of asset confiscation. For example, in Italy (cf. Section 6.7.5), the authorities may request the preventive seizure of property of a person who, on the basis of factual elements, is habitually involved in the commission of offences, habitually living off the proceeds of crime or commits offences that endanger physical or moral integrity, health or public safety. The court may order the seizure of property that the person controls, directly or indirectly, when the value of these assets is disproportionate to the person's income or economic activity, or if, on the basis of sufficient evidence, there are reasons to believe that they are the result of illegal activity or money laundering. The defendant has the possibility to demonstrate the legitimate origin of that property and if it is not done within one year of the seizure, the court shall order its confiscation. This procedure takes place outside of any criminal proceedings and is based on the danger represented by the person or property itself. In Italy, it has proved to be one of the most effective measures against mafia organisations.

4. Challenges raised by innovative approaches

While some of these mechanisms have long been in use in some jurisdictions, they may not exist everywhere. Hence, countries where prosecution struggles in proving money laundering or the illicit origin of property may benefit from introducing them into their own legal processes. Indeed, those countries risk being overwhelmed by organised crime activities because of the "regulatory arbitrage" done by OCGs, who target States where they can find impunity.

Countries where these mechanisms do not exist face challenges in introducing them and in providing assistance to countries where they are used. Indeed, the EU AML/CFT Global Facility has observed first-hand that countries that could potentially benefit from those mechanisms may be reluctant to introduce them into their national legislation. This stems from their perception that some of these mechanisms are susceptible of breaching fundamental rights or may not be compatible with their national constitution or legal order. For the same reason, those countries struggle in providing legal assistance to requests from other countries based on mechanisms that do not exist in their own law.

4.1. Tensions with fundamental rights

While generally welcomed by frontline practitioners, these innovations have been met with some concern that they potentially undermine constitutional and human rights and impede the rights of the defence in a prosecution particularly. Certain legal provisions have been challenged before regional and national courts. The main constitutional issues regarding the shift of the burden of proof and other such mechanisms relates to their compatibility with the presumption of innocence (including the right to protection against self-incrimination) and the right to peaceful enjoyment of possessions.

Above all, the **presumption of innocence** is a fundamental principle that forms the basis of criminal justice systems around the world. It is enshrined in numerous international instruments, including the Universal Declaration of Human Rights,[20] the International Covenant on Civil and Political Rights,[21] and regional human rights treaties such as the African Charter on Human and Peoples' Rights,[22] the American Convention on Human Rights,[23] and the European Convention on Human Rights[24]. Additionally, it is included in domestic constitutions of many countries.[25]

This principle ensures that individuals charged with a criminal offense are considered innocent until proven guilty. It places the burden of proof on the prosecution, requiring them to demonstrate the guilt of the accused beyond a reasonable doubt, while the accused has a correspondence right to silence. The presumption of innocence also guarantees that the accused is afforded the benefit of doubt and that they are treated in accordance with this principle throughout the criminal proceedings.

According to the consolidated case law of the European Court of Human Rights (ECtHR), these mechanisms are **not, per se, incompatible with the abovementioned rights**. In the Salabiaku case, the Court recognised that *"every legal system has presumptions of fact or law"*, but that States must confine these presumptions *"within reasonable limits that take into account the gravity of the issue and preserve the rights of the defence"*.[26] This reasoning is not exclusive

20. Article 11.1 of UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: https://www.refworld.org/docid/3ae6b3712c.html [accessed 28 July 2023]

21. Article 14.2 of UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 28 July 2023]

22. Article 7.1.b. of Organisation of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: https://www.refworld.org/docid/3ae6b3630.html [accessed 28 July 2023]

23. Article 8.2. of Organisation of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, available at: https://www.refworld.org/docid/3ae6b36510.html [accessed 28 July 2023]

24. Article 6.2. of Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: https://www.refworld.org/docid/3ae6b3b04.html [accessed 28 July 2023]

25. See for example section 14(2) of the Constitution of the Philippines, Approved on October 12, 1986; Article 28 of the Constitution of the United Arab Emirates, permanently adopted in July 1996; Article 20.B.I. of the Political Constitution of the United Mexican States, ratified on 5 February 1917; Article 35(1) of the Provisional Constitution of the Federal Republic of Somalia, adopted on 1 August 2012; Article 5.LVII of the Constitution of the Federative Republic of Brazil, ratified on 5 October 1988; Article 27 of the Constitution of the Italian Republic.

26. ECtHR, Salabiaku v. France, App n. 10519/83, 7 October 1988.

to Europe and a similar conclusion was reached by the Court of Appeal of the Hong Kong SAR in Attorney General v. Hui Kin Hong, where the Court concluded that *"there are exceptional situations in which justifying some degree of deviation from the normal principle that the prosecution must prove the guilt of the accused beyond reasonable doubt may remain compatible with human rights."*[27]

Furthermore, the ECtHR uses a number of "tests" to determine whether or not restrictive measures taken by the State have a criminal law character and has found that civil or non-conviction-based forfeiture of criminal property do not have such character. As a consequence, they do not have to be subject to the strict evidentiary standards of criminal law (cf. Section 6.7.1).

As regards the **right to peaceful enjoyment of possessions**, the ECtHR's jurisprudence leaves a wide margin for appreciation to States when evaluating the proportionality of the restriction to this right and the general interest pursued. In *Arcuri v. Italy*,[28] for example, the Court found that the confiscation measures impugned were proportionate considering the gravity of the organised crime problem in Italy and the fact that the enormous illicit profits made by these organisations gave them enough power to undermine the rule of law. As such, the Italian confiscation regime appeared essential to successfully counter mafia organisations. Finally, the preventive nature of confiscation justifies its immediate application notwithstanding any appeal. It appears therefore from the jurisprudence of the Court that, as long as the right safeguards are in place and measures are proportional to the general interest pursued, civil or non-conviction-based forfeiture of criminal property does not violate the presumption of innocence nor the protection of property rights.

Another key issue is whether these mechanisms are compatible to the **right to protection against self-incrimination** within a criminal prosecution. This right provides that a suspect should not, at any time and under any circumstances, be forced to incriminate himself or admit guilt. According to the opponents of non-conviction-based confiscation, requiring the accused to provide proof of the origin of his wealth in an illicit enrichment case, for example, may expose him to the risk of self-incrimination. Evidence of income from real estate or business, for example, could demonstrate the lawful origin of the accused's income but could also lead to criminal charges, when for example he did not declare these sources of income to the tax authorities. While the right against self-incrimination is a fundamental right, it is not absolute. In Argentina, in the Alsogaray case,[29] the court found that the justification mentioned in the provision on illicit enrichment does not violate the right against self-incrimination, as it can only be understood as a notification to the accused of the need to demonstrate the lawfulness of his enrichment. Moreover, certain jurisdictions, such as Ireland, have statutory restrictions on the admission of information or evidence disclosed during a civil forfeiture procedure in a subsequent criminal prosecution.

Another important case in this perspective is the *Zschüschen v. Belgium*[30] case before the ECtHR, a money laundering case without a known predicate offence. The defendant had given a vague and unconvincing explanation for the origin of the money, and did not want to answer any further questions about it. The Belgian judge held against him this refusal to state anything about the origin of the money. According to the ECtHR, this does not conflict with the right to remain silent and right not to incriminate yourself, as there was also other evidence in this case. The court took into account that 'it should not be complicated for Zschüschen to substantiate his statement about the origin of the money. The conclusions drawn from his refusal to declare are not unfair or unreasonable, but motivated by common sense'.

In the same vein, in *Murray v. United Kingdom*,[31] the ECtHR reasoned that the right to remain silent is not absolute: 'on the one hand, it is self-evident that it is incompatible with the immunities under consideration (the right to remain silent under police questioning and the privilege against self-incrimination- GCH) to base a conviction solely or mainly on the accused's silence or a refusal to answer questions or give evidence himself. On the other hand, the Court deems it equally obvious that **these immunities cannot and should not prevent that the accused's silence, in situations which clearly call for an explanation from him, be taken into account in assessing the persuasiveness of the evidence adduced by the prosecution'.**

Finally, as the case law cited in this publication demonstrates, it is important to also note that while **such mechanisms do not necessarily affect the principle of presumption of innocence** do not necessarily affect the principle of presumption of innocence, the competent authority still has to make a reasonable case that the property in question are the products or instruments of crime and the person prosecuted still has the opportunity, in fair proceedings before an independent and impartial tribunal, to rebut the presumption. This can be illustrated by the abovementioned Alsogaray case. The offence of illicit enrichment was challenged on the grounds that it would violate the presumption of innocence. In that case, the court held that the offence of illicit enrichment does not require the accused public official to prove his or her innocence. Instead, it is up to the prosecutor to prove the unjustified increase in property as specifically and precisely as possible.

27. Attorney General v Hui Kin-hong [1995] HKCA 351

28. ECtHR, Arcuri and others v. Italy, App. n. 52024/99, 5 July 2001.

29. Cámara Nacional de Casación Penal, sala IV, 'Alsogaray', causa n°4787 (2005), 9 June 2005.

30. ECtHR, Zschüschen vs Belgium, App. n. 23572/07, 2 May 2017.

31. ECtHR, Murray v. United Kingdom, App. n. 14310/88, 28 October 1994.

4.2. Challenges regarding international cooperation

Although the criminal offences and asset recovery mechanisms described in this publication allow authorities to more easily bring to justice those who profit from crime and recover criminal proceeds, the lack of harmonisation between national legislations gives rise to challenges in cross-border cooperation. These challenges pertain to the investigation and prosecution of offences, as well as to the recognition and execution of confiscation and forfeiture orders.

4.2.1. Investigation and prosecution of offences

As Article 43.2 UNCAC provides that

"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 Parties.."

This standard has been replicated in the field of anti-money laundering with FATF Recommendation 37. The last part of article 43.2 UNCAC, which requires that both countries criminalise the *conduct* underlying the offence (regardless of matters of internal classification or terminology) is an expression of the **principle of dual criminality**. This principle is central in mutual legal assistance in criminal matters and its absence may represent an obstacle to the investigation and prosecution of "innovative" offences.

The application of this principle causes states to only provide mutual legal assistance in criminal matters if the offense being investigated in the requesting state is also an offense in the state being asked for assistance, which may represent a major obstacle in international investigations of some offences present in this paper, such as illicit enrichment, when they involve states where such offences do not exist. **Illicit enrichment legislation is not harmonised across countries** and, although the criminalisation of illicit enrichment is promoted in UNCAC and other regional treaties, it is not mandatory under these conventions.

Although its scope of application is narrower than UNTOC's, several provisions of UNCAC are relevant to this discussion, particularly as regards the o**bligation of requested States to provide legal assistance** to requests based on offences covered by the Convention, including illicit enrichment, **even in the absence of dual criminality.**

Article 43. International cooperation

1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

2. 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 Parties.

While article 43 (2) removes some formal obstacles to cooperation (by preventing States that receive requests from refusing to provide assistance based on differences in denomination or classification of the offence), the conduct underlying the offence in question should be criminalised in both the requesting State and the State whose assistance is requested.

In any case, according to article 46 (1) of the Convention,

States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

In the same vein, article 46 (9) of the Convention provides the following:

(a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that

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does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

These provisions make it clear that, in the absence of dual criminality, the requested State must still offer the widest measure of mutual legal assistance to the requesting State in line with the purpose of the Convention, unless in situations where

A) the assistance requested is inconsistent with the basic concepts of its legal system; or

B) the assistance involves coercive action; or

C) the assistance involves matters of a de minimis nature; or

D) the assistance sought is available under other provisions of the Convention.

In practice, **in the absence of dual criminality the requested State will provide non-coercive assistance** the requested State will provide non-coercive assistance including but not limited to : taking evidence or statements from persons; effecting service of judicial documents; providing information, evidentiary items and expert evaluations; providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records; identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes; and facilitating the voluntary appearance of persons in the requesting State Party.[32] However, this excludes some forms of coercive assistance which are of a crucial importance in the prosecution of such offences, such as searches, seizure and freezing of the proceeds of crime; and the freezing and recovery of the proceeds of crime.[33]

As a consequence, the lack of a wider-spread adoption of illicit enrichment and offences that criminalise similar conduct still represents an obstacle to international investigations of these offences in absence of dual criminality.

4.2.2. Recognition and execution of confiscation orders

As mentioned in section 3.2.2, some countries have introduced **alternative procedures** to criminal confiscation to recover the proceeds of criminal activity, such as non-conviction-based (NCB) confiscation. However, this may cause issues in instances where those countries request legal assistance from countries where these procedures do not exist. Indeed, **the the requested State** may not recognise or execute confiscation orders under those procedures. This causes significant obstacles to jurisdictions that seek to have their NCB confiscation orders enforced abroad.[34]

Conversely, in the absence of alternative procedures such as NCB in its own legal order, the requesting State may face **legal obstacles in the requested State** obstacles in the requested State that these alternative procedures are meant to circumvent. For example, foreign authorities seeking to obtain a criminal confiscation judgement in the United States may face an insurmountable obstacle, as the in absentia prosecution and conviction of the perpetrator is not possible in the US. In such a case, the only possible avenue to recover the proceeds of crime would be NCB confiscation, which may not exist in the requesting State's legal order.[35]

Even within a block of countries with strong legislative integration and cooperation tools such as the European Union, the non-recognition/ non-execution of confiscation orders issued under confiscation regimes which are not harmonised by EU legislation (such as non-conviction-based confiscation; or unexplained wealth confiscation) similarly continues to represent a major challenge in international cooperation.[36]

However, the absence of analogous procedures in the requesting and requested States may not necessarily constitute an obstacle to the recognition and execution of confiscation orders across borders. In France, the Court of Cassation, in its Crisafulli judgment[37] opened the door to the recognition of non-conviction-based confiscation measures despite the non-existence of such procedures in the French system. In that case, the Court confirmed the execution of an Italian measure of preventive confiscation (this mechanism is explained in more detail in section 6.7.5).

The Italian request for mutual legal assistance was based on the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[38] Ratified by the 47 Member States of the Council of Europe, in addition to Australia. Article 23 of the Convention provides that

32. These measures are explicitly mentioned in article 46 (3) (a), (b), (e), (f), (g), (h) of UNCAC.

33. Mentioned in article 46 (c), (j), (k) of UNCAC·

34. See for example S. Betti, V. Kozin and J.-P. Brun, Orders without borders – direct enforcement of foreign restraint and confiscation decisions, 2022, International Bank for Reconstruction and Development / The World Bank, 59.

35. Ibid.

36. Milieu Consulting, "Study on freezing, confiscation and asset recovery – what works, what does not work", 2021, Publications Office of the European Union, 111.

37. Crim. 13 November 1982, Bull. crim., no. 213

38. Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Warsaw, 16 May 2005.

1. 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.

[...]

5. The Parties shall co-operate to the widest extent possible under their domestic law with those Parties which request the execution of measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions, in so far as such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offence, provided that it has been established that the property constitutes proceeds or other property in the meaning of Article 5 of this Convention

In the Crisafulli decision, and on the basis of the domestic law that implemented the Strasbourg Convention,[39] the Court examined three key questions in order to determine whether the confiscation could be enforced by French jurisdictions:

1. Whether the Italian procedure guaranteed the rights of the defence;
2. Whether the non-criminal nature of the Italian procedure was an obstacle to its implementation in the French legal order where such procedures did not exist;
3. Whether confiscation could have been ordered in France under similar circumstances.

On the first question, the Court considered that the Italian procedure provided the necessary guarantees, drawing from the case law of the European Court of Human Rights (for a more detailed analysis on this point, see section 6.7.5 infra).

On the second question, the Court stated that, although such a procedure did not exist in the French system, neither the Convention nor the French law implementing it required that the request from foreign authorities be based on a criminal conviction.

The explanatory report of the Convention notes the “considerable differences” in the types of procedures that resulted in confiscation orders in the various State parties: they may be taken by criminal courts, administrative tribunals, separate judicial authorities or in civil or criminal proceedings entirely separate from those in which the guilt of the offender is determined (the Convention refers to those procedures as "proceedings for the purpose of confiscation"). [40]

The explanatory report states, in its § 43, that

[...] the request must concern instrumentalities or proceeds from offences.[...].

It also follows from the article that the request concerns a confiscation which by its very nature is criminal and thus excludes a request which is not connected with an offence, for example administrative confiscation. However, the decision of a court to confiscate need not be taken by a court of criminal jurisdiction following criminal proceedings.

Any type of proceedings, independently of their relationship with criminal proceedings and of applicable procedural rules, might qualify in so far as they may result in a confiscation order, provided that they are carried out by judicial authorities and that they are criminal in nature, that is, that they concern instrumentalities or proceeds. Such types of proceedings (which include, for instance, the so called" in rem proceedings") are, as indicated under "General considerations" above, referred to in the text of the Convention as "proceedings for the purpose of confiscation".

From the text of article 23 of the Convention (cf. supra) and from the explanatory report, one deduces that countries have an obligation to provide the widest assistance possible under their domestic law to requests for confiscation, even on the basis of alternative mechanisms such as NCB confiscation, as long as the confiscation has been ordered by a judge and that confiscation concerns the proceeds of crime (which excludes purely administrative confiscation). The Italian procedure did fulfill both these conditions.

Finally, on the third question, the Court first noted that requiring an identity of procedures between the requesting and requested States would paralyse the implementation of the Convention. Hence, it pondered whether confiscation could have been ordered in France under similar circumstances, although through a different procedure.

The Italian decision had established a link between the property targeted by the confiscation order and the offence of money laundering. Those facts would have made it possible to open an investigation, during which the property could have been seized or subjected to securities and precautionary measures. Subsequently, in the context of a criminal trial for money laundering, the penalty of ,confiscation could have been imposed.

As a consequence, **the Court confirmed the possibility for French judges to enforce the Italian confiscation order.**

39. L. n° 96-392, JO 14 mai 1996
40. C.f. for example article 21,1.

5. Methodology

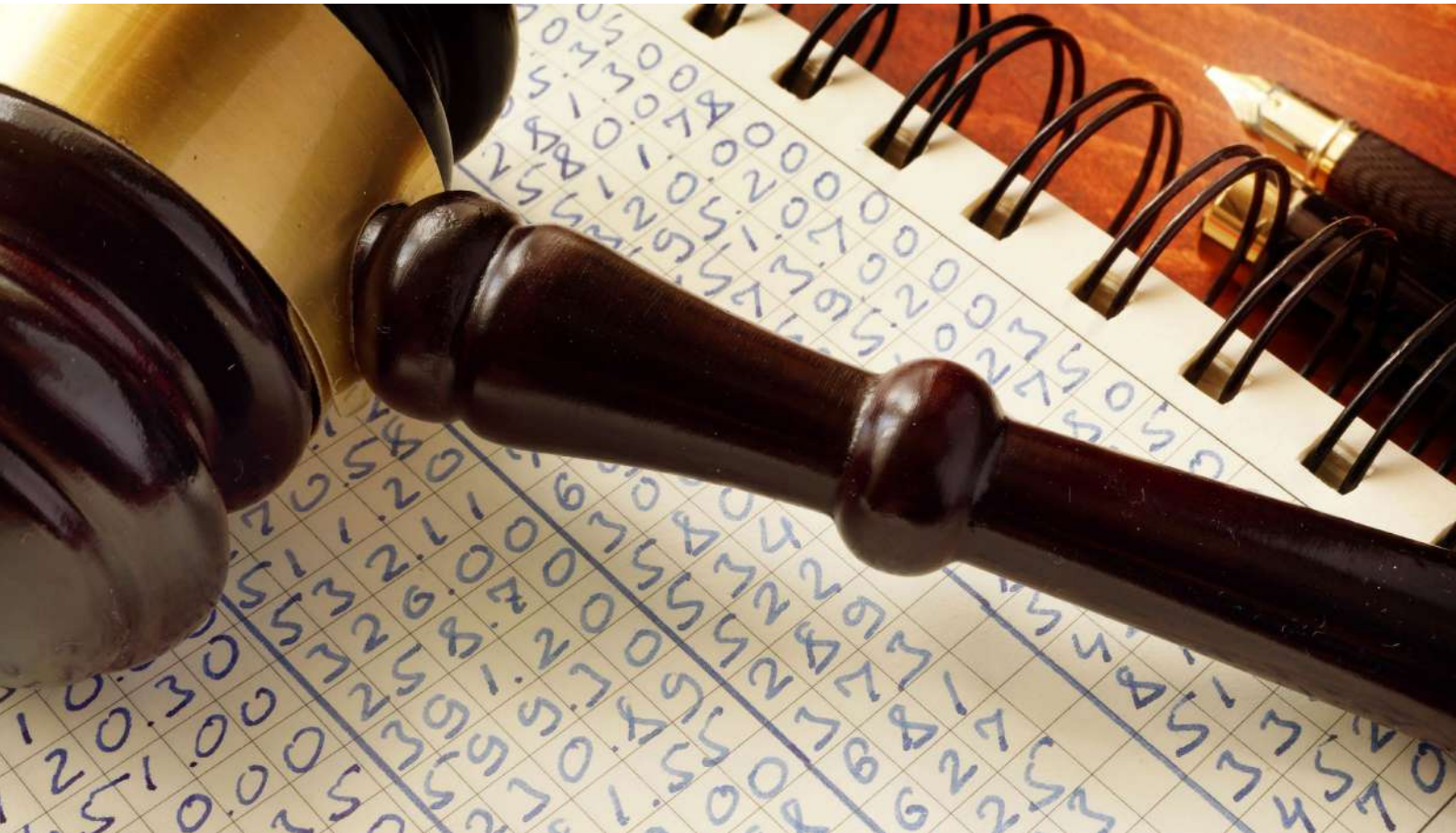
As mentioned above, the present document contains an overview of the legal mechanisms that were identified as possible solutions to the abovementioned evidentiary challenges mentioned above. It also presents a discussion on the compatibility of each mechanism with fundamental rights, drawing from existing regional and national case law. The annex to this publication contains a catalogue of mechanisms identified for reader reference, classified by country and typology.

This research was conducted by the project's research team from September 2021 to August 2023 with the support of the project's expert working group. The group was composed of international experts with extensive subject-matter knowledge and professional experience in the fields of criminal law; anti-money laundering; confiscation; international cooperation in criminal matters; and constitutional law. Members of the group came from a variety of legal traditions and from professional backgrounds that included prosecution; policy-making; judiciary; defense attorneys; financial intelligence units; academia; national AML and anticorruption agencies; and civil society.

The research team conducted a global survey through various networks and professional associations of legal professionals and subject-matter experts with a view to collecting data on as many legal systems and mechanisms as possible. In parallel, the research team also conducted extensive desk research mostly based on open-source information, as well as consultations with external experts. The research results were periodically reviewed by the expert working group.

The research focused on mechanisms that can be used as alternatives to the prosecution of money laundering and to asset-based criminal confiscation when those processes encounter evidentiary challenges, with a particular emphasis on challenges related to the proof of the illicit origin of property. Although effective prosecutorial strategies may involve the prosecution of alternative offences such as tax offences or Customs offences, such processes were excluded from the scope of the research as they require the proof of additional elements compared to money laundering or illicit enrichment offences. Of note, this publication focuses on legal processes whose aim is to bring perpetrators of money laundering and its predicate offences to justice, as well as depriving them from the proceeds of criminal conduct.

Although the response rate to the survey from European countries was outstandingly high compared to other regions, balance in the geographical representation of national systems was given focus in the research process and substantive data was collected from non-European regions, which is reflected in this publication. In any case, the Siracusa International Institute, the EU AML/CFT Global Facility and the project's expert working group strongly encourage the continued development and sharing of legal mechanisms and best practices.



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6. Money laundering Offences

The most straightforward and universally accepted legal basis to both punish perpetrators of money laundering and recover the proceeds of crime is the **dedicated offence** which is present in practically every jurisdiction worldwide, due to the ratification of international instruments such as the Vienna and Palermo Conventions and the strong movement led by international organisations such as the FATF.

Article 3.1 of the UN Vienna 1988 Convention defines money laundering as follows:

> *"the conversion or transfer of property, knowing that such property is derived from any offense(s), for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in such offense(s) to evade the legal consequences of his actions."*

In a similar vein, Article 6 of the Palermo Convention provides that

"1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organised criminal groups;

(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party "9 in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;

(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances."

Similarly, FATF Recommendation 3 states that:

> *"3.1 money laundering should be criminalised on the basis of the Vienna Convention and the Palermo Convention (see Article 3(1)(b)&(c) Vienna Convention and Article 6(1) Palermo Convention).*
>
> *3.2 The predicate offences for money laundering should cover all serious offences, with a view to including the widest range of predicate offences. At a minimum, predicate offences should include a range of offences in each of the designated categories of offences. […]"*

According to the FATF report on the state of effectiveness and compliance with the FATF standards, published in April 2022, 93% of jurisdictions are in technical compliance with Recommendation 3. Similarly, nearly 85% of all FATF and FATF style regional body jurisdictions have implemented the technical requirements of all recommendations on Financial intelligence, money laundering investigations, prosecutions and confiscation.[42]

41. FATF, supra n.9, Figure 6.2.
42. Ibid.

From this data alone, one can deduce that **the offence of money laundering, as defined in the international norms mentioned above, is a universal tool against criminal economies.**

To obtain a conviction for this offence, three elements must be proven by the prosecution:

1) the accused has committed concealment, conversion or transfer operations on the property.;

2) the property are the proceeds of crime;

3) the accused did so with intent and purpose and/or the knowledge and that the property was the proceeds of crime or recklessness as to whether the property might be such (mens rea).

As explained in section 8, the main difficulty is related to the double **proof of the criminal origin of the property and the knowledge of this origin** by the accused. When the criminal proceeds concern things that are directly related to the offence being prosecuted (drugs, weapons, stolen property), this proof is generally easy to provide. Where the proceeds of crime are funds or securities into which these assets have been transformed, the situation is quite different. This evidence can quickly become a probatio diabolica, especially in jurisdictions where the prosecution is required to prove not only that the property is of criminal origin, but also that it is specifically derived from the offence being prosecuted, excluding all others. The prosecutor must also prove that the person being prosecuted knew of the criminal origin of the property which is in his possession. The complexity of modern money laundering schemes makes this proof exponentially more difficult as the funds move from hands to hands to obfuscate their illicit origin.

In the process of proving that property are the proceeds of crime, a first distinction can be made between jurisdictions in which there exists an **exhaustive** list of predicate offences for the offence of money laundering; and jurisdictions which adopt a **"threshold approach"**. The latter consider as potential predicate offences all offences that entail a maximum penalty above a certain threshold. Some respondents to the survey argued that the introduction of a "threshold approach" for predicate offences facilitated ML prosecutions as compared to the alternative.

While **many jurisdictions do not require prosecution to specifically identify the predicate offence** for ML prosecutions to result in a conviction, some, such as Poland or Chile, for example, do.

According to the Court of Appeal in Warsaw, for property to be considered as the proceeds of crime for the purposes of the offence of money laundering, it is not sufficient simply to establish that certain property is derived from any illegal activity or any undisclosed or "illegal" source. It is also not sufficient in this respect to indicate that the property is the proceeds of crime, some unspecified prohibited act or a certain group of offences (for example offences against property or tax fraud) without specifying the specific type of offence involved.[43]

This interpretation is tempered by other case law, including a judgement by the Circuit Court in Warsaw held that no conviction is required for the predicate offence, it is enough to prove its probability, e.g. in the form of procedural acts (decision on the presentation of charges, indictment, judgment conditionally discontinuing criminal proceedings) or by presenting relevant evidence to the court.[44]

Concerning the **intentional element**, some jurisdictions (such as Turkey and the Netherlands) consider that dolus eventualis is sufficient to establish the intentional element. Others like Brazil, Canada and Cyprus apply the theory of willful blindness to the intentional element of the offence of money laundering. Although examining all the complex nuances of these concepts goes beyond the scope of this publication, it is important to note that such degrees of proof for the intentional element are lower than full knowledge and/or intent. Indeed, they typically only require proof of the acceptance of a certain degree of risk.

In the same vein, in several jurisdictions including, among others, the UAE, Finland and the Netherlands, there exists an offence which could be called **"negligent money laundering"**, which applies to negligent acquirers of the proceeds of crime. This is a variant that appears when the suspect should have reasonably suspected that the property originated from a crime. For example, section 420quater of the Dutch Criminal Code reads as follows:

> *Culpable or negligent money laundering*
>
> *[...]*
>
> *a) Hides or conceals the true nature, the origin, the place where it was found, the disposal or the relocation of an object, or hides or conceals who the person holding title to the object is or who has it in his possession, whereas he should reasonably suspect that the object originates – directly or indirectly – from a criminal offence;*
>
> *b) Acquires, possesses, passes on or sells an object, or makes use of an object, whereas he should reasonably suspect that the object originates – directly or indirectly – from a criminal offence.*
>
> *2) Objects include all items of property and all property rights."*

43. Judgment of 20 May 2021 (II AKa 27/21)

44. Judgment of 21 May 2018 (XVIII K 155/15)

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6.1. The use of circumstantial evidence

6.1.1. Overview

A very common mechanism to facilitate the proof of the money laundering offence is the use of **circumstantial evidence**. Among the jurisdictions that have answered the survey, none have stated that the mechanism was not accepted in their national law.

The use of circumstantial evidence to deduce the **mens rea** is expressly mentioned in article 6, 2, (f) of the Palermo Convention:

> *"Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances."*

For example, in a drug trafficking and money laundering case in Chile,[45] the court considered that the intentional element of money laundering could be proven by circumstances such as *"the unusual increase in equity or the handling of amounts of money in cash that, due to their quantity and dynamics of the transmissions, that highlight operations that are strange to ordinary commercial practice, the inexistence of legal businesses that justify, due to their entity and importance , the increase in assets, and the verification of any link or connection with trafficking activities or with the persons or groups related to them."* [45bis]

In the same decision, the court states the following:

> *"These judges consider that the only way to prove the intentional element in this type of figure is through circumstantial evidence."*

However, the use of circumstantial evidence is not limited to proving the *mens rea*. Indeed, circumstantial evidence can also be used in the same way to prove the **illicit origin of property** (and the facts that lead to those two conclusions are often the same).

Examples that may flow from a police investigation include unusual, complex or non-transparent conditions of operations, such as evidence of the use of unregistered money service businesses (MSBs); drop-offs of bags, packages or suitcases of money; the placing of similar amounts of money through multiple banks; encrypted communications; the use of cryptocurrency and tokens; the bundling of large amounts of money by denomination in elastic bands; and vehicle trunk-to-trunk money transfers, among others. Most such indicators are internationally applicable, and additional indicators can be developed as appropriate for the national context. [46]

In the Netherlands, the Supreme Court determined in one of its first judgments after the implementation of the national money laundering legislation 28 September 2004 (LJN no. AP2124, HR 02679/03), that

> *"in order to prove that the object 'originates from any criminal offence' it is not required to prove that the object in question originates from a precisely identified crime. This also means that it is not necessary to prove by whom, when and where this crime was actually committed. […] It is not required that the object originates entirely from crime: an object that is partly financed with criminal money and partly with legal money is also considered to originate from crime".*

The Dutch courts then developed a systematic process to determine the criminal origin of assets in standalone money laundering investigations; the so-called 6 steps approach. The Supreme Court ruled that [46bis]

> *"For a conviction for money laundering it must be proven that the amount of money charged originates from any crime (predicate offence). For the element "originating from any crime" to be proven, it is not required that it must be possible to deduce from the evidence that the amount of money charged comes from a precisely specified crime. If, on the basis of the available evidence, no direct link can be established between the amount of money or property and a specific crime (step 1), it can nevertheless be considered proven that the amount of money or property originates from any crime, if, based on the facts and circumstances established in the criminal investigation/trial, there can be no other explanation than that the amount of money or property originates from any crime. It is up to the Public Prosecution Service to provide evidence for this (step 2). Prosecution must present facts and circumstances on the basis of which a profound suspicion of money laundering arises, including, for example, an unjustified increase in assets, or any other indicator for money*

45. Case N° 248-2018, Tribunal del Juicio Oral de Puente Alto

45 bis. Ibid.

46. In this regard, the typologies developed by the FATF provide precious guidance. Some national authorities also publish their own indicators list, cf. link to the Dutch AMLC website.

46 bis. https://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2013:BY8481

laundering (In the Netherlands ML typologies developed by the FIU are accepted by the court and can be used to ground suspicion). If prosecution succeeds in justifying a suspicion on which base the court can draw no other conclusion than that the asset originates from a crime, the defendant can be expected[47] to give an explanation of the origin of the of the money or property (step 3) and is required to provide 'a concrete, verifiable and not in advance highly unlikely explanation' that the object does not originate from crime (step 4). If a statement of the suspect is not made, despite all the evidence against him, the judge may include that circumstance in its evidentiary considerations and will usually result in a conviction for money laundering.

If the suspect gives the aforementioned verifiable statement, it is up to the Public Prosecution Service to conduct further investigation (step 5). The judge will then assess whether money laundering can be proven on the grounds that (it cannot be anything other than that) the object originates from some crime (step 6). [47bis]

The statement (or lack of it) as well as its truthfulness are then considered as circumstantial evidence and may be used as evidence. This is an application of the Murray case law of the European Court of Human Rights.[47ter] According to the ECtHR, although silence or refusal to answer a question cannot in itself prove guilt, if the evidence adduced by the prosecution clearly calls for an explanation, the judge may take into account the accused's silence when assessing the persuasiveness of that evidence as regards the accused's guilt.

In line with international standards,[48] several jurisdictions apply the principle that the offence of money laundering can be proven without the need to prove a particular predicate offence, as long as the elements of the crime are proven, the fact that the property is the proceeds of crime and that the accused was aware of this being demonstrated by the use of circumstantial evidence.

In Ireland, in the case "Director of Public Prosecutions versus Henry Alinta" the Court of Appeal interpreted the legal provision on money laundering as meaning that, while the burden of proof of the offence remains with the prosecutor,

"it is not necessary for the prosecution, in order to prove that the money is the proceeds of crime, to establish that a particular offence or a particular class of offence comprising criminal conduct was committed in relation to the money or that a particular person committed an offence comprising criminal conduct in relation to the money".

While the burden of proof remains with the prosecutor and does not shift to the accused at any stage, this does not prevent a court from concluding, on the basis of presumptions arising from the surrounding circumstances, that the ingredients of the offence are in fact proved beyond reasonable doubt by the prosecution. Therefore **there is no shifting the burden of proof**, simply a reliance on presumptions from the surrounding suspicious circumstances. In short, while it may be an evidentiary burden placed on an accused to address the "presumptions" (which is a standard element of criminal proceedings, where the accused can provide a defense to avoid conviction), there is no legal burden on the accused to do so.

47. Murray vs UK, ECtHR 8 February 1996

47bis. https://www.amlc.eu/step-by-step-plan-handout/

47ter. ECtHR, Murray v. United Kingdom, App. n. 14310/88, 28 October 1994.

48. See for example United Nations convention against corruption, (UNCAC) 2004 Article 23: *Stand alone ML*

Money-laundering offences established in accordance with this article are understood to be independent and autonomous offences and that a prior conviction for the predicate offence is not necessary to establish the illicit nature or origin of the assets laundered;

see also Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism , Warsaw Convention 16-5-2005*: Each Party shall ensure that a prior or simultaneous conviction for the predicate offence is not a prerequisite for a conviction for money laundering.*

48bis. Court of Appeal of Ireland, *DPP v Alinta*, 10 December 2019, [2019] IECA 368.

6.1.2. Compatibility with fundamental rights

The use of circumstantial evidence in the prosecution of the money laundering offence has been challenged in several jurisdictions, which have found that it did not breach the fundamental rights of the accused. Decision 1933/2007 of the Chilean Supreme Court insists on the necessity for prosecution to rely on circumstantial evidence, inferences and presumptions of fact:

> *"These inference process, as they are currently preferred to be called, allow the court, by means of a logical operation, to deduce from the factual material that the evidence provided has placed within its reach, the concurrence of the intentional components of the criminal event, since the object of the conviction of the court is an element that in its principle remains reserved in the inner self of the individual, so that its investigation requires an inference from external data. Regarding these considerations, there is no doubt that indirect evidence, indications or presumptions, undoubtedly have probative capacity and their use in the process will always be necessary, having to take into particular consideration that, as one author points out, "the criminal intention can only be put into indirect evidence".*

It is important to note that, while the use of indirect or circumstantial evidence can facilitate the proof of offences, the **burden of proof remains with the prosecutor**. Indeed, several jurisdictions have noted that, while the silence of the defendant may be considered as circumstantial evidence, a conviction cannot be made on that alone:

However no conviction can be based solely on the defendant's exercise of his right to silence or failure to mention a particular matter. An inference may only be drawn where the strength of the evidence at the time clearly calls for an explanation and that the only reason for a failure to give such an explanation is that the defendant had none to give.[49]

In Mauritius, it was held that:

Where the evidence for the Prosecution establishes a strong and unshaken prima facie case and the accused chooses not to swear to his statement and expose himself to cross examination, the trial Court is perfectly entitled to conclude that the Prosecution evidence remains unrebutted. It is of course true that the burden of proving the guilt of an accused squarely lies on the Prosecution and that the accused is entitled to remain silent. His right to silence, however, is exercised at his risk and peril when, at the close of the case for the Prosecution, a prima facie case has been clearly established since the burden then shifts on him to satisfy the Court that it should not act on the evidence adduced by the Prosecution.[49bis]

The compatibility of the use of circumstantial evidence with fundamental rights has been thoroughly assessed by the European Court of Human Rights in the **Zschüschen case**.[50] The court was asked to review a mechanism which finds its source in consolidated Belgian case law interpreting the indirect method of proof, according to which a conviction for money laundering may be obtained even without knowledge of the precise predicate offence, provided that the judge can, on the basis of factual data, exclude any legal origin for the property in question.

According to the "Zschüschen" decision, **the refusal of the defendant to provide explanations on the origin of property can be held against him** and does not conflict with the presumption of innocence nor the right to remain silent, now that there was other evidence in the case and the silence was not the sole basis for the conviction (this is in line with the reasoning mentioned above in the cases of the UK and Mauritius).

The Belgian Court of Cassation had previously considered that

> *"it is not required that criminal proceedings have been instituted for the predicate offence; it is not required that the predicate offence be specifically specified in the indictment; it is not even required that the criminal judge who has to rule on the laundering offence be aware of the precise predicate offence, provided that he can, on the basis of factual data, exclude any legal origin".*[51]

In the following paragraphs of the "Zschüschen" decision, the ECtHR assessed the compatibility of the mechanism with the presumption of innocence and the right against self-incrimination. After recalling that the possibility of drawing inferences from the accused's silence stemmed from an interpretation of the rules of evidence under Belgian law, the Court considered the following:

28. As to the degree of coercion exercised in the present case, the Court notes that the applicant made initial statements during an interrogation (see paragraph 3 above), but that he did not wish to provide further information about the origin of the money in dispute and was able to remain silent on that fact. His refusal to answer did not in itself constitute a criminal offence […].

29. Turning next to the role that the deductions played in the criminal proceedings and in the applicant's conviction, the fact that the applicant's refusal to prove his vague and unconvincing statements as to the origin of the money in issue was used, among other things, by the trial courts to conclude that any lawful origin of the money could be ruled out does not, in itself, constitute an infringement of the applicant's right to remain

49. See for example in the UK: Condron and Condron 1997 1 Cr App R 185; Condron v United Kingdom 2001 EHRR 1; Murray v United Kingdom 1996 22 EHRR 29.

49bis. Andoo v The Queen, 1989 SCJ 257

50. Zschüschen v. Belgium, supra n.30.

51. Cass. 25 September 2001, J.T., 2002, 660.

silent and not to contribute to his own incrimination. The Convention does not prohibit the silence of an accused person from being taken into account in finding him guilty, unless his conviction is based exclusively or mainly on his silence (see John Murray, cited above, § 47), which is clearly not the case in this instance. The domestic courts convincingly established a body of corroborating evidence to support the applicant's guilt, and his refusal to provide explanations as to the source of the money, when the situation called for an explanation on his part, only served to reinforce that evidence […].

The Court also noted that, if the accused's version had been true, it would not have been difficult for him to demonstrate the lawful origin of the property in question (§30) and that, **r given the weight of evidence against him, the conclusions drawn from his absence of justification were *"dictated by common sense"*, and *"[could not] be regarded as unfair or unreasonable"*.**

The Court then concluded that this mechanism did not shift the burden of proof onto the accused in a manner that violates the presumption of innocence.

6.2. Legal presumption of illicit origin for money laundering

6.2.1. Overview

A very similar mechanism is the legal presumption present in the French Criminal Code, which allows the illicit origin of the property to be presumed under certain conditions.

> *Article 324-1 of the Criminal Code, as modified by Order n°2000-916 of 19 September 2000.*
>
> *Money laundering is the act of facilitating, by any means, the false justification of the origin of the property or income of the perpetrator of a crime or offence which has provided the perpetrator with a direct or indirect profit.*
>
> *The act of assisting in the investment, concealment or conversion of the direct or indirect proceeds of a crime or offence shall also constitute money laundering.*
>
> *Money laundering is punishable by five years' imprisonment and a fine of EUR 375 000.*
>
> *Article 324-1-1 of the Criminal Code, as amended by Law n°2013-1117 of 6 December 2013.*
>
> *For the purposes of Article 324-1, property or income shall be presumed to be the direct or indirect proceeds of a crime or misdemeanour where the material, legal or financial conditions of the investment, concealment or conversion operation cannot have any other justification than to conceal the origin or beneficial owner of the property or income.*

Article 324-1-1 creates a **presumption of illicit origin of the property, under specific conditions**. In practice, this allows the prosecution, once the operations of conversion have been demonstrated (element 2 of the three elements of the money laundering offence described above), not only to deduce the mens rea (element 3) but also presume the illicit origin of the property (element 1) based on objective elements. To rebut this presumption, the defendant is expected to provide a plausible explanation of the legitimate origin of property.

To be triggered, this presumption requires that circumstances of law or fact suggest that the origin or beneficial owner of the impugned property has been obfuscated. More specifically, "the material, legal or financial conditions of the investment, concealment or conversion operation cannot have any other justification than to conceal the origin or beneficial owner of the property or income."

This mechanism has resulted in convictions in the following situations, among others:[52]

- A person attempting to cross the border while in possession of an envelope containing €49,500, without declaring it. Foreign authorities informed investigators that the defendant was currently under investigation for large-scale fraud. Furthermore, the defendant's account of his trip across borders was inconsistent and he could not provide plausible justifications of the reasons for the trip. The size of the undeclared sum was also considered to deduce that the material conditions of the operation to conceal this money could have no other justification than to conceal its origin or its actual beneficiary.

- A person was found with €224,000 concealed in the seat covers of vehicles, in a convoy and along a route designed to avoid controls, the banknotes having revealed strong traces of cocaine and the defendant having failed to justify the origin of the alleged debt he was discharging by carrying out the transport. While the defendant had provided several versions to explain the origin of the money, none of them was deemed convincing.

6.2.2.Compatibility with fundamental rights

The French Court of Cassation has consistently confirmed the compatibility of this mechanism with fundamental rights:

> *"On the one hand, the presumption of illegality, established by the contested text, of the origin of the property or income to which the offence of money laundering provided for in Article 324-1 of the Criminal Code relates, is not irrefutable, and, on the other hand, requires, in order to be implemented, the meeting of factual or legal conditions leading to the assumption of the concealment of the origin or of the effective beneficiary of this property or income"* [53]

52. Examples provided by a French prosecutor responding to the survey.
53. Cour de cassation, criminelle, Chambre criminelle, 9 décembre 2015, 15-90.019

In another case, the Court found that the Court of Appeal justified its decision when, in order to apply this presumption, it noted, on grounds of its own sovereign assessment, the factual circumstances allowing it to state that the material conditions of the operation to conceal the sum in possession of which the accused was found when he crossed the border cannot have any other justification than to conceal the origin or the actual beneficiary of this sum.[54]

6.3. Illicit enrichment

6.3.1. Overview

The mechanism discussed under this section consists in **laws under which the control by a person over an unexplained amount of wealth constitutes a criminal offence.** These laws are applied according to criminal procedures and attract criminal punishments.

Article 20 of the United Nations Convention against Corruption urges State Parties to introduce the offence of illicit enrichment into their legal orders. It is interesting to note that, in line with the Convention's objective of combating corruption , the offence mentioned is limited to public officers:

> *"Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is,* ***a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income****."*

In a 2021 study, such laws were found in numerous countries including Afghanistan, Republic of the Congo ,Jordan, Pakistan, Algeria, Côte D'Ivoire, Kuwait, Palestine, Antigua and Barbuda, Cuba, Kyrgyz Republic, Panama, Argentina, Djibouti, Lebanon, Paraguay, Armenia, Dominican Republic, Libya, Peru, Benin, Ecuador, Lithuania, Rwanda, Bhutan, Egypt, Madagascar, Saint Lucia, Bolivia, El Salvador, Malawi, São Tomé and Príncipe, Botswana, Eswatini, Mali, Sénégal, Brunei Darussalam, Ethiopia, Marshall Islands, Seychelles, Burkina Faso, Fiji, Mauritania, Sierra Leone, Cambodia, Guatemala, Mexico, Sudan, Chile, Guinea, Moldova, Tanzania, China, Guyana, Mongolia, Togo, Hong Kong, Haiti, Mozambique, Tunisia, Macau, Honduras, Nepal, Turkey, Colombia, India, Nicaragua, Uganda, Democratic Republic of Congo, Jamaica, Niger, Venezuela.[55]

In these jurisdictions, the prosecution of illicit enrichment presents a major advantage for the authorities over, for example, the prosecution of money laundering,[55bis] as the prosecutor does not have to demonstrate the commission of a predicate offence and not even the illicit origin of the property. Indeed, the prosecutor must only demonstrate:

1) the lawful income of the accused;

2) the amount of wealth that he actually controls;

3) the disproportion between the two.

These elements, combined with the absence of a "reasonable explanation" from the accused on the origin of those assets, cause the part of the accused's wealth that is both disproportionate and unjustified to be considered as illicit, and if the mens rea is also proven ("knowingly", as per the wording of article 20 UNCAC), he will face a conviction.

Sanctions for illicit enrichment offences vary across jurisdictions and may include imprisonment, fines or administrative sanctions. The convicted offender will also be required to return the illicitly acquired property. This can be done through various mechanisms such as compensation or restitution orders; or through confiscation.

Often, as in the case of article 20 UNCAC, illicit enrichment criminal offences are limited to public officials, which reflects the link between the introduction of this mechanism in national legislations and global efforts to fight corruption. The offence often still applies to **public officials** during a limited period after they have left office.[56]

However, there are jurisdictions where the offence of illicit enrichment applies to private persons as well, such as Lithuania:

> Unjust Enrichment
>
> *1. A person who holds by the right of ownership the property whose value exceeds 500 MSLs, while being aware or having to be and likely to be aware that such property could not have been acquired with legitimate income,*
>
> *shall be punished by a fine or by arrest or by a custodial sentence for a term of up to four years.*
>
> *2. A person who takes over the property referred to in paragraph 1 of this Article from third parties shall be released from criminal liability for unjust enrichment where he gives a notice thereof to law enforcement institutions before the service of a notice of suspicion and actively cooperates in determining the origin of the property.*
>
> *3. A legal entity shall also be held liable for the acts provided for in this Article.*
>
> **Note. Under Article 189(1), only the persons who hold the property having the characteristics specified in Article 189(1) of the Criminal Code after the entry into force of this Law shall be criminally liable.*[57]

54. Cour de cassation, criminelle, Chambre criminelle, 6 mars 2019, 18-81.059
55. A. Dornbierer, Illicit enrichment: a guide to laws targeting unexplained wealth, 2021, Basel Institute on Governance, 45.

55bis. Practitioners from certain other jurisdictions, however, consider that illicit enrichment can be covered by the offence of money laundering in their own legislation, particularly when the interpretation of circumstantial evidence allows for a shift in the burden of proof (cf. section 6.1.).

56. For example, in Guatemala, the offence applies also to former public officials until five years after they have left office (Article 448 of the Código Penal, Decreto Número 17-73 (modificado por Ley Contra La Corrupción, Decreto Número 312012).
57. Law On The Approval And Entry Into Force Of The Criminal Code, 26 September 2000 No VIII-1968 (As Last Amended On 23 April 2015 – No XII-1649), Article 189(1).

Even when they both apply to public officials and private citizens, illicit enrichment offences may provide **more guarantees to private citizens**, reflecting the origin of this mechanism born from anticorruption policies.[58] It is interesting to note that, in some jurisdictions, illicit enrichment offences are applicable to legal persons or even to aiders and abettors.[59]

In certain legal systems, the offence of illicit enrichment requires the prosecutor to demonstrate an additional element, namely a **"reasonable suspicion" or "reasonable belief"** that some form of criminal activity has occurred or that the wealth under scrutiny has been obtained through unlawful means. Such an offence can be found in the law of the United Arab Emirates:

> *"Anyone who acquires, ceals or conducts a transaction with funds when there is sufficient evidence or presumptions that the source of such funds is illegitimate, shall be punished with imprisonment for no less than three months and a fine of no less than 50,000 (fifty thousand) dirhams, or with one of the two sanctions. Upon issuing the conviction, the court shall order confiscation pursuant to provisions of Article (26) of the present Decree Law."* [60]

A similar offence exists in Singapore:[61]

> *Possessing or using property reasonably suspected to be benefits from drug dealing, etc.*
>
> *55.—(1) Any person who possesses or uses any property that may be reasonably suspected of being, or of in whole or in part, directly or indirectly, representing, any benefits of drug dealing or benefits from criminal conduct shall, if the person fails to account satisfactorily how the person came by the property, be guilty of an offence.*
>
> *(2) Any person who commits an offence under subsection (1) shall be liable on conviction —*
>
> *(a) if the person is an individual, to a fine not exceeding $150,000 or to imprisonment for a term not exceeding 3 years or to both; or*
>
> *(b) if the person is not an individual, to a fine not exceeding $300,000.*

It is interesting to note that both these examples do not only apply to civil servants but also potentially to private persons. In fact, both these provisions were introduced by laws aiming to fight organised crime and money laundering. However, this larger scope is counterbalanced by the additional element that the prosecutor must demonstrate, which confirms the tendency to provide more guarantees to the accused (compared to article 20 UNCAC) when the offence also applies to private citizens. That being said, a "reasonable suspicion", "reasonable belief" or "sufficient evidence or presumptions" are significantly lower degrees of proof than the canonical "beyond reasonable doubt" standard which would apply in a money laundering prosecution.

It is important to note that, under this mechanism, **the prosecution still has to properly demonstrate the disproportion between the amount of wealth enjoyed and the legal income of the accused**. This can be illustrated, among others, by the case of "Uganda vs Benard Davis Wandera"[62] where the prosecution's expert witness had not provided the details of the calculation of the value of the accused's property. The latter was then acquitted for that reason.

As mentioned above, a crucial element of illicit enrichment offences is the absence of justification by the accused of the origin of the property. Certain offences require the accused to **demonstrate the lawful origin of their property** according to a "balance of probabilities", while many others only require a 'satisfactory' or 'reasonable' explanation for the accused to avoid a conviction. For example, in Tanzania,

> *27. (1) A person commits an offence who, being or having been a public official*
>
> *(a) maintains a standard of living above that which is properly commensurate with his present or past lawful income;*
>
> *(b) owns property disproportionate to his present or past lawful income, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such property came under his ownership.*[63]

By contrast, in Nicaragua, the standard applied to the defense is that the explanation must be "reasonable". [64]

58. For example, the illicit enrichment offence in article 27 of the Bolivian "Ley De Lucha Contra La Corrupción, Enriquecimiento Ilícito e Investigación De Fortunas "Marcelo Quiroga Santa Cruz" (Ley No 004 from 31.03.2010) applies to public officials; while a separate offence in article 28 of the same law applies to private citizens if the conduct "affected the assets of the State".

59. See A. Dornbierer, supra n. 55, 49-51.

60. Article 25 bis of Federal Decree Law no. (26) of 2021 amending some provisions of the Federal Decree Law no. (20) of 2018 on combatting money laundering and counter terrorism financing. (The amendment was published in the Official Gazette on 26 November 2021).

61. Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992, as last amended by Act 18 of 2022.

62. Uganda Vs Benard Davis Wandera, Court Of Appeal, Criminal Appeal No.781 Of 2014.

63. Prevention and Combating of Corruption Act 2007, Section 27.

64. Article 448 of the Código Penal, Ley N°. 641, Aprobado el 13 de Noviembre de 2007

6.3.2. Compatibility with fundamental rights[65]

The use of the presumption that certain wealth or property were obtained through illegal means, placing the burden on the accused to prove the lawful origin of their wealth, may raise concerns as to the compatibility of these mechanisms with the presumption of innocence, a fortiori when certain jurisdictions impose explicit obligations on the accused to provide satisfactory explanations regarding the source of their wealth. Some mechanisms have thus been challenged on the grounds that it contravenes one of the fundamental requirements of the presumption of innocence principle, namely that the responsibility for proving the key elements of an offence must be that of the accusing party.

Some jurisdictions have considered that the **offence of illicit enrichment does not reverse the burden of proof** and that, consequently, the prosecution must prove all the elements of the offence.

In Lithuania, the Constitutional Court was petitioned to assess the compatibility of the illicit enrichment offense with the presumption of innocence principle as outlined in the Lithuanian Constitution. Noting that the Code of Criminal Procedure in Lithuania specifies that the burden of proving an illicit enrichment offense rests with the prosecutor, the court concluded that the burden of proof was not reversed, that the accused is under no obligation to prove the legitimacy of his enrichment and that he has the right to defend himself without providing evidence to disprove the offense.[66] The accused person has the right to defend themselves, provide evidence, and challenge the suspicions or charges against them. The court emphasised that the accused is not obliged to prove their innocence and that remaining silent cannot be considered as aggravating their situation in criminal proceedings.

When examining the formulation of the Lithuanian offence in question,[67] it is interesting to note that the conduct criminalised is the fact of owning property (whose value must exceed a certain threshold) *while being aware or having to be and likely to be aware that such property could not have been acquired with legitimate income*. In a sense, its construction may be closer to some of the money laundering offences discussed in previous Sections than to article 20 of the UN Convention against Corruption, in particular as it requires proof of the illicit origin of the property (*"such property could not have been acquired with legitimate income"*) and an intentional element (*"being aware or having to be and likely to be aware"*) which the prosecutor has to prove. A notable difference is that the offence seemingly applies to the proceeds of any unlawful act (which does not need to be identified, as long as legitimate sources of income have been excluded), as opposed to the common approaches where predicate offences are limited to particular crimes or categories of crimes (cf. supra page 18).

More relevant to offences that follow the construction of article 20 UNCAC is the Alsogaray case[68] in Argentina, where the court found that the offence did not entail any reversal of the burden of proof. The offence was formulated as follows:

> *Art. 268 (2): "Shall be punished with imprisonment or imprisonment from two to six years, a fine of fifty percent to one hundred percent of the value of the enrichment and disqualification for life, whoever, upon being duly requested, does not justify the origin of an appreciable patrimonial enrichment of his own or of a person interposed to dissimulate it, which occurred after the assumption of a public office or employment and up to two years after having ceased to hold it.*
>
> *It shall be understood that there has been enrichment not only when the patrimony has been money, things or goods, but also when debts have been cancelled or obligations that affected him have been extinguished.*
>
> *The person interposed to dissimulate the enrichment shall be punished with the same penalty as the perpetrator of the act.*

One of the key points examined by the Court was whether this provision reversed the burden of proof in a manner contrary to the presumption of innocence by basing the conviction on the absence of justification of the provenance of the assets by the accused. In its nuanced analysis, the Court clarified that the conduct criminalised was the act, for a public official, of increasing his wealth to an "appreciable" extent without objective justification for that enrichment. However, the element of "non-justification" does not stem from the lack of explanation by the accused during the trial, but by the absence of objective reason for the accused's enrichment, which the prosecutor has to prove.[69] This rationale is close to the one expressed by the French Court of Cassation regarding the "*non-justification of resources*" discussed in Section 6.4.2. In conclusion, the prosecutor needs to make a *prima facie* case demonstrating the appreciable increase in wealth and the objective absence of justification, after which the accused will have, as the manifestation of his right to defend himself and in line with the general principles of criminal procedure, the faculty to provide evidence to demonstrate that the increase was justified.[70] As a consequence, the provision does not reverse the burden of proof and does not contravene to the presumption of innocence and the right against self-incrimination.

65. See also the in-depth analysis in A. Dornbierer, supra n. 55, Sections 4.1-4.3.

66. Constitutional Court of Lithuania, Case no. 14/2015-1/2016-2/2016-14/2016-15/2016 - The Constitutional Court of the Republic of Lithuania in the name of the Republic of Lithuania ruling on the compliance of Paragraph 1 of Article 1891 of the Criminal Code of the Republic of Lithuania with the Constitution of the Republic of Lithuania 15 March 2017, no KT4-N3/2017

67. Cf. supra page 25.

68. Court of Cassation of Argentina, Cámara Nacional de Casación Penal, sala IV, 'Alsogaray', causa n°4787 (2005)

69. See the relevant passage: *"Pero esta injustificación, a la luz de todo lo expuesto, no es, por definición, la que proviene del funcionario cuando es requerido para que justifique ese enriquecimiento, sino la que resulta en principio de la comprobación -en base a las pruebas colectadas en el juicio- de que no encuentra sustento en los ingresos registrados del agente; y, en definitiva, cuando ese aumento del patrimonio excede crecidamente y con evidencia las posibilidades económicas provenientes de los ingresos legítimos del sujeto, es decir, sin justa causa comprobada."*

70. See the relevant passage: *"ni puede asignarse entidad delictiva en los términos de esta figura penal a la circunstancia de que el sujeto no conteste el requerimiento de justificación patrimonial que se le efectúa en un proceso judicial, ni a la insuficiente explicación acerca del origen del enrique-cimiento que realice en ese mismo marco, pues ambas situaciones deben reputarse manifestaciones del ejercicio del derecho de defensa en juicio, que debe ser garantizado al imputado libre de presiones y sujeciones de cualquier índole y no sometido a la coacción que implica la posibilidad de incurrir en responsabilidad penal".*

In other jurisdictions, illicit enrichment offences are deemed to contain presumptions that shift the burden of proof onto the accused to some extent. The European Court of Human Rights, in its landmark decision in "Salabiaku v France",[71] played a significant role in shaping the jurisprudence on the compatibility of reverse onus mechanisms in criminal proceedings with the presumption of innocence. In that case, the applicant was challenging legal provisions according to which, as he had been found in possession of prohibited goods while he was crossing the border, he had been presumed to have committed a smuggling offence and had been eventually convicted. The court held that the presumption of innocence is not an absolute right and does not prevent legal systems from implementing legislation that includes rebuttable presumptions of fact or law. However, such presumptions must be within reasonable limits and must safeguard the rights of the defense.[72] The court concluded that the conviction of the applicant was not incompatible with the presumption of innocence as, while there was a legal presumption that he had committed a smuggling offence, the national courts had considered all the evidence available to them in the case, none of which rebutted the presumption.

This position has been reaffirmed in subsequent court decisions[73] and has found support in domestic courts worldwide. The case of "Salabiaku v France" has been cited in judicial proceedings to determine the compatibility of offences including reverse onus mechanisms with the presumption of innocence.[74]

Different approaches and tests have been employed worldwide to assess the acceptability of such exceptions to the presumption of innocence principle can be justified. These issues include assessing whether the accusing party is still required to prove the fundamental facts of their accusation in proceedings under the law; evaluating whether the presumptions contained in the offence logically derive from the facts established by the accusing party; examining whether the infringement on the principle of the presumption of innocence imposed by the law serves the public interest; and considering whether the facts needed to disprove the presumption are within the particular knowledge of the accused.

The legitimacy of such provisions is often assessed by courts based on **whether the state retains the primary responsibility of proving the guilt of the accused,** even when the procedure includes a shift of the burden of proof. If the court determines that the state must establish the essential ingredients or foundational facts of the accusation before triggering such mechanisms, the law may be deemed compatible with the presumption of innocence principle.

In the case of "Attorney General v Hui Kin-hong"[75] in Hong Kong, the Court of Appeal followed such a reasoning as it evaluated the legitimacy of the following provision:[76]

> *"Possession of unexplained property*
>
> *(1)Any person who, being or having been the Chief Executive or a prescribed officer— […]*
>
> *(a)maintains a standard of living above that which is commensurate with his present or past official emoluments; or*
>
> *(b)is in control of pecuniary resources or property disproportionate to his present or past official emoluments,*
>
> *shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence"*

The Court of Appeal sought to determine the essential ingredients that a prosecutor must prove to trigger a presumption against the accused. The court concluded that the prosecutor must prove the amount of pecuniary resources and other property in the accused's control, the accused's total official emoluments, and establish a disproportion between the two. The court reasoned that, while Section 10 did trigger a shift in the burden of proof, contrarily to a previous case,[77] the shift was reasonable as the matters that the prosecution had to prove to trigger that presumption were more complex than a mere formality[78] Similar rationales were adopted by the Supreme Courts of India[79] and Pakistan.[80]

Another consideration for the acceptability of such presumptions is **whether they rationally flow from the facts** established by the prosecution. In the case of "Tot v United States",[81] the court considered a presumption that, in a state where firearms were usually registered, the possession of an unregistered firearm could create a presumption that it was acquired from another state. The court held that the presumption was not permissible because it did not satisfy the rational connection test. The court emphasised that a statutory presumption must have a rational connection between the fact proved and the ultimate fact presumed, and the inference between the two should be supported by common experience. Several national courts have adopted a similar reasoning regarding the rationality of presumptions that may give rise to convictions for illicit enrichment.[82]

71. ECtHR, *Salabiaku v. France*, App. n. 10519/83, 7 October 1988.

72. Idem, §28.

73. ECtHR, *Falk v. The Netherlands*, App. n. 66273/01, 19 October 2004; ECtHR, Krumpholz v. Austria, App. n. 13201/05, 18 March 2010.

74. *Attorney General v Hui Kin-hong* [1995] HKCA 351.

75. Ibid.

76. Section 10 of Cap. 201 Prevention of Bribery Ordinance, L.N. 58 of 1971.

77. *Attorney General v. Lee Kwong-kut* [1993] AC 951

78. *Attorney General v Hui Kin-hong* [1995] HKCA 351, §40.

79. *Vasant Rao Guhe vs The State Of Madhya Pradesh* (Criminal Appeal No.1279 of 2017).

80. *Syed Qasim Shah v the State* 2009 SCMR 790.

81. *Tot v United States*, 319 U.S. 463 (1943); see also *Leary v the United States* 395 US 6 (1969).

82. See infra "Unconstitutionality of the non-justification of resources in Italy: the reasonableness of presumptions"; see also Malawi Chief Resident's Magistrate's Court, *Republic v Wesley Mzumara* (Criminal Case No.47 of 2010); see also the "Wandera" case, supra n. 62.

When courts evaluate the legitimacy of infringements on the presumption of innocence principle, one crucial consideration is **whether the deviation serves to protect a broader societal interest.** Courts worldwide have sought to determine whether the underlying objective of a reverse burden is sufficiently compelling and in the public interest to justify an infringement on the presumption of innocence principle.

In the case of "R v Oakes", the Canadian Supreme Court reviewed a provision containing a presumption that a person found in possession of narcotic substances intended to traffic it. It made the following consideration:

> *"[The objective of the measure] must be sufficiently important to warrant overriding a constitutionally protected right or freedom. The standard must be high to ensure that trivial objectives or those discordant with the principles of a free and democratic society do not gain protection. At a minimum, an objective must relate to societal concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important."* [83]

In several jurisdictions that have conducted such a proportionality assessment, the need to fight corruption has been deemed as a sufficiently important public interest objective to legitimate the presumption present in illicit enrichment offences targeting public officials.[84]

The fourth major question pondered by courts is **whether a particular mechanism involving a shift in the burden of proof requires the accused to prove matters that are particularly within their own knowledge.** This concept is intimately linked to the rebuttable character of the presumption against the accused, which is one of the condition *sine qua non* allowing for an exception to the presumption of innocence. Indeed, the fact that the means of rebutting the presumption against the accused are particularly within his knowledge makes it possible to argue that the burden placed on him is not unreasonable.

In the case of "K. Veeraswami vs Union Of India And Others",[85] the Supreme Court of India assessed the legitimacy of the shift in burden entailed by the illicit enrichment offence of the Prevention of Corruption Act. It held that the burden can be, in certain cases, placed on the accused, particularly regarding matters "specially within his knowledge." The court stated that it would not be unreasonable, unjust, or unfair to impose such a burden on the accused, considering that the prosecution cannot reasonably be expected to know the affairs of a public servant found in possession of resources or property disproportionate to their known sources of income.[86] The particular knowledge by the accused of the facts that would rebut the presumption was also raised in the abovementioned "Hui Kin-Hong" decision.

Nevertheless, it is important to note that some courts have expressed concerns about relying solely on the accused's particular knowledge assessment when evaluating the acceptability of statutory presumptions in criminal cases. In "Tot v. The United States" the Court underscored that the defendant's to information cannot by itself justify the creation of a presumption: indeed, this would imply a complete reversal of the burden of proof in all criminal cases, as the accused is always at least as well informed on the facts, if not more, than the prosecution. For this reason, the court considered this aspect as a "corollary" test to be applied alongside the rational connection test discussed earlier.[87]

Another major constitutional challenge to illicit enrichment offences concerns the **right to silence and the privilege against self-incrimination**, which are fundamental principles aimed at ensuring fair judicial proceedings. These principles are rooted in the presumption of innocence. The right to silence prevents an accused person from being compelled to provide evidence during pre-trial or trial proceedings. It also safeguards them from adverse inferences that may arise from choosing to remain silent., Accordingly, the privilege against self-incrimination may permit individuals to refuse to answer questions or produce evidence that could implicate them in alleged actions or subject them to further legal proceedings.

The case of "Murray v the United Kingdom", [88] examined by the European Court of Human Rights, explored whether an accused person's failure to answer police questions or testify in court could lead to adverse inferences being made against them during proceedings. The court acknowledged that the right to remain silent and the privilege against self-incrimination are internationally recognised standards that are integral to the concept of a fair procedure. However, the court also concluded that these principles are not absolute and must be subject to certain conditions.

The court emphasised that it would be incompatible with these principles to base a conviction solely or primarily on the accused's silence or refusal to answer questions. However, it stated that an accused person's silence could be taken into account when assessing the persuasiveness of the evidence presented by the prosecution, as long as specific conditions are met. These conditions include providing appropriate warnings to the accused regarding the legal consequences of maintaining silence, establishing a prima facie case against the accused with direct evidence that, if believed, could lead a properly directed jury to conclude the essential elements of

83. *R v Oakes* [1986] 1 SCR 103, 76.

84. *Attorney General v Hui Kin-hong* [1995] HKCA 351; *N. Pasupathy v State* 2018 (1) MLJ (Crl) 745, 212.

85. Supreme Court of India, *K. Veeraswami vs Union Of India And Others* 1991 SCR (3)

86. Idem., 189.

87. US Supreme Court, *Tot v United States,* 319 U.S. 463 (1943), 467-469.

88. ECtHR, *Murray v. United Kingdom*, App. n. 14310/88, 28 October 1994.

the offense are proved, and demonstrating that the evidence against the accused necessitates an explanation that the accused should be able to provide. The Court expanded on the reasoning in "Murray" in "Zschüschen v. Belgium" and we refer to the discussion in Section 6.1 for more detail.

The case of "Vasant Rao Guhe vs The State Of Madhya Pradesh",[89] heard by the Supreme Court of India, briefly discussed the reversal of the burden of proof in illicit enrichment proceedings. It mentioned that if the prosecution fails to prove that a public servant, either individually or through someone else, possessed pecuniary resources or property disproportionate to their known sources of income during their period of office, the accused is not legally obligated to offer any explanation. In such cases, a public servant cannot be compelled to provide an explanation in the absence of proof regarding the allegation of disproportionate possession.

In the context of criminal law, **the principle against retroactivity** prohibits the punishment of an individual for an act that was not considered a crime at the time it was committed. However, despite these prohibitions, retroactive laws are common in legal systems worldwide, particularly in cases of tax evasion and avoidance. The application of retroactive laws in illicit enrichment cases varies among countries.

The Supreme Court of Lithuania strictly interpreted the ECHR and the Lithuanian Criminal Code, stating that defendants cannot be found guilty of illicit enrichment for acquisitions made before the law criminalizing illicit enrichment was enacted. The court reasoned that punishing an act that occurred before the law was in force would require retroactive application which is limited, in Lithuania, to an exhaustive list of offences contained in article 3 of the Criminal Code and did not feature the offence of illicit enrichment.[90]

Contrarily, the Ugandan Constitutional Court found no conflict between the illicit enrichment provision and the non-retroactivity article in Uganda's Constitution, allowing the law to target properties acquired before its enactment. Indeed, Section 31 of the Anti-Corruption Act n.6 of 2009, which provided for the offence in question, read as follows:

> *"(1)The Inspector General of Government or the Director of Public Prosecutions or an authorised officer, may investigate or cause an investigation of any person where there is reasonable ground to suspect that the person—(a)maintains a standard of living above that which is commensurate with his or her current or past known sources of income or property; or(b)is in control or possession of pecuniary resources or property disproportionate to his or her current or past known sources of income or property.*
>
> *(2)A person found in possession of illicitly acquired pecuniary resources or property commits an offence and is liable on conviction to a term of imprisonment not exceeding ten years or a fine not exceeding two hundred and forty currency points or both.*
>
> *(3)Where a court is satisfied in any proceedings for an offence under subsection (2) that having regard to the closeness of his or her relationship to the accused and to other relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused, or acquired such resources or property as gift or loan without adequate consideration, from the accused, those resources or property shall, until the contrary is proved, be deemed to have been under the control or in possession of the accused."*

As the material element of the offence is the current "possession" of illicitly acquired property in disproportion to "current or past known sources of income or property", the fact that property was acquired before the enactment of the law sanctioning the offence is irrelevant. As the Court notes:

> *"The Applicant tries to construe the "past known . . . property" language of S.31 the Anti-Corruption Act as meaning that if an asset was already in existence before the Anti-Corruption Act was enacted then that asset cannot be used to bring criminal 9 charges under the Anti-Corruption Act. Such an interpretation we find cannot be what was intended by the Legislature. Certainly the Act was passed in order to prevent persons from engaging in corrupt actions, per its name, not to regulate the timing of IGG investigations. The issue in our view is not the timing under which the possessions were acquired but rather whether such acquisitions are explainable by reason of the income and other sources of the alleged offender.*
>
> *[...]The offence looks to the present possessions of the applicant and had he disposed of them previously, then he would be outside the ambit of the said section."*[91]

89. *Vasant Rao Guhe vs The State Of Madhya Pradesh* (Criminal Appeal No.1279 of 2017).

90. Case no. 14/2015-1/2016-2/2016-14/2016-15/2016 - The Constitutional Court of the Republic of Lithuania in the name of the Republic of Lithuania ruling on the compliance of Paragraph 1 of Article 1891 of the Criminal Code of the Republic of Lithuania with the Constitution of the Republic of Lithuania 15 March 2017, no KT4-N3/2017, 18.1-18.4.

91. Idem, reference n.1, pp. 9-10.

6.4. Non-justification of resources

6.4.1. Overview

The offence contained in the following article of the French Criminal Code is somewhat similar to the illicit enrichment offences mentioned above but with stronger requirements. Indeed, the prosecutor must prove an additional element, namely that the accused is in "habitual relations" with a person involved in serious crimes.

> *Article 321-6 of the Criminal Code, as modified by Law n. 2006-64 of 23 January 2006.*
>
> *Failure to provide proof of resources corresponding to one's lifestyle or failure to provide proof of the origin of property held, while being in habitual relations with one or more persons who either are engaged in the commission of crimes or offences punishable by at least five years' imprisonment and provide them with a direct or indirect profit, or are the victims of one of these offences, is punishable by three years' imprisonment and a fine of 75,000 euros.*
>
> *The same penalties shall apply to facilitating the justification of fictitious resources to persons who commit crimes or offences punishable by at least five years' imprisonment and who benefit directly or indirectly from them.*

Under this provision, the prosecution does not have to prove the illicit origin of the resources, nor that the defendant knows of this illicit origin. The illicit origin of that property is presumed.

However, the prosecution must prove the habitual relations between the defendant and the person who is engaged in the commission of the crimes mentioned (serious crimes that generate profit); as well as the discrepancy between the resources and the lifestyle of the defendant. Being "engaged in the commission of" crimes has a broader sense and a lower standard of proof than "committing" crimes.

The presumption of illicit origin of the resources can be rebutted if the defendant can prove the licit origin of his resources. Most convictions are the result of in-depth investigations that demonstrate that the defendant led a lavish lifestyle which was categorically incompatible with his meager official income.

A typical application case would be the spouse or partner of a drug trafficker who cannot be proven to have aided and abetted in the trafficking, but who has on her bank account assets that are not commensurate with her legal income. This also applies to people who are in habitual relations with victims of serious profit-generating offences (i.e. prostitutes or victims of slavery) and therefore can be applied against the people who exploit those victims.

6.4.2. Compatibility with fundamental rights

Concerning the difference between reversing the burden of the proof and the establishment of an offence as referring to Art. L-321-6 of the French Penal Code, the Criminal Chamber of the French Court of Cassation considers that the offence of illicit enrichment is not linked to the reversal of the burden of the proof, since there is no presumption of penal responsibility in that article but it establishes a new specific offence, for which the proof belongs to the prosecution, which has to provide evidence that the suspect has not enough financial resources to have acquired all the assets and properties that belong to him.

At the regional level, the European Court of Human rights has found the provision to be compatible with the rights protected by the European Convention on Human Rights.

In "Aboufadda v. France", the investigation had revealed that the Aboufaddas' income was mostly derived from their son's activities as a drug trafficker and their assets, including their family house, were confiscated as per decisions of the French courts. The ECHR reviewed the compatibility of this confiscation with the right to peaceful enjoyment of property and the right to privacy and family life.

The court highlighted the "wide margin of appreciation" of States in assessing the use of property against general interest and considered the decision of the French courts as the expression of the legitimate will to severely punish what amounts to the concealing of illegally-acquired property, a fortiori given the gravity of the infraction that generated the proceeds (large-scale drug trafficking). The decision was further justified by the fact that confiscation of property obtained from the proceeds of crime is internationally recognised as a key element of effective criminal justice systems. Moreover, the defendants had the possibility not to be convicted by demonstrating the lawful origin of their income and property, but did not do so.

> *"Whoever, being in the personal circumstances indicated in the preceding Article, is caught in possession of money or valuables, or other things not appropriate to his status, and of which he does not justify the provenance, shall be punished by imprisonment from three months to one year".*

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6.4.3. Unconstitutionality of the non-justification of resources in Italy: the reasonableness of presumptions

Italy had introduced a similar offence to the non-justification of resources. Under article 708 of the Criminal Code,

The Italian Constitutional Court had validated the offence criminalising the unjustified possession of altered keys or picks by a person already convicted for a series of crimes against property (e.g. theft, robbery, breaking and entering, etc.) and admonished judges to make an assessment in concrete terms (by considering, for example, whether the person had been found during the day or at night wearing a balaclava and with a tool to break down the door).

In 1996, when it came to examining article 708, which punished the same type of individuals when caught in possession of assets not befitting their state of wealth, not befitting their status, the provenance of which they could not justify, the Court[92] reasoned that the offence was based on the assumption that those assets were the fruit of unlawful enrichment and that, therefore, that was, in some way, a consequential offence to a crime that had not been ascertained, but was, in some way, suspected. In that case, the court found that assumption to be historically obsolete, i.e. that the main source of illicit enrichment were no longer the classic crimes against property. Already in 1996, the main source of illicit enrichment were no longer crimes against property but the various forms of organised and white-collar crimes. Therefore, creating a presumption of illicit enrichment for people who had been convicted for crimes against property created an unreasonable disparity of treatment, which was the main ground on which the provision was declared unconstitutional.

Similar tests of the reasonableness of presumptions contained in illicit enrichment offences have been conducted in other countries by courts that reviewed the compatibility of illicit enrichment offences with fundamental rights and, contrarily to the example above, some presumptions have been considered as reasonable (cf. Section 6.3.2).

92. Corte Costituzionale, Sentenza 370/1996 del 17 Ottobre 1996.

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III. Recovery of the proceeds of crime

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III. Recovery of the proceeds of crime

6.5. Overview

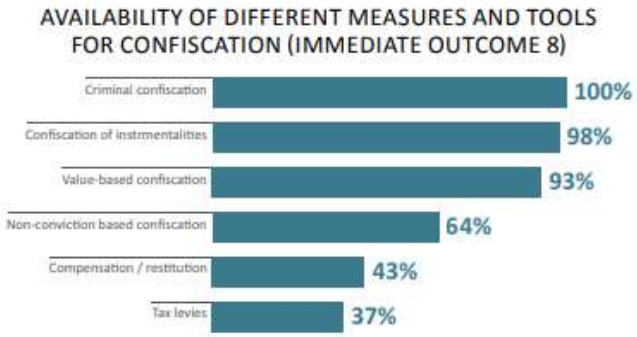
As previously mentioned, there exist a **variety of mechanisms and procedures** to retrieve the proceeds of crime, all of which provide different degrees of flexibility. The following sections will provide a review of the mechanisms that were mentioned by survey respondents.

Drawing from the standards set by international conventions, FATF Recommendation 4 provides that

> *Countries should adopt measures similar to those set forth in the Vienna Convention, the Palermo Convention, and the Terrorist Financing Convention, including legislative measures, to enable their competent authorities to freeze or seize and confiscate the following, without prejudicing the rights of bona fide third parties:*
>
> *(a) property laundered,*
>
> *(b) proceeds from, or instrumentalities used in or intended for use in money laundering or predicate offences,*
>
> *(c) property that is the proceeds of, or used in, or intended or allocated for use in, the financing of terrorism, terrorist acts or terrorist organisations, or*
>
> *(d) property of corresponding value.*
>
> *Such measures should include the authority to:*
>
> *(a) identify, trace and evaluate property that is subject to confiscation;*
>
> *(b) carry out provisional measures, such as freezing and seizing, to prevent any dealing, transfer or disposal of such property;*
>
> *(c) take steps that will prevent or void actions that prejudice the country's ability to freeze or seize or recover property that is subject to confiscation; and*
>
> *(d) take any appropriate investigative measures.*
>
> *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.*

A comprehensive evaluation conducted by the FATF and FATF-style regional bodies revealed that all countries within the Global Network have established laws and regulations for criminal confiscation (100%), with the vast majority also having provisions for confiscating instrumentalities (98%) and implementing value-based confiscation (93%). Although not mandated by FATF standards, a significant portion of the reviewed countries (37 out of 59) also allow for non-conviction-based confiscation.

It is interesting to note that, in many jurisdictions, there exist multiple mechanisms and procedures that can be applied concurrently by the authorities to recover the same assets, and the following section will detail some good practice on how authorities can address such overlaps.



6.6. Conviction-based models of confiscation

6.6.1. Criminal confiscation

Overview

This type of confiscation, present in virtually all countries in the world (see section 6.5) consists in the confiscation of certain property following a final conviction for a criminal offence. Such final conviction may also result from proceedings in absentia. Conviction-based confiscation is present in all surveyed jurisdictions. In several jurisdictions, confiscation is exclusively conviction-based (e.g. Turkey, UAE, Cyprus).

For example, the Canadian Federal Criminal Code provides for the following system:[93]

- Under Section 462.37(1), "subject to this section and sections

93. In the case of Canada, it is important to note that, due to the federal structure of the country, procedures such as non-conviction-based confiscation have been introduced at the State-level and coexist with the provisions cited here.

462.39 to 462.41, if an offender is convicted, or discharged under section 730, of a designated offence and the court imposing sentence or discharging the offender, on application of the Attorney General, is satisfied on a balance of probabilities, that any property is proceeds of crime obtained through the commission of the designated offence, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law."

- Section 462.37(2) deals with the situation where the property is not related to the offence of which the defender is convicted or discharged. The court "can" make an order of forfeiture of that property if it is "satisfied beyond a reasonable doubt, that the property is proceeds of crime".
- Under section 462.37(1)-the offender must be found guilty (and then convicted or discharged) of a designated offence; and there is property that is proceeds of crime and related to the offence for which the offender has been convicted or discharged; the burden on the prosecution is a balance of probabilities.
- Under section 462.37(2)-the offender must be found guilty (and convicted or discharged) of a designated offence; and there is property that is proceeds of crime, but not related to the offence for which the offender has been convicted or discharged; the burden of proof is beyond reasonable doubt.

Similar systems can be found in other common law countries such as the British Virgin Islands.[94] As a side note, this type of considerations typically do not apply to civil law countries as these systems do not include a hierarchy of standards of proof (see section 1).

Standard conviction-based confiscation has two forms: asset-based confiscation and value-based confiscation. Criminal confiscation can be limited to property which constitutes the direct proceeds or instrumentalities[95] of the criminal offence for which a person has been convicted (asset-based) but many countries (see section 6.5) allow for the confiscation of other assets of the convicted person (even acquired legally), the value of which corresponds to the value of those instrumentalities or proceeds (value-based confiscation).

Value-based confiscation, sometimes also called "equivalent value confiscation", is a legal construction which allows, when the property liable to confiscation cannot be represented,[96] to pronounce a monetary confiscation of an amount equivalent to that of the property subject to confiscation. In some countries, the law may only allow for equivalent value confiscation of property that has been identified and valued, but which cannot be represented for a specific reason. This is the case, for example, with Article 43 bis of the Belgian Criminal Code, introduced by the Act of 17 July 1990, which provides, with regard to the confiscation of the pecuniary benefits derived from the offence, that if these things cannot be found in the convicted person's property, the judge will proceed to evaluate them in monetary terms and the confiscation will relate to a sum of money that is equivalent to them. Other value-based confiscation procedures do not require the impossibility of representing the direct proceeds of criminal conduct and provide that the judge estimates the benefit realised by the offender from the offence for which he was convicted, then orders the confiscation of an amount equivalent to that estimate.[97]

Compatibility with fundamental rights

As this mechanism is almost ubiquitous across jurisdictions, it is in principle compatible with commonly recognised fundamental rights and constitutional principles. However, a case worth mentioning is Sun vs Russia,[98] where the European Court of Human Rights found that a Russian decision ordering the confiscation of a sum of money constituted a violation of the right to peaceful enjoyment of property under article 1 of Protocol 1 to the European Convention on Human Rights.

In that particular case, Sun had been convicted for smuggling foreign currency into Russia. After the conviction, the money in his possession when he crossed the border was confiscated on the basis that it had been "criminally acquired", that is that it constituted the proceeds of crime. However, the prosecution had not demonstrated nor even asserted that the property was of illicit origin. On the contrary, the investigation lent support to Sun's claim that the money had been lawfully acquired and the Russian case law related to the offence of foreign currency smuggling consistently considered that smuggled money constituted the "object" or "instrumentality" of the crime and not its proceeds. Consequently, as the confiscation of the object or instrumentality of the crime was not provided for neither in the criminal offence for which Sun had been convicted, nor in the confiscation procedure that was used, the European Court of Human Rights concluded that the confiscation had been ordered without a foreseeable legal basis and therefore represented a violation of Sun's right to property in breach of article 1 of Protocol 1 to the Convention.

6.6.2. Extended confiscation

Overview

Some jurisdictions include a system of **extended confiscation** based on a presumption that at least part of the income of a convicted offender is derived from criminal activity. This presumption is rebuttable and may be tied to a particular type of offence[99] and apply only to property acquired during the period where the offender is presumed to have benefitted from his criminal lifestyle. The presumption may also be

94. Proceeds of Criminal Conduct Act, Act 5 of 1997, last amended by Act 11 of 2017.
95. Assets or property used to facilitate the commission of that offence, such as motor vehicles or yachts.
96. Or realised.
97. See for example, in the UK, Section 7 of the Proceeds of Crime Act 2002.
98. ECtHR, *Sun v Russia,* App. n. 31004/02, 5 February 2009.
99. Occasionally referred to as "Lifestyle offences" such as Drug trafficking or human trafficking.

limited to property which are disproportionate to the offender's legal income.

This presumption is rebuttable and it is up to the defendant to prove the lawful origin of the property in question, lest these be confiscated. This system is very common in EU countries due to its harmonisation at the supranational level:[100]

> *"1. Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.*
>
> *2. For the purpose of paragraph 1 of this Article, the notion of 'criminal offence' shall include at least the following:*
>
> *(a) active and passive corruption in the private sector, as provided for in Article 2 of Framework Decision 2003/568/JHA, as well as active and passive corruption involving officials of institutions of the Union or of the Member States, as provided for in Articles 2 and 3 respectively of the Convention on the fight against corruption involving officials;*
>
> *(b) offences relating to participation in a criminal organisation, as provided for in Article 2 of Framework Decision 2008/841/JHA, at least in cases where the offence has led to economic benefit;*
>
> *(c) causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes if the child is over the age of sexual consent, as provided for in Article 4(2) of Directive 2011/93/EU; distribution, dissemination or transmission of child pornography, as provided for in Article 5(4) of that Directive; offering, supplying or making available child pornography, as provided for in Article 5(5) of that Directive; production of child pornography, as provided for in Article 5(6) of that Directive;*
>
> *(d) illegal system interference and illegal data interference, as provided for in Articles 4 and 5 respectively of Directive 2013/40/EU, where a significant number of information systems have been affected through the use of a tool, as provided for in Article 7 of that Directive, designed or adapted primarily for that purpose; the intentional production, sale, procurement for use, import, distribution or otherwise making available of tools used for committing offences, at least for cases which are not minor, as provided for in Article 7 of that Directive;*
>
> *(e) a criminal offence that is punishable, in accordance with the relevant instrument in Article 3 or, in the event that the instrument in question does not contain a penalty threshold, in accordance with the relevant national law, by a custodial sentence of a maximum of at least four years."*

For example, in Poland:[101]

> *"When sentencing for an offence whereby the offender has even indirectly obtained a substantial financial benefit, or from which a financial benefit has been or could have been derived, even indirectly, which offence is punishable by imprisonment for a term of 5 years or more, or committed in an organised group or association aimed at committing an offence, the assets that the offender took possession of, or to which any title was acquired, within 5 years prior to committing the same until a sentence, even a non-appealable one, is passed, shall be considered as a benefit derived from the offence, unless the offender or another interested party tenders evidence to the contrary.[...]"*

Similar legislation exists in other parts of the world: for instance, in Brazil,[102] for offenses for which the maximum penalty is higher than 6 years (this includes money laundering):

> *Art. 91-A. In the event of conviction for offenses to which the law assigns a maximum penalty of more than 6 (six) years of confinement, the loss may be decreed, as proceeds or income from the crime, of assets corresponding to the difference between the value of the convicted party's assets and that which is compatible with his lawful income. (Included by Law No. 13,964, of 2019)*
>
> *§ Paragraph 1 For the purposes of the loss provided for in the caput of this article, the assets of the convicted person shall be understood as all assets: (Included by Law No. 13,964, 2019)*
>
> *I - of his ownership, or in relation to which he has dominion and direct or indirect benefit, on the date of the criminal offense or received thereafter; and (Included by Law No. 13,964, 2019)*
>
> *II - transferred to third parties free of charge or for a derisory consideration, as of the beginning of the criminal activity. (Included by Law No. 13,964, 2019)*

100. Article 5 of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union

101. Art. 45 §2 of the Criminal Code.

§ 2 The convicted person may demonstrate the inexistence of incompatibility or the licit origin of the assets. (Included by Law No. 13,964, 2019)

§ 3º The forfeiture provided for in this article shall be expressly requested by the Public Prosecutor's Office, at the time the accusation is offered, indicating the difference ascertained. (Included by Law No. 13,964, 2019)

§ 4 In the conviction sentence, the judge shall state the value of the difference ascertained and specify the assets whose forfeiture is decreed. (Included by Law No. 13,964, 2019)

§ 5º The instruments used for the commission of crimes by criminal organisations and militias shall be declared forfeited in favor of the Union or the State, depending on the Court where the criminal action is proceeding, even if they do not endanger the safety of persons, morality or public order, nor offer serious risk of being used for the commission of new crimes. (Included by Law No. 13,964, 2019)

While the EU, Polish and Brazilian provisions indicate a "threshold approach" to the scope of extended confiscation, Japanese law limits such presumptions to a list of specific offences as part of the country's policy against drug crime.[103] This is reminiscent of the trends related to predicate offences of money laundering (see the discussion on page 23).

"Article 14

The proceeds of crime with regard to crimes prescribed in Article 5 are presumed as proceeds of drug crime if: the offender obtains the asset during the period of trade prescribed in Article 5, and the amount of the asset is unreasonably expensive in the light of the circumstances of the offender on work or receipt of legal benefits.

Article 5

A person committing one or more of following acts, or both following acts and acts prescribed in Article 8, in the course of trade, is subject to a sentence that combines either life imprisonment or imprisonment for a term not less than five years with a fine not exceeding 10,000,000 yen:

1) an act constitutes crimes prescribed in Articles 64, 64-2 (except possession of Diacetylmorphine or a Similar Substance), 65, 66 (except possession of a Narcotic other than Diacetylmorphine or a Similar Substance), 63 and 64 (except possession of Narcotic) of Narcotics and Psychotropics Control Act (Act No. 14 of 1953),

2) an act constitutes crimes prescribed in Articles 24 and 24-2 (except possession of cannabis) of Cannabis Control Act (Act No. 124 of 1948),

3) an act constitutes crimes prescribed in Articles 51 and 52 (except possession of opium) of Opium Act (Act No. 71 of 1954), or

4) an act constitutes crimes prescribed in Articles 41 and 41-2 (except possession of stimulants) of Stimulants Control Act (Act No. 252 of 1951)

Article 8

(1) A person, with intent to import or export controlled substance to or from Japan, importing or exporting drug or other goods to or from Japan which the person obtained or received as controlled substance is subject to imprisonment for a term of not more than three years or a fine not exceeding 500,000 yen.

(2) A person, with intent to transfer, receive or possess controlled substance, transferring or receiving drug or other goods as controlled substance, or possessing drug or other goods which the person obtained or received as controlled substance is subject to imprisonment for a term of not more than two years or a fine not exceeding 300,000 yen."

Interestingly, several countries have reported that extended confiscation is currently less used compared to other forms of confiscation (such as non-conviction-based confiscation where it exists), due to several reasons including the fact that it is limited to certain forms of crime; matters of procedure and mandates of the institutions involved; its temporal scope of application around the moment of the commission of the offence; and the relative novelty of the mechanism.[104] Despite this, stakeholders agree that its effectiveness and efficiency warrant raising the awareness of relevant criminal justice actors (such as prosecutors) and promoting its use. [105]

Compatibility with fundamental rights

In some jurisdictions (such as Brazil for example), extended confiscation is a recent introduction and the constitutionality of this mechanism has yet to be challenged. However, some lessons can be drawn from the experience of European countries. Indeed, due to the legislative power of supranational institutions, the region presents a unique legal environment where harmonisation has taken place between countries that belong to both the common law and civil law traditions, as was done in the field of extended confiscation.

102. Art. 91-A of the Penal Code, included by Law No. 13.964/2019

103. Act Concerning Special Provisions for the Narcotics and Psychotropics Control Act, etc. and Other Matters for the Prevention of Activities Encouraging Illicit Conducts and Other Activities Involving Controlled Substances through International Cooperation (Act No. 94 of 1991)

104. Such as in Finland, Hungary, Croatia, Malta, Portugal, Romania and Slovenia see Milieu Consulting, supra n. 36, 101.

105. Idem, 131-132.

In the case of "Phillips v. the United Kingdom",[106] the European Court of Human Rights considered whether the British mechanism of extended confiscation entailed violations of the defendant's presumption of innocence, his rights to a fair trial and against self-incrimination and his right to peaceful enjoyment of possessions.

The Court clarified that the presumption of innocence no longer applied once the accused was convicted of a relevant offense. In this case, the presumption was used by the national court to assess the appropriate amount for the confiscation order after a conviction and was not used in assessing guilt.

The Court also rejected the applicant's claims of violations of his right to a fair trial and the right against self-incrimination, as he was required to explain the legitimacy of his property. The Court found that the application of presumptions in the procedure provided sufficient guarantees for a fair trial, as the applicant had the opportunity to demonstrate an alternative lawful acquisition of the property.

Regarding the complaint concerning a violation of the right to peaceful enjoyment of property guaranteed by Article 1 of Protocol No. 1, the Court acknowledged that the law providing for such procedures was meant to deter individuals from taking part in in drug trafficking and deprive them of the proceeds obtained from such activities. The Court considered the amount covered by the confiscation to be proportionate, as it corresponded to the value of benefits derived by the applicant from drug trafficking in the preceding six years and was recoverable from the applicant's available assets. Therefore, the Court concluded that the intervention in the applicant's right to property was proportionate, and there was no violation.

This reasoning was followed in several constitutional reviews at the national level in the region, including in Cyprus[107] and Finland[108] among others. The latter's Parliament, for example, deemed that the presumption on which extended confiscation was based was compatible with the Finnish Constitution as:

1) it is not directed to the question of guilt;

2) the prosecutor must prove that the accused received funds during the period of commitment of the crime and the presumption of illicit origin of the property concerned must be grounded on objective criteria; and

3) once this presumption is established, unreasonable expectations are not set upon the defendant who is required to prove the lawful origin of the property concerned.

Importantly – and logically, in light of the considerations above - when a person has been partially convicted, extended confiscation does not allow for the confiscation of assets on the grounds that they are the proceeds of facts for which the person has been acquitted. In the case of "Geerings vs. the Netherlands,"[106bis] although Geerings had been convicted for several crimes, the confiscation order against his assets (based on a provision of the Dutch Criminal Code on extended confiscation)[106ter] was considered incompatible with the presumption of innocence. The reason was that the order covered an amount equal to the estimated sum of the benefits of all individual charges, including the facts for which he had been acquitted and assets which the prosecution had not proven that he possessed. That last part was deemed incompatible with the presumption of innocence:

> 46. Firstly, the Court of Appeal found that the applicant had obtained unlawful benefit from the crimes in question although in the present case he was never shown to be in possession of any assets for whose provenance he could not give an adequate explanation. The Court of Appeal reached this finding by accepting a conjectural extrapolation based on a mixture of fact and estimate contained in a police report.
>
> 47. The Court considers that "confiscation" following on from a conviction – or, to use the same expression as the Netherlands Criminal Code, "deprivation of illegally obtained advantage" – is a measure (maatregel) inappropriate to assets which are not known to have been in the possession of the person affected, the more so if the measure concerned relates to a criminal act of which the person affected has not actually been found guilty. If it is not found beyond a reasonable doubt that the person affected has actually committed the crime, and if it cannot be established as fact that any advantage, illegal or otherwise, was actually obtained, such a measure can only be based on a presumption of guilt. This can hardly be considered compatible with Article 6 § 2 (compare, mutatis mutandis, Salabiaku v. France, judgment of 7 October 1988, Series A no. 141-A, pp. 15-16, § 28).
>
> 48. Secondly, unlike in the Phillips and Van Offeren cases, the impugned order related to the very crimes of which the applicant had in fact been acquitted.

106. ECtHR, *Phillips v The United Kingdom*, App. n. 41087/98, 5 July 2001.

106bis. ECtHR, *Geerings v. the Netherlands*, App. 30801/03, Judgement of 1st June 2007.

106ter. Article 36e of the Dutch Criminal Code.

49. In the Asan Rushiti judgment (cited above, § 31), the Court emphasised that Article 6 § 2 embodies a general rule that, following a final acquittal, even the voicing of suspicions regarding an accused's innocence is no longer admissible.

50. The Court of Appeal's finding, however, goes further than the voicing of mere suspicions. It amounts to a determination of the applicant's guilt without the applicant having been "found guilty according to law" (compare Baars v. the Netherlands, no. 44320/98, § 31, 28 October 2003).

6.6.3. General confiscation

Overview

Like the previous models, general confiscation is still based on a conviction but is a penalty decoupled from the licit or illicit origin of the defendant's property. In French law, Article 131-21 al.6 of the Criminal Code provides that, in the event of a conviction, the court can order the confiscation of all or part of the convicted person's property, whether it is of legal or illegal origin. This form of confiscation only applies to convictions for the most serious offences, namely drug production and trafficking (art. 222-49 C. pén.); crimes against humanity (art. 213-1 C. pén.) and "crimes against the human species" (art. 215-1 and 215-3 C. pén.);, trafficking in human beings and procuring (art. 225-2555 C. pén.); terrorism (Art. 422-6 C. pén.); criminal conspiracy (Art. 450-5 Penal Code) and, interestingly for the purposes of this publication, non-justification of resources (Article 321-6 C. pén.)

This measure is optional and the judge may decide on the extent of the confiscation, which does not necessarily cover all of the convicted person's property. It has the undeniable advantage that, when the convicted person has benefited from the crimes he or she has committed, it is not necessary to prove that said property was derived from the crime. It goes even further, since it is not even necessary to prove that the offence has produced income or to estimate the amount of criminal income in order to confiscate it. The convicted person cannot even argue that the property is of lawful origin to oppose confiscation.

Other general confiscation laws can be found in Armenia, Kazakhstan, Kyrgyzstan, Latvia and Ukraine[109] It is interesting to note that, in these jurisdictions, this type of confiscation is typically considered as a penalty (see the discussion in Section 6.9). In those jurisdictions, this type of confiscation is also typically limited to serious, profit-generating crimes.[110] The law can also provide for exceptions where, in any case, certain goods or sums of money cannot be confiscated.[111]

Compatibility with fundamental rights

This procedure was challenged in the case of "Djordjević v. France"[112] where the European Court of Human Rights has unanimously declared the challenge inadmissible. The case concerned the confiscation of a building belonging to the applicant, who had been convicted of a repeat offence of criminal conspiracy, in application of an additional penalty allowing property to be confiscated in blanket fashion.

Invoking Article 1 of Protocol No. 1 (protection of property),

107. *Tekinder Pal v The Republic*, Criminal Appeal n. 4/2010.

108. Statement of the Legal Affairs Committee of the Parliament, 13/2021.113. Act of July 31, 1789, Sections 12, 36; 1 Stat. 39, 47

109. OECD, *Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia,* 2018, 51.

110. Idem, 52.

111. For example, Annex No. 1 to the Criminal Procedure Code of Latvia and Annex No. 4 to the Law of Latvia on the procedure of enactment and application of the criminal law contain exceptions which cannot be confiscated, such as wedding rings, pets and the monetary equivalent of one legal minimum monthly salary.

112. ECtHR, *Djordjević v. France*, App. n. 15572/17, 7 October 2021.

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> *"1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *2. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

the claimant argued that the measure constituted a disproportionate interference with his right to property, that the property had been lawfully acquired well before the commission of the offences sanctioned by the criminal court.

The ECtHR noted that the confiscation was based on Articles 450-1 and 450-5 of the Criminal Code, which provided an accessible and foreseeable legal basis aimed at combating organised crime by imposing a deterrent pecuniary penalty for participation in criminal conspiracy. The court acknowledged that the fight against organised crime served the public interest and that the confiscation of criminal property played an important role in the legal systems of various contracting states and at the international level. It recognised that confiscation served not only as a means to gather evidence of criminal activity but also as a separate penalty for an offense.

Considering proportionality, the ECtHR acknowledged that confiscation could involve some of an individual's property, even if those assets were not directly related to the offense or its proceeds. In this case, the court observed that the disputed confiscation was imposed as a penalty for particularly serious offenses committed as a repeat offense. The national courts had ordered a partial confiscation of the applicant's immovable property, taking into account the profits earned by the criminal organisation headed by the applicant.

Furthermore, the ECtHR noted that the applicant had been given the opportunity to present his case adequately before three levels of jurisdiction through an adversarial trial. He was assisted by a lawyer and had the opportunity to present all his arguments. Considering the considerable discretion of the respondent state in crime prevention policies, the court concluded that the disputed confiscation was not disproportionate in relation to the public-interest aim pursued.

The ECtHR thus found the application inadmissible as it determined that the confiscation of the applicant's property under the additional penalty provision was based on an accessible and foreseeable legal basis aimed at fighting organised crime. The court considered the confiscation proportionate, given the seriousness of the offenses committed and the profits gained by the criminal organisation. The applicant had the opportunity to present his case sufficiently in a fair trial before multiple levels of jurisdiction.

6.7. Non-criminal models of confiscation

6.7.1. Non-conviction-based forfeiture: overview

In non-conviction-based confiscation (NCB, also called "non-conviction-based forfeiture" or "in rem confiscation"), the focus is on seizing property rather than targeting individuals. This type of confiscation involves initiating proceedings to seize property that has been obtained through unlawful conduct. The assets are treated separately from their owners, and confiscation does not depend on the conviction of a specific person. Rather, the mechanism is underpinned by the rationale according to which, if property has been obtained through criminal activity, it should be forfeited to the state, regardless of the issue of guilt. As a result, in rem confiscation typically occurs within judicial proceedings that are separate from criminal proceedings.

The first modern use of civil confiscation can be found in the maritime law of the USA, as a sanction against the use of ships in customs violations.[113] The US Congress then expanded the forfeiture to the money generated by drug trafficking,[114] then to real property. [115]

The burden of proof is generally placed on the public authorities, such as the police or the prosecution service, who initiate the confiscation procedure.[116] However, in certain cases, the burden of proof may be shifted to the interested party (cf. Section 6.7.7.).

In the majority of cases, confiscating property without a criminal conviction does not require proof of guilt. The crucial factor is establishing a connection between the property and criminal conduct. It is often sufficient to prove the existence of a crime or ongoing criminal activity and a link between the property and such criminal conduct. Most jurisdictions consider these procedures as civil, although there are exceptions such as Germany, where NCB is considered as a criminal procedure.[117]

In countries, especially those following common law, that adopt the civil confiscation model, the standard of proof is usually based on the balance of probabilities.[118] This standard is also referred to as a 'preponderance of evidence' in certain countries like Bhutan.[119] There are still uncertainties regarding the uniform application of this

113. Act of July 31, 1789, Sections 12, 36; 1 Stat. 39, 47

114. 21 U.S.C. Section 881(a)(6)

115. 21 U.S.C. Section 853.

116. Or in some jurisdictions, designated public agencies.

117. Conference of the State Parties to the United Nations Convention against Corruption, *Procedures allowing the confiscation of proceeds of corruption without a criminal convic-*

standard across countries. Some countries clarify that the balance of probabilities still necessitates a decision beyond reasonable grounds, while others debate whether it could be a slightly higher standard in non-conviction-based cases compared to ordinary cases, sometimes known as an 'enhanced civil standard of proof.' [120]

6.7.2. Extinguishment of the right of ownership (extinción de dominio) in Colombia

Overview

Extinción de dominio is a form of non-conviction-based confiscation mostly present in some Latin American jurisdictions.[121] It is a civil action, acting directly on the goods and declarative in nature whereby the right of ownership of the defendant on a good is declared to be vitiated – and thus void – on the grounds that the property was acquired unlawfully. In Colombia, the mechanism was introduced by Law 333 of 1996, which was then repealed by Law 793 of 2002[122] which, chiefly, enshrines the full independence of this action from any criminal proceedings.[123] This independence was further consolidated by Law 1708 of 2014 which, in addition to codifying all the rules regarding *extinción de dominio*, provides for the creation of specialised jurisdictions with prosecutors and judges specialised in asset forfeiture.

This mechanism allows the prosecutor, as the custodian of public interest, to challenge a person's right of ownership on specific property before a civil judge on the grounds that it was not acquired through lawful income. Although there is technically no shifting of the burden of proof onto the defendant, the burden on the prosecution is lighter than in criminal proceedings (where the elements of the offence must be proven beyond reasonable doubt): in civil proceedings, the burden of proof is dynamic (or shared), which means that the defendant must assume an active role in protecting his challenged right of ownership and cannot merely make unsubstantiated assertions that his assets are not of illicit origin but must provide evidence of the lawful activities that have generated his income.[124] If the court is satisfied that the assets are of illicit origin, it declares the extinguishment of the defendant's right of ownership and orders the transfer of the property to the state or to its otherwise rightful owner (if he has been identified).

In Colombia, the declarative nature of *extinción de dominio* causes this action to be imprescriptible and retroactive, as the right of ownership is deemed to be vitiated ab initio. As a consequence, it can affect property acquired before the promulgation of the law introducing the action, or even before the adoption of the country's Constitution in 1991.

Compatibility with fundamental rights

The Constitutional Court reviewed the constitutionality of Law 333 of 1996, in particular as regards the potential infringement that it might entail to the right of property protected by the following articles of the 1991 Constitution:

> *"Article 34*
>
> *Punishments of exile, life imprisonment, and confiscation are prohibited.*
>
> *However, a judicial sentence may nullify ownership of property when same is injurious to the public treasury or seriously harmful to social morality."*
>
> *"Article 58*
>
> *Private property and the other rights acquired in accordance with civil laws are guaranteed and may neither be disregarded nor infringed by subsequent laws. When in the application of a law enacted for reasons of public utility or social interest a conflict between the rights of individuals and the interests recognised by the law arises, the private interest shall yield to the public or social interest.*
>
> *Property has a social dimension which implies obligations. As such, an ecological dimension is inherent to it. […]"*

The court highlighted that "one of the fundamental pillars of the Colombian State is constituted by work. The Constitution recognises and protects property obtained on the basis of work."[125] Hence,

> *"The right to property that the Constitution guarantees in Article 58 is that acquired in a lawful manner, in accordance with the requirements of the law, without harm or offense to individuals or the State and within the limits imposed by social morality. No one can demand guarantee or respect for his property when the title he holds is vitiated, since, if it contradicts the minimum legal and ethical postulates that society proclaims, the domain and its essential components lack legitimacy"* [126]

The court then found that, while the appearance of ownership must be presumed to correspond to reality as long as there has been no final

tion, Vienna, 6–10 September 2021, CAC/COSP/WG.2/2021/4, §81.

118. Australia, the Bahamas, Brunei Darussalam, Mauritius, New Zealand, the United Kingdom, the United States and Singapore; see Conference of the State Parties to the United Nations Convention against Corruption, *Procedures allowing the confiscation of proceeds of corruption without a criminal conviction*, Vienna, 6–10 September 2021, CAC/COSP/WG.2/2021/4, §81.

119. Ibid.

120. Ibid.

121. Besides Colombia, the mechanism is also present in Mexico (Ley Nacional De Extinción De Dominio, 9 de agosto de 2019, Última Reforma DOF 22-01-2020) and Peru (Decreto

judgement on the right, this appearance disappears as soon as the civil judge is satisfied that the goods were illicitly acquired. In this regard, the judge does not order the extinguishment of the right of ownership as much as find out that that right could not be recognised in the first place:

> *""In reality, the 'loss' referred to in the accused article is not such in the strict sense, since the right in question was not legally protected, but corresponds to the a posteriori externalisation that this was so, whereby the appearance of ownership existing up to the moment of being distorted by the judgment is extinguished or disappears. It is clear that, as long as such ruling is not final, it must be presumed that such appearance corresponds to reality, since to assume otherwise would imply disregarding the presumptions of innocence and good faith embodied in the Constitution, but once the ruling is executed, such appearance ends, being understood that substantially, and in spite of having been formally recognised, the right of ownership was never consolidated in the head of the person who claimed to be its owner"* [127]

Despite the fact that the action is initiated by a prosecutor, the non-criminal nature of the measure was also confirmed by the Constitutional Court in its case law. Note the following:

> *""The process of extinction of ownership does not have the same object of the criminal process, nor does it correspond to a sanction of that nature. Its autonomous nature, with strictly patrimonial consequences, is based on the same constitutional text and corresponds to the need for the State to discourage illicit activities and those contrary to the State patrimony and public morals, externalising, by means of a judicial sentence, that the person who passed for the holder of the right of ownership was not, due to the vitiated origin thereof, inasmuch as he could not allege any constitutional protection whatsoever. Thus, since the action is of an eminently real nature, the legislator could have entrusted its processing to a special jurisdiction, to the civil branch of the ordinary jurisdiction, or, as he did, to the officials listed in paragraph 1 of article 14, which is the subject matter of the review. It makes no sense, then, the alleged imposition that the legislator necessarily had to tie the judicial process corresponding to the criminal proceeding for illicit enrichment"* [128]

6.7.3. Civil confiscation in Georgia

Overview

Another example of civil confiscation can be found in the law of Georgia. Georgia established two procedures for property forfeiture: "criminal confiscation" and "administrative confiscation." Criminal confiscation is a general measure that involved depriving individuals of objects, instrumentalities, and proceeds derived from criminal offenses. It is imposed as part of the sentencing process following a final conviction that established the person's guilt. On the other hand, the administrative confiscation procedure, regulated by Article 37 § 1 of the Code of Criminal Procedure (CCP) and Articles 21 §§ 4 to 11 of the Code of Administrative Procedure (CAP), specifically aims to recover unlawfully acquired property and unexplained wealth from public officials, their family members, close relatives, and "connected persons," even without a prior criminal conviction of the official in question.

For administrative confiscation to be initiated, it is necessary that an official had been charged with offenses committed during their term in office that were against the interests of the public service, the concerned enterprise or organisation, or one of the following offenses: money laundering, extortion, misappropriation, embezzlement, tax evasion, or violations of custom regulations. This requirement applies regardless of whether the official is still in office or not.

Therefore, if a public official is accused of any of the mentioned offenses, and the investigating public prosecutor has a reasonable suspicion that the property belonging to the official, their family members, close persons, or "connected persons" might have been acquired unlawfully, the prosecutor can file a "civil action" with the court under Article 37 § 1 CCP. This action seeks the confiscation of the "ill-gotten" property and unexplained wealth.

Once the public prosecutor filed a civil action for confiscation, supported by sufficient documentary evidence, the burden of proof shifts to the respondent. If the respondent fails to refute the prosecutor's claim by presenting documents proving the lawful acquisition of the property (or the financial resources for its purchase) or the proper payment of taxes on the property, the court, after ensuring the substantiation of the prosecutor's claim, orders the confiscation of the property in question, as stated in Article 21 § 6 of the CAP.

According to Article 21 § 8 of the CAP, the purpose of administrative confiscation is to restore the situation that existed before the public official acquired the contested property through wrongful means. Specifically, the property confiscated in these administrative proceedings is to be returned to its legitimate owner(s), which could be a private individual or a legal entity, after satisfying the legal claims of all other third parties. If the legitimate owner cannot be determined during the confiscation proceedings, the property will be forfeited in favor of the State, according to Article 21 § 8 (1) of the CAP. Value confiscation was also possible under Article 21 § 8 (3) of the CAP, which states that

Legislativo N° 1373 sobre extinción de dominio, 4 de agosto de 2018), among others.
122. Official Gazette n. 45046, 2002.

if the property subject to forfeiture cannot be transferred to the State in its original form, the respondent will be required to pay monetary compensation equivalent to the value of the property.

This procedure does not require proof "beyond reasonable doubt" of the illicit origins of the property. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, is sufficient.

Compatibility with fundamental rights

In the **ECtHR case Gogitidze and Others v. Georgia**, no. 36862/05, Judgment of 12 May 2015, the applicants claimed that Georgia, through the use of the procedure mentioned above, had violated their right to property and their right to a fair trial, which are protected by the European Convention on Human Rights and its Protocols. The Court found that there had been no violation and that the mechanism was compatible with the abovementioned rights.

One of the applicants, who was a former Deputy Minister of the Interior and President of the Audit Office of the Autonomous Republic of Adjara, was charged with abuse of authority and extortion, among other offences. The day after, the prosecutor also filed a claim before the Ajarian Supreme Court for the civil confiscation of several of the applicants' assets. According to the evidence presented by the prosecutor, the property of all four applicants included several homes and vehicles and was valued at 450,000 euros while the first applicant had earned 7,667 euros in the two posts that he had held. Likewise, the other applicants (his family members) had not earned enough to legally acquire their property as well. After they failed several times to appear in court to justify the origin of their property, the court ordered its confiscation on the grounds that they had failed to discharge the burden of proof against them. After multiple appeals by the applicants, the Georgian Supreme Court and the Georgian Constitutional Court upheld the decision.

The Public Prosecutor's Office of the Autonomous Republic of Adjara (AAR) initiated proceedings before the Ajarian Supreme Court on August 26, 2004, seeking the confiscation of property that was wrongfully and inexplicably acquired from the applicants. This action was based on Article 37 § 1 (1) of the Code of Criminal Procedure (CCP) and Article 21 §§ 5 and 6 of the Code of Administrative Procedure (CAP). The relevant legislative provisions were adopted on February 13, 2004.

The public prosecutor alleged that there were reasonable grounds to believe that the salaries received by the first applicant, who served as Deputy Minister of the Interior from 1994 to 1997 and President of the Audit Office from November 1997 to May 2004, were insufficient to finance the acquisition of the property. The property in question had been acquired during the same period by the first applicant, his sons, and his brother.

At the national level, the case was reviewed by the Constitutional Court of Georgia. In his constitutional complaint, the first applicant largely restated the arguments he had previously presented before the Supreme Court of Georgia. He contended that the confiscation of his and his family members' property constituted a form of punishment without a final conviction establishing his guilt. He argued that he should not have been required to prove his innocence or the lawfulness of the disputed property. The first applicant also claimed that the confiscation violated his right to be presumed innocent of the corruption charges. He further asserted that he and his family had acquired the property in question prior to the enactment of the amendments on February 13, 2004, and thus retroactively applying those provisions to their case was unconstitutional. He contended that the confiscation procedure under the contested provisions of the Code of Criminal Procedure (CCP) and Code of Administrative Procedure (CAP) was arbitrary and violated the constitutional protection of his private property.

In its judgment on July 13, 2005, the Constitutional Court dismissed the first applicant's complaint as unfounded based on the following reasoning. Firstly, the court stated that, similar to Article 1 of Protocol No. 1 to the Convention, the Georgian constitution's protection of the right to property (Article 21 of the Constitution) did not preclude deprivation of property if it was lawful, pursued a public interest, and passed the proportionality test. The court emphasised that only lawfully obtained property enjoyed full constitutional protection, and in the first applicant's case, there was a legitimate suspicion regarding the lawful origins of the property that he and his family members failed to refute during the relevant judicial proceedings.

The Constitutional Court further clarified that the administrative confiscation proceedings provided for in the CCP and CAP could not be equated with criminal proceedings because they did not involve the determination of a criminal charge. Instead, such proceedings were considered a civil dispute between the State, represented by the public prosecutor, and private individuals. Given the civil nature of the proceedings, it was acceptable to shift the burden of proof onto the respondent, the second applicant. The Constitutional Court referred to comparative legal research and judgments of the European Court of Human Rights in relevant cases to support the notion that civil mechanisms involving the forfeiture of unlawfully obtained or unexplained property were not uncommon in Western democracies, including Italy, the United Kingdom, and the United States of America.

Regarding the alleged retroactivity of the amendment introduced on February 13, 2004, and its impact on the second applicant's presumption of innocence, the Constitutional Court ruled that since the proceedings were civil, rather than criminal, the criminal law guarantees mentioned did not apply. The court also concluded that the amendment did not introduce any new concept but rather regulated existing measures aimed at preventing and eradicating corruption in the public service in a more efficient manner. The Constitutional Court referred to the 1997 Act on Conflict of Interests and Corruption in the Public Service, which required public officials to declare their own property and that of their family and close relatives, as well as demonstrate that the declared property had been lawfully acquired.

The ECtHR decision emphasised the "wide margin of appreciation" of States in assessing the proportionality between, on the one hand, the interference with the right to property entailed by confiscation procedures and, on the other hand, their public interest aim of preventing unjust enrichment through corruption. It noted the magnitude of the corruption phenomenon in Georgia, according to international assessments, and emphasised that the introduction of civil confiscation in Georgian legislation had brought it more in line with international anti-corruption standards.

The Court noted that

> *"as regards property presumed to have been acquired either in full or in part with the proceeds of drug-trafficking offences or other illicit activities of mafia-type or criminal organisations, the Court did not see any problem in finding the confiscation measures to be proportionate even in the absence of a conviction establishing the guilt of the accused persons."* [129]

[The Court also found that it was] legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence which suggested that the respondents' lawful incomes could not have sufficed for them to acquire the property in question. Indeed, whenever a confiscation order was the result of civil proceedings in rem which related to the proceeds of crime derived from serious offences, the Court did not require proof "beyond reasonable doubt" of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1.

The domestic authorities were further given leeway under the Convention to apply confiscation measures not only to persons directly accused of offences but also to their family members and other close relatives who were presumed to possess and manage the ill-gotten property informally on behalf of the suspected offenders, or who otherwise lacked the necessary bona fide status." [130]

The Court also found that the confiscation order was not arbitrary because it had not been ordered based on a mere, unsubstantiated suspicion of the prosecutor, as the investigation had documented and established facts that confirmed the existence of a considerable discrepancy between their income and their wealth, which then became the basis for confiscation. Moreover,

> *" it was only reasonable to expect all three applicants – one of whom had been directly accused of corruption in a separate set of criminal proceedings, whilst the remaining two were presumed, as the accused's family members, to have benefited unduly from the proceeds of his crime – to discharge their part of the burden of proof by refuting the prosecutor's substantiated suspicions about the wrongful origins of their assets. Moreover, those civil proceedings for confiscation clearly formed part of a policy aimed at the prevention and eradication of corruption in the public service, and the Court reiterates that in implementing such policies, respondent States must be given a wide margin of appreciation with regard to what constitutes the appropriate means of applying measures to control the use of property such as the confiscation of all types of proceeds of crime."* [131]

Crucially, the Court made the following observation:

> *"Having regard to such international legal mechanisms as the 2005 United Nations Convention against Corruption, the Financial Action Task Force's (FATF) Recommendations and the two relevant Council of Europe Conventions of 1990 and 2005 concerning confiscation of the proceeds of crime (ETS No. 141 and ETS No. 198) (see paragraphs 55-65 above),* ***the Court observes that common European and even universal legal standards can be said to exist which encourage, firstly, the confiscation of property linked to serious criminal offences such as corruption, money laundering, drug offences and so on, without the prior existence of a criminal conviction."*** [132]

123. Article 4 of Law 793 of 2002.
124. Constitutional Court of Colombia, Judgement C-740, 2003.
125. Decision C-374, 1997.
126. Ibid.

6.7.4. Non-conviction-based forfeiture in Ireland

Overview

The Irish system of civil confiscation is similar in principle, although it presents some interesting peculiarities. The Proceeds of Crime Act (POCA)[133] applies to 'specified' property having a value of not less than €5,000, which directly or indirectly constitutes proceeds of crime, i.e. it operates in rem. Issues of evidence are determined by way of the civil, rather than criminal, evidentiary test, i.e. 'on the balance of probabilities'.

In the first stage of proceedings, the High Court may grant an interim order, ex parte, to freeze property on an application to it by a member of An Garda Síochána not below the rank of Chief Superintendent, once it is satisfied that this property constitutes directly or indirectly the proceeds of crime (Section 2).

In the second stage of proceedings, the court may thereafter grant an interlocutory order over such property on application on notice within 21 days, if it appears to the court that the said property constitutes directly or indirectly the proceeds of crime unless the respondent (or any other person) shows to the satisfaction of the court that the particular property does not constitute, directly or indirectly, proceeds of crime (Section 3).

Moreover, any person, including a victim, claiming to have a right to the property can make an application to the court to have this order discharged (Section 3(3)) and the court can vary a Section 2 or 3 order for the purpose of releasing funds for essential legal, business and living expenses (Section 6).

During these proceedings, the 'belief' of a member of An Garda Síochána not below the rank of Chief Superintendent shall be 'evidence' (Section 8). Also during proceedings, the court can make an order directing a respondent to furnish details of his earnings over the previous 6 years and to outline his property (Section 9).

It is important to note that any statement or affidavit submitted in compliance with such orders are, by statute, inadmissible in any subsequent criminal trial (Section 9). However there is no absolute prohibition on the admission of a statement of evidence or affidavit submitted by a defendant in the course of a Section 4 application as evidence before a trial court. The civil court however may make such orders.

Where an interim or interlocutory order is in force, the Act provides for the appointment of a Receiver to either manage the property or, as is more usual, to sell the property and lodge such proceeds to an interest bearing bank account pending a further order of the court (Section 7). After 7 years, the court is empowered to make a disposal order transferring all such property to the benefit of the Central Exchequer (Section 4).

The court is also empowered to make an order compensating any respondent should any order made under this Act be shown to have acted unjustly against such respondent (Section 16). It is arguable that this provision obviates the necessity for the Applicant to give an undertaking as to damages, as would ordinarily be required in the case of an application for Injunction.

While the "belief" of a member of An Garda Síochána is considered as evidence under the POCA, it does not trigger any presumption that the property in question constitutes the proceeds of crime. However, it can be used, alongside other evidence, to build *a prima facie* case arguing that the property is of illicit origin. In the case "F.McK v G.W.D.", Judge McCracken outlined the following process to guide the consideration of belief evidence:

As a result, in absence of any justification by the defendant regarding the provenance of the assets, the court may rely on the belief of the Chief to order the confiscation. However, without other corroborating evidence, it may not suffice as it is 'open to challenge' and not "conclusive".[135]

> *1. "He should firstly consider the position under Section 8. He should consider the evidence given by the member or authorised officer of his belief and at the same time consider any other evidence, such as that of the two police officers in the present case, which might point to reasonable grounds for that belief;*
>
> *2. If he is satisfied that there are reasonable grounds for the belief, he should then make a specific finding that the belief of the member or authorised officer is evidence;*
>
> *3. Only then should he go on to consider the position under Section 3. He should consider the evidence tendered by the plaintiff, which in the present case would be both the evidence of the member or authorised officer under Section 8 and indeed the evidence of the other police officers;*
>
> *4. He should make a finding whether this evidence constitutes a prima facie case under Section 3 and, if he does so find, the onus shifts to the defendant or other specified person;*
>
> *5. He should then consider the evidence furnished by the defendant or other specified person and determine whether it is satisfied that the onus undertaken by the defendant or other specified person has been fulfilled;*
>
> *6. If he is satisfied that the defendant or other specified person has satisfied his onus of proof then the proceedings should be dismissed.*
>
> *7. If he is not so satisfied he should then consider whether there would be a serious risk of injustice. If the steps followed in that order, there should be little risk of the type of confusion which arose in the present case."*[134]

127 Ibid.

128. Decision C-409, 1997.

129. ECtHR, *Gogitidze and Others v. Georgia*, no. 36862/05, Judgment of 12 May 2015, 107.

Compatibility with fundamental rights

The key case law on constitutional challenges to the POCA are the cases of "Gilligan v Criminal Assets Bureau",[136] "Murphy .v. GM PB PC Ltd"[137] and the joint hearing of the appeals for both these cases by the Supreme Court in "Murphy v. M(G)".[138]

Whereas the applicant argued that the abovementioned procedure was a criminal proceeding under the guise of a civil one, with the objective of circumventing the guarantees of conventional criminal procedure, the Court found that the proceedings were civil and not criminal in nature because

> *"There is no provision for the arrest or detention of any person, for the admission of persons to bail, for the imprisonment of a person in default of payment of a penalty, for a form of criminal trial initiated by summons or indictment, for the recording of a conviction in any form or for the entering of a nolle prosequi at any stage"*[139]

As to the argument that the POCA entailed an unfair reversal of the burden of proof the court in "Gilligan" noted that the shift was only triggered after the Criminal Assets Bureau had presented a prima facie case. Furthermore,

> *"Once it is accepted that proceedings are in fact civil there is no constitutional infirmity in a procedure whereby the onus is placed on a person seeking property to negative the inference from evidence adduced that a criminal offence has been committed."*[140]

The considerations of the judge in "Gilligan" regarding the right against self-incrimination resulted in the introduction by subsequent legislation of the safeguard in Section 9 POCA mentioned above.

Regarding the infringement to the right to property that POCA might entail, the court found that, while the consequences of the procedure may be onerous, they are "directly connected with the establishment to the satisfaction of the court that the property involved is in fact directly or indirectly the proceeds of crime".[141] Furthermore, the State has a 'legitimate interest' in the forfeiture of the proceeds of crime,[142] and the 'right to private ownership can not hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired or held.'[143]

Finally, as regards the principle of non-retroactivity of criminal punishment, the judge found that it had not been infringed as the acquisition of assets which derive from crime was not an illegal activity before the passing of the POCA and did not become an illegal activity because of the POCA.[144]

6.7.5. Preventive confiscation in Italy

Overview

The Italian legal system also includes a form of preventive confiscation, based on a rebuttable presumption. Preventive confiscation was introduced in the Italian legal order in 1982, at the same time as the criminal offence of "mafia association", and has long been one of the country's main tools to fight the mafia phenomenon. Indeed, this procedure reportedly leads to confiscation 90% of the time, as opposed to less than 50% for other types of confiscation (criminal, extended, NCB as part of criminal proceedings, etc.).[145]

The authorities may request the preventive seizure of property of a person who, on the basis of factual elements, is habitually involved in the commission of offences, habitually living off the proceeds of crime or commits offences that endanger physical or moral integrity, health or public safety. The court may order the seizure of property that the person controls, directly or indirectly, when the value of these property is disproportionate to the person's income or economic activity, or if, on the basis of sufficient evidence, there are reasons to believe that they are the result of illegal activity or money laundering. The defendant has the possibility to demonstrate the legitimate origin

130. Ibid.
131. Ibid., 108.
132. ECtHR, *Gogitidze and Others v. Georgia*, no. 36862/05, Judgment of 12 May 2015, 105.
133. Proceeds of Crime Act 1996.
134. .McK v GWD [2004] 2 I.R. 470, 70.
135. Gilligan v Criminal Assets Bureau [1997] IEHC 106, 160.
136. Ibid,
137. Murphy .v. GM PB PC Ltd [1999] IEHC 5.
138. Murphy v. M(G), [2001] IESC82.
139. Murphy v. M(G), [2001] IESC82, 107.
140. Gilligan v Criminal Assets Bureau [1997] IEHC 106, 106.
141. Ibid., 133.
142. Ibid., 134.
143. Ibid., 136.
144. Ibid., at [140].
145. Milieu Consulting, supra n. 36,107.

of that property and if it is not done within one year of the seizure, the court shall order its confiscation.

This mechanism is part of the "preventive measures" in Italian law, which only apply to particular categories of persons who are deemed dangerous to society. This dangerousness assessment is independent from any form of conviction and the standard of proof is lower than in criminal proceedings. It is conducted "based on factual elements", meaning from certain, objectively identifiable and therefore verifiable circumstances (indirect evidence) and excluding elements lacking concrete evidence, such as mere suspicions, inferences and conjectures.

There are four categories of dangerousness: qualified dangerousness (mafia and other serious crimes), common dangerousness (persons living off criminal activities or having a criminal lifestyle), subversives (people involved in terrorism or other activities aiming to subvert the State) and violent sports hooligans.

It is necessary to ascertain the effective social dangerousness of the subject, which is the intrinsic and indispensable reason for the measure of prevention, which includes the ascertained predisposition to commit crimes, even in the case of a person against whom no proof of guilt has been found. A global assessment of the subject's entire personality is required, resulting from all the social manifestations of his or her life and from the ascertainment of an unlawful and antisocial behaviour persisting over time, such as to require special vigilance on the part of the public security bodies. To this end, the judgement of dangerousness 'may also be based on elements justifying suspicion or presumption', which can include facts such as criminal records, the existence of recent reports of serious offences, the standard of living, the habitual company of convicted criminals and persons subject to prevention measures, and other manifestations objectively contrary to public safety.

Usually, the application of prevention measures also requires the dangerousness to be current, meaning that factual elements indicate that the person is likely to commit a crime, the prevention of which justifies the application of the measure. However, this does not apply to the preventive confiscation of article 24 of the Antimafia Code because it bases itself on the dangerousness of the property themselves. It is considered that property acquired by a dangerous person remains "tainted" until they are removed from the economy through confiscation, as they distort the economy even after their acquirer has ceased to be dangerous. Preventive confiscation can thus be applied to property as long as the prosecutor can demonstrate, based on factual elements, the dangerousness of the acquirer at the moment of the acquisition. For example, this allows for the preventive confiscation of the property of a deceased person if they were obtained at a time where that person had ties to mafia.

In addition to the dangerousness of the property, it is also necessary for the prosecutor to demonstrate, based on factual elements, that:

- the person, also through a third party, is the owner or that the assets are available to him in any capacity;
- the assets are disproportionate in value to the income, declared for direct tax purposes, or to the economic activity of the proposed person, or that they are suspected to be the proceeds of unlawful activities or constitute the reuse thereof.

The defendant has the opportunity to justify the legitimate provenance of the property seized. If he does not do so, the judge may order its confiscation.

Although requiring the defendant to justify the legitimate origin of the property may seem like a reversal – or a shift – of the burden of proof, it can be more accurately described as a lightening of the burden of proof. Indeed, the prosecutor does not start from the presumption that the seized assets are of unlawful source but he provides circumstantial evidence of their illicit origin. If the prosecution fails in doing so and even if the defendant does not provide any justification, the confiscation will not be ordered.

The defendant must indicate the factual elements from which the Judge can deduce that the asset has not been acquired with the proceeds of illicit activity, or that the acquisition was not disproportionate to his legal income. Providing an explanation (e.g. "I have received a donation from a relative") without concrete references therefore amounts to an 'apparent allegation' and will not be a sufficient justification.

Regarding the proof that "the person, also through a third party, is the owner or that the assets are available to him in any capacity", the prosecutor may presume that the defendant is the beneficial owner of property owned by the people in his household who are not financially independent. In contrast, with regard to all other natural or legal persons, specific evidence must be acquired as to the fictitious nature of the ownership by third persons.

The object of the measure is particularly extensive as it may include movable property, real estate, credits, shares, companies, etc. These must be assets belonging to the defendant, of which he is unable to justify the lawful provenance and which, even through an intermediary natural or legal person, he is found to own or control, in any capacity whatsoever and whose value is disproportionate to his income or economic activity or are suspected to be the proceeds of unlawful activities or was acquired through such proceeds.

As it is, in fact, an ante delictum measure, it disregards the ascertainment of a specific fact of crime or a conviction (the law expressly states that this procedure is independent from criminal prosecution).

Under certain conditions, it can also affect property that are owned by third parties unconnected with the crime.

Compatibility with human rights

This mechanism has been considered as providing the necessary guarantees to the rights of the defendant both at the national and regional levels. According to the Italian Court of Cassation,[146]

> *"the burden of proof regarding the disproportion between assets and properties and the income capacity, as well as the illicit provenance, to be demonstrated also on the basis of presumptions, is incumbent on the prosecution, while the faculty of offering contrary proof is recognised to the defending party"; […]*
>
> [in order for confiscation to be ordered] *"it is sufficient that there be a disproportion between the assets and the income reported by the defending party or evidence capable of giving rise to a well-founded presumption that the assets were acquired thanks to the proceeds of unlawful activities and that the defending party has failed to demonstrate the lawful origin of the money used to purchase such assets. Hence, in this regard, there is no reversal of the burden of proof, because the law links the presumption of the unlawful provenance of the assets to factual elements and not to the failure to allege their lawful provenance, the demonstration of which is capable of overcoming that presumption''.*

In the case "Arcuri and others v. Italy" before the European Court of Human Rights,[147] the first applicant was under suspicion of being affiliated with a criminal organisation engaged in drug trafficking. In response, the Turin public prosecutor's office commenced criminal proceedings against the applicant and sought the seizure of certain property. It was revealed through inspections conducted by the national anti-mafia brigade (DIA) that there was a disparity between the first applicant's financial resources and their lawful business activities and reported income. The applicants argued that the preventive confiscation measure violated their right to the peaceful enjoyment of their possessions.

The Court noted that:

> *The confiscation complained of sought to prevent the unlawful use, in a way dangerous to society, of possessions whose lawful origin has not been established. It therefore considers that the aim of the resulting interference serves the general interest (see the Raimondo v. Italy judgment of 22 February 1994, Series A no. 281-A, p. 17, § 30, and the Commission decision in the M. v. Italy case cited above, p. 59, at p. 100).*
>
> *In the same vein, the impugned measure forms part of a crime-prevention policy; it considers that in implementing such a policy the legislature must have a wide margin of appreciation both with regard to the existence of a problem affecting the public interest which requires measures of control and the appropriate way to apply such measures.*
>
> *In Italy, the problem of organised crime has reached a very disturbing level. The enormous profits made by these organisations from their unlawful activities give them a level of power which places in jeopardy the rule of law within the State. The means adopted to combat this economic power, particularly the confiscation measure complained of, may appear essential for the successful prosecution of the battle against the organisations in question (see the Raimondo judgment cited above, p. 17, § 30, and the Commission decision in the M. v. Italy case cited above, p. 101).*
>
> *Furthermore, the proceedings for the application of preventive measures were conducted in the presence of both parties in three successive courts – the District Court, the Court of Appeal and the Court of Cassation. In particular, the applicants, instructing the lawyer of their choice, were able to raise the objections and adduce the evidence which they considered necessary to protect their interests, which shows that the rights of the defence were respected.*
>
> *In addition, the Italian courts were debarred from basing their decisions on mere suspicions. They had to establish and assess objectively the facts submitted by the parties and there is nothing in the file which suggests that they assessed the evidence put before them arbitrarily. On the contrary, the Italian courts based their decision on the evidence adduced against the first applicant, which showed that he was in regular contact with members of criminal organisations and that there was a considerable discrepancy between his financial resources and his income. The domestic courts also carefully analysed the financial situation of the other applicants and the nature of their relationship with the first applicant and concluded that all the confiscated assets could only have been purchased by virtue of the reinvestment of [the defendant's] unlawful profits and were de facto managed by him, with the official attribution of legal title to the last three applicants being merely a legal dodge designed to circumvent the application of the law to the assets in question.*

146. Judgment Cass. pen., Sec., un., 26 June 2014, no. 4880.
147. ECtHR, *Arcuri and others v. Italy*, App. n. 52024/99, 5 July 2001,

6.7.6. Non-conviction-based confiscation within the scope of criminal proceedings

Confiscation without conviction within the context of criminal proceedings pertains to situations where criminal proceedings have been commenced concerning an offense that may result in economic gain but a conviction cannot be obtained due to the impossibility for the accused to undergo trial. Confiscation orders in such instances may still be authorised in limited circumstances, such as when the individual has died, is suffering from an illness[148] or has absconded. The rationale is that, had it been possible to conduct the trial, the proceedings could have resulted in a criminal conviction. In such procedures, the standard of proof of the illicit origin of the property subject to the confiscation order is typically the criminal standard (beyond reasonable doubt).

Like extended confiscation, this system is quite common in EU countries as it has been harmonised by Art. 4.2 of Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union:

> *1. Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.*
>
> *2. Where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.*

The limited scope of the harmonised procedure under the Directive reflects the compromise reached between Member States of the block that wished to disseminate the use of non-conviction-based forfeiture and the ones that resisted the introduction of a fully-fledged NCB confiscation procedure into their legal orders.

A similar type of procedure can be found elsewhere in the world, e.g. in Qatar:[149]

6.7.7. Unexplained wealth forfeiture

It is common, as explained above, for legal systems to employ **rebuttable presumptions** and some jurisdictions do so within NCB confiscation proceedings. "Unexplained wealth forfeiture" refers to non-conviction-based forfeiture procedures whereby forfeiture can be ordered on the grounds that there is an unjustified disproportion between the defendant's actual wealth and his lawful income. Importantly, these procedures do not require the authorities to demonstrate a link between the assets and criminal conduct. Nevertheless, they are typically integrated into their jurisdictions' policies against organised crime and/or corruption, underpinned by the rationale that, in such contexts, assets which are disproportionate to a person's legal income and whose origin cannot be justified are the proceeds of illicit activity. On the basis of this unjustified disproportion, the defendant will thus be ordered to pay a civil debt to the state.

Unexplained wealth confiscation mechanisms may also have a broader scope than forms of non-conviction-based (NCB) confiscation that may only apply to tangible property. It may encompass not only these property but also any financial contributions to a person's lifestyle, such as expenditures or services received. Unlike some other forms of confiscation, unexplained wealth forfeiture can extend its reach to intangible items that contribute to a person's quality of life, including the reduction of a debt.[150]

In some jurisdictions, such forfeiture can only be ordered if the enforcement agency can demonstrate to the court that there is a "reasonable suspicion" or "reasonable belief" that criminal activity has taken place. For example, in Kenya, a civil forfeiture order can be granted against the "unexplained assets" of a person, defined as follows:

> *""unexplained assets" means assets of a person—*
>
> *(a) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and*
>
> *(b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation."*[151]

Similarly, in the Australian jurisdiction of Queensland, the Supreme Court can issue a civil order under the Criminal Proceeds Confiscation Act for unexplained wealth, which is determined as the excess amount beyond a person's lawfully acquired wealth. However, such an order may only be issued if the court is satisfied that there is a reasonable suspicion that the person has engaged in one or more serious crime-related activities

148. Making him unfit to defend the proceedings, thus making it impossible for the trial, and potential confiscation order, to proceed.
149. Article (89) of Law No.: (20) of 2019 Promulgating the Law on Combating Money Laundering (ML) and Financing of Terrorism (FT).
150. A. Dornbierer, supra n. 55, 39.
151. Section 2 of the Anti-Corruption and Economic Crimes Act 2003.

or has acquired serious crime-derived property without adequate consideration, regardless of whether the person knew or suspected the property's illegal origin.[152]

Nevertheless, this threshold is typically lower than the "balance of probabilities" used in civil confiscation. Note Andrew Dornbierer on this point:

> *"Of course, while the definition of a 'reasonable suspicion' or 'reasonable belief' will depend on the jurisdiction, thresholds contained in [such laws] requiring the demonstration of a reasonable suspicion or belief of underlying criminality are arguably lower than those contained in other asset recovery laws such as [civil confiscation] laws – which require the state to demonstrate to a civil standard (e.g. on the balance of probabilities) that some sort of underlying criminality actually occurred, or more specifically, that an asset is either the proceeds of crime or was used in the commission of an offence. For instance, while general case law in Australia suggests that a reasonable suspicion is 'not arbitrary', and that 'some factual basis for the suspicion must be shown' to justify it, it also describes a reasonable suspicion as 'less than a reasonable belief, but more than a possibility' and suggests that the requirement to demonstrate such a suspicion does not necessarily imply that it needs to be well-founded or that all the grounds for suspicion must be factually correct. Moreover in Australia, the establishment of such a suspicion may rely on hearsay material or other material that may normally be inadmissible as evidence."*[153]

6.7.7.1 Unexplained Wealth Orders in the UK

Overview

In the UK, the Criminal Finances Act of 2017 introduced the mechanism of "unexplained wealth orders", whereby the High Court, upon application by an enforcement authority, may order a person to disclose information about specific assets that he owns. The mechanism has been inserted after Section 362 of the Proceeds of Crime Act 2002 (POCA) and constitutes an optional investigative step in the jurisdiction's civil forfeiture system.

> *"362A (1)The High Court may, on an application made by an enforcement authority, make an unexplained wealth order in respect of any property if the court is satisfied that each of the requirements for the making of the order is fulfilled.*
>
> *(2)An application for an order must—*
>
> *(a)specify or describe the property in respect of which the order is sought, and*
>
> *(b)specify the person whom the enforcement authority thinks holds the property ("the respondent") (and the person specified may include a person outside the United Kingdom).*
>
> *(3)An unexplained wealth order is an order requiring the respondent to provide a statement—*
>
> *(a)setting out the nature and extent of the respondent's interest in the property in respect of which the order is made,*
>
> *(b)explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met),*
>
> *(c)where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and*
>
> *(d)setting out such other information in connection with the property as may be so specified.*
>
> *(4)The order must specify—*
>
> *(a)the form and manner in which the statement is to be given,*
>
> *(b)the person to whom it is to be given, and*
>
> *(c)the place at which it is to be given or, if it is to be given in writing, the address to which it is to be sent.*
>
> *(5)The order may, in connection with requiring the respondent to provide the statement mentioned in subsection (3), also require the respondent to produce documents of a kind specified or described in the order.*
>
> *(6)The respondent must comply with the requirements imposed by an unexplained wealth order within whatever period the court may specify (and different periods may be*

152. Sections 89G and 89L of the Criminal Proceeds Confiscation Act 2002 (as amended by the Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013)

specified in relation to different requirements).

(7)In this Chapter "enforcement authority" means—

(a)the National Crime Agency,

(b)Her Majesty's Revenue and Customs,

(c)the Financial Conduct Authority,

(d)the Director of the Serious Fraud Office, or

(e)the Director of Public Prosecutions (in relation to England and Wales) or the Director of Public Prosecutions for Northern Ireland (in relation to Northern Ireland)."

According to Section 362B of POCA, to grant the order, the court must be satisfied that

1) there is reasonable cause that the respondent holds the property;

2) there is reasonable cause that the value of the property is greater than £50,000;

3) there are reasonable grounds for suspecting that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property; and

4) the respondent is a politically exposed person or there are reasonable grounds for suspecting that the respondent is, or has been, involved in serious crime or is connected to a person who is or has been so involved.

If the respondent fails, without reasonable excuse, to comply with the requirements of the order in relation to specific property, that property will be presumed to be recoverable through the POCA civil confiscation procedure (Section 362C(2)-(3)), unless the contrary is shown (i.e. the presumption is rebuttable). The respondent complies with the requirements imposed by an unexplained wealth order only if he complies, or purports to comply, with all of those requirements (Section 362D(7)(a)). According to Section 362F(1), statements made by the respondent under such an order cannot be used as evidence against him in criminal proceedings. However, the information disclosed can be used in subsequent civil confiscation proceedings.

Also of note, under Section 362E(1), a person commits an offence if, in purported compliance with a requirement imposed by an unexplained wealth order, the person makes a statement that he knows to be false or misleading in a material particular, or recklessly makes a statement that is false or misleading in a material particular. However, as with any criminal offence, it would need to be proven beyond reasonable doubt for the respondent to be convicted and punished, which is at odds with the purpose of unexplained wealth orders. Indeed, these are meant to be used to facilitate the collection of evidence when it would otherwise be difficult.

This mechanism is relatively recent and, so far, it has not been used in enough cases to draw conclusions as regards its effectiveness. On the one hand, analysts have raised concerns about certain elements of the law such as the vagueness of the concept of "purported compliance" or the technical difficulties encountered when applying it to complex ownership structures of legal persons (which in one case resulted in a major loss for the National Crime Agency).[154] It is also unclear how much weight will be given by the judge to the presumption under Section 362C(2)-(3). On the other hand, in the case of "Mansoor Mahmood Hussain", the order indirectly allowed the authorities to collect enough additional evidence to secure a substantive settlement.[155] In any case, this mechanism is certainly less powerful than models where the presumption of illicit origin is simply triggered by the disproportion between the defendant's wealth, lifestyle and resources and his lawful income (cf. infra).

Compatibility with fundamental rights

In the UK, the landmark case of "National Crime Agency v Zamira Hajiyeva"[156] before the High Court, followed by the subsequent case of "Zamira Hajiyeva v National Crime Agency"[157] before the Court of Appeal, constituted the first instance of a legal challenge against UWOs.

The High Court had granted a UWO "without notice" against Mrs. Hajiyeva, compelling her to disclose information regarding the origin of funds utilised for the acquisition of real estate property in London. The property was suspected to be derived from corrupt activities committed by her husband, the former chairman of the state-owned International Bank of Azerbaijan. She attempted to have the order discharged on several grounds, including her assertion that it violated her privilege against self-incrimination – despite the explicit prohibition to do so under Section 362F(1) of POCA.

Nevertheless, both the Court of Appeal and the High Court rejected Mrs. Hajiyeva's argument, maintaining the position that Parliament had intended to "abrogate" the privilege within the context of the UWO procedure. The courts further reasoned that applying the privilege against self-incrimination to such orders would render the process of UWOs meaningless, since their purpose is to compel the provision of

153. A. Dornbierer, supra n. 55, 36-37

154. See T. Keatinge, A. Moiseienko, and H. Wood, *Unexplained Wealth Orders: UK Experience and Lessons for British Columbia*, 2020, Royal United Services Institute; see also Kennedy Talbot QC, 'Proceeds of Crime and the Professional Trustee: The End of the Unexplained Wealth Order?', 30 April 2020 , https://www.33knowledge.com/current-awareness/proceeds-of-crime-and-the-professional-trustee-the-end-of-the-unexplained-wealth-order

155. NCA v Mansoor Mahmood Hussain et al [2020] EWHC 432 (Admin) [2020] 1 WLR 2145

156. National Crime Agency v Mrs Zamira Hajiyeva [2018] EWHC 2534 (Admin).

157. Mrs Zamira Hajiyeva v National Crime Agency [2020] EWCA Civ 108.

information.[158] Furthermore, both courts stated that the respondent did not face any real risk of being criminally prosecuted in the UK on the basis of those statements.[159]

6.7.7.2. Unexplained Wealth Orders in Mauitius

Overview

Under the the Good Governance and Integrity Reporting Act 2015 ("GGIRA") the Integrity Reporting Services Agency (IRSA) may apply for a non-conviction based confiscation. Since the application of the IRSA is civil (non-conviction based), the standard of proof is that of balance of probabilities. Importantly, it is not necessary for the IRSA to prove any connection between the property in question and any criminal activity. The IRSA can request any person to provide explanations on the origin of any property, and the burden of proof is on the defendant to prove that the property does not constitute unexplained wealth, defined as follows by Section 2 of the GGIRA :

> *"unexplained wealth" includes any property –(a) under the ownership of a person to an extent which is disproportionate to his emoluments and other income;(b) the ownership, possession, custody or control of which cannot be satisfactorily accounted for by the person who owns, possesses, has custody or control of the property; or(c) held by a person for another person to an extent which is disproportionate to the emoluments or other income of that other person and which cannot be satisfactorily accounted for;"*

The IRSA is not obliged to prove anything beyond the fact that the respondent owns or controls the disputed property. Section 3(5) of the GGIRA provides indeed for a complete reversal of the burden of proof of the lawful origin of the respondent's property:

> *"(5) Any application made under this Act shall constitute civil proceedings and the onus shall lie on the respondent to establish, on a balance of probabilities, that any property is not unexplained wealth."*

Section 5 of the GGIRA provides for the Powers of the IRSA in the following terms:

> *1. a) On receipt of a report under section 9(1) or (2), or on its own initiative, the Agency may, in writing, request any person to explain, by way of affidavit within 21 working days or any such longer period which the Director may determine, the source of any funds which the person owns, possesses, has custody or control of, or which are believed to have been used in the acquisition of any property;*
>
> *(b) Where the Agency does not receive a reply within the period specified in paragraph (a), it shall apply for a disclosure order under section 13.*

There is however no obligation on the person so requested to comply with such request from the IRSA. Should the person served with the request fail to reply, the IRSA may through an ex parte application seek a Disclosure Order from a Judge in Chamber in order to obtain information on property held by a person or by any other person on his behalf. Section 13 of the GGIRA stipulates the following:

> *The Agency may apply, in relation to a suspected case of unexplained wealth, to the Judge in Chambers for a disclosure order –*
>
> *(a) to obtain information on property held by a person or by any other person on his behalf; or*
>
> *(b) requiring any person to disclose the sources of funds used to acquire, possess or control any property*

Where the information obtained through the Disclosure Order is not to the satisfaction of the IRSA as to the legitimacy of the funds of the suspect, the IRSA reports it to an independent board, the Integrity Reporting Board, which oversees the process. If the Board concurs with the IRSA that the property constitutes unexplained wealth, it can recommend an application for an Unexplained Wealth Order. An affidavit is then sworn by the Director of the IRSA before a Judge in Chambers and requesting for the confiscation of the property concerned.

Where the Judge is satisfied with the application of the IRSA, an Unexplained Wealth Order is granted. If the order is neither subject to an appeal, nor discharged, the property recovered and confiscated vests in the IRSA. The IRSA appoints a liquidator to realise any confiscated property.

158. Mrs Zamira Hajiyeva v National Crime Agency [2020] EWCA Civ 108, 51; National Crime Agency v Mrs Zamira Hajiyeva [2018] EWHC 2534 (Admin), 110 -112.

159. Mrs Zamira Hajiyeva v National Crime Agency [2020] EWCA Civ 108, 50; National Crime Agency v Mrs Zamira Hajiyeva [2018] EWHC 2534 (Admin), 115.

However, where the Judge in Chambers cannot grant the application on the basis of the application made, he shall refer the matter to the Supreme Court.

Section 14 of the GGIRA provides for Unexplained Wealth Orders in the following terms:

> *Where the Board has reasonable grounds to believe that a person has unexplained wealth, it shall direct the Agency to apply to a Judge in Chambers for an Unexplained Wealth Order for the confiscation of that unexplained wealth.*
>
> *The Agency may amend an application for an Unexplained Wealth Order at any time before the final determination of the application by the Judge in Chambers where reasonable notice of the amendment is given to every person on whom the application has been served.*
>
> *Where an application is made under subsection (1), the Agency may apply for an order prohibiting the transfer, pledging or disposal of any property*

Finally, according to Section 16 of the GGIRA

> *Where the Agency makes an application–*
>
> *for an Unexplained Wealth Order; and the Judge in Chambers is satisfied that the respondent has unexplained wealth, he shall make an Unexplained Wealth Order or an order for the payment of its monetary equivalent.*
>
> *(1A) Where the Judge in Chambers makes an Unexplained Wealth Order for the confiscation of any virtual asset, the respondent shall further be ordered to disclose all such information to the Agency as is necessary in order to enable the recovery of the virtual asset.*

Compatibility with fundamental rights

The constitutionality of s.5 and s.16 of the GGIRA, which deal with the statutory request, confiscation of unexplained wealth and empowering the IRSA to confiscate someone's property without adequate compensation is presently contested before the Supreme Court on the grounds that it violates the fundamental rights and constitutional rights of the Respondent. A judgment on the merits of the case is being awaited in the matter of **Integrity Reporting Services Agency v Ramgoolam N. Dr GCSK FRCP SN.418/2018.**

The Judge in Chambers after considering the affidavits on record from both parties held as follows:

> *"I observe the following:*
>
> *i. the fact that there is an appeal pending before the Supreme Court against the judgment of the Intermediate Court in the criminal case lodged by the Director of Public Prosecutions against the present respondent, does not preclude the present civil proceedings. I am of the view that if an UWO is granted in the present application, this will not preclude the Intermediate Court, if the situation arises, from taking note of any previous UWO made by the Judge in Chambers and from taking the appropriate decision. As such, there cannot be any risk of duplicity of Orders. In any case, this issue is purely academic at this stage as the appeal has not been disposed of yet;*
>
> *ii.the objection raised regarding the "right to silence" is devoid of merit as the criminal proceedings before the Intermediate Court are over;*
>
> *iii. the point raised on behalf of the respondent that the present application is void ab initio for tack of authority is also devoid of merit. Learned Senior Counsel for the respondent wrongly submitted at paragraph 31 of his written submissions that the letter of the Board is unsigned and undated. This is not the case. Document D of the first affidavit of the applicant contains clear direction from the Board. It is signed by the Chairperson and the members and it is also dated;*
>
> *iv. the contention of the respondent regarding an alleged state immunity is also devoid of merit as there is no such immunity in our law in respect of a former Prime Minister;*
>
> *v. the fact that the applicant did not apply for a Disclosure Order prior to entering the present application is in no way fatal to this application. The law imposes such an obligation on the Agency only in cases where no reply is made to a statutory request. This is clearly not the case here. A reply was made by the respondent on 2s.01.18, and*
>
> *vi. the Annex Centurion cards cannot be assimilated to properties within the meaning of the GGIRA. A credit card*

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is a mere credit facility and cannot be the subject matter of a UWO.

the whole and after considering the submissions of all parties, I am of the view that the facts and circumstances of the present application are such that the Judge in Chambers cannot proceed to grant a UWO based on affidavit evidence only. I bear in mind the extreme nature and consequences of such an Order.

Indeed, the law has placed on the respondent the onus of proving on a balance of probabilities that the above-mentioned items do not amount to unexplained wealth. I note from the respondent's affidavit that he has in effect given an explanation as to the source of the monies, albeit not accepted by the Board. Therefore, it is desirable and in the interest of justice that the respondent be given the full opportunity to adduce evidence and explain to the Court the source of the monies, subject matter of the present application.

In addition, I am of the view that the applicant will also have the opportunity to discharge fully its legal duty under section 3(7) of the GGIRA namely to satisfactorily explain the exact point in time at which the monies, subject matter of this application, have come into the possession or under the control of the respondent bearing in mind the requirement of the GGIRA. As matters stand, this is not clear."

6.7.7.2. Unexplained Wealth Orders in Mauitius

So far, unexplained wealth forfeiture mechanisms have yet to be challenged before regional human rights jurisdictions. In Mauritius (cf. supra) and some other jurisdictions, however, their compatibility with the defendant's rights, chiefly the right to property, has been questioned.

In Kenya, the mechanism passed the review, as the courts found that, firstly, the unexplained wealth forfeiture procedure only required the defendant to explain the origin of his wealth after the authorities have discharged their part of the burden of proof (i.e. proving, on the balance of probabilities, that the assets were acquired at or around the time the person was reasonably suspected of corruption or economic crime and that their value is disproportionate to the person's known sources of income at or around that time); [160] and, secondly, the burden of proof in civil litigation was dynamic and required the party better able to prove a fact to shoulder the burden regarding that fact.[161]

In the jurisdiction of Western Australia, the law provides for a mechanism similar to the one described supra in Mauritius, whereby the enforcement authority only has to prove that a person controls a certain amount of wealth and then the onus shifts onto the defendant to prove, on a balance of probabilities, that his assets are of lawful origin:

"12(1) On hearing an application under section 11(1), the court must declare that the respondent has unexplained wealth if it is more likely than not that the total value of the respondent's wealth is greater than the value of the respondent's lawfully acquired wealth.

12(2) Any property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary." [162]

In the case "Director of Public Prosecutions v Morris",[163] the judge found that the mechanism was reasonable as it required the defendant to prove facts that were particularly within his knowledge, citing the following reasoning expressed in an earlier case:

"In my view a person who becomes the owner of substantial property by legitimate means ought reasonably to be expected to be able to prove that fact, on the balance of probabilities, without any great difficulties. If the route by which property came into the ownership of an objector is lawful, it will usually be documented in some way." [164]

The same reasoning[165] was adopted by the Parliamentary Joint Committee on Law Enforcement which reviewed the law in 2012 and concluded, on that basis, that unexplained wealth forfeiture was a "reasonable, and proportionate response to the threat of serious and organised crime in Australia"[166] provided that there were safeguards in place. Although unexplained wealth forfeiture has yet to be tested against regional conventions on Human Rights, one can note the approach adopted by the European Court of Human Rights in relevant cases (see also the other sections of this publication):

160. Ethics and Anti-Corruption Commission (The legal successor of Kenya Anti - Corruption Commission) v Stanley Mombo Amuti [2015] eKLR, 33.

161. Ibid.; This reasoning was upheld in Stanley Mombo Amuti v Kenya Anti-Corruption Commission (Civil Appeal No. 184 of 2018), see points 78-80 of the decision.

162. Criminal Property Confiscation Act 2000

163. Director of Public Prosecutions v Morris [No2][2010] WADC 148

164. Director of Public Prosecutions for Western Australia v Gypsy Jokers Motorcycle Club Inc (2005) WASC 61, 68

165. Parliamentary Joint Committee on Law Enforcement, Parliament of Australia, Inquiry into Commonwealth Unexplained Wealth Legislation and Arrangements (March 2012), 2.23-2.24.

166. Ibid.

In a number of cases the Court examined under Article 1 of Protocol No. 1 various measures taken for the purposes of combating unlawful enrichment from the proceeds of crime. In such cases, States have a wide margin of appreciation in implementing policies to fight crime, including confiscation of property that is presumed to be of unlawful origin (Raimondo v. Italy, § 30; Riela and Others v. Italy (dec.); Arcuri and Others v. Italy (dec.); Gogitidze and Others v. Georgia, § 108), property purchased with illicit funds (Ulemek v. Serbia (dec.)), proceeds of a criminal offence (productum sceleris) (Phillips v. the United Kingdom; Silickienė v. Lithuania; Gogitidze and Others v. Georgia), property that was the object of the offence (objectum sceleris) (Agosi v. the United Kingdom; Sun v. Russia; Ismayilov v. Russia), or property that had served, or had been intended to serve, for the commission of the crime (instrumentum sceleris) (Andonoski v. the former Yugoslav Republic of Macedonia; B.K.M. Lojistik Tasimacilik Ticaret Limited Sirketi v. Slovenia; S.C. Service Benz Com S.R.L. v. Romania; Butler v. the United Kingdom (dec.); Markus v. Latvia, § 69, and Todorov and Others v. Bulgaria, §§ 189-199, for the recapitulation of different situations).[167]

Also relevant, certain systems include legal or institutional safeguards to prevent the misuse of unexplained wealth forfeiture mechanisms. Such safeguards include the possibility for the judge to refuse to order the defendant to pay if such an order would not be in the public interest,[168] oversight and review of the use of the law by a Parliamentary Committee,[169] exceptions based on good faith,[170] a review of the case by an independent board before applying for forfeiture,[171] the prohibition of using the information disclosed during the civil procedure in subsequent criminal proceedings,[172] or the prohibition to use the mechanism against public officials during electoral periods.[173]

6.8. Taxation of the proceeds of crime

One relatively novel remedy that has been effective in some jurisdictions is the taxation of the proceeds of crime. It is important to distinguish this concept from the prosecution of the criminal offence of tax evasion itself, and the sanctions that may follow conviction. The proceeds themselves are simply seen as income, as susceptible to taxation as any other income, thus becoming subject to an assessment tax and collection like any other tax. Two questions immediately arise:

The first relates to a concern as to whether the taxation of the proceeds of crime was appropriate as it might appear to legitimise such criminal activity. Illegally acquired gains are taxable, according to the judge-made law of common law countries, yet many revenue codes are surprisingly silent on the subject.

For a short while, though, things were different in the USA. Congress received its legislative power to tax 'incomes from whatever source derived' with the passage of the 16th amendment in 1913. In the same year, a tax was imposed on income derived from 'any lawful business carried on for gain or profit'. In 1916, without debate, Congress omitted the word 'lawful' — substituting an unqualified form of words which still endures.[174]

In Ireland, while historically there were some judicial concern as to whether illegally acquired gains were taxable, the question was clarified by the enactment of s.19 of the Finance Act, 1983 which makes profits unlawfully derived assessable to tax. Furthermore, s.94 makes provision for the imposition of penalties on persons who knowingly or willfully fail to comply with any provision of the Tax or Customs Acts relating to the making of returns, the production of books and documents, or obstructs or interferes with Revenue officers carrying out their statutory duties or exercising their statutory powers.

167. European Court of Human Rights, Guide on Article 1 of Protocol No. 1 to the Europeanourt of India, K. Veeraswami vs Union Of India And Others 1991 SCR (3)

168. See for example, in Ireland, sections 3(1) and 4(8) of POCA 1996 respectively granting courts the faculty to refuse to make interlocutory or disposal orders if there is a "serious risk of injustice".

169. See in Australia, at the federal level, the Proceeds of Crime Act 2002, Section 179U

170. Serious and Organised Crime (Unexplained Wealth) Act 2009 of South Australia, Section 9(11).

171. See the example of Mauritius in section 6.7.7.2.

172. Proceeds of Crime Act 2018 of the Bahamas, Section 75(3); see also, inter alia, section 6.7.4. supra and section 7. infra.
US Supreme Court, Tot v United States, 319 U.S. 463 (1943), 467-469.

173. See in the Philippines, Republic Act No. 1379, An Act Declaring Forfeiture in Favor of the State Any Property Found to have been Unlawfully Acquired by any Public Officer or Employee and Providing for the Proceedings Therefor (18 June 1955), Sections 2 and 6.

174. Glover, J. (1997), "Taxing the Proceeds of crime", Journal of Money Laundering Control.

175. https://www.lawreform.ie/_fileupload/Reports/rProceedsofCrime.html

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In the United Kingdom, Section 317 of the Proceeds of crime Act 2002 permits the National Crime to take over "general Revenue Functions", in other words the role of Tax Collector traditionally occupied by HMRC. This power allows NCA to carry out the role of tax collection and recover tax due from profitable criminal activity. There is no requirement for a criminal conviction.

A second natural question is that taxation is only designed to collect a proportion of income, never the total amount. This, however, is to ignore the practicalities of investigations into the activities of organised criminal gangs. The identification of the actual income may occur many years after its generation, accordingly leaving any tax assessment the subject of both significant interest and penalties for the late payment of the tax due. Experience has shown that such assessments, when combined with penalties and interest usually come close to, and occasionally exceed, the illegal profits generated.

Taxation of the proceeds of crime in Ireland

The following is a brief analysis of the Irish position and some of the questions that were considered by the courts.

The question of using the taxation code as a method of sequestering the proceeds of crime to the state was initially considered by the law reform Commission, in its 1991 report.[175] Note the following:

> *It was urged upon us in the course of our consultations that the various powers available to the Revenue Commissioners might provide a suitable model for a statutory scheme of tracing and confiscating the proceeds of crime. It should be noted, however, that none of these provisions enable the Revenue Commissioners to freeze a person's assets or appoint a receiver over them without at least some pre-conditions being satisfied.*
>
> *The Revenue have certainly been given extensive powers by the legislature to collect taxes and duties. The tracing of income and the sources of income is a similar exercise to the tracing of income from crime, its disposal and translation into assets. But it is a mistake to assume that the Revenue Commissioners are possessed of or endowed with a type of Constitutional "carte blanche.*
>
> *The Revenue Commissioners have emphasised to us that it is a fundamental principle of the tax code that taxpayers are entitled to expect that any information provided by them is treated in confidence for tax purposes only and that such information and their tax affairs will not be disclosed to third parties.*

Despite concerns about preserving the credibility of the tax code and the confidentiality of information provided or obtained, the report ultimately concluded:

> *1. The existing tax laws should be enforced with vigour against drug dealers, handlers of stolen goods, or others obtaining a living from crime. The powers given in the various Finance Acts, particularly in sections 18 and 19 of the Finance Act 1983 should be employed as extensively as possible.*
>
> *2. While we appreciate and endorse the wishes of the Revenue to maintain confidentiality in tax matters in the ordinary run of cases, no law, practice or custom should in any way shield persons who profit from crime.*
>
> *3. Any powers given to the Revenue, such as those of obtaining information on income from financial institutions or from receivers of income on behalf of others or concerning holders of securities should be available to the prosecution or to any receiver appointed for that purpose. Accordingly, provision should be made for the disclosure of tax information by the Revenue Commissioners and of bank accounts and other transactions by any bank or financial institution to the prosecution authorities on production of a court order. An application for such order should have to set out the type of information which is required.*

The Criminal Assets Bureau

The murder of an investigative crime journalist in Ireland on the 6th of June 1996 provided sufficient political impetus for an in depth legislative analysis of this remedy. The following was put in place.

An independent multidisciplinary agency, the Criminal Assets bureau (CAB), was established with the function of identifying the property of persons which derive directly or indirectly from criminal activity and taking appropriate action under the law to deprive or deny those persons have such property.[176] Officers of that agency include police officers, revenue inspectors and collectors, social welfare inspectors, analysts, forensic accountants, and lawyers all working together to achieve this single objective. Bureau officers, while working under the direction of the Chief Bureau officer, a senior police officer, still retained and could exercise those powers as police officers, revenue officers and social welfare officers.

Not only was specific provision made by permitting Bureau officers to exchange information amongst themselves, regardless of their function, further provision was made authorising the disclosure of information in the possession of the Revenue Commissioners to the CAB for the purposes of investigating persons who may have derived

176. https://revisedacts.lawreform.ie/eli/1996/act/31/front/revised/en/html
177. https://www.irishstatutebook.ie/eli/1996/act/25/enacted/en/html

profits or gains from an unlawful source.[177] These provisions addressed those concerns raised in the law reform Commission report.

In order to address a genuine concern by both revenue and social welfare officials, specific provision was made to protect their anonymity when exercising their functions, including when presenting evidence to a court.

There are pre-existing protections within the tax code, including an initial right of appeal to the appeal commissioners, and further right of appeal to the ordinary courts. Submissions to the Irish courts that the simultaneous applications by the State for a confiscation order, either conviction or non-convention based, and execution under the tax code could constitute an abusive process have to date been dismissed, as they are seen as separate and independent functions. That being said, there is an awareness within the Bureau of the potential interdependence where, for example, proceeds of crime which have been the subject of a tax assessment may subsequently be forfeit by way of confiscation order, requiring reanalysis of the initial tax assessment.

It may be for this reason that the Attorney general in the United Kingdom, a jurisdiction which also has the facility to apply the tax code to the proceeds of criminal conduct, had instigated an administrative priority. Those agencies pursuing the proceeds of criminal conduct should first seek to enforce a conviction-based remedy, but in cases where this approach proved ineffective to consider the non-conviction based remedy, and where both those remedies prove ineffective, that the authorities may resort to pursuing the tax code. This policy has since become a little more nuanced, emphasising the priority of the criminal deterrent. Note the following extract from the current Guidelines.

> *A relevant authority must exercise its functions under POCA in the way which it considers is best calculated to contribute to the reduction of crime. The reduction of crime is in general best secured by means of criminal investigations and criminal proceedings (see section 2A of POCA). This includes use of the criminal asset recovery powers to seek confiscation orders, contained in Parts 2, 3 and 4 of POCA, which require a defendant to pay a sum equivalent to their proceeds of crime from any available assets.*
>
> *Whilst in general the reduction of crime is best secured through criminal investigations and proceedings, civil powers under Parts 5 and 6 of POCA (also referred to in this Guidance as "non-conviction-based asset recovery powers") also make an important contribution to the reduction of crime. As do other powers—which could include but are not limited to tax assessment, bankruptcy, insolvency and Serious Crime Prevention Orders. There is no strict hierarchy to denote the use of the powers. Nothing in this guidance should prohibit the use of non-conviction-based asset recovery powers in an individual case.*
>
> *Relevant authorities, and other law enforcement agencies (police etc.), financial investigators and prosecution agencies should consider taking asset recovery and financial investigation action, utilising both criminal and civil powers, at the outset of all investigations. This includes the ability to refer the asset recovery aspect of a case for civil recovery and/or taxation powers in POCA to a relevant agency that possesses the powers to take such action.*
>
> *Relevant authorities and agencies will be aware that it is not possible to apply for civil recovery order if a confiscation order has been made (in respect of property that has been taken into account in deciding the amount of a person's benefit from criminal conduct), therefore emphasising the need to assess the merits of asset recovery or financial investigation at the earliest opportunity.* [178]

Key questions on taxation of the proceeds of crime

The taxation of the proceeds of crime raised some questions during the discussions of the expert working group, some of which are discussed below. **Should tax collection proceedings be adjourned pending the determination of any criminal proceedings?**

Unlike many civil law jurisdictions, where criminal proceedings have a primacy in time, the Courts in Ireland have concluded that the onus is on an applicant to establish that there is a real risk of prejudice to an accused before an adjournment will be granted.

> *Relevant also, in my view, to the exercise by the court of its discretion on an application such as the present one is the fact that it is clear from the Proceeds of crime Act, 1996 that it is envisaged that there will be both civil and criminal proceedings relating to the same activities in existence at the same time. Accordingly, there are significant public policy reasons, in my view, as to why the civil proceedings, such as those which emanate from s. 3 of the act, should not be postponed until the determination of any criminal proceedings concerning the same activities.*

178. https://www.gov.uk/government/publications/the-proceeds-of-crime-act-section-2a/the-proceeds-of-crime-act-section-2a-accessible-version NCA v Mansoor Mahmood Hussain et al [2020] EWHC 432 (Admin) [2020] 1 WLR 2145

179. https://www.courts.ie/acc/alfresco/dfc4fa9c-b7db-41d3-aa56-a6b6befb48c4/2018_IECA_371_1.pdf/pdf#view=fitH

> *Second, the High Court judge correctly considered the manner in which the s. 3 proceedings might impact upon the criminal proceedings and in order to ameliorate any unnecessary risk of prejudice to Mrs Connors gave a number of directions in accordance with the provisions of the 1996 Act which were to her benefit. After noting that any affidavits sworn by Mrs. Connors could not be admitted in the criminal proceedings, she directed that any evidence given in the s. 3 proceedings would not be admissible in the criminal proceedings. She also directed that the s. 3 proceedings be heard in camera and imposed reporting restrictions as earlier advised.* [179]

Are there prohibitions against running confiscation and tax proceedings simultaneously?

While there are no statutory limitations, the courts will ensure contemporaneous proceedings are conducted in such a way as to ensure a defendant's ability to litigate both proceedings are adequately protected. As an example, one defendant subject to tax proceedings claimed he could not file the tax due as all his funds were frozen under the proceeds of crime Act (POC Act). The court, having carefully considered the implications, noted other provisions under the POC act which could have provided effective remedies. He could have moved an application under Section 2(3) to prove the funds were not the proceeds of crime, then got access to the funds, and then being able to use them to pay the tax due. Alternatively, he could have argued that the words "necessary expenses" pursuant to Section 6 also includes monies due and payable under a statutory obligation. This would have included an ability to pay tax from the monies frozen.

Is it possible to freeze property pending the determination of tax collection proceedings?

In common law jurisdictions, to obtain a Mareva Injunction it is sufficient to establish that the plaintiff has a good arguable case and there is evidence of a potential intention to take action designed to frustrate subsequent orders of the court. [181]

> *While it is acknowledged that the Revenue's powers derive from statute, this is an issue of access to the High Court and whether High Court has jurisdiction. It has.*
>
> *In the absence of clear explicit authority it is my view that when the jurisdiction of this court is invoked by a plaintiff which has a statutory authority to bring proceedings by way of plenary summons then a full jurisdiction of the High Court is invoked and, as I have already indicated in my opinion, that jurisdiction includes the power to bring a Mareva Injunction.* [182]

Does the calculation of the tax assessments, which is done by a tax inspector and not the courts, constitute an administration of justice, which in Ireland is exclusively the provenance of the courts?

This issue had been determined under general tax law, prior to the establishment of the Criminal justice Bureau. The courts have concluded that the Commissioner is not exercising a judicial controversy contrary to Article 34 of the Constitution and that its quasi-judicial nature was permitted under Article 37.[183]

> *Assessment is purely an administrative function, not the administration of justice. If taxpayer, through his own inaction allows assessment to be made he is estopped from denying its accuracy. The central nature of tax is to assess, in the sense of calculating or computing the amount having regard to the information provided: Does not presuppose a dispute:* [184]

The application of these principles in the pursuit of the proceeds of crime by the CAB can be demonstrated with the following judicial quotation:

> *A Notice of Attachment therefore can address any funds regardless of whether they are the proceeds of crime, so long as they are a debt due by the chargeable person.*
>
> *The court is simply asked to consider whether the assessments are arbitrary and accordingly ultra vires the Inspector, in line with Duighnan –v- Hearne, as the court cannot act by way of an appeal against the assessment. To that extent the view which the court takes of the evidence adduced on this issue as to whether the truth lies is irrelevant. The assessments were of course in a sense arbitrary but there was no alternative as the applicant has failed to engage with the process. In those circumstances, in line with Murphy J. in Duighan and Hearne, he must use his best judgement on*

180. Criminal Assets Bureau –v- John Kelly: Supreme Court: Murray J: 10th of October 2002
181. Fleming –v- Ranks 1983
182. Criminal Assets Bureau –v- McSweeney: O'Sullivan J.: 11th April 2000
183. Cacul –v- Revenue Commissioners: 1979
184. Duignan –v- Hearne: Murphy J. (Finlay J.): 1990.
185. Anthony Sloan –v- Criminal Assets Bureau: Judgement Finnegan J.: 10th of October 2005.

> *whatever information is available to him. On the basis of the evidence used therefore the applicant has failed to satisfy me that the assessments are arbitrary.*[185]

The courts however have held that an Appeal Commissioner is still required to act judicially and have referred a case back asking that a refusal to adjourn be reconsidered. [186]

Is it effective?

Some indication as to its effectiveness can be seen from the following press release issued by the minister for justice on the occasion of the publication of the annual report of the criminal property Bureau, in 2021.

> *Between the years 1996 to 2021, €204 million was returned to the Exchequer. This covers €165 million in Revenue settlements, €6 million in Social Welfare recoupments €33 million in proceeds of crime. The Bureau illustrates its commitment to targeting organised criminal groups and individuals with almost €170 million in property having been brought through the Courts in over 360 Proceeds of crime cases. In 2021, the Criminal Property Bureau returned in excess of €5.5 million to the Exchequer. This comprised of €4.4 million in Revenue settlements, €0.364 million in Social Welfare recoveries and €1.14 million in proceeds of crime.* [187]

Despite access to a radical non-conviction based forfeiture remedy (the Proceeds of crime act 1996) utilisation of the tax code has proved more effective on the basis of revenue returned to the exchequer.

6.9. The need for a conviction: is confiscation a criminal penalty?

Given the constitutional considerations raised in this document, it is useful to examine the nature of confiscation orders as a penalty or a remedy for reparation or divestment.

Any in-depth analysis of this topic would be an extensive undertaking, requiring consideration of a historical perspective and the identification of common strands within the extensive range of remedies used in the modern context, from confiscation for value, extended confiscation to non-conviction-based confiscation. This is not the function of this report. However, even from a peripheral consideration, the group note that a national legislative framework which utilizes confiscation as a form of reparation, focusing on the divestment of the illicit benefit while respecting the principle of proportionality, tends to protect that framework from judicial and academic criticism with respect to respecting standard fundamental human rights principles.

The group, during its deliberations, saw benefit in considering how certain jurisdictions analyze the nature of a confiscation order. In this respect we noted a gradual shift, whether conscious or not, from its imposition as being perceived as a sanction/penalty to a developing focus on reparation (or in the Italian case as a "preventative measure").

There are some benefits to the latter perception. If the imposition of a confiscation order is seen as a sanction, then the analysis of its components becomes more akin to a criminal trial, therefore drawing the requirements implicit in the principal of "presumption of innocence". If, on the other hand, its imposition is focused on reparation, i.e. a strict analysis of the benefit/profit directly earned from the criminal activity, property/ property to which the respondent has no moral or legal entitlement, then its imposition cannot be seen as a sanction or punishment. Note Professor Michele Simonato on this subject::

186. Christopher Griffin –v- CAB: Judicial Review 2005

187. https://www.cab.ie/cab-annual-report-2021/#:~:text=Between%20the%20years%201996%20to,million%20in%20proceeds%20of%20crime.

188. Simonato, M., "Confiscation and fundamental rights across criminal and non-criminal domains", ERA Forum 18, 2017, 365–379

> *"Besides the rules protecting the right to property (and, to a minor extent, the right to privacy), are there any other parameters/standards with which confiscation must comply? Are there rules which preclude that confiscation be imposed without an accompanying conviction for an offence? The answer to these questions requires tackling the largely debated issue of the nature of confiscation. Is confiscation a penalty? The problem at stake can be simply described: if confiscation must be viewed as a penalty for criminal behaviour, it follows that it should then comply with the many principles concerning the application of criminal penalties, starting from a stricter legality principle. Furthermore, the principle of legality becomes applicable, as well as a strong proportionality principle and the safeguards of criminal justice, which include the presumption of innocence with its corollaries (including the rule of conviction only beyond reasonable doubt) and strong participation rights. On the contrary, if confiscation cannot be considered a penalty, then the principle of legality is less stringent, the principle of proportionality of the measure becomes less strict and the safeguards which are applicable need not be those that are applicable in criminal matters, but can be those of the civil/administrative realm of the law. This means that the decision can be based on a balance of probabilities and presumptions can be used, that defence rights are of lesser importance and the like."*[188]

As early as 1991, the law reform Commission in Ireland perceived confiscation as a punishment, as noted below in its report:

> *"A majority of the Commission regards confiscation as a punishment in that the procedure makes the offender contribute to the State in amelioration of the offence which he has caused to society by his activities. The holding of the proceeds is legal in the first place and there is no parallel with the restitution of stolen property as confiscation is not the same as restoration. It would be essential for the legislation to observe the constitutional criteria as to proportionality mentioned by Henchy J but these would not present a problem. The Commission is recommending that in relation to particularly serious crimes which do great harm to society there should be a procedure for confiscation of the property of a criminal who has been convicted of that sort of crime. The proportionality principle means that a convicted defendant is not to be given a heavy sentence which is out of all proportion to the crime which he has committed. The presumption which we are raising, namely that a defendant convicted of one of these crimes who has substantial property has acquired those property through similar activities, implies that he must have been involved in other serious crime. That being the case we fail to see how a very substantial Confiscation Order would cause a proportionality difficulty."*[189]

This issue was considered by the ECtHR in 1995 when considering an extended confiscation order, which presumed that earnings made prior to the enactment of the relevant legislation was earned in the course of criminal conduct, and therefore included such earnings in its final order.

> *In this connection, confiscation orders have been characterised in some UK court decisions as constituting "penalties" and in others as pursuing the aim of reparation as opposed to punishment.*
>
> *However there are several aspects of the making of an order under the 1986 act which are in keeping with the idea of a penalty as it is commonly understood, even though they may also be considered as essential to the preventative scheme inherent in the 1986 act. The sweeping statutory assumptions in Section 2(3) of the 1986 act that all property passing through the offender's hands over a six year period is the fruit of drug trafficking unless he can prove otherwise: the fact that the confiscation order is directed to the proceeds involved in drug dealing and is not limited to actual enrichment or profit; the discretion of the trial judge, in fixing the amount of the order to take into consideration the degree of culpability of the accused; and the possibility of imprisonment in default of payment by the offender are all elements which when considered together, provide a strong indication of, inter alia, a regime of punishment."* [190]

The court saw the distinction between "reparation" and "penalty" as critical. The combination of the statutory assumptions, the lack of a limitation to actual profit, the consideration of the degree of culpability and the possibility of imprisonment all contained ingredients closer to a criminal trial, and resultant prohibition on retroactive penal legislation

189. Law Reform Commission of Ireland, Report on the confiscation of the proceeds of crime, 1991.

190. *Welch v. the United Kingdom* – app. n. 17440/90 Judgment 9.2.1995.

191. *Grayson & Barnham v. United Kingdom*, App. n. 19955/05 and 15085/06, 23 September 2008

contained within the European Convention on human rights. Similar legislation enacted by the UK has survived subsequent challenge in the ECtHR primarily as the making of such extended confiscation orders is now seen as "part of the sentencing process". [191]

Also note the devolvement in "Phillips v UK"[192] (already discussed) where the ECtHR concluded that reference to other criminal conduct in extended confiscation 'was not the conviction or acquittal of the applicant for any other drug-related offence' but 'to enable the national court to assess the amount at which the confiscation order should properly be fixed'. The reference to other offences was simply a criterion by which the extent of the confiscation order, operating in the sentencing phase (for the judged offences) was determined but not representing a new charge for the other non-judged offences allegedly committed by the convicted person. Thus article 6(2) ECHR did not apply.

By way of example we might consider the process as it applies in Ireland a somewhat similar regime to the UK:

Standard conviction-based confiscation:

- The Director of public prosecutions may make an application to a trial court for a confiscation order with respect to any serious offense,
- but only following conviction and sentence.
- The court first has to consider whether the person concerned has benefited from the offence for which he has been convicted
- The court is empowered to make an order for payment to the State of that benefit
- The benefit is defined as the value of any property received as a result of or in connection with that offense
- The confiscation order must be limited to the amount appearing to the court that might be realised (i.e. that the person concerned can actually pay).
- the standard of proof to determine any question arising as to whether the person has benefited and the amount that might be realisable is that applicable in civil proceedings
- Despite this civil assessment, the process is defined by statute as part of the criminal proceedings, as those proceedings do not end, until the confiscation order has been satisfied (paid).
- In the event that the person concerned does not satisfy (pay) the confiscation order he becomes automatically liable to serve a prison sentence according to a sliding scale in which the greater the outstanding amount the greater the period of imprisonment. This sentence is totally independent of any sentence applied for the commission of the offense itself.

Extended conviction-based confiscation:

- Extended confiscation only applies to specified offences, initially only drug trafficking, but subsequently extended to offenses such as human trafficking and money laundering in line with EU requirements.
- Following conviction and sentence, the court is required to make an assessment as to whether person has benefited from drug trafficking generally, not limited to the specific offense for which he has been convicted.
- The court does not have to proceed further if, following a preliminary examination it is clear that the amount which might be recovered would not justify the making of an order.
- While there is a rebuttable presumption that any property held by the defendant, or any expenditure made by the defendant, over the previous six years constitutes an economic advantage derived from the relevant conduct, the court shall not apply the presumption if to do so would create an injustice.
- While the onus is on the State to satisfy the court as to the extent of the defendant's economic benefit, it is up to the defendant to justify the reduction on the basis how much is realisable.[193]

For the following reasons, it is suggested that significant effort has been made in the drafting of this legislation to ensure that the confiscation order focuses on reparation and does not constitute a penalty:

- The assessment only takes place following conviction and sentence. Accordingly, the sanction applicable to the moral reprehensibility of the offense itself has already been assessed and applied.

192. *Phillips v. The United Kingdom*, App. n. 41087/98, 5 July 2001.

193. DPP v Morgan; Hedigan J.; July 2018. Also R v Barwick (2001) CAR 129. p445.

194. DPP v. Izundu, [2011] IECCA 82.

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• The court can, when making the compensation order take into account the effect of the sentence already imposed.

• The confiscation order is limited to the "economic benefits" generated from the criminal activity.

• The confiscation order is further limited to that amount which is realisable, i.e., is available to the person at the time of the making of the order to enable him to discharge the confiscation order. In short no confiscation order can be made in circumstances where the convicted person cannot pay it.

Yet, despite the process being defined as being part of the criminal process and preceded by a trial in which all the ingredients of the "presumption of innocence" would **apply, there are elements that do not sit easily with the concept of a criminal trial,** such as the determination of facts being on the civil standard of proof, the inclusion of certain presumptions and the possibility of the order having retroactive effect. Most importantly there is a consequential term of imprisonment for nonpayment.

Judicial authorities and academic commentators alike have acknowledged that the process of reparation, the extraction from a person of the proceeds of criminal conduct, is not in itself a sanction and accordingly is not a criminal "trial" to which to which those protections implicit in the "presumption of innocence" need be present. But there is a thin line here in order to avoid the order straying from a mere reparation of the benefits of the criminal conduct into something greater, ultimately constituting a penalty/sanction.

The definition of the "**benefit**" in confiscation, the value of the pecuniary advantage derived as a result of the commission of the offence, is sufficiently broad to ensure an accurate analysis of the benefit and thus avoid straying into the area of potential sanction. It gets a bit more complicated when dealing with drug trafficking, where the benefit is defined as the aggregate of any payments or other reward received by a person at any time in connection with drug trafficking, allied to a presumption that any property held by the defendant, or any expenditure made by the defendant, over the previous six years constitutes an economic advantage derived from the relevant conduct. Applying such a definition strictly may be to ignore the commercial reality of the drug trafficking enterprise, effectively defining turnover as pure profit. The saviors within the statute are that the presumption is rebuttable, one presumes by the defendant, and the court need not make any order it considers "unjust".

Regarding the **imposition of a further prison sentence for nonpayment**, any concern that the potential prison sentence for non-discharge of the order may constitute a further sanction of itself, ignores the fact that the confiscation order is limited to what is realisable by the defendant, rendering such a sentence more in the nature of a contempt of court for the nonpayment of a debt the court has already assessed as capable of payment.

> *What the state cannot do is seek to use the confiscation order process to attain the unattainable, i.e. recoup from a convicted drug trafficker monies that, for whatever reason, he no longer possesses.* [194]

This approach reflects the common law on general debt collection.

There is a line of authority in the United Kingdom which applies the principle of "proportionality" to the assessment of "benefit" when making a confiscation order. In one particular example, involving a mortgage fraud, the initial order was reduced significantly on appeal by excluding the notional profit which would have been legitimately earned were the deception not to have been perpetrated.[195] Such a principle however does not prevent the court from occasionally making a confiscation order in circumstances where the defendants property are not immediately identifiable but, following an analysis of his financial transactions such as his bank accounts, found to be available to him albeit "hidden" from the courts. The order effectively forces the defendant either to engage with the court to identify these properties or liquidate them himself in order to discharge the confiscation order.

One may also consider **whether confiscation orders should be taken into account during the sentencing process**. Within this context it may also be important to distinguish the sentencing process from the making of the confiscation order, the former being the application of a sanction for the moral reprehensibility of the offense itself, while the latter is limited to the reparation of illegally obtained property. It can occasionally be difficult from a practical perspective to divorce both issues, especially in administrative proceedings within the environmental or competition law framework. Again, the views of the Law Reform Commission in Ireland may be illuminating;

> *The next question that arises is as to whether any confiscation measure imposed should be taken into account when sentencing. The danger is that so to provide would introduce a system of "paying one's way out of prison". While a confiscation order, as we have pointed out, will be punitive in its nature in some cases, its objective is not primarily punitive. As with any forfeiture type order, including those already in use, the objective is either to restore property to those to whom it belongs or to deprive*

195. R v Waya, [2012] UKSC 51
196. Supra n. 158.

> *the defendant of property which he would not have were it not for some criminal activity. Most people would see no injustice in imposing a sentence of imprisonment or a fine in addition to ordering the confiscation of the proceeds of the crime. The removal of the property of itself would hardly be such a punishment as would normally deter repetition of the crime or its commission by other possible offenders. It could not be plausibly suggested, for example, that seizure of stolen property is a satisfactory penalty for the offence of theft or robbery. The fact is that the seizure or confiscation of any property is not commonly seen as primarily punishment for the crime and so the imposition in addition of a conventional sentence will in general be thought to be desirable. It is true that the Hodgson Committee Report on The Profits of Crime and their Recovery in the UK suggested that orders for the payment of money should be taken into account in determining punishment. But this would be viewed by many as allowing criminals to buy their way out of punishment for crime. The Commission share this view. It follows that any confiscation order made should not be taken into account in imposing sentence.*[196]

As many of the legislative processes in place in common law jurisdictions provide that sentencing precedes consideration of a restitution or confiscation order, and as the court is entitled to take into account that sentence already imposed when making such orders, the concerns raised above will generally be addressed.

6.10. Contemporaneous criminal and civil proceedings

From a constitutional perspective, the expert group noted one benefit in favor of the criminal model, as opposed to non-conviction-based confiscation or the use of the tax code, was the avoidance of an accused/defendant having simultaneously to defend a multiplicity of proceedings, and the potential prejudice this may cause. In general, consideration of a confiscation order only arises in the criminal model following conviction, while other models leave open the possibility of different court, with different jurisdictions/functions having to consider the same facts, potentially leading to contradicting judgments or prejudicing an accused's ability to defend a criminal prosecution.

While the primacy of the criminal trial, the principle of *"le criminel tient le civil en l'état"*,[197] has found favor in some of the continental jurisdictions, common law jurisdictions generally require an accused/defendant to demonstrate a clear prejudice before civil proceedings will be adjourned pending determination of a criminal trial.

> *"As the plaintiff could not have had an order to postpone the criminal proceedings until the termination of the civil action, equally the hearing of the civil action cannot be required to await the conclusion of the criminal proceedings. No considerations of public policy are in question."*[198]

As stated earlier, the Courts in Ireland have emphasised the importance of protecting a plaintiff's right to achieve a timely resolution in their civil proceedings and confirmed that that the onus is on an applicant, who seeks to postpone civil proceedings to await the outcome of criminal proceedings, to establish that there would be a real risk of prejudice or injustice if the civil case were allowed to proceed. Each case had to be judged on its own facts to assess whether there was a real danger of causing an injustice in the criminal proceedings by allowing the civil proceedings advance.

> *"It would, therefore, appear that there is no hard and fast rule as to how contemporaneous civil and criminal proceedings arising out of the same matter should be progressed. It is clear that the onus rests on the party seeking a stay of the civil proceedings to establish the grounds necessary to enable the court so to do. In coming to any such assessment the court must, on the one hand, give due recognition to the importance of allowing the plaintiff or other moving party in the civil proceedings to achieve a timely resolution of those proceedings and obtain the benefit of any orders which might be appropriate. On the other hand the court has to balance, as against that, the extent to which there may be a real risk that prejudice might be caused to the criminal proceedings. I am satisfied that in giving consideration to this latter matter the court must attempt to analyse the likelihood of there being any such prejudice and have regard to the extent to which it may be possible by measures to be adopted in the criminal process to minimise or ameliorate any such prejudices might arise."* [199]
>
> *"Likewise it is common case between the parties that each application to adjourn proceedings of civil nature pending the determination of criminal proceedings must*

197. Formerly a principal in French law, not applicable since law 2007-291 of 5th March 2007.
198. Dillon v. Dunnes Stores [1996] Supreme Court , I.R. 397; O'Dálaigh C.J
199. Wicklow Co. Council v. O'Reilly [2006] 3 I.R. 623; Clerk J

> *be determined on its own facts……., that the onus on the applicant is to establish that there is a real risk of prejudice or injustice if the tax appeal proceeds."* [200]

When dealing with the non-conviction-based confiscation applications in Ireland the courts have noted that in a significant percentage of the applications brought by the Criminal Assets Bureau under Section 3 of the Proceeds of Crime Act there are coexisting criminal proceedings. Therefore, if respondents could rightfully maintain an entitlement to have these proceedings stayed pending the outcome of the criminal trial, then all respondents in similar circumstances would enjoy a like entitlement, thus significantly slowing down the administration of justice. That being said, the responsibility on a civil court to consider the extent to which in the course of the proposed civil proceedings the judge might, by reason of any relevant statutory provision or otherwise, be in a position to minimize, ameliorate or otherwise further safeguard the applicant from any potential prejudice in the criminal proceedings has been emphasised.

By way of example, a High Court judge had, when refusing an adjournment in the recent case of Connors v the Criminal Assets Bureau,[201] made rulings concerning how the Criminal Assets Bureau proceedings would be conducted so as to protect against any prejudice that might otherwise occur by allowing those proceedings to be determined prior to an ongoing criminal trial. In order to ensure that the accused right against self-incrimination was not undermined she not only noted that all affidavits filed in the civil proceedings were by statute inadmissible in the criminal trial, she made rulings determining that any further evidence adduced in the course of the civil trial would be also inadmissible. Furthermore, she directed that the civil trial proceed "in camera" to avoid any potential prejudice arising from the publication of the civil proceedings. The Court of Appeal, in refusing to overturn that refusal to adjourn, noted:

> *The High Court judge, in the course of her ruling, went even further for the purposes of seeking to protect Mrs Connors from any potential prejudice in that she directed that not only would any affidavit sworn by her pursuant to s.9 not be admissible in the criminal proceedings but also direct that "any evidence" given in the course of the s. 3 proceedings would not be admissible in the criminal proceedings. She did so for the stated reason of seeking to protect Mrs Connors from any possible prejudice that might arise for her in her criminal proceedings if it happened that she was to be cross examined on her affidavit in the course of the CAB proceedings and her evidence sought to be introduced in the criminal proceedings. Further, the High Court judge gave directions that the provisions of s. 8(3) and (4) of the 1996 Act were to be deployed in the CAB proceedings and that this direction would have the effect of protecting Mrs. Connors further from prejudice in the context of her criminal proceedings. The CAB proceedings would be heard in camera and she would make an order prohibiting the publication of any information in relation to the application.*

Thus, while the courts are generally slow to grant an adjournment, they are alive to a potential prejudice and will conduct civil proceedings in such a way as to protect the rights of an accused in a criminal trial. Such a coordinated and consolidated approach may serve to avoid criticisms of the application of non-conviction and tax collection remedies. ■

200. C.G. v. Appeal Commissioners [2005] 2 I.R. 223; Finlay Geoghegan J.
201. Criminal Assets Bureau v. Margaret Connors, [2018] IECA 371

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7. Other tools for the disclosure of unexplained wealth

7.1. Forced disclosure

Forced disclosure is a mechanism through which the authorities may compel individuals to provide information regarding their financial status, including the origins of their wealth and the sources of income used to acquire or enjoy such wealth. This authority can be invoked during an investigation to oblige individuals to provide a sworn statement containing comprehensive details about their wealth, including a complete inventory of their assets and the means by which these assets were acquired. Importantly, non-compliance with such requests give rise to automatic sanctions.

For instance, according to the Prevention of Corruption Act in Brunei Darussalam, [202] which encompasses the country's illicit enrichment legislation, a public prosecutor possesses the power to issue a written notice to individuals suspected of engaging in illicit enrichment:

> *"23A. (1)* ***In the course of any investigation into or proceedings relating to an offence alleged or suspected to have been committed by any person under this Act or under sections 161 to 165 or 213 to 215 of the Penal Code (Chapter 22) or a conspiracy to commit, or an attempt to commit, or an abetment of any such offence,*** *the Public Prosecutor may, notwithstanding anything in any other written law to the contrary, by written notice*
>
> *— (a) require any such person to furnish a statutory declaration or, as the Public Prosecutor sees fit, a statement in writing enumerating all movable or immovable property belonging to or possessed by such person and by the spouse, parents, or sons and daughters of such person, and specifying the date on which each of the properties enumerated was acquired whether by way of purchase, gift, bequest, inheritance or otherwise;[…]*
>
> ***(2) Every person to whom a notice is sent by the Public Prosecutor under subsection (1) of this section shall, notwithstanding the provisions of any written law or any oath of secrecy to the contrary, comply with the terms of that notice within such times as may be specified therein and any person who wilfully neglects, or fails so to comply shall be guilty of an offence: Penalty, a fine of $5,000 and imprisonment for one year."***

Such provisions, which impose sanctions on the accused who refuses to disclose potentially incriminating information in criminal investigations, would face major challenges in other jurisdictions as they arguably violate the right against self-incrimination. In the course of one of the earliest NCB (POCA) applications in Ireland, the judge expressed concern that the mandatory nature of a similar affidavit of disclosure may breach the respondent's right to silence, refusing to make the order without an undertaking from the Director of Prosecutions that the affidavit would not be used in any subsequent prosecution. Subsequent legislation has since addressed this issue (cf. Section 0).

Likewise, in Niger, the Constitutional Court partly invalidated the Ordonnance no. 92-024 du 18 Juin 1992 portant répression de l'enrichissement illicite as certain of its provisions were deemed unconstitutional. Indeed, under the provisions in question, a person indicted for the criminal offence of illicit enrichment,[203] was compelled, upon request by the prosecutor, to disclose the extent and origin of his assets. Failure to comply triggered a presumption of guilt whereby the accused was presumed to have committed the offence, unless he proved the contrary.[204] When reviewing the law, the Constitutional Court stated the following:

> *"Considering that article 4 of the contested order requires any person involved in an investigation for unlawful enrichment to disclose to the Public Prosecutor's Office, at its request and within the time limit set by the Public Prosecutor, the state of his assets and the manner in which they were constituted, as well as the nature and amount of his income. the nature and amount of his or her income; in the absence of a reply, or in the event of an inaccurate or incomplete response or incomplete response to the Public Prosecutor's request, article 5 paragraph 1 of the aforementioned order stipulates that the offence of illicit enrichment is presumed to have been committed, unless proof to the contrary provided by the accused;*
>
> *Considering that under the terms of article 17 paragraph 1 of the Constitution and article 11-1 of the Universal Declaration of Human Rights of Human Rights, "any person accused of a criminal act is presumed innocent presumed innocent until his guilt has been legally established in a public trial public*

202. Prevention of Corruption Act 1982, as last amended in 2010.

203. Article 1 of the Ordinance provides that "The offence of illicit enrichment is constituted when it is established that a person possesses assets or lives a lifestyle that cannot be justified by his lawful income" and, according to article 9 of the same instrument, "Anyone found guilty of the offence of illicit enrichment will be punished by a term of between three and less than ten years' imprisonment and a fine of at least the amount at least equal to the amount by which the guilty party has illicitly enriched himself/herself, and at most double this sum, or one of these two penalties only."

204. Article 5, ibid.

trial at which he shall have been afforded all the guarantees necessary for his free guaranteed"; that article 7-b of the African Charter on Human and Peoples' Rights the right to be presumed innocent until proven guilty by a court of law. established by a competent court";[...]

Considering that the principle of presumption of innocence does not prevent the legislator from legislator to institute presumptions of fact or of law in criminal matters, provided that such presumptions are not irrebuttable. they are not irrebuttable, respect for the rights of the defense is ensured and the facts the facts reasonably suggest imputability;

Considering that respect for the rights of the defense enshrined in articles 17 paragraph 1 of the Constitution Constitution, 11-1 of the Universal Declaration of Human Rights and 7-c of the African of Human and Peoples' Rights implies, in criminal matters, the existence of fair and equitable of a fair and equitable procedure guaranteeing the balance of the rights of the parties;

Considering that article 4 of the contested order, by virtue of the obligations it places on the incriminated and the consequences drawn from it by article 5 paragraph 1 in the event of failure to comply, obliges the accused to participate in the prosecution; the right of the accused not to incriminate incriminate himself is a corollary of the rights of the defense;

[...]

Considering that, as the rights of the defence are not guaranteed, the legislator could not derogate from the presumption of innocence without infringing the provisions of article 17 paragraph 1 of the Constitution, article 11-1 of the Universal Declaration of Human Rights and article 7-b of the African Charter of Human Rights; that articles 4 and 5 paragraph 1 of the contested order must be declared to be in breach of the aforementioned provisions; [...].

[The Court d]eclares articles 4, 5 paragraph 1 to be unconstitutional[...]" [205]

It is interesting to compare this decision with the rationales outlined in section 6.3.2 supra, particularly as regards the prosecutorial threshold as, in this case, the burden on the prosecution arguably amounted to a mere formality (initiating an investigation).

7.2. Transparency obligations

As illustrated in sections 6.3 and 6.7, the public interest goal of fighting corruption has rendered the easing of the burden of proof more widely accepted for the prosecution of criminal offences or confiscation and forfeiture procedures involving public officials.

Article 8 of the United Nations Convention against Corruption provides that

1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system. [...]

5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.

As per article 8.6., these asset declaration obligations should be tied to sanctions, which can be used to obtain the conviction of the perpetrator or to recover the contested property.

For instance, in accordance with the criminal code of North Macedonia, if a public official knowingly provides inaccurate or incomplete information during mandatory reporting procedures and it can be established that the public official possesses property that is significantly disproportionate to their lawful income, such conduct will constitute an offense, leading to the confiscation of the excess property.[206] In Gabon, failure by a public official to comply with asset reporting procedures may also result in the confiscation of property.[207]

This type of obligations, which give rise to sanctions, is not limited to public officials. Indeed, in Italy, for example, the legislator has

205. Constitutional Court of Niger, Decision n. 07/08/CC/MC of 20 November 2008.

206. Criminal Code (as amended up until 2018), Article 359-a

207. Loi N°002/2003 du 7 mai 2003, instituant un régime de prévention et de répression de l'enrichissement illicite en République Gabonaise

resorted to models based on so-called "collaborative" obligations, providing for criminal or para-criminal sanctions in the event of non-compliance. The sanctions are often constructed according to the paradigm of obstruction of the control or supervisory function of a sector authority. In this regard, Article 2638 of the Civil Code is emblematic, as it punishes persons who, being subject by law to public supervisory authorities (or in any case subject to obligations towards them), obstruct their functions, including by omitting due communications. Numerous obligations to make periodic and truthful reports, as well as to comply with the authority's requests, are provided for and apply to financial intermediaries such as banks.[208]

Other rules which may interact with money laundering investigations, providing evidence on the financial situation of the suspect, pertain to tax law, unsurprisingly. An interesting aspect of these rules is that they do not necessarily need to provide for a penalty to be effective. In Italy still, the rules on tax matters provide for procedural preclusions (Article 32 of Presidential Decree No. 600 of 1973 and Article 52 of Presidential Decree No. 633 of 1973) that prevent, in the subsequent proceedings, the use in favor of the interested party of the material that was not provided by him during the investigations; thus imposing on him a total discovery obligation at a stage when the prosecution has not yet crystalized, exposing him to the risk of providing contra se elements that can also be used in a possible criminal proceeding.

Respect for the right to silence takes on a particular importance when administrative and criminal proceedings are conducted in parallel (see also the discussion in Section 6.10 supra). The lower level of protection afforded to the right against self-incrimination in administrative proceedings imposes particular caution with regard to the use in criminal proceedings of what was gathered during the former proceedings, since the subject may well have produced self-incriminating elements in the face of the imposition of obligations to cooperate - often protected by substantially criminal sanctions as explained above.

First of all, such elements may take on the value of *notitia criminis,* also in the light of the reporting obligations imposed on the agents of the supervisory authority. In this hypothesis, the declarations or documents handed over by the subject would lead to the initiation of criminal proceedings against him on the basis of what he has produced. In addition, what emerges in administrative proceedings may be used for investigative purposes to bring to light further elements that can be directly used in criminal proceedings. Finally, there is the risk that material with self-accusatory content may be allowed to be admitted by assuming it as documentary evidence;[209] or by assuming it through the testimony of the agents who took part in the inspection or surveillance activities, before the emergence of indicia of a crime.

In the decision "D.B. v. Consob",[210] the Court of Justice of the European Union affirmed the need to guarantee the right to silence in any proceedings liable to impose substantially criminal sanctions, thus preventing a person from being sanctioned for his refusal to provide the authority with answers from which his criminal or para-criminal liability might emerge. Specifying, moreover, that the principle must not be limited to confessions of wrongdoing but must also include information on matters of fact, which could potentially be used to support the accusation in future proceedings (thus going beyond its own previous antitrust guidelines). On the other hand, the omission of any cooperation with the authorities, such as a refusal to appear at a hearing, remains outside the scope of the right to silence.

The Italian Constitutional Court[211] concurred with what had been expressed by the Grand Chamber of the CJEU, specifying that the right to silence must be recognised already during the supervisory activity functional to the discovery of offences; therefore, at a time prior to the formal institution of proceedings. The right to silence must be guaranteed in any proceedings in which, due to the presence of obligations to cooperate with the authority, a punitive or criminal administrative liability might emerge from the subject's statements. On this occasion, however, the Court limited the effectiveness of the right to silence to statements only, excluding (in addition to the right not to appear before the authority) the right not to hand over data or documents pre-dating the authority's requests.[212]

208. For example, Article 170-bis of Legislative Decree No. 58 of 1998 (T.u.f.) punishes with imprisonment 'anyone who obstructs the supervisory functions attributed to the Bank of Italy and CONSOB' and Article 187-quienquiesdecies T.u.f. punishes obligations to cooperate with punitive administrative sanctions. Similar provisions are also contemplated in tax matters, where Article 11 of Legislative Decree No. 471 of 1997 provides for administrative sanctions for anyone who fails to provide the authority - in the exercise of its supervisory powers - with communications, or provides incomplete or untrue communications.

209. In Italian law, this is possible for evidence considered unrepeatable, pursuant to Article 238(3) of the Code of Criminal Procedure.

210. Court of Justice of the European Union, D.B. v. Consob, C-481/19, 2 February 2021.

211. Italian Constitutional Court, Sentence No. 84 of 2021.

212. On the subject of non-delivery of documents with potential contra se value, having regard also to the circulation of evidence between administrative and criminal proceedings, the European Court of Human Rights also expressed itself in the judgment. "Chambaz v. Switzerland", app. n. 11663/04, 5 April 2012 (paras. 52 ff.) and recognised that the principle of nemo temetur se detegere should be applied to such situations.

THE SIRACUSA INTERNATIONAL INSTITUTE
for criminal justice and human rights

EU AML / CFT
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ANNEXES

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Catalogue of legal mechanisms

Annex 1 to the publication "Legal approaches to evidentiary challenges in money laundering prosecutions and confiscation proceedings - A constitutional review"

EU AML/CFT Global Facility - Siracusa International Institute

01/10/2023

About this document

This document is meant to serve as a catalogue providing an overview of national systems and legal bases for mechanisms that address evidentiary challenges in the prosecution of money laundering and the confiscation of the proceeds of crime. It includes the mechanisms referenced in the main publication "Legal approaches to evidentiary challenges in money laundering prosecutions and confiscation proceedings - A constitutional review", as well as an additional selection of mechanisms that were mentioned or described by survey respondents. The document also includes lists of relevant national and regional case law mentioned in the main publication. For the ease of the reader, all the following legal provisions are in English. The assistance of machine translation was used for legislation in other languages and the texts below should not be considered as official translations. The catalogue is also articulated around key concepts from the main publication to facilitate navigation.

Table of contents

International Instruments and Standards

UN Economic and Social Council (ECOSOC), United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 19 December 1988[1]

(money laundering)

Article 3.1

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law, when committed intentionally […]

(b) (i) the conversion or transfer of property, knowing that such property is derived from any offense(s), for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in such offense(s) to evade the legal consequences of his actions.

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such an offence or offences;

(c) Subject to its constitutional principles and the basic concepts of its legal system: (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences;

(burden of proof, reversal)

Article 5

[…]

7. Each Party may consider ensuring that the onus of proof be reversed regarding the lawful origin of alleged proceeds or other property liable to confiscation, to the extent that such action is consistent with the principles of its domestic law and with the nature of the judicial and other proceedings.

8. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a Party.

UN General Assembly, United Nations Convention against Transnational Organised Crime : resolution adopted by the General Assembly, 8 January 2001, A/RES/55/25[2]

(money laundering)

Article 6

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences all serious crime as defined in article 2 of this Convention and the offences established in accordance with articles 5, 8 and 23 of this Convention. In the case of States Parties whose legislation sets out a list of specific predicate offences, they shall, at a minimum, include in such list a comprehensive range of offences associated with organised criminal groups;

(c) For the purposes of subparagraph (b), predicate offences shall include offences committed both within and outside the jurisdiction of the State Party "9 in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

1 Available at: https://www.refworld.org/docid/49997af90.html

2 Available at: https://www.refworld.org/docid/3b00f55b0.html

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence;

(f) Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective factual circumstances.

(burden of proof, reversal)

Article 12

[…]

7. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings.

8. The provisions of this article shall not be construed to prejudice the rights of bona fide third parties.

9. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422[3]

(transparency obligations)

Article 8

1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system. […]

5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.

(illicit enrichment)

Article 20

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

(international cooperation)

Article 43

1. States Parties shall cooperate in criminal matters in accordance with articles 44 to 50 of this Convention. Where appropriate and consistent with their domestic legal system, States Parties shall consider assisting each other in investigations of and proceedings in civil and administrative matters relating to corruption.

2. 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 Parties.

Article 46

(1) States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

[…]

(9) (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

3 Available at: https://www.refworld.org/docid/4374b9524.html

Council of Europe, Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Warsaw, 16 May 2005[4]

(international cooperation; confiscation)

Article 23

1. 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.

[…]

5. The Parties shall co-operate to the widest extent possible under their domestic law with those Parties which request the execution of measures equivalent to confiscation leading to the deprivation of property, which are not criminal sanctions, in so far as such measures are ordered by a judicial authority of the requesting Party in relation to a criminal offence, provided that it has been established that the property constitutes proceeds or other property in the meaning of Article 5 of this Convention.

European Union, Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union[5]

(criminal confiscation; non-conviction-based confiscation within the scope of criminal proceedings)

Article 4

1. Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.

2. Where confiscation on the basis of paragraph 1 is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.

(extended confiscation)

Article 5

1. Member States shall adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.

2. For the purpose of paragraph 1 of this Article, the notion of 'criminal offence' shall include at least the following:

(a) active and passive corruption in the private sector, as provided for in Article 2 of Framework Decision 2003/568/JHA, as well as active and passive corruption involving officials of institutions of the Union or of the Member States, as provided for in Articles 2 and 3 respectively of the Convention on the fight against corruption involving officials;

(b) offences relating to participation in a criminal organisation, as provided for in Article 2 of Framework Decision 2008/841/JHA, at least in cases where the offence has led to economic benefit;

(c) causing or recruiting a child to participate in pornographic performances, or profiting from or otherwise exploiting a child for such purposes if the child is over the age of sexual consent, as provided for in Article 4(2) of Directive 2011/93/EU; distribution, dissemination or transmission of child pornography, as provided for in Article 5(4) of that Directive; offering, supplying or making available child pornography, as provided for in Article 5(5) of that Directive; production of child pornography, as provided for in Article 5(6) of that Directive;

(d) illegal system interference and illegal data interference, as provided for in Articles 4 and 5 respectively of Directive 2013/40/EU, where a significant number of information systems have been affected through the use of a tool, as provided for in Article 7 of that Directive, designed or adapted primarily for that purpose; the intentional production, sale, procurement for use, import, distribution or otherwise making available of tools used for committing offences, at least for cases which are not minor, as provided for in Article 7 of that Directive;

(e) a criminal offence that is punishable, in accordance with the relevant instrument in Article 3 or, in the event that the instrument in question does not contain a penalty threshold, in accordance with the relevant national law, by a custodial sentence of a maximum of at least four years.

4 Available at https://rm.coe.int/168008371f

5 Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042

Regional case law

- ECtHR, Salabiaku v. France, App n. 10519/83, 7 October 1988
- ECtHR, Murray v. United Kingdom, App. n. 14310/88, 28 October 1994
- ECtHR, Welch v. the United Kingdom – app. n. 17440/90 Judgment 9.2.1995.
- ECtHR, Phillips v The United Kingdom, App. n. 41087/98, 5 July 2001.
- ECtHR, Arcuri and others v. Italy, App. n. 52024/99, 5 July 2001
- ECtHR, Falk v. The Netherlands, App. n. 66273/01, 19 October 2004
- ECtHR, Geerings v. the Netherlands, App. 30801/03, Judgement of 1st June 2007
- ECtHR, Grayson & Barnham v. United Kingdom, App. n. 19955/05 and 15085/06, 23 September 2008
- ECtHR, Sun v Russia, App. n. 31004/02, 5 February 2009
- ECtHR, Krumpholz v. Austria, App. n. 13201/05, 18 March 2010
- ECtHR, Chambaz v. Switzerland, App. n. 11663/04, 5 April 2012
- ECtHR, Aboufadda v. France, App. n. 28457/10, 4 November 2014
- ECtHR, Gogitidze and Others v. Georgia, App n. 36862/05, 12 May 2015
- ECtHR, Zschüschen vs Belgium, App. n. 23572/07, 2 May 2017
- ECtHR, Djordjević v. France, App. n. 15572/17, 7 October 2021

- Court of Justice of the European Union, D.B. v. Consob, C-481/19, 2 February 2021.

National legislation and case law

Argentina

Criminal Code[6]

(illicit enrichment)

Art. 268 (2):

Shall be punished with imprisonment or imprisonment from two to six years, a fine of fifty percent to one hundred percent of the value of the enrichment and disqualification for life, whoever, upon being duly requested, does not justify the origin of an appreciable patrimonial enrichment of his own or of a person interposed to dissimulate it, which occurred after the assumption of a public office or employment and up to two years after having ceased to hold it.

It shall be understood that there has been enrichment not only when the patrimony has been money, things or goods, but also when debts have been cancelled or obligations that affected him have been extinguished.

The person interposed to dissimulate the enrichment shall be punished with the same penalty as the perpetrator of the act.

Case law

- Cámara Nacional de Casación Penal, sala IV, 'Alsogaray', causa n°4787 (2005), 9 June 2005

6 Available at https://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/texact.htm

Australia (Federal level)

Proceeds of Crime Act 2002[7]

Making a preliminary unexplained wealth order requiring a person to appear

(1) A court with * proceeds jurisdiction must make an order (a preliminary unexplained wealth order) requiring a person to appear before the court for the purpose of enabling the court to decide whether or not to make an * unexplained wealth order in relation to the person if:

(a) a * proceeds of crime authority applies for an unexplained wealth order in relation to the person; and

(b) the court is satisfied that an * authorised officer has reasonable grounds to suspect that the person›s * total wealth exceeds the value of the person›s * wealth that was * lawfully acquired; and

(c) any affidavit requirements in subsection (2) for the application have been met.

Effect of restraining orders

(1A) Paragraphs (1)(b) and (c) do not apply if a * restraining order made under section 20A in relation to the person:

(a) is in force; or

(b) has been revoked under section 44.

(1B) If subsection (1A) applies, the court may, in considering making an order under subsection (1), take into account:

(a) an affidavit of an * authorised officer that:

(i) supported the application for the * restraining order made under section 20A; and

(ii) met the requirements of subsection 20A(3); and

(b) any material that an authorised officer or * proceeds of crime authority provided, in the proceedings under section 20A, relating to the requirements of subsection 20A(3); and

(c) any other material that an authorised officer or proceeds of crime authority provides in the proceedings under this section.

This subsection does not limit the court's power to take other material into account.

Affidavit requirements

(2) An application for an * unexplained wealth order in relation to a person must be supported by an affidavit of an * authorised officer that:

(a) states that the authorised officer suspects that the person›s * total wealth exceeds the value of the person›s * wealth that was * lawfully acquired; and

(b) includes the grounds on which the authorised officer holds that suspicion.

Considering application without notice

(3) The court must make the order under subsection (1) without notice having been given to any person if the * responsible authority requests the court to do so.

Refusal to make preliminary unexplained wealth order

(4) Despite subsection (1), the court may refuse to make the * preliminary unexplained wealth order if the court is satisfied that there are not reasonable grounds to suspect that the person›s * total wealth exceeds by $100,000 or more the value of the person›s * wealth that was * lawfully acquired.

Australia (Queensland)

Criminal Proceeds Confiscation Act 2002 (as amended by the Criminal Proceeds Confiscation (Unexplained Wealth and Serious Drug Offender Confiscation Order) Amendment Act 2013)[8]

(unexplained wealth forfeiture)

'89G Making of unexplained wealth order

'(1) The Supreme Court must, on an application under section 89F, make an unexplained wealth order against a person if it is satisfied there is a reasonable suspicion that—

(a) the person—
(i) has engaged in 1 or more serious crime related activities; or
(ii) has acquired, without giving sufficient consideration, serious crime derived property from a serious crime related activity of someone else, whether or not the person knew or suspected the property was derived from illegal activity;

and

(b) any of the person's current or previous wealth was acquired unlawfully.

7 Available at http://www8.austlii.edu.au/cgi-bin/viewdb/au/legis/cth/consol_act/poca2002160/

8 Available at https://www.legislation.qld.gov.au/view/pdf/asmade/act-2013-021

'(2) However, the court may refuse to make the order if the court is satisfied it is not in the public interest to make the order.

'(3) A finding of the court under subsection (1)(a)—

(a) need not be based on a reasonable suspicion that a particular offence was committed; and
(b) may be based on a reasonable suspicion that some offence that is a serious crime related activity was committed.

'(4) The court may not make an unexplained wealth order on an application that relates only to external serious crime related activity unless it is satisfied that no action has been taken under a law of the Commonwealth or any other place outside Queensland, including outside Australia, in relation to the proceeds of the external serious crime related activity.

'(5) For subsection (4), an affidavit by an appropriate officer that includes a statement that the officer has made due enquiry and is satisfied that no action has been taken under a law of the Commonwealth or any place outside Queensland, including outside Australia, against any property in relation to the proceeds of the external serious crime related activity is proof, in the absence of evidence to the contrary, of the matters contained in the affidavit.

'(6) The court may make the ancillary orders the court considers appropriate when it makes the unexplained wealth order or at a later time.

'89L Assessment for unexplained wealth order

'(1) The unexplained wealth of a person is the amount mentioned in subsection (2) or (3).

'(2) For subsection (1), the amount may be the amount equivalent to—

(a) the person's current or previous wealth of which the State has given evidence; less
(b) any of the current or previous wealth mentioned in paragraph (a) that the person proves was lawfully acquired.

'(3) Alternatively, for subsection (1), the amount may be the amount equivalent to the person's expenditure for a period of which the State has given evidence less the income for that period that the person proves was lawfully acquired.

'(4) For subsection (2), the value of a thing included as current or previous wealth is—

(a) if the wealth has been disposed of, the greater of—
    (i) the value when the wealth was acquired; or
    (ii) the value immediately before the wealth was disposed of;

or

(b) otherwise, the greater of—
    (i) the value when the wealth was acquired; or
    (ii) the value when the application for the unexplained wealth order was made.

'(5) However, the court may—

(a) treat, as the value of the person's current or previous wealth, the value it would have had if it had been acquired at the time the court decides the application; and
(b) without limiting paragraph (a), have regard to any decline in the purchasing power of money between the time the current or previous wealth was acquired and the time the court decides the application.

'(6) In this section— acquired includes provided or derived.

Australia (Western Australia)

Criminal Property Confiscation Act 2000[9]

(burden of proof; reversal)

12(1) On hearing an application under section 11(1), the court must declare that the respondent has unexplained wealth if it is more likely than not that the total value of the respondent's wealth is greater than the value of the respondent's lawfully acquired wealth.

12(2) Any property, service, advantage or benefit that is a constituent of the respondent's wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary.

Case law

- Director of Public Prosecutions for Western Australia v Gypsy Jokers Motorcycle Club Inc (2005) WASC
- Director of Public Prosecutions v Morris [No2][2010] WADC

9 Available at https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_25306.pdf/$FILE/Criminal%20Property%20Confiscation%20Act%202000%20-%20%5B03-d0-03%5D.pdf?OpenElement

Australia (South Australia)

Serious and Organised Crime (Unexplained Wealth) Act 2009[10]

(unexplained wealth forfeiture; exception; good faith)

Section 9

[…]

(11) If, in determining an application under this section relating to wealth of a person, the Court is satisfied— (a) that it is not reasonably possible for the person to establish that a component of his or her wealth was lawfully acquired (due to the effluxion of time, the circumstances in which that component was acquired or any other reason); and (b) that the person has acted in good faith, the Court may determine that that component should be excluded from the application.

10 Available at https://www.legislation.sa.gov.au/lz?path=%2FC%2FA%2FSERIOUS%20AND%20ORGANISED%20CRIME%20(UNEXPLAINED%20WEALTH)%20ACT%202009

Belgium

Criminal Code, as last amended in 2021[11]

(criminal confiscation)

Art. 42. Special confiscation applies to :

1° Things forming the object of the offence and to those which served or were intended to commit it, when ownership belongs to the convicted person;

2° Things produced by the offence.

(3° To the financial benefits derived directly from the offence, to the goods and values substituted for them and the income from these invested benefits). <L 1990-07-17/30, art. 1, 004; In force : 25-08-1990>

Art. 43. Special confiscation (applying to the things referred to in 1° and 2° of article 42), for a felony or misdemeanour, of things that

1 Have been used or

2 Have been intended for use to commit the crime or misdemeanor,

will be ordered, except when it has the effect of subjecting the convicted person to an unreasonably heavy penalty.<L 1990-07-17/30, art. 2, 004; In force: 25-08-1990>

It will only be pronounced for contraventions in cases determined by law.

(equivalent value confiscation)

Art. 43bis.<Inserted by L 1990-07-17/30, art. 3, 004; In force: 25-08-1990> (The special confiscation applying to the things referred to in article 42, 3°, may still be ordered by the judge, but only insofar as it is requested in writing by the public prosecutor. <L 2002-12-19/86, art. 1, 039; In force : 24-02-2003>

If the items referred to in paragraph 1 and the items used or intended for use in committing the offence cannot be found in the convicted person's estate, the judge will proceed with their monetary valuation and confiscate an equivalent sum of money.

Where the confiscated items belong to the plaintiff, they will be returned to him. Forfeited items confiscated items will likewise be attributed to him when the judge has ordered their confiscation on the grounds that they constitute goods or values substituted by the convicted person for those belonging to the civil party, or because they constitute the equivalent of such things within the meaning of paragraph 2 of the present article.

Any other third party claiming a right to the confiscated item may assert this right within a time limit and according to procedures determined by the King.

The special confiscation of immovable property must or may be ordered by the judge, depending on the legal basis but only insofar as it has been requested in writing by the public prosecutor.

The Public Prosecutor's written request for the confiscation of real estate that has not been seized in accordance with the applicable formalities is, on pain of inadmissibility, entered free of charge in the margin of the last transcribed title or judgment referred to in article 1, paragraphs 1 and 2, of the mortgage law of 16 December 1851. The Public Prosecutor attaches proof of the marginal note to the criminal record before the close of the proceedings. If necessary, the Public Prosecutor requests that the marginal note be removed free of charge.

If necessary, the judge reduces the amount of the pecuniary benefits referred to in article 42, 3°, or the monetary valuation referred to in paragraph 2 so as not to subject the convicted person to an unreasonably heavy sentence.

(extended confiscation)

Article 43quater
§ 1. Notwithstanding article 43bis, paragraphs 3 and 4, the patrimonial advantages contemplated in § 2, the assets and securities with which they may have been replaced and the proceeds of the investment of the advantages that are in the possession of a person may, at the request of the royal prosecutor, be confiscated, or the person may be sentenced to pay an amount that the judge considers that corresponds to the value of the property is the person is found guilty:

1°of one or more of the offences contemplated:
a) in articles 136sexies en 136septies, 1° ;
b) in article 137, to the extent that these crimes are punishable by one of the penalties referred to in Article 138, § 1, 4° to 10°, and are of such a nature that they may result in financial gain, in Article 140, to the extent that this crime or wrongdoing is of such a nature that it may result in financial gain, in Articles 140bis to 140sexies insofar as these crimes are of such a nature that they may result in financial gain, in article 140septies, insofar as this crime is punishable by one of the penalties referred to in article 140septies, § 1, third and fourth indents, and is of such a nature that it may result in financial gain, and in article 141;
c) in articles 162, 163, 173, 180 and 186;
d) in articles 246 - 250;
e) in articles 417/25 - 417/36, 417/38, 433quater/1 and 433quater/4];
f) in articles 433quinquies - 433octies, 433undecies and 433duodecies;
g) in articles 504bis and 504ter;
h) in article 505, with the exception of assets covered by article 42, 1° ;

11 Available at http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&caller=list&cn=1867060801&la=f&fromtab=loi

i) in article 2bis, § 1 of the Act of 24 February 1921 concerning the trafficking of poisonous, soporific, narcotic, psychotropic, disinfectant or antiseptic substances and substances that may be used for the illicit manufacture of narcotic and psychotropic substances, insofar as the facts relate to the import, export, manufacture, sale or putting on sale of the means and substances referred to in that article, or in article 2bis, § 3, b), of § 4, b);
j) in article 2quater, 4°, of the same Act;
k) in articles 77bis - 77quinquies of the Law of 15 December 1980 on entry, stay, settlement and removal of foreign nationals.

l) in article 10, § 1, 2° of the Law of 15 July 1985 on the use in animals of substances having a hormonal, anti-hormonal, beta-adrenergic or production-enhancing action.

2° or of one or more of the offences contemplated in article 324ter;

3° or to one or more of the crimes listed below when committed within the framework of a criminal organisation as defined in Article 324bis :
a) in articles 468, 469, 470, 471 or 472;
b) in article 475;
c) in article 477 - 477sexies or article 488bis;
d) in Article 8 of the Law of 5 August 1991 on the import, export and transit of, and the suppression of illicit traffic in, arms, ammunition and equipment specially designed for military or law enforcement use and related technology;
e) in Articles 1 and 8 of the Royal Decree of April 12, 1974 on certain operations related to substances with hormonal, anti-hormonal, anabolic, beta-adrenergic, anti-infectious, anti-parasitic, and anti-inflammatory effects, for the offenses punishable under the Law of February 24, 1921 on the trafficking of poisons, soporifics and narcotics, psychotropic substances, disinfectants and antiseptics and of the substances that may be used for the illegal manufacture of narcotics and psychotropic substances;
4° or to several offenses jointly prosecuted, and whose seriousness, finality and interrelatedness allow the court to conclude certainly and necessarily that these offenses were committed in the context of serious tax fraud, organised or otherwise.

§ 2. The confiscation contemplated in § 1 may be pronounced against the perpetrators, co-perpetrators or accomplices who have been convicted for one or more of the offences of this article, and under the conditions defined in § 1 if the sentenced person has acquired supplementary patrimonial advantages during a pertinent period, and serious and concrete evidence exist that they are derived from the offence for which he was sentenced or from identical acts and that the sentenced person cannot reliably prove otherwise. That option may also be asserted by any third party claiming to have rights over the advantages.

§ 3. Under this article, pertinent shall be understood to mean a period starting five years before the indictment of the person until the date of the ruling.

The serious and concrete evidence of § 2 may be contained in any trustworthy elements that have been submitted to the court in a regular fashion and which show an imbalance of any interest between, on the one hand, a temporary or ongoing increase of the patrimony and the expenses of the sentenced person during the pertinent period, of which the prosecution submits the evidence, and, on the other hand, a temporary or ongoing increase of the patrimony and the expenses of the sentenced person during this period that the person may be prove that is not related to the acts for which he was sentenced, or to identical acts.

When the court orders the special confiscation under this article, it may decide to not include a portion of the pertinent period or the revenues, the assets or the securities if it considers that such measure is convenient in order to avoid subjecting the convict to an unreasonably heavy penalty.

§ 4. The patrimony of a criminal organisation must be confiscated, subject to the rights of third parties in good faith.

Case law

- Cass. 25 September 2001, J.T., 2002, 660

Bhutan

Anti-Corruption Act of Bhutan 2011[12]

(illicit enrichment)

60 Possession of unexplained wealth

(1) Any person who, being or having been a public servant or serving or having served in a Civil Society Organisation or such other individual or organisation using public resources:

(a) Maintains a standard of living that is not commensurate with his or her present or past lawful sources of income; or

(b) Is in control of assets disproportionate to his or her present or past official lawful sources of income shall be guilty of an offence.

(2) A person shall not be guilty of an offence under this section, if such person furnishes a satisfactory explanation to the Court:

(a) As to how he or she was able to maintain such a standard of living; or

(b) How such assets came under his or her lawful control.

(3) In a proceeding under this section, if the Court is satisfied that, having regard to the closeness of his or her relationship to the accused and to other circumstances, there is reason to believe that any person was holding assets in trust for or otherwise on behalf of the accused or acquired such resources or property as a gift from the accused, such assets shall, in the absence of evidence to the contrary, be presumed to have been in the control of the accused.

(4) An offence under this section shall be a misdemeanor.

(5) In addition to any penalty imposed under subsection (4), the Court may order a person convicted of an offence under subsection (1) of this section to pay into the Consolidated Fund:

(a) A sum not exceeding the value of the pecuniary resources; or

(b) A sum not exceeding the value of the assets, the acquisition by him or her of which was not explained to the satisfaction of the Court.

12 Available at https://www.nab.gov.bt/assets/uploads/docs/acts/2014/The_Anti-Corruption_Act,_2011eng7th.pdf

Bolivia

Ley De Lucha Contra La Corrupción, Enriquecimiento Ilícito e Investigación De Fortunas "Marcelo Quiroga Santa Cruz" (Ley No 004 from 31.03.2010)[13]

(illicit enrichment)

Article 27. (Illicit Enrichment).

Public servants who have disproportionately increased their wealth in relation to their legitimate income and who cannot justify it, shall be punished with imprisonment of five to ten years, disqualification from the exercise of public office and/or elected positions, a fine of two hundred to five hundred days and the confiscation of the illegally obtained assets.

Article 28. (Illicit Enrichment of Private Individuals Affecting the State).

Any natural person who, through private activity, has disproportionately increased his or her assets in relation to his or her legitimate income, affecting the State's assets, and fails to disprove this situation, shall be punished with imprisonment of three to eight years, a fine of one hundred to three hundred days and the confiscation of the illegally obtained assets. The same offence and the same penalty shall be incurred by the representatives or former legal representatives of legal persons who, through private activity, have increased the assets of the legal person, affecting the assets of the State and who cannot prove that they come from a lawful activity; additionally, the legal person shall return to the State the assets that have been affected in addition to those obtained as proceeds of the offence and shall be punished with a fine of 25% of its assets.

13 Available at http://www.oas.org/juridico/spanish/mesicic3_blv_ley_quiroga.pdf

Brazil

Criminal code[14]

(extended confiscation)

Art. 91-A. In the event of conviction for offenses to which the law assigns a maximum penalty of more than 6 (six) years of confinement, the loss may be decreed, as proceeds or income from the crime, of assets corresponding to the difference between the value of the convicted party's assets and that which is compatible with his lawful income. (Included by Law No. 13,964, of 2019)

§ Paragraph 1 For the purposes of the loss provided for in the caput of this article, the assets of the convicted person shall be understood as all assets: (Included by Law No. 13,964, 2019)

I. of his ownership, or in relation to which he has dominion and direct or indirect benefit, on the date of the criminal offense or received thereafter; and (Included by Law No. 13,964, 2019)
II. transferred to third parties free of charge or for a derisory consideration, as of the beginning of the criminal activity. (Included by Law No. 13,964, 2019)

§ 2 The convicted person may demonstrate the inexistence of incompatibility or the licit origin of the assets. (Included by Law No. 13,964, 2019)

§ 3º The forfeiture provided for in this article shall be expressly requested by the Public Prosecutor›s Office, at the time the accusation is offered, indicating the difference ascertained. (Included by Law No. 13,964, 2019)

§ 4 In the conviction sentence, the judge shall state the value of the difference ascertained and specify the assets whose forfeiture is decreed. (Included by Law No. 13,964, 2019)

§ 5º The instruments used for the commission of crimes by criminal organisations and militias shall be declared forfeited in favor of the Union or the State, depending on the Court where the criminal action is proceeding, even if they do not endanger the safety of persons, morality or public order, nor offer serious risk of being used for the commission of new crimes. (Included by Law No. 13,964, 2019)

14 Available at https://www.planalto.gov.br/ccivil_03/decreto-lei/del2848compilado.htm

Brunei Darussalam

Prevention of Corruption Act 1981, as last amended in 2014[15]

(illicit enrichment)

12 Possession of Unexplained Property

1. Any person who, being or having been a public officer –

   (a) maintains a standard of living above that which is commensurate with his present or past emoluments; or

   (b) is in control of pecuniary resources or property disproportionate to his present or past emoluments,

shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence: Penalty, a fine of B$30,000 and imprisonment for 7 years.

2. In addition to any penalty imposed under subsection (1) the court may order a person convicted of an offence under subsection (1) to pay to the Government –

   (a) a sum not exceeding the amount of the pecuniary resources; or

   (b) a sum not exceeding the value of the property,

the acquisition of which by him was not explained to the satisfaction of the court and any such sum ordered to be paid shall be recoverable as a fine.

3. Where a court is satisfied in proceedings for an offence under subsection (1) that, having regard to the closeness of his relationship to the accused and to other relevant circumstances. There is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused, or acquired such pecuniary resources or property as a gift, or loan without adequate consideration from the accused, such pecuniary resources or property shall until the contrary is proved, be deemed to have been under the control or in the possession of the accused.

(forced disclosure)

23A. (1) In the course of any investigation into or proceedings relating to an offence alleged or suspected to have been committed by any person under this Act or under sections 161 to 165 or 213 to 215 of the Penal Code (Chapter 22) or a conspiracy to commit, or an attempt to commit, or an abetment of any such offence, the Public Prosecutor may, notwithstanding anything in any other written law to the contrary, by written notice

— (a) require any such person to furnish a statutory declaration or, as the Public Prosecutor sees fit, a statement in writing enumerating all movable or immovable property belonging to or possessed by such person and by the spouse, parents, or sons and daughters of such person, and specifying the date on which each of the properties enumerated was acquired whether by way of purchase, gift, bequest, inheritance or otherwise;[…]

(2) Every person to whom a notice is sent by the Public Prosecutor under subsection (1) of this section shall, notwithstanding the provisions of any written law or any oath of secrecy to the contrary, comply with the terms of that notice within such times as may be specified therein and any person who wilfully neglects, or fails so to comply shall be guilty of an offence: Penalty, a fine of $5,000 and imprisonment for one year.

15 Available at https://www.fao.org/faolex/results/details/en/c/LEX-FAOC202844/

Canada

Criminal code[16]

(money laundering)

Section 462.31(1)

Everyone commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property with intent to conceal or convert that property or those proceeds, knowing or believing that, or being reckless as to whether, all or part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

(a) The commission in Canada of a designated offence; or

(b) An act or omission anywhere that, if it had occurred in Canada would have constituted a designated offence.

(criminal confiscation, NCB Confiscation within the scope of criminal proceedings; extended confiscation)

462.37

(1) Subject to this section and sections 462.39 to 462.41, if an offender is convicted, or discharged under section 730, of a designated offence and the court imposing sentence on or discharging the offender, on application of the Attorney General, is satisfied, on a balance of probabilities, that any property is proceeds of crime obtained through the commission of the designated offence, the court shall order that the property be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law.

(2) If the evidence does not establish to the satisfaction of the court that property in respect of which an order of forfeiture would otherwise be made under subsection (1) was obtained through the commission of the designated offence of which the offender is convicted or discharged, but the court is satisfied, beyond a reasonable doubt, that the property is proceeds of crime, the court may make an order of forfeiture under subsection (1) in relation to that property.

(2.01) A court imposing sentence on an offender convicted of an offence described in subsection (2.02) shall, on application of the Attorney General and subject to this section and sections 462.4 and 462.41, order that any property of the offender that is identified by the Attorney General in the application be forfeited to Her Majesty to be disposed of as the Attorney General directs or otherwise dealt with in accordance with the law if the court is satisfied, on a balance of probabilities, that

- (a) within 10 years before the proceedings were commenced in respect of the offence for which the offender is being sentenced, the offender engaged in a pattern of criminal activity for the purpose of directly or indirectly receiving a material benefit, including a financial benefit; or
- (b) the income of the offender from sources unrelated to designated offences cannot reasonably account for the value of all the property of the offender.

490.1(1)

Subject to sections 490.3 to 490.41, if a person is convicted or discharged under section 730, of an indictable offence under this Act or the Corruption of Foreign Public Officials Act and, on application of the Attorney General the court is satisfied, on a balance of probabilities, that offence-related property is related to the commission of the offence, the court shall

(a) if the prosecution of the offense was commenced at the instance of the government of a province and conducted by or on behalf of that government, order that the property be forfeited to Her Majesty in right of that province to be disposed of or otherwise dealt with in accordance with the law by the Attorney General or Solicitor General of that province; and

(b) in any other case, order that the property be forfeited to Her Majesty in right of Canada to be disposed of or otherwise dealt with in accordance with the law by the member of the Queen's Privy Council for Canada that is designated by the Governor in Council for the purpose of this paragraph.

Case law

- Supreme Court of Canada, R v Oakes [1986] 1 SCR 103, 76.

16 Available at https://laws-lois.justice.gc.ca/eng/acts/c-46/

Cambodia

Anti-Corruption Law, 2010[17]

(illicit enrichment)

Article 36: Illicit Enrichment

Illicit enrichment is an increase in the wealth of an individual and the individual cannot provide a reasonable explanation of its increase in comparison to his or her legal income. After the first assets and liabilities declaration, every person as described in article 17 (people required to declare assets and debt) and article 19 (other people required to declare assets and debt) of this law, who cannot provide a reasonable explanation of the wealth increase in comparison to his or her legal income, shall face confiscation of the unexplainable property. All of the confiscated property will become state property. If the unexplainable wealth increase is connected to any corruption offence as stated in this law, the wealth owner shall be punished in accordance with this law.

17 Available at https://cdc.gov.kh/wp-content/uploads/2022/05/ANTI-CORRUPTION-LAW-FULL-TEXT-.pdf

Colombia

Ley 1708 de 2014 (Enero 20) Por medio de la cual se expide el Código de Extinción de Dominio[18]

(extinguishment of the right of ownership; extinción de dominio)

ARTICLE15. Concept. The extinction of ownership is a patrimonial consequence of illegal activities or activities that seriously deteriorate social morality, consisting of the declaration of ownership in favor of the State of the assets referred to in this law, by sentence, without consideration or compensation of any nature for the affected.

[…]

ARTICLE16. Causes. The ownership of assets found in the following circumstances will be declared extinguished:

1. Those that are the direct or indirect product of an illegal activity.

2. Those that correspond to the material object of the illicit activity, unless the law provides for their destruction.

3. Those that come from the partial or total, physical or legal transformation or conversion of the product, instruments or material object of illicit activities.

4. Those that are part of an unjustified increase in assets, when there are elements of knowledge that allow it to be reasonably considered that they come from illicit activities.

5. Those that have been used as a means or instrument for the execution of illegal activities.

6. Those that, according to the circumstances in which they were found, or their particular characteristics, allow it to be established that they are intended for the execution of illicit activities.

7. Those that constitute income, rents, fruits, profits and other benefits derived from the above assets.

8. Those of legal origin, used to hide goods of illicit origin.

9. Those of legal origin, materially or legally mixed with goods of illicit origin.

10. Those of legal origin whose value is equivalent to any of the assets described in the previous paragraphs, when the action is inadmissible due to the recognition of the rights of a third party in good faith and free of fault.

11. Those of legal origin whose value corresponds to or is equivalent to that of goods that are the direct or indirect product of an illicit activity, when their location, identification or material impact is not possible.

PARAGRAPH. The extinction of ownership will also proceed with respect to the assets subject to succession due to death, when any of the causes provided for in this law occur.

ARTICLE17. Nature of the action. The domain forfeiture action referred to in this law is of a constitutional, public, jurisdictional, direct nature, of a real nature and of patrimonial content, and will proceed over any property, regardless of who has it in their possession or who has acquired it.

ARTICLE18. Autonomy and independence of action. This action is distinct and autonomous from criminal action, as well as from any other, and independent of any declaration of responsibility.

In no case will prejudicial proceedings proceed to prevent the delivery of a sentence, or incidents other than those provided for in this law.

ARTICLE19. Procedural action. The procedural action will be developed taking into account respect for fundamental rights and the need to achieve the effectiveness of the administration of justice in the terms of this code.

The judicial official is obliged to correct irregular acts, always respecting rights and guarantees.

[…]

ARTICLE21. Timelessness. The action of domain forfeiture is imprescriptible.

The extinction of ownership will be declared regardless of whether the assumptions for its origin have occurred prior to the validity of this law.

PARAGRAPH . The precautionary measures ordered in the domain forfeiture processes will be in force until there is a court order ordering their cancellation or there is an enforceable judgment that has put an end to the judicial process within which they were ordered.

(Paragraph, Added by Art. 212 of Law 2294 of 2023)

ARTICLE22. Nullity ab initio. Once the illegality of the origin of the assets affected in the property extinction process has been demonstrated, it will be understood that the object of the legal transactions that gave rise to their acquisition is contrary to the constitutional and legal regime of property and therefore the acts and Contracts that deal with said assets in no case constitute fair title and will be considered void ab initio . The foregoing, without prejudice to the rights of third parties in good faith and free of fault.

[…]

18 Available at https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=56475

Case law

- Constitutional Court of Colombia, Decision C-374, 1997
- Constitutional Court of Colombia, Decision C-409, 1997
- Constitutional Court of Colombia, Decision C-740, 2003.

Chile

Case law

- Decision 1933/2007, Supreme Court of Chile
- Case Nº 248-2018, Tribunal del Juicio Oral de Puente Alto

China (Hong Kong)

Cap. 201 Prevention of Bribery Ordinance, L.N. 58 of 1971[19]

(illicit enrichment)

Section 10

Possession of unexplained property

(1)Any person who, being or having been the Chief Executive or a prescribed officer— […]

(a)maintains a standard of living above that which is commensurate with his present or past official emoluments; or

(b)is in control of pecuniary resources or property disproportionate to his present or past official emoluments,

shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

Case law

- Attorney General v. Lee Kwong-kut [1993] AC 951
- Attorney General v Hui Kin-hong [1995] HKCA 351

19 Available at https://www.elegislation.gov.hk/checkconfig/checkClientConfig.jsp?applicationId=RA001

Cyprus

Case law

- Tekinder Pal v The Republic, Criminal Appeal n. 4/2010.

Fiji

Prevention of Bribery Act (Promulgation No. 12 of 2007)[20]

(illicit enrichment)

10. Possession of unexplained property

(1) Any person who, being or having been a prescribed officer –

(a) maintains a standard of living above that which is commensurate with his present or past official emoluments; or

(b) is in control of pecuniary resources of property disproportionate to his present or past official emoluments,

shall, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such pecuniary resources or property came under his control, be guilty of an offence.

(2) Where a court is satisfied in proceedings for an offence under subsection (1)(b) that, having regard to the closeness of his relationship to the accused and to other circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused or acquired such resources or property as a gift from the accused, such resources or property shall, in the absence of evidence to the contrary, be presumed to have been in the control of the accused.

(3) In this section, "official emoluments" includes any pension or gratuity payable under any statutory law.

…

12. Penalty for offences

(1) Any person guilty of an offence under this Part, other than an offence under section 3, shall be liable –

(a) on conviction on indictment –

(i) for an offence under section 10, to a fine of $1,000,000 and to imprisonment for 10 years;

…

(b) on summary conviction –

(i) for an offence under section 10, to a fine of $500,000 and to imprisonment for 3 years;

…

(3) In addition to any penalty imposed under subsection (1), the court may order a person

convicted of an offence under section 10(1)(b) to pay to the Government –

(a) a sum not exceeding the amount of the pecuniary resources; or

(b) a sum not exceeding the value of the property,

the acquisition of which by him was not explained to the satisfaction of the court.

(4) An order under subsection (3) may be enforced in the same manner as a judgment of the High Court in its civil jurisdiction.

12AA Confiscation of assets

(1) Subject to this section, where a person is convicted on indictment of an offence under section 10(1)(b) the court may, in addition to any penalty imposed under section 12(1), order the confiscation of any pecuniary resources or property –

(a) found at the trial to be in his control as provided in section 10; and

(b) of an amount or value not exceeding the amount or value of pecuniary resources or property the acquisition of which by him was not explained to the satisfaction of the court.

(2) Any application for an order under subsection (1) shall be made by the Attorney-General within 28 days after the date of the conviction.

(3) An order under subsection (1) shall not be made in respect of pecuniary resources or property held by a person other than the person convicted unless that other person has been given reasonable notice that such an order may be made and has had an opportunity to show cause why it should not be made.

(4) An order under subsection (1) shall not be made in respect of pecuniary resources or property held by a person other than the person convicted if that other person satisfies the court in any proceedings to show cause under subsection (3) that he had –

(a) acted in good faith as regards the circumstances in which the pecuniary resources or property came to be held by him; and

(b) so acted in relation to the pecuniary resources or property that an order in the circumstances would be unjust.

20 Available at https://www.laws.gov.fj/Acts/DisplayAct/805

(5) Nothing in subsection (4) shall be construed as limiting the court's discretion to decline to make an order under subsection (1) on grounds other than those specified in subsection (4).

(6) An order under subsection (1) – may be made subject to such conditions as the court thinks fit in all the circumstances of the case.

(7) A court may make orders under both subsection (1) and section 12(3) in respect of the same offence but shall not make orders under both provisions in respect of the same pecuniary resources or property.

(8) An order under subsection (1) may make provision for taking possession of pecuniary resources or property to which the order applies and for the disposal of such resources or property by or on behalf of the Government.

Proceeds of Crime Act 1997 (as amended by the Proceeds of Crime Amendment Act No.7 of 2005 and by the Proceeds of Crime (Amendment) Decree 2012 (Decree No.61 of 2012))[21]

(unexplained wealth forfeiture)

Proceedings civil, not criminal

27B.

[…]

(2) Except in relation to an offence under this Act:

(a) the rules of construction applicable only in relation to the criminal law do not apply in the interpretation of this Act; and

(b) the rules of evidence applicable in civil proceedings apply, and those applicable only in criminal proceedings do not apply, to proceedings under this Act

[…]

Possession of unexplained wealth

71F. Any person who –

(a) maintains a standard of living above that which is commensurate with his or her present or past lawful emoluments, or
(b) is in control of pecuniary resources or property disproportionate to his or her present or past lawful emoluments,

shall, unless he or she provides a satisfactory explanation to the court as to how he or she was able to maintain such a standard of living or how such pecuniary resources or property came under his or her control, be required to pay to the Forfeited Assets Fund the amount specified in the unexplained wealth declaration under section 71K.

Application for an unexplained wealth declaration

71G. (1) The Director of Public Prosecutions may make an application in court for an unexplained wealth declaration against a person.

(2) An application under subsection (1) may be made in conjunction with an application under section 34 of the Act for a restraining order or at any other time.

(3) If the court makes an unexplained wealth declaration under subsection (1), the Director of Public Prosecutions may also make an application in court that the unexplained wealth is forfeitable.

[…]

Unexplained Wealth

71H. (1) For the purposes of this Decree, a person has unexplained wealth if the value of the person's total wealth as described in subsection (2) is greater than the value of the person's lawfully acquired wealth as described in subsection (3).

(2) The value of the person's total wealth is the total value of all the items of property and all the services, advantages and benefits that together constitute the person's wealth.

(3) The value of the person's lawfully acquired wealth is that person's total wealth that was lawfully acquired.

Assessing the value of unexplained wealth

71I. When assessing the respondent's wealth, the court shall consider the following—

(a) the value of any property, service, advantage or benefit is to be taken as its greater value—

(i) at the time that it was acquired; and

(ii) on the day that the application for the unexplained wealth declaration was made;

(b) the value of any property, service, advantage or benefit that was a constituent of the respondent's wealth but has been given away, used, consumed or discarded, or that is for any other reason no longer available, is taken to be an outgoing at the greater of its value—

21 Available at https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=95508

(i) at the time that it was acquired; and

(ii) immediately before it was given away, or was used, consumed or discarded, or is unavailable; and

(c) when hearing an application under section 71G, it shall not take account of any property—

(i) that has been forfeited under this Decree or any other written law; or

(ii) service, advantage or benefit that was taken into account for the purpose of making an earlier unexplained wealth declaration against the respondent.

[…]

The constituents of a person's wealth

71J. The following property, services, advantages and benefits constitute a person's wealth—

(a) all property that the person owns, whether the property was acquired before or after the commencement of this Decree;
(b) all property that the person effectively controls, whether the person acquired effective control of the property before or after the commencement of this Decree;
(c) all property that the person has given away at any time, whether before or after the commencement of this Decree;
(d) all other property acquired by the person at any time, whether before or after the commencement of this Decree, including consumer goods and consumer durables that have been consumed or discarded (but not including necessary food, clothing and other items reasonably necessary for ordinary daily requirements of life);
(e) all services, advantages and benefits that the person has acquired at any time, whether before or after the commencement of this Decree;
(f) all property, services, advantages and benefits acquired, at the request or direction of the person, by another person at any time, whether before or after the commencement of this Decree, including consumer goods and consumer durables that have been consumed or discarded (but not including necessary food, clothing and other items reasonably necessary for ordinary daily requirements of life); and
(g) anything of monetary value acquired by the person or another person, in Fiji or elsewhere, from the commercial exploitation of any product or any broadcast, telecast or other publication, where the commercial value of the product, broadcast, telecast or other publication depends on or is derived from the person's involvement in the commission of a serious offence, whether or not the thing was lawfully acquired and whether or not the person has been charged with or convicted of the offence.

Unexplained wealth declaration

71K. (1) The court that is hearing an application under section 71G shall declare that the respondent has unexplained wealth if it is more likely than not that the respondent's total wealth is greater than his or her lawfully acquired wealth.

(2) Any property, service, advantage or benefit that is a constituent of the respondent's total wealth is presumed not to have been lawfully acquired unless the respondent establishes the contrary.

(3) Without limiting the matters to which a court may have regard for the purpose of deciding whether the respondent has unexplained wealth, the court may have regard to the amount of the respondent's lawful income and outgoings at any time or at all times.

(4) When a court makes an unexplained wealth declaration, the court shall—

(a) assess the respondent's total unexplained wealth in accordance with section 71I and 71J;
(b) specify the assessed value of the unexplained wealth in the declaration; and
(c) order the respondent to pay to the Forfeited Assets Fund the amount specified in the declaration as the value of his or her unexplained wealth.

(5) When making an unexplained wealth declaration, the court may make any necessary or convenient ancillary orders and declarations, including awarding costs as the court sees fit.

France

Criminal Code[22]

Article 131-21 - Modified by Law n°2022-299 of March 2, 2022 - art. 12

(criminal confiscation)

The additional penalty of confiscation is incurred in cases provided for by law or regulation. It is also automatically incurred for crimes and misdemeanors punishable by a prison sentence of more than one year, with the exception of press offenses.

Subject to the last paragraph, confiscation applies to all movable or immovable property, whatever its nature, divided or undivided, which has been used to commit the offence or which was intended to commit the offence, and of which the convicted person is the owner or, subject to the rights of the owner in good faith, of which he has free disposal. When an offence for which the penalty of confiscation is incurred has been committed using an online public communication service, the instrument used to access this service is considered as movable property used to commit the offence and may be confiscated. In the course of the investigation or inquiry, it may be seized under the conditions laid down in the Code of Criminal Procedure.

Subject to the last paragraph, confiscation also applies to all property that is the object or direct or indirect product of the offence, with the exception of property that may be returned to the victim. If the proceeds of the offence have been mixed with funds of licit origin for the acquisition of one or more items of property, confiscation may relate to these items only up to the estimated value of the proceeds.

Subject to the same reservations, confiscation may also involve any movable or immovable property defined by the law or regulation which punishes the offence.

(extended confiscation)

Subject to the same reservations, in the case of a felony or misdemeanor punishable by at least five years' imprisonment and having procured a direct or indirect profit, confiscation may also be applied to movable or immovable property of any kind, whether divided or undivided, belonging to the convicted person or, subject to the rights of the owner in good faith, of which he or she has free disposal, when neither the convicted person nor the owner, when given the opportunity to explain the property for which confiscation is envisaged, has been able to justify its origin.

(general confiscation)

Subject to the last paragraph, where the law punishing the crime or offence so provides, confiscation may also relate to all or part of the property belonging to the convicted person or, subject to the rights of the owner in good faith, of which he has free disposal, whatever its nature, whether movable or immovable, divided or undivided.

[…]

(equivalent value confiscation)

Subject to the same reservations, confiscation may be ordered in terms of value. Value confiscation may be carried out on any property, of whatever kind, belonging to the convicted person or, subject to the rights of the owner in good faith, of which he or she has free disposal. For the recovery of the sum representing the value of the confiscated item, the provisions relating to judicial constraint are applicable.

[…]

(money laundering offence; presumption)

Article 324-1

Money laundering is the act of facilitating, by any means, the false justification of the origin of the property or income of the perpetrator of a crime or offence which has provided the perpetrator with a direct or indirect profit.

The act of assisting in the investment, concealment or conversion of the direct or indirect proceeds of a crime or offence shall also constitute money laundering.

Money laundering is punishable by five years' imprisonment and a fine of EUR 375 000.

Article 324-1-1

For the purposes of Article 324-1, property or income shall be presumed to be the direct or indirect proceeds of a crime or misdemeanour where the material, legal or financial conditions of the investment, concealment or conversion operation cannot have any other justification than to conceal the origin or beneficial owner of the property or income.

(non justification of one's resources)

Article 321-6 of the Criminal Code, as modified by Law n. 2006-64 of 23 January 2006.

Failure to provide proof of resources corresponding to one's lifestyle or failure to provide proof of the origin of property held, while being in habitual relations with one or more persons who either are engaged in the commission of crimes or offences punishable by at least five years' imprisonment and provide them with a direct or indirect profit, or are the victims of one of these offences, is punishable by three years' imprisonment and a fine of 75,000 euros.

The same penalties shall apply to facilitating the justification of fictitious resources to persons who commit crimes or offences punishable by

22 Available at https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719/

at least five years' imprisonment and who benefit directly or indirectly from them.

Case law

- Crim. 13 November 1982, Bull. crim., no. 213 (Crisafulli)
- Cour de cassation, criminelle, Chambre criminelle, 9 décembre 2015, 15-90.019
- Cour de cassation, criminelle, Chambre criminelle, 6 mars 2019, 18-81.059

Gabon

Loi N°002/2003 du 7 mai 2003, instituant un régime de prévention et de répression de l'enrichissement illicite en République Gabonaise[23]

(transparency obligations)

Article 8: Any representative of State authority who fails to comply with the wealth declaration formality declaration of assets instituted by the present law shall be dismissed from his employment or office in accordance with the rules governing his status or the convention to which he is subject.

Article 9 : Any representative of the State's authority who leaves his or her post without submitting a declaration of assets may, without prejudice to any disciplinary or criminal action that may be criminal action that may be taken against him/her, his/her property may be confiscated pending a decision on the merits of the case.

23 Available at https://faolex.fao.org/docs/pdf/gab202723.pdf

Guatemala

Criminal Code - Decreto Número 17-73 (modificado por Ley Contra La Corrupción, Decreto Número 312012)[24]

(illicit enrichment)

Article 448 Bis

The offence of illicit enrichment is committed by any civil servant, public employee or anyone exercising public functions, and up to five years after having ceased to exercise the public function, who obtains for himself or for any person a patrimonial benefit, an increase in his level of expenses, cancellation of debts or obligations that do not correspond to what he may have obtained, derived from the exercise of the position or from any income and which he cannot justify its lawful origin. The person responsible for this offence will be sanctioned with a prison sentence of five to ten years, a fine of fifty thousand to five hundred thousand Quetzales and special disqualification.

Article 448 Ter

The offence of illicit enrichment of private individuals is committed by anyone who, without being a public official or employee, administers, executes or manages public resources or State assets, up to five years after having ceased in said function, who obtains for themselves or for any person a patrimonial benefit, an increase in their level of expenditure, or cancellation of debts or obligations that do not correspond to what they may have obtained from their administration, execution or management or other lawful income. The person responsible for this offence will be sanctioned with a prison sentence of four to eight years and a fine of fifty thousand to five hundred thousand Quetzales.

In the event that the person responsible for this offence is a legal person, the provisions of Article 38 of the Criminal Code shall be applied for the imposition of the penalty.

24 Available at https://mcd.gob.gt/wp-content/uploads/2013/07/Actualizaci%C3%B3n_del_Codigo_Penal_Decreto_17-73.pdf

Haiti

Loi portant prévention et répression de la corruption (Loi No. CI-2014-008)[25]

(illicit enrichment)

Article 5.2. Illicit Enrichment

Any politician, public official, civil servant, magistrate or member of the police force who cannot reasonably justify a disproportionate increase in his or her assets in relation to his or her legitimate income shall be guilty of illicit enrichment.

Such act shall be punishable by imprisonment and a fine representing twice the value of such disproportion, without prejudice to the pecuniary penalties provided for in tax matters.

Any person found guilty of receiving illicit enrichment or the proceeds of illicit enrichment shall be sentenced to the same penalties as the perpetrator.

25 Available at https://www.fao.org/faolex/results/details/fr/c/LEX-FAOC202729/#:~:text=Ha%C3%AFti%20(Niveau%20national)-,Loi%20du%2012%20Mars%202014%20portant%20pr%C3%A9vention%20et%20r%C3%A9pression%20de,R%C3%A9publique%20d'Haiti%20est%20partie.

India

Case law

- Supreme Court of India, K. Veeraswami vs Union Of India And Others 1991 SCR (3)
- Supreme Court of India, Vasant Rao Guhe vs The State Of Madhya Pradesh (Criminal Appeal No.1279 of 2017)
- High Court of Madras, N. Pasupathy v State 2018 (1) MLJ (Crl) 745, 212

Ireland

Finance Act 1983[26]

(taxation of the proceeds of crime)

18.—(1) In this section—

"authorised officer" means an inspector or other officer of the Revenue Commissioners authorised by them in writing to exercise the powers conferred by this section;

"books" means—

(a) bankers' books, within the meaning of the Bankers' Books Evidence Acts, 1879 and 1959, and
(b) records and documents of persons referred to in section 7 (4) of the Central Bank Act, 1971 ;

"financial institution" means—

(a) a person who holds or has held a licence under section 9 of the Central Bank Act, 1971 ,

and

(b) a person referred to in section 7 (4) of that Act;

"judge" means a judge of the High Court;

"person" (other than in the definition of "financial institution") means an individual who is ordinarily resident in the State.

(2) Where—

(a) a person who, for the purposes of tax, has been duly required by an inspector to deliver a statement of the profits or gains arising to him from any trade or profession or to deliver to the inspector a return of income, fails to deliver that statement or that return to the inspector,

or

(b) the inspector is not satisfied with such a statement or return so delivered,

an authorised officer may, if he is of opinion that that person maintains or maintained an account or accounts, the existence of which has not been disclosed to the Revenue Commissioners, with a financial institution or that there is likely to be information in the books of that institution indicating that the said statement of profits or gains or the said return of income is false to a material extent, apply to a judge for an order requiring that financial institution to furnish the authorised officer—

(i) with full particulars of all accounts maintained by that person, either solely or jointly with any other person or persons, in that institution during a period not exceeding ten years immediately preceding the date of the application, and
(ii) with such information as may be specified in the order relating to the financial transactions of that person, being information recorded in the books of that institution which would be material in determining the correctness of the statement of profits or gains or the return of income delivered by that person or, in the event of failure to deliver such statement or return, would be material in determining the liability of that person to tax.

(3) Where the judge to whom an application is made under subsection (2) is satisfied that there are reasonable grounds for making the application, he may, subject to such conditions as he may consider proper and specify in the order, make an order requiring the financial institution to furnish the authorised officer with such particulars and information as may be specified in the order.

(4) Where a judge makes an order under this section, he may also, upon the application of the authorised officer concerned, make a further order prohibiting for such period as the judge may consider proper and specify in the order, any transfer of, or any dealing with, without the consent of the judge, any assets or moneys of the person to whom the order relates that are in the custody of the financial institution at the time the order is made.

(5) Every hearing of an application for an order under this section and of any appeal in connection therewith shall be held in camera.

19.—(1) Profits or gains shall be chargeable to tax notwithstanding that at the time an assessment to tax in respect of those profits or gains was made—

(a) the source from which those profits or gains arose was not known to the inspector,
(b) the profits or gains were not known to him to have arisen wholly or partly from a lawful source or activity, or
(c) the profits or gains arose and were known to him to have arisen from an unlawful source or activity,

and any question whether those profits or gains arose wholly or partly from an unknown or unlawful source or activity shall be disregarded in determining the chargeability to tax of the said profits or gains.

(2) Notwithstanding anything in the Tax Acts, any profits or gains which are charged to tax by virtue of subsection (1)—

(a) shall be charged under Case IV of Schedule D, and
(b) shall be described in the assessment to tax concerned as "miscellaneous income",

and the assessment shall not be discharged by the Appeal Commissioners or by a court by reason only of the fact that the income should, apart

26 Available at https://www.irishstatutebook.ie/eli/1983/act/15/enacted/en/html

from this section, have been described in some other manner or by reason only of the fact that the profits or gains arose wholly or partly from an unknown or unlawful source or activity.

(3) In this section "tax" means income tax, corporation tax or corporation profits tax, as appropriate.

(4) This section shall apply and have effect in respect of assessments to tax made on or after the passing of this Act.

Proceeds of Crime Act 1996[27]

(non conviction-based forfeiture)

Interim order

2.—(1) Where it is shown to the satisfaction of the Court on application to it ex parte in that behalf by a member, an authorised officer or the Criminal Assets Bureau—

(a) that a person is in possession or control of—
  (i) specified property and that the property constitutes, directly or indirectly, proceeds of crime, or
  (ii) specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,

and

(b) that the value of the property or, as the case may be, the total value of the property referred to in both subparagraphs (i) and (ii), of paragraph (a) is not less than €5,000,

the Court may make an order ("an interim order") prohibiting the person or any other specified person or any other person having notice of the order from disposing of or otherwise dealing with the whole or, if appropriate, a specified part of the property or diminishing its value during the period of 21 days from the date of the making of the order.

(2) An interim order—

(a) may contain such provisions, conditions and restrictions as the Court considers necessary or expedient, and
(b) shall provide for notice of it to be given to the respondent and any other person who appears to be or is affected by it unless the Court is satisfied that it is not reasonably possible to ascertain his, her or their whereabouts.

(3) Where an interim order is in force, the Court, on application to it in that behalf by the respondent or any other person claiming ownership of any of the property concerned may, if it is shown to the satisfaction of the Court that—

(a) (a) the property concerned or a part of it is not property to which subparagraph (i) or (ii) of subsection (1)(a) applies, or
(b) the value of the property to which those subparagraphs apply is less than €5,000,

discharge or, as may be appropriate, vary the order.

(3A) Without prejudice to sections 3(7) and 6, where an interim order is in force, the Court may, on application to it in that behalf by the applicant or any other person, vary the order to such extent as may be necessary to permit—

(a) the enforcement of any order of a court for the payment by the respondent of any sum, including any sum in respect of costs,
(b) the recovery by a county registrar or sheriff of income tax due by the respondent pursuant to a certificate issued by the Collector-General under section 962 of the Taxes Consolidation Act 1997, together with the fees and expenses provided for in that section, or
(c) the institution of proceedings for, or relating to, the recovery of any other sum owed by the respondent.

(4) The Court shall, on application to it in that behalf at any time by the applicant, discharge an interim order.

[…]

Interlocutory order

3.—(1) Where, on application to it in that behalf by a member, an authorised officer or the Criminal Assets Bureau, it appears to the Court on evidence tendered by the applicant, which may consist of or include evidence admissible by virtue of section 8—

(a) that a person is in possession or control of—
  (i) specified property and that the property constitutes, directly or indirectly, proceeds of crime, or
  (ii) specified property that was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,

and

(b) that the value of the property or, as the case may be, the total value of the property referred to in both subparagraphs (i) and (ii) of paragraph (a) is not less than €5,000,

the Court shall, subject to subsection (1A), make an order ("an interlocutory order") prohibiting the respondent or any other specified person or any other person having notice of the order from disposing of or otherwise dealing with the whole or, if appropriate, a specified part of the property or diminishing its value, unless, it is shown to the satisfaction of the Court, on evidence tendered by the respondent or any other person—

(I) that that particular property does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in

27 Available at https://www.irishstatutebook.ie/eli/1996/act/30/enacted/en/html

connection with property that, directly or indirectly, constitutes proceeds of crime, or

(II) that the value of all the property to which the order would relate is less than €5,000:

Provided, however, that the Court shall not make the order if it is satisfied that there would be a serious risk of injustice.

(1A) On such an application the Court, with the consent of all the parties concerned, may make a consent disposal order, and section 4A shall apply and have effect accordingly.

(2) An interlocutory order—

(a) may contain such provisions, conditions and restrictions as the Court considers necessary or expedient, and
(b) shall provide for notice of it to be given to the respondent and any other person who appears to be or is affected by it unless the Court is satisfied that it is not reasonably possible to ascertain his, her or their whereabouts.

(3) Where an interlocutory order is in force, the Court, on application to it in that behalf at any time by the respondent or any other person claiming ownership of any of the property concerned, may, if it is shown to the satisfaction of the Court that the property or a specified part of it is property to which paragraph (I) of subsection (1) applies, or that the order causes any other injustice, discharge or, as may be appropriate, vary the order.

(3A) Without prejudice to subsection (7) and section 6, where an interlocutory order is in force, the Court may, on application to it in that behalf by the applicant or any other person, vary the order to such extent as may be necessary to permit—

(a) the enforcement of any order of a court for the payment by the respondent of any sum, including any sum in respect of costs,
(b) the recovery by a county registrar or sheriff of income tax due by the respondent pursuant to a certificate issued by the Collector-General under section 962 of the Taxes Consolidation Act 1997, together with the fees and expenses provided for in that section, or
(c) the institution of proceedings for, or relating to, the recovery of any other sum owed by the respondent.

(4) The Court shall, on application to it in that behalf at any time by the applicant, discharge an interlocutory order.

(5) Subject to subsections (3) and (4), an interlocutory order shall continue in force until—

(a) the determination of an application for a disposal order in relation to the property concerned,
(b) the expiration of the ordinary time for bringing an appeal from that determination,
(c) if such an appeal is brought, it or any further appeal is determined or abandoned or the ordinary time for bringing any further appeal has expired,

whichever is the latest, and shall then lapse.

[…]

Disposal order.

4.—(1) Subject to subsection (2), where an interlocutory order has been in force for not less than 7 years in relation to specified property, the Court, on application to it in that behalf by the applicant, may make an order ("a disposal order") directing that the whole or, if appropriate, a specified part of the property be transferred, subject to such terms and conditions as the Court may specify, to the Minister or to such other person as the Court may determine.

(2) Subject to subsections (6) and (8), the Court shall make a disposal order in relation to any property the subject of an application under subsection (1) unless it is shown to its satisfaction that that particular property does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime.

(3) The applicant shall give notice to the respondent (unless the Court is satisfied that it is not reasonably possible to ascertain his or her whereabouts), and to such other (if any) persons as the Court may direct of an application under this section.

(4) A disposal order shall operate to deprive the respondent of his or her rights (if any) in or to the property to which it relates and, upon the making of the order, the property shall stand transferred to the Minister or other person to whom it relates.

(5) The Minister may sell or otherwise dispose of any property transferred to him or her under this section, and any proceeds of such a disposition and any moneys transferred to him or her under this section shall be paid into or disposed of for the benefit of the Exchequer by the Minister.

(6) In proceedings under subsection (1), before deciding whether to make a disposal order, the Court shall give an opportunity to be heard by the Court and to show cause why the order should not be made to any person claiming ownership of any of the property concerned.

(7) The Court, if it considers it appropriate to do so in the interests of justice, on the application of the respondent or, if the whereabouts of the respondent cannot be ascertained, on its own initiative, may adjourn the hearing of an application under subsection (1) for such period not exceeding 2 years as it considers reasonable.

(8) The Court shall not make a disposal order if it is satisfied that there would be a serious risk of injustice.

[…]

Provisions in relation to evidence and proceedings under Act.

8.—(1) Where a member or an authorised officer states—

(a) in proceedings under section 2, on affidavit or, if the Court so directs, in oral evidence, or
(b) in proceedings under section 3, on affidavit or, where the respondent requires the deponent to be produced for cross-examination or the court so directs, in oral evidence,

that he or she believes either or both of the following, that is to say:

(i) that the respondent is in possession or control of specified property and that the property constitutes, directly or indirectly, proceeds of crime,
(ii) that the respondent is in possession of or control of specified property and that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime,

and that the value of the property or, as the case may be, the total value of the property referred to in both paragraphs (i) and (ii) is not less than 5,000, then, if the Court is satisfied that there are reasonable grounds for the belief aforesaid, the statement shall be evidence of the matter referred to in paragraph (i) or in paragraph (ii) or in both, as may be appropriate, and of the value of the property.

(2) The standard of proof required to determine any question arising under this Act shall be that applicable to civil proceedings.

(3) Proceedings under this Act in relation to an interim order shall be heard otherwise than in public and any other proceedings under this Act may, if the respondent or any other party to the proceedings (other than the applicant) so requests and the Court considers it proper, be heard otherwise than in public.

(4) The Court may, if it considers it appropriate to do so, prohibit the publication of such information as it may determine in relation to proceedings under this Act, including information in relation to applications for, the making or refusal of and the contents of orders under this Act and the persons to whom they relate.

Affidavit specifying property and income of respondent.

9.—(1) At any time during proceedings under section 2 or 3 or while an interim order or an interlocutory order is in force, the Court or, as appropriate, in the case of an appeal in such proceedings, the Supreme Court may by order direct the respondent to file an affidavit in the Central Office of the High Court specifying—

(a) the property of which the respondent is in possession or control, or
(b) the income, and the sources of the income, of the respondent during such period (not exceeding 10 years) ending on the date of the application for the order as the court concerned may specify,

or both.

(2) Such an affidavit is not admissible in evidence in any criminal proceedings against that person or his or her spouse, except any such proceedings for perjury arising from statements in the affidavit.

Case law

- Cacul –v- Revenue Commissioners: 1979
- Fleming –v- Ranks 1983
- Duignan –v- Hearne: Murphy J. (Finlay J.): 1990.

- Dillon v. Dunnes Stores [1996] Supreme Court , I.R. 397; O'Dálaigh C.J

- Gilligan v Criminal Assets Bureau [1997] IEHC 106
- Murphy .v. GM PB PC Ltd [1999] IEHC 5
- Criminal Assets Bureau –v- McSweeney: O'Sullivan J.: 11th April 2000
- Murphy v. M(G), [2001] IESC82
- R v Barwick (2001) CAR 129
- Criminal Assets Bureau –v- John Kelly: Supreme Court: Murray J: 10th of October 2002
- McK v GWD [2004] 2 I.R. 470, 70
- C.G. v. Appeal Commissioners [2005] 2 I.R. 223; Finlay Geoghegan J.
- Anthony Sloan –v- Criminal Assets Bureau: Judgement Finnegan J.: 10th of October 2005.
- Christopher Griffin –v- CAB: Judicial Review 2005
- Wicklow Co. Council v. O'Reilly [2006] 3 I.R. 623; Clerk J
- DPP v. Izundu, [2011] IECCA 82.
- DPP v Morgan; Hedigan J.; July 2018.
- Criminal Assets Bureau v. Margaret Connors, [2018] IECA 371
- Court of Appeal of Ireland, DPP v Alinta, 10 December 2019, [2019] IECA 368

Italy

Criminal code[28]

(illicit enrichment)

Article 708

Whoever, being in the personal circumstances indicated in the preceding Article, is caught in possession of money or valuables, or other things not appropriate to his status, and of which he does not justify the provenance, shall be punished by imprisonment from three months to one year.

Decreto legislativo del 6 settembre 2011, n. 159 Codice delle leggi antimafia e delle misure di prevenzione, nonché nuove disposizioni in materia di documentazione antimafia, a norma degli articoli 1 e 2 della legge 13 agosto 2010, n. 136. (11G0201)[29]

(preventive confiscation)

Article 24 - Confiscation

1. The court orders the confiscation of the seized assets referred to in the person against whom the proceedings are initiated cannot justify the legitimate origin and who, even through intermediaries (natural or legal person), is the owner of these assets or disposes of them in any capacity in disproportionate value to one's own income, declared for income tax purposes, or to one's own economic activity, as well as the goods that appear to be the result of illicit activities or converted from these. In any case the defendant cannot justify the legitimate origin of the goods alleging that the money used to purchase them is the proceeds or was otherwise obtained from tax evasion. If the court does not order the confiscation, may also apply ex officio the measures referred to in articles 34 and 34-bis where the conditions set out therein are met. […]

2. The seizure order loses effectiveness if the court does not file the decree pronouncing the confiscation within one year and six months from the date of placing the goods in possession of the goods of the judicial administrator. In the case of complex investigations or significant asset compendiums, the term referred to in the first period it can be extended by reasoned decree of the court for six months. For the purposes of calculating the aforementioned terms, account is taken of causes for suspension of the terms of duration of precautionary custody, provided for by the criminal procedure code , as compatible; The term remains suspended for a period not exceeding ninety days where it is necessary to carry out expert assessments on the assets of which the person against whom the procedure appears to be possible to dispose of, directly or indirectly. The deadline also remains suspended for the time necessary for the final decision on the recusal request presented by defender and for the time starting from the death of the proposed party, intervened during the procedure, up to the identification and citation of the subjects provided for in article 18, paragraph 2, as well as during the period provided for by paragraphs 10-sexies, 10-septies and 10-octies of Article 7. (20) ((32)) ((37)).

2-bis. With the provision of definitive revocation or cancellation of the confiscation decree, the cancellation of all transcriptions and annotations.

3. Seizure and confiscation may be adopted upon request of the subjects referred to in article 17, paragraphs 1 and 2, when applicable conditions, even after the application of a preventive measure personal. The same court will decide on the request arranged the personal prevention measure, with the foreseen forms for the relevant procedure and respecting the provisions of this title.

Case law

- Corte Costituzionale, Sentenza 370/1996 del 17 Ottobre 1996
- Judgment Cass. pen., Sec., un., 26 June 2014, no. 4880
- Italian Constitutional Court, Sentence No. 84 of 2021.

28 Available at https://www.gazzettaufficiale.it/sommario/codici/codicePenale

29 Available at https://www.gazzettaufficiale.it/atto/serie_generale/caricaDettaglioAtto/originario?atto.dataPubblicazioneGazzetta=2011-09-28&atto.codiceRedazionale=011G0201

Japan

Act Concerning Special Provisions for the Narcotics and Psychotropics Control Act, etc. and Other Matters for the Prevention of Activities Encouraging Illicit Conducts and Other Activities Involving Controlled Substances through International Cooperation (Act No. 94 of 1991)[30]

(extended confiscation)

Article 14
The proceeds of crime with regard to crimes prescribed in Article 5 are presumed as proceeds of drug crime if: the offender obtains the asset during the period of trade prescribed in Article 5, and the amount of the asset is unreasonably expensive in the light of the circumstances of the offender on work or receipt of legal benefits.

Article 5
A person committing one or more of following acts, or both following acts and acts prescribed in Article 8, in the course of trade, is subject to a sentence that combines either life imprisonment or imprisonment for a term not less than five years with a fine not exceeding 10,000,000 yen:

(1) an act constitutes crimes prescribed in Articles 64, 64-2 (except possession of Diacetylmorphine or a Similar Substance), 65, 66 (except possession of a Narcotic other than Diacetylmorphine or a Similar Substance), 63 and 64 (except possession of Narcotic) of Narcotics and Psychotropics Control Act (Act No. 14 of 1953),

(2) an act constitutes crimes prescribed in Articles 24 and 24-2 (except possession of cannabis) of Cannabis Control Act (Act No. 124 of 1948),

(3) an act constitutes crimes prescribed in Articles 51 and 52 (except possession of opium) of Opium Act (Act No. 71 of 1954), or

(4) an act constitutes crimes prescribed in Articles 41 and 41-2 (except possession of stimulants) of Stimulants Control Act (Act No. 252 of 1951)

30 Available at https://www.japaneselawtranslation.go.jp/en/laws/view/1209

Kenya

Anti-corruption and economic crimes act 2003 [31]

(unexplained wealth; definition)

2. – […]

"unexplained assets" means assets of a person—

(a) acquired at or around the time the person was reasonably suspected of corruption or economic crime; and

(b) whose value is disproportionate to his known sources of income at or around that time and for which there is no satisfactory explanation.

(unexplained wealth forfeiture)

55. Forfeiture of unexplained assets

(1) In this section, "corrupt conduct" means—

(a) conduct that constitutes corruption or economic crime; or
(b) conduct that took place before this Act came into operation and which—
  (i) at the time, constituted an offence; and
  (ii) if it had taken place after this Act came into operation, would have constituted corruption or economic crime.

(2) The Commission may commence proceedings under this section against a person if—

(a) after an investigation, the Commission is satisfied that the person has unexplained assets; and
(b) the person has, in the course of the exercise by the Commission of its powers of investigation or otherwise, been afforded a reasonable opportunity to explain the disproportion between the assets concerned and his known legitimate sources of income and the Commission is not satisfied that an adequate explanation of that disproportion has been given.

(3) Proceedings under this section shall be commenced in the High Court by way of originating summons.

(4) In proceedings under this section—

(a) the Commission shall adduce evidence that the person has unexplained assets; and
(b) the person whose assets are in question shall be afforded the opportunity to cross-examine any witness called and to challenge any evidence adduced by the Commission and, subject to this section, shall have and may exercise the rights usually afforded to a defendant in civil proceedings.

(5) If after the Commission has adduced evidence that the person has unexplained assets the court is satisfied, on the balance of probabilities, and in light of the evidence so far adduced, that the person concerned does have unexplained assets, it may require the person, by such testimony and other evidence as the court deems sufficient, to satisfy the court that the assets were acquired otherwise than as the result of corrupt conduct.

(6) If, after such explanation, the court is not satisfied that all of the assets concerned were acquired otherwise than as the result of corrupt conduct, it may order the person to pay to the Government an amount equal to the value of the unexplained assets that the Court is not satisfied were acquired otherwise than as the result of corrupt conduct.

(7) For the purposes of proceedings under this section, the assets of the person whose assets are in question shall be deemed to include any assets of another person that the court finds—

(a) are held in trust for the person whose assets are in question or otherwise on his behalf; or
(b) were acquired from the person whose assets are in question as a gift or loan without adequate consideration.

(8) The record of proceedings under this section shall be admissible in evidence in any other proceedings, including any prosecution for corruption or economic crime.

Case law

- Ethics and Anti-Corruption Commission (The legal successor of Kenya Anti - Corruption Commission) v Stanley Mombo Amuti [2015] eKLR
- Stanley Mombo Amuti v Kenya Anti-Corruption Commission (Civil Appeal No. 184 of 2018)

31 Available at https://eacc.go.ke/default/wp-content/uploads/2018/06/aceca.pdf

Lithuania

Law On The Approval And Entry Into Force Of The Criminal Code, 26 September 2000 No VIII-1968 (As Last Amended On 23 April 2015 – No XII-1649[32]

(illicit enrichment)

Article 189 (1)

1. A person who holds by the right of ownership the property whose value exceeds 500 MSLs, while being aware or having to be and likely to be aware that such property could not have been acquired with legitimate income,

shall be punished by a fine or by arrest or by a custodial sentence for a term of up to four years.

2. A person who takes over the property referred to in paragraph 1 of this Article from third parties shall be released from criminal liability for unjust enrichment where he gives a notice thereof to law enforcement institutions before the service of a notice of suspicion and actively cooperates in determining the origin of the property.

3. A legal entity shall also be held liable for the acts provided for in this Article.

*Note. Under Article 189(1), only the persons who hold the property having the characteristics specified in Article 189(1) of the Criminal Code after the entry into force of this Law shall be criminally liable.

Case law

- Constitutional Court of Lithuania, Case no. 14/2015-1/2016-2/2016-14/2016-15/2016

32 Available at https://e-seimas.lrs.lt/portal/legalActPrint/lt?jfwid=rivwzvpvg&documentId=a84fa232877611e5bca4ce385a9b7048&category=TAD

Luxembourg

Case law

- Court of Appeal of the Grand Duchy of Luxembourg, 22 January 1993, Public Prosecutor v. Jurado Rodriguez José Francklin and others.

Malawi

Case law

- Malawi Chief Resident's Magistrate's Court, Republic v Wesley Mzumara (Criminal Case No.47 of 2010)

Mauritius

Proceeds of Crime Act 2002[33]

(forfeiture of the object of the offence)

82. Prosecution, conviction and forfeiture

[..]

(4) Where a person is convicted of an offence under this Act or Part II of the Financial Intelligence and Anti-Money Laundering Act 2002, the Court may, in addition to any penalty imposed, order the forfeiture of the property the subject-matter of the offence.

(corruption, presumption)

83. Burden of proof

In the course of a trial of an accused for a corruption offence, it shall be presumed that at the time a gratification was received, the recipient knew that such gratification was made for a corrupt purpose.

(unexplained wealth as corroborating evidence)

84. Possession of unexplained wealth

(1) The Commission may -

(a) order any public official or any person suspected of having committed a corruption offence to make a statement under oath of all his assets and liabilities and of those of his relatives and associates;

(b) investigate whether any public official or any person suspected of having committed a corruption offence -

(i) has a standard of living which is commensurate with his emoluments or other income;

(ii) owns, or is in control of, property to an extent which is disproportionate to his emoluments or other income; or

(iii) is able to give a satisfactory account as to how he came into ownership, possession, custody or control of any property.

(2) Where, in proceedings for an offence under this Act, it is established that the accused -

(a) was maintaining a standard of living which was not commensurate with his emoluments or other income;

(b) was in control of property to an extent which is disproportionate to his emoluments or other income;

(c) held property for which he, his relative or associate, is unable to give a satisfactory account as to how he came into its ownership, possession, custody or control, that evidence shall be admissible to corroborate other evidence relating to the commission of the offence.

Good Governance and Integrity Reporting Act 2015[34]

(unexplained wealth; definition)

Section 2

33 Available at https://nssec.govmu.org/Documents/Legislations/The_Prevention_of%20Corruption%20Act.pdf

34 Available at https://www.fiumauritius.org/fiu/wp-content/uploads/2021/05/THE-GOOD-GOVERNANCE-AND-INTEGRITY-REPORTING-ACT-

unexplained wealth" includes any property –

(a) under the ownership of a person to an extent which is disproportionate to his emoluments and other income;

(b) the ownership, possession, custody or control of which cannot be satisfactorily accounted for by the person who owns, possesses, has custody or control of the property; or

(c) held by a person for another person to an extent which is disproportionate to the emoluments or other income of that other person and which cannot be satisfactorily accounted for;

(unexplained wealth forfeiture; burden of proof; reversal)

Section 3

[…]

(5) Any application made under this Act shall constitute civil proceedings and the onus shall lie on the respondent to establish, on a balance of probabilities, that any property is not unexplained wealth.

Section 5

1. a) On receipt of a report under section 9(1) or (2), or on its own initiative, the Agency may, in writing, request any person to explain, by way of affidavit within 21 working days or any such longer period which the Director may determine, the source of any funds which the person owns, possesses, has custody or control of, or which are believed to have been used in the acquisition of any property;

(b) Where the Agency does not receive a reply within the period specified in paragraph (a), it shall apply for a disclosure order under section 13.

Section 13

The Agency may apply, in relation to a suspected case of unexplained wealth, to the Judge in Chambers for a disclosure order –

(a) to obtain information on property held by a person or by any other person on his behalf; or

(b) requiring any person to disclose the sources of funds used to acquire, possess or control any property

Section 14

Where the Board has reasonable grounds to believe that a person has unexplained wealth, it shall direct the Agency to apply to a Judge in Chambers for an Unexplained Wealth Order for the confiscation of that unexplained wealth.

The Agency may amend an application for an Unexplained Wealth Order at any time before the final determination of the application by the Judge in Chambers where reasonable notice of the amendment is given to every person on whom the application has been served.

Where an application is made under subsection (1), the Agency may apply for an order prohibiting the transfer, pledging or disposal of any property.

Section 16

Where the Agency makes an application–

for an Unexplained Wealth Order; and the Judge in Chambers is satisfied that the respondent has unexplained wealth, he shall make an Unexplained Wealth Order or an order for the payment of its monetary equivalent.

(1A) Where the Judge in Chambers makes an Unexplained Wealth Order for the confiscation of any virtual asset, the respondent shall further be ordered to disclose all such information to the Agency as is necessary in order to enable the recovery of the virtual asset.

Case law

- Andoo v The Queen, 1989 SCJ 257
- Integrity Reporting Services Agency v Ramgoolam N. Dr, GCSK FRCP SN.418/2018

2015-Updated-2020.pdf

Myanmar

Anti-Corruption Law (2013)[35]

(burden of proof)

Article 64.

The accused is responsible to show with clear evidence and supporting documents how he/she has received or came to own the Monies and Properties concerned or the nature of income he/she has received.

35 Available at https://www.myanmar-law-library.org/law-library/laws-and-regulations/laws/myanmar-laws-1988-until-now/union-solidarity-and-development-party-laws-2012-2016/myanmar-laws-2013/pyidaungsu-hluttaw-law-no-23-2013-anti-corruption-law-english.html

Netherlands (The)

Criminal Code[36]

(Extended confiscation)

Article 36e

1. At the request of the Public Prosecution Service, a separate judicial decision may impose on the person convicted of a criminal offense the obligation to pay a sum of money to the state for the deprivation of unlawfully obtained benefits.

2. The obligation may be imposed on the person referred to in the first paragraph who has obtained benefit through or from the benefits of the offense referred to there or other criminal offenses for which there are sufficient indications that they were committed by the convicted person.

3. At the request of the Public Prosecution Service, a separate judicial decision may impose on a person convicted of a crime that, according to the legal definition, threatens with a fine of the fifth category, the obligation to pay a sum of money to the state for the deprivation of unlawfully obtained advantage, if it is plausible that that crime or other criminal offenses have in any way led to the convicted person obtaining unlawful advantage. In that case it can also be suspected that:

a. expenses incurred by the convicted person in a period of six years prior to the commission of that crime, embody unlawfully obtained benefits, unless it is plausible that these expenses were incurred from a legal source of income, or;

b. objects that came to belong to the convicted person in a period of six years prior to the commission of that crime embody benefits as referred to in the first paragraph, unless it is plausible that the acquisition of those objects is based on a legal source of origin.

4. The judge may ex officio, at the request of the Public Prosecution Service or at the request of the convicted person, deviate from the period of six years referred to in the third paragraph and take a shorter period into account.

5. The judge determines the amount at which the unlawfully obtained advantage is estimated. Benefit includes cost savings. The value of objects that are considered by the court to be an unlawfully obtained benefit can be estimated at the market value at the time of the decision or by reference to the proceeds to be achieved at public sale, if recovery is required. The judge may determine the amount to be paid is lower than the estimated benefit. At the reasoned request of the suspect or convicted person, if the current and reasonably expected future capacity of the suspect or convicted person will not be sufficient to pay the amount to be paid, the judge may take this into account when determining the amount to be paid. to hold. In the absence of such a request, the judge may exercise this power ex officio or at the request of the public prosecutor.

6. Objects are understood to mean all property and all property rights.

7. When determining the amount of the unlawfully obtained advantage on the basis of the first and second paragraphs in respect of criminal offenses committed by two or more persons, the court may determine that they are jointly and severally liable or for a portion to be determined by it. for the joint payment obligation.

8. When determining the amount of the benefit, the judge may deduct costs that are directly related to the commission of criminal offenses referred to in the first to third paragraphs, and that are reasonably eligible for deduction.

9. When determining the size of the amount on which the unlawfully obtained benefit is estimated, legal claims granted to injured third parties as well as the obligation to pay the state a sum of money on behalf of the victim as referred to in Article 36f insofar as this have been paid and deducted.

10. When imposing the measure, obligations imposed under previous decisions to pay an amount of money for the deprivation of unlawfully obtained benefits are taken into account.

11. When imposing the measure, the judge determines the maximum duration of the hostage-taking that can be demanded in application of Article 6:6:25 of the Code of Criminal Procedure . When determining the duration, no more than one day is taken into account for each full €25 of the imposed amount. The duration is a maximum of three years.

(Money laundering offence; negligent money laundering)

Section 420bis Intentional money laundering

1. Any person who:

a. hides or conceals the real nature, the source, the location, the transfer or the moving of an object, or hides or conceals the identity of the person entitled to an object or has it in his possession, while he knows that the object derives - directly or indirectly - from any serious offence;

b. obtains an object, has an object in his possession, transfers or converts an object or makes use of an object, while he knows that the object derives - directly or indirectly - from a serious offence;

shall be guilty of laundering and shall be liable to a term of imprisonment not exceeding four years or a fine of the fifth category.

2. Objects shall mean all property of any description, whether corporeal or incorporeal.

36 Available at https://wetten.overheid.nl/BWBR0001854/2023-09-01

Section 420 bis 1 Self-laundering

Money laundering that consists solely of the acquisition or possession of an object that directly results from any own crime is punishable as simple money laundering with a prison sentence of up to six months or a fine of the fourth category.

Section 420ter Habitual Money laundering

Any person who engages in habitual laundering shall be liable to a term of imprisonment not exceeding six years or a fine of the fifth category.

Section 420quater Negligent money laundering

1. Any person who:

a. hides or conceals the real nature, the source, the location, the transfer or the moving of an object, or hides or conceals the identity of the person entitled to an object or has it in his possession, while he has reasonable cause to suspect that the object derives - directly or indirectly - from any serious offence;

b. obtains an object, has an object in his possession, transfers or converts an object or makes use of an object while he has reasonable cause to suspect that the object derives - directly or indirectly - from any serious offence;

shall be guilty of negligent laundering and shall be liable to a term of imprisonment not exceeding one year or a fine of the fifth category.

2. Objects shall mean all property of any description, whether corporeal or incorporeal.

Section 420 quater 1. Negligent money laundering

Negligent money laundering that consists solely of the acquisition or possession of an object that directly results from any own crime is punishable as simple culpable money laundering with a prison sentence of not more than three months or a fine of the fourth category.

Section 420quinquies

In the case of conviction for any of the serious offences defined in sections 420bis to 420quater inclusive, disqualification from the rights listed in section 28(1)(1°),(2°) and (4°) may be imposed and the offender may be disqualified from the practice of the profession in which he committed the serious offence.

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North Macedonia

Criminal Code (as amended up until 2018)[37]

(illicit enrichment; transparency obligations)

Unlawful obtaining and covering property

Article 359-a

(1) Official person or responsible person in a public enterprise, public institution or other legal entity having at its disposal state capital, who against the legal obligation to report the material condition or its change provides false or incomplete data regarding its property or the property of the members of his family, which in significant amount exceeds his legal revenues, shall be sentenced to imprisonment of six months to five years and shall be fined.

(2) The sentence referred to in paragraph (1) of this Article shall be imposed to an official person or responsible person in a public enterprise, public institution or other legal entity having at its disposal state capital which provides false data or covers its true sources, when in legally regulated procedure it is confirmed that during the performance of its function or duty, he or a member of his family has obtained property that in significant amount exceeds its legal revenues.

(3) If the crime referred to in paragraphs (1) and (2) of this Article has been committed against a property which in greater extent exceeds its legal revenues, the offender shall be sentenced to imprisonment of one to eight years and shall be fined.

(4) For the crimes referred to in paragraphs (2) and (3) of this Article, the offender shall not be sentenced if during the procedure he gives in court acceptable explanation regarding the origin of the property.

(5) The property exceeding the legally obtained revenues by the offender, wherefore he has provided false or incomplete data or has not provided any data or covers its true sources of origin shall be confiscated, and if such confiscation is not possible, another property corresponding to its value shall be confiscated from the offender.

(6) The property referred to in paragraph (5) of this Article shall be as well confiscated from the members of the offender's family for whom it has been obtained or to whom it has been transferred, should it be obvious that they have not given counter-compensation corresponding to its value, as well as from third parties unless they prove to have given counter-compensation corresponding to the value of the object or the property.

37 Available at https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/66834/135908/F-1025739791/MKD-66834%20(EN).pdf

Nicaragua

Código Penal, Ley N°. 641, Aprobado el 13 de Noviembre de 2007[38]

(illicit enrichment)

Art. 448 Illicit enrichment

Any public authority, official or employee who, without incurring a more severely punishable offence, obtains a significant increase in his or her assets in excess of his or her legitimate income, during the exercise of his or her functions, and who cannot reasonably justify its origin, shall be punished by three to six years' imprisonment and disqualification for the same period from holding public office or employment.

38 Available at http://www.cicad.oas.org/fortalecimiento_institucional/legislations/PDF/NI/ley_641_codigo_penal.pdf

Niger

Case law

- Constitutional Court of Niger, Decision n. 07/08/CC/MC of 20 November 2008.

Pakistan

Case law

- Supreme Court of Pakistan, Syed Qasim Shah v the State 2009 SCMR 790

Philippines

Republic Act No. 1379, An Act Declaring Forfeiture in Favor of the State Any Property Found to have been Unlawfully Acquired by any Public Officer or Employee and Providing for the Proceedings Therefor (18 June 1955)[39]

(non-conviction-based confiscation; guarantees)

Section 2. Filing of petition. — Whenever any public officer or employee has acquired during his incumbency an amount of property which is manifestly out of proportion to his salary as such public officer or employee and to his other lawful income and the income from legitimately acquired property, said property shall be presumed prima facie to have been unlawfully acquired. The Solicitor General, upon complaint by any taxpayer to the city or provincial fiscal who shall conduct a previous inquiry similar to preliminary investigations in criminal cases and shall certify to the Solicitor General that there is reasonable ground to believe that there has been committed a violation of this Act and the respondent is probably guilty thereof, shall file, in the name and on behalf of the Republic of the Philippines, in the Court of First Instance of the city or province where said public officer or employee resides or holds office, a petition for a writ commanding said officer or employee to show cause why the property aforesaid, or any part thereof, should not be declared property of the State: Provided, That no such petition shall be filed within one year before any general election or within three months before any special election.

The resignation, dismissal or separation of the officer or employee from his office or employment in the Government or in the Government-owned or controlled corporation shall not be a bar to the filing of the petition: Provided, however, That the right to file such petition shall prescribe after four years from the date of the resignation, dismissal or separation or expiration of the term of the officer or employee concerned, except as to those who have ceased to hold office within ten years prior to the approval of this Act, in which case the proceedings shall prescribe after four years from the approval hereof.

Section 6. Judgment. — If the respondent is unable to show to the satisfaction of the court that he has lawfully acquired the property in question, then the court shall declare such property, forfeited in favor of the State, and by virtue of such judgment the property aforesaid shall become property of the State: Provided, That no judgment shall be rendered within six months before any general election or within three months before any special election. The Court may, in addition, refer this case to the corresponding Executive Department for administrative or criminal action, or both.

39 Available at https://lawphil.net/statutes/repacts/ra1955/ra_1379_1955.html

Poland

Criminal code[40]

(extended confiscation)

Article 45

[…]

§2 When sentencing for an offence whereby the offender has even indirectly obtained a substantial financial benefit, or from which a financial benefit has been or could have been derived, even indirectly, which offence is punishable by imprisonment for a term of 5 years or more, or committed in an organised group or association aimed at committing an offence, the assets that the offender took possession of, or to which any title was acquired, within 5 years prior to committing the same until a sentence, even a non-appealable one, is passed, shall be considered as a benefit derived from the offence, unless the offender or another interested party tenders evidence to the contrary.[…]

40 Available at https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19970880553/U/D19970553Lj.pdf

Qatar

Law No.: (20) of 2019 Promulgating the Law on Combating Money Laundering (ML) and Financing of Terrorism (FT)[41]

(criminal confiscation; non-conviction-based confiscation within the scope of criminal proceedings)

Article (89)

The court shall order the confiscation of the following in the case of conviction for ML, FT or predicate offense, without prejudice to the rights of bona fide third parties:

1. Funds that constitute the subject of the crime.

2. Funds constituting proceeds of crime, including funds mixed with, derived from or exchanged with such proceeds, or funds the value of which corresponds to the value of such proceeds.

3. Funds constituting revenues and other benefits derived from such Funds or proceeds of crime.

4. Instruments used for the commission of such crime.

The third party shall be in good faith if he obtains the funds referred to or part thereof or acquires them while not aware of their illegal source or in consideration of a reasonable price or providing services which are of proportionate value or on the basis of other legitimate grounds.

In the event a crime punishable under the provisions of this law is committed and the perpetrator is not convicted on the grounds of being anonymous or dead, the Public Prosecution may submit the papers to the competent court to issue a judgment confiscating the seized funds, subject to that sufficient evidence is provided that such funds are of the proceeds of crime.

41 Available at https://www.qfcra.com/en-us/AML%20Law%20and%20Legislation/Law%20No.%20(20)%20of%202019%20on%20Combating%20Money%20Laundering%20and%20Terrorism%20Financing%20(1).pdf

Singapore

Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992, as last amended by Act 18 of 2022[42]

(illicit enrichment)

55.—(1) Any person who possesses or uses any property that may be reasonably suspected of being, or of in whole or in part, directly or indirectly, representing, any benefits of drug dealing or benefits from criminal conduct shall, if the person fails to account satisfactorily how the person came by the property, be guilty of an offence.

(2) Any person who commits an offence under subsection (1) shall be liable on conviction —

(a) if the person is an individual, to a fine not exceeding $150,000 or to imprisonment for a term not exceeding 3 years or to both; or

(b) if the person is not an individual, to a fine not exceeding $300,000.

Prevention of Corruption Act 1990[43]

(corruption; presumption)

Article 8.

Where in any proceedings against a person for an offence under section 5 or 6, it is proved that any gratification has been paid or given to or received by a person in the employment of the Government or any department thereof or of a public body by or from a person or agent of a person who has or seeks to have any dealing with the Government or any department thereof or any public body, that gratification shall be deemed to have been paid or given and received corruptly as an inducement or reward as hereinbefore mentioned unless the contrary is proved.

(unexplained wealth; corroborating evidence)

Article 24.

(1) In any trial or inquiry by a court into an offence under this Act or under sections 161 to 165 or 213 to 215 of the Penal Code 1871 or into a conspiracy to commit, or attempt to commit, or an abetment of any such offence the fact that an accused person is in possession, for which he cannot satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income, or that he had, at or about the time of the alleged offence, obtained an accretion to his pecuniary resources or property for which he cannot satisfactorily account, may be proved and may be taken into consideration by the court as corroborating the testimony of any witness in the trial or inquiry that the accused person accepted or obtained or agreed to accept or attempted to obtain any gratification and as showing that the gratification was accepted or obtained or agreed to be accepted or attempted to be obtained corruptly as an inducement or reward.

(2) An accused person shall, for the purposes of subsection (1), be deemed to be in possession of resources or property or to have obtained an accretion thereto where those resources or property are held or the accretion is obtained by any other person whom, having regard to his relationship to the accused person or to any other circumstances, there is reason to believe to be holding those resources or property or to have obtained the accretion in trust for or on behalf of the accused person or as a gift from the accused person.

42 Available at https://sso.agc.gov.sg/Act/CDTOSCCBA1992

43 Available at https://sso.agc.gov.sg/Act-Rev/PCA1960/Published/19930315?DocDate=19870330

Slovenia

Criminal Procedure Act 2007 (ZKP-UPB4)[44]

(money laundering; non-conviction-based confiscation within the scope of criminal proceedings)

Article 498.a:

(1) Except where criminal proceedings are concluded with a judgment of conviction, the money or property of illegal origin referred to in Article 245 of the Criminal Code (Money Laundering) and unlawfully given or accepted bribes referred to in Articles 151, 157, 241, 242, 261, 262, 263 and 264 of the Criminal Code shall also be seized:

- if those statutory characteristics of a criminal offence referred to in Article 245 of the Criminal Code (Money Laundering) that indicate that the money or property from the stated Article originates from criminal offences, are proven, or

- if those statutory characteristics of a criminal offence referred to in Articles 151, 157, 241, 242, 261, 262, 263 and 264 of the Criminal Code that indicate that a reward, gift, bribe or any other form of proceeds was given or accepted, are proven.

(2) The panel shall issue a special ruling thereon (paragraph six of Article 25) upon a reasoned motion of the state prosecutor; however, before this, the investigating judge must, at the request of the panel, collect data and investigate all the circumstances relevant for the determination of the illegal origin of the money or property or unlawfully given or received bribes.

(3) A certified copy of the ruling referred to in the preceding paragraph shall be served on the owner of the seized money or property or bribe if his or her identity is known. If the owner is unknown, the ruling shall be posted on the court notice board and, after the expiry of eight days, it shall be deemed that service on the unknown owner has thus been carried out.

(4) The owner of seized money or property or bribes shall have the right to appeal against the ruling referred to in paragraph two of this Article if he or she believes that there were no legal grounds for the seizure.

Confiscation of assets of illicit origin act (ZOPNI)(Official Gazette no. 91/11 , 25/14 and 53/18)[45]

(civil confiscation)

Article 2 (Purpose of the Act)

(1) The purpose of this Act is to prevent the acquisition and use of assets of illicit origin in order to protect the legal acquisition of assets and to protect the economic, social and environmental function of property guaranteed by the acquisition of assets in compliance with regulations.

(2) The purpose of this Act referred to in the preceding paragraph shall be achieved by confiscating the illegally acquired assets of persons who acquire these assets or to whom the assets are transferred free of charge or for consideration that is disproportionate to the actual value of the assets in question.

Article 3 (Start of the procedure)

Financial investigations under this Act shall be carried out in the event that there are grounds for suspicion in pre-trial or trial proceedings that a person has assets of illicit origin in his/her possession with a total value exceeding EUR 50,000.

[…]

Article 5 (Assets of illicit origin)

(1) Assets shall be deemed to be of illicit origin unless it has been demonstrated that such assets have been acquired from lawful income; i.e., in a lawful manner.

(2) Assets shall be presumed to be of illicit origin if there is a notable disproportion between the amount of assets and income minus taxes and contributions paid by the person against whom the procedure is pending in support of this Act.

(3) The value of the total assets which are owned, possessed, used, enjoyed, held or transferred to related parties by the persons referred to in the preceding paragraph or which have been blended together with the assets of such related parties or which have been passed to the aforementioned persons' legal successors shall be taken into account in determining this disproportion.

Article 6 (Presumption of a gratuitous transfer of assets)

Assets of illicit origin shall be presumed to have been transferred free of charge or for consideration that is disproportionate to the asset's actual value if such assets have been transferred to closely related parties or immediate family members.

Article 7 (Competent authorities)

(1) Financial investigation proceedings shall be conducted by the State Prosecutor's Office, which is competent for commencing pre-trial or trial proceedings for listed criminal offences in conjunction with the competent State Prosecutor of the Specialised Office of the State Prosecutor of the Republic of Slovenia (hereinafter: the SDT RS).

44 Available at https://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=89469&p_classification=01

45 Available at http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6267

(2) The SDT RS shall represent the Republic of Slovenia in its role as the plaintiff in the proceedings for the confiscation of assets of illicit origin or in connection therewith. In proceedings involving extraordinary legal remedies before the Supreme Court, the Republic of Slovenia shall be represented by the Office of the State Prosecutor General of the Republic of Slovenia.

(3) Decisions in the proceedings of freezing and temporary confiscation of assets of illicit origin shall be made by the court with jurisdiction to decide in the pre-trial or trial proceedings referred to in the preceding paragraph.

(4) The Ljubljana District Court shall have the jurisdiction to determine the proceedings for the confiscation of assets of illicit origin.

[…]

Article 9 (Mutatis mutandis application of other regulations)

(1) The provisions of the Act governing criminal proceedings shall apply, mutatis mutandis, to the financial investigation procedure, freezing and temporary confiscation of assets of illicit origin.

(2) The provisions of the Act governing civil procedure shall apply, mutatis mutandis, to the confiscation proceedings relating to assets of illicit origin unless otherwise provided by this Act.

(3) The provisions of the Criminal Code (KZ-1) concerning the confiscation of proceeds of crime or proceeds associated with crime shall apply, mutatis mutandis, to the transfer of assets free of charge or for consideration that is disproportionate to the actual value of the assets, and to the presumption of a gratuitous transfer of assets unless otherwise provided by this Act.

Article 10 (Investigation launch)

(1) The State Prosecutor shall order a financial investigation once the following conditions have been met:

1. during pre-trial or trial proceedings it is established that there are grounds for suspicion that a suspect, an accused person or a testator has committed a listed criminal offence;

2. the persons referred to in the preceding point own, possess, use or enjoy assets in respect of which there are grounds to suspect that these assets are of illegal origin or that they have been held or have been passed to such persons' legal successors or transferred to their related parties or have been blended with the assets of these persons; and

3. the assets referred to in the preceding point are not the proceeds of a listed criminal offence or the subject of such an offence.

[…]

Article 26 (Start of the procedure)

(1) The civil proceedings for the confiscation of assets of illicit origin shall commence by a lawsuit brought against the owner as the defendant by the plaintiff.

[…]

Article 27 (Burden of proof)

(1) During the civil proceedings, the plaintiff shall state the facts and submit the evidence that give rise to the suspicion of the illegal origin of the defendant's assets in accordance with the provisions of this Act.

(2) If assets of illicit origin have been transferred to a related party, the plaintiff shall also state in the civil proceedings the facts and submit evidence of the transfer carried out free of charge or of consideration that is disproportionate to the actual value of the assets, and, in the case of a closely related party or an immediate family member, the facts and evidence that give rise to the presumption of a gratuitous transfer of assets.

(3) The defendant may challenge the presumption referred to in paragraph two of Article 5 of this Act if he/she proves that it is likely that the assets are not of illicit origin and may challenge the presumption referred to in Article 6 of this Act if he/she proves that it is likely that he/she has paid the actual value of the assets.

Article 34 (Judgment)

(1) The court shall deliver a judgment granting the claim and establishing that particular assets are of illegal origin, whereupon these assets shall be confiscated and shall become the property of the Republic of Slovenia.

(2) Until the end of the main hearing, the plaintiff may, without the consent of the defendant, modify his/her lawsuit so as to require the confiscation of assets which correspond to the value of the assets of illicit origin, or that the defendant be ordered to pay a sum of money corresponding to this value, if due to circumstances that have occurred since the filing of the lawsuit, the confiscation of assets of illicit origin is no longer possible.

(3) If the court refuses the claim, the court shall not abolish freezing and return the temporarily confiscated assets prior to the expiry of one month after the date of valid service of the decision on DURS.

Tanzania

Prevention and Combating of Corruption Act 2007[46]

(illicit enrichment)

27. (1) A person commits an offence who, being or having been a public official

(a) maintains a standard of living above that which is properly commensurate with his present or past lawful income;

(b) owns property disproportionate to his present or past lawful income, unless he gives a satisfactory explanation to the court as to how he was able to maintain such a standard of living or how such property came under his ownership.

46 Available at https://www.fiu.go.tz/pcca.pdf

Thailand

Organic Act on Anti-Corruption (1999)[47]

(unexplained wealth forfeiture)

Section 75. In the case where an allegation is made that any person holding a political position or any State official has become unusually wealthy, the N.C.C. Commission shall make a preliminary determination as to whether the circumstance or the matter put in the allegation falls within the matters capable of acceptance by the N.C.C. Commission. If the alleged culprit is the person who has already submitted an account showing particulars of assets and liabilities, the N.C.C. Commission shall also take such account into consideration. The allegation of unusual wealthiness shall be made at the time the alleged culprit is a State official or has ceased to be a State official for not more than two years. […]

Section 78. In the case where the N.C.C. Commission discovers that any property of the alleged culprit is connected with the unusual wealthiness and is under the circumstance convincingly indicative of the possibility of its transfer, move, transformation or concealment, the N.C.C. Commission shall have the power to issue an order of temporary seizure or attachment of that property , without prejudice to the right of the alleged culprit to submit an application for taking such property for use with or without bail or security. When there occurs a temporary seizure or attachment of the property under paragraph one, the N.C.C. Commission shall cause to be conducted proof of the property without delay. In the case where the alleged culprit is unable to present evidence that the property under temporary seizure or attachment is not connected with the unusual wealthiness, the N.C.C. Commission shall have the power to continue its seizure or attachment until the N.C.C. Commission passes a resolution that the allegation has no prima facie case, which must be within one year as from the date of the seizure or attachment or until the Court passes a final judgment dismissing that case. But, if the proof is successful, the property shall be returned to such person.

Section 79. For the purpose of a fact inquiry, the N.C.C. Commission shall order the alleged culprit to show particulars of assets and liabilities of the alleged culprit in accordance with items and procedures and within the time prescribed by the N.C.C. Commission, which shall not be less than thirty days and shall not be more than sixty days.

Section 81. The Prosecutor-General or the President, as the case may be, shall submit a motion requesting the Court to order that the property devolve upon the State under section 80 within ninety days as from the date the matter is received from the N.C.C. Commission. In the case in which a request is made that the property be ordered to devolve upon the State, onus of proof to the Court that the said property does not result from the unusual wealthiness is upon the alleged culprit.

47 Available at https://faolex.fao.org/docs/pdf/tha202806.pdf

Uganda

Anti-Corruption Act, 2009[48]

(illicit enrichment)

31. Illicit enrichment

(1) The Inspector General of Government or the Director of Public Prosecutions or an authorised officer, may investigate or cause an investigation of any person where there is reasonable ground to suspect that the person—

(a) maintains a standard of living above that which is commensurate with his or her current or past known sources of income or assets; or
(b) is in control or possession of pecuniary resources or property disproportionate to his or her current or past known sources of income or assets.

(2) A person found in possession of illicitly acquired pecuniary resources or property commits an offence and is liable on conviction to a term of imprisonment not exceeding ten years or a fine not exceeding two hundred and forty currency points or both.

(3) Where a court is satisfied in any proceedings for an offence under subsection (2) that having regard to the closeness of his or her relationship to the accused and to other relevant circumstances, there is reason to believe that any person was holding pecuniary resources or property in trust for or otherwise on behalf of the accused, or acquired such resources or property as gift or loan without adequate consideration, from the accused, those resources or property shall, until the contrary is proved, be deemed to have been under the control or in possession of the accused.

(4) In any prosecution for corruption or proceedings under this Act, a certificate of a Government Valuer or a valuation expert appointed by the Inspector General of Government or the Director of Public Prosecutions as to the value of the asset or benefit or source of income or benefit is admissible and is proof of the value, unless the contrary is proved.

Case law

- Uganda Vs Benard Davis Wandera, Court Of Appeal, Criminal Appeal No.781 Of 2014

48 Available at https://ulii.org/akn/ug/act/2009/6/eng@2015-11-11

United Arab Emirates

Federal Decree Law no. (26) of 2021 amending some provisions of the Federal Decree Law no. (20) of 2018 on combatting money laundering and counter terrorism financing[49]

(money laundering; presumptions)

Article 2

Any person, having the knowledge that the funds are the proceeds of a predicate offence, and who wilfully commits any of the following acts, shall be considered a perpetrator of the crime of Money Laundering:

a- Transferring or moving proceeds or conducting any transaction with the aim of concealing or disguising their Illegal source.

b- Concealing or disguising the true nature, source or location of the proceeds as well as the method involving their disposition, movement, ownership of or rights with respect to said proceeds.

c- Acquiring, possessing or using proceeds upon receipt.

d- Assisting the perpetrator of the predicate offense to escape punishment.

2- The crime of Money Laundering is considered as an independent crime. The punishment of the perpetrator for the predicate offence shall not prevent his punishment for the crime of Money Laundering.

3- Proving the illicit source of the proceeds should not constitute a prerequisite to sentencing the perpetrator of the predicate offence.

Article 22

1.Any person who commits or attempts to commit any of the acts set forth in Clause (1) of Article 2 of this Decree-Law shall be sentenced to imprisonment for a period not less than one year and not exceeding ten years and to a fine of no less than (100,000) AED one hundred thousand and not exceeding (5,000,000) AED five Million or either one of these two penalties.

A temporary imprisonment and a fine of no less than AED 300,000 (three hundred thousand dirham) and no more than AED 10,000,000 (ten million dirham) shall be applied if the perpetrator of a money laundering crime commits any of the following acts:

a) If he abuses his influence or the power granted to him by his profession or professional activities.

b) If the crime is committed through a non-profit organisation.

c) If the crime is committed through an organised crime group.

d) In case of Recidivism

2- An attempt to commit a money laundering offense shall be punishable by the full penalty prescribed for it

3- A life imprisonment sanction or temporary imprisonment of no less than (10) ten years and penalty of no less than AED 300,000 (three hundred thousand dirham) and no more than AED 10,000,000 (ten million dirham) is applied to anyone who uses Proceeds for terrorist financing.

4- A temporary imprisonment sanction and a penalty of no less than AED 300,000 (three hundred thousand dirham) shall be applicable to anyone who uses the Proceeds in financing illegal organisations.

5- The Court may commute or exempt from the sentence imposed on the offenders if they provide the judicial or administrative authorities with information relating to any of the offenses punishable in this article, when this leads to the disclosure, prosecution, or arrest of the perpetrators.

(illicit enrichment)

Article 25 bis

"Anyone who acquires, conceals or conducts a transaction with funds when there is sufficient evidence or presumptions that the source of such funds is illegitimate, shall be punished with imprisonment for no less than three months and a fine of no less than 50,000 (fifty thousand) dirhams, or with one of the two sanctions. Upon issuing the conviction, the court shall order confiscation pursuant to provisions of Article (26) of the present Decree Law."

(criminal confiscation, confiscation in equivalent value and NCB confiscation within the scope of criminal proceedings)

Article 26

1- The court shall, once the perpetration of the crime is verified, confiscate the following:

a) Funds subject matter of the crime, proceeds and instrumentalities .

b) Any funds owned by the perpetrator with an equivalent value to the funds and Proceeds instrumentalities mentioned in paragraph (a) of this clause if it fails to confiscate those funds.

49 Available at https://www.adgm.com/documents/financial-crime-prevention-unit/aml-tab/federal-decree-no-26-of-2021.pdf

If it is not possible to rule for the confiscation of funds, proceeds, or instrumentalities due to of their failure to seize them or because they are related to the rights of bona fide third parties, the court shall pass a fine equivalent to its value at the time of the crime.

2- The confiscation shall be imposed irrespective of whether the funds, Proceeds, or Instrumentalities are owned by or in possession of the perpetrator or a third party without prejudice to the rights of third party acting in good faith.

3. The fact that the offender is unknown, lack of his criminal responsibility abstained, or the criminal case for a crime punishable under the provisions of this Decree-Law is elapsed does not preclude the competent court from ruling, on its own or at the request of the Public Prosecution, as the case may be, to confiscate the seized funds, proceeds and instrumentalities if it is proven that they are related to the same. .4Without prejudice to the rights of bona fide third parties, any contract or act where the parties, or any one of them or otherwise are aware that such contract or act aims at impacting the ability of the competent authorities to enforce the seizure, freezing or the execution of the confiscation order, shall be void.

United Kingdom

Proceeds of Crime Act 2002[50]

(recoverable amount)

7 Recoverable amount

(1)The recoverable amount for the purposes of section 6 is an amount equal to the defendant's benefit from the conduct concerned.

(2)But if the defendant shows that the available amount is less than that benefit the recoverable amount is—

(a) (a)the available amount, or
(b) (b)a nominal amount, if the available amount is nil.

(3)But if section 6(6) or 6(6A) applies the recoverable amount is such amount as—

(a) (a)the court believes is just, but
(b) (b)does not exceed the amount found under subsection (1) or (2) (as the case may be).

(4)In calculating the defendant's benefit from the conduct concerned for the purposes of subsection (1), the following must be ignored—

(a) (a)any property in respect of which a recovery order is in force under section 266,
(b) (b)any property which has been forfeited in pursuance of a forfeiture notice under section 297A or an account forfeiture notice under section 303Z9,...
(c) (c)any property in respect of which a forfeiture order is in force under section 298(2), 303O(3), 303R(3) or 303Z14(4), and
(d) (d)any property which is the forfeitable property in relation to an order under section 303Q(1).

(5)If the court decides the available amount, it must include in the confiscation order a statement of its findings as to the matters relevant for deciding that amount.

(unexplained wealth order)

362A Unexplained wealth orders

(1)The High Court may, on an application made by an enforcement authority, make an unexplained wealth order in respect of any property if the court is satisfied that each of the requirements for the making of the order is fulfilled.

(2)An application for an order must—

(a)specify or describe the property in respect of which the order is sought, and

(b)specify the person whom the enforcement authority thinks holds the property ("the respondent") (and the person specified may include a person outside the United Kingdom).

(3)An unexplained wealth order is an order requiring the respondent to provide a statement—

(a)setting out the nature and extent of the respondent's interest in the property in respect of which the order is made,

(b)explaining how the respondent obtained the property (including, in particular, how any costs incurred in obtaining it were met),

(c)where the property is held by the trustees of a settlement, setting out such details of the settlement as may be specified in the order, and

(d)setting out such other information in connection with the property as may be so specified.

(4)The order must specify—

(a)the form and manner in which the statement is to be given,

(b)the person to whom it is to be given, and

(c)the place at which it is to be given or, if it is to be given in writing, the address to which it is to be sent.

(5)The order may, in connection with requiring the respondent to provide the statement mentioned in subsection (3), also require the respondent to produce documents of a kind specified or described in the order.

(6)The respondent must comply with the requirements imposed by an unexplained wealth order within whatever period the court may specify (and different periods may be specified in relation to different requirements).

(7)In this Chapter "enforcement authority" means—

(a)the National Crime Agency,

(b)Her Majesty's Revenue and Customs,

50 Available at https://www.legislation.gov.uk/ukpga/2002/29/contents

(c)the Financial Conduct Authority,

(d)the Director of the Serious Fraud Office, or

(e)the Director of Public Prosecutions (in relation to England and Wales) or the Director of Public Prosecutions for Northern Ireland (in relation to Northern Ireland).

362B Requirements for making of unexplained wealth order

(1)These are the requirements for the making of an unexplained wealth order in respect of any property.

(2)The High Court must be satisfied that there is reasonable cause to believe that—

(a)the respondent holds the property, and

(b)the value of the property is greater than £50,000.

(3)The High Court must be satisfied that there are reasonable grounds for suspecting —

(a)that the known sources of the respondent's lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property, or

(b)that the property has been obtained through unlawful conduct (within the meaning given by section 242).

(4)The High Court must be satisfied that—

(a)the respondent is a politically exposed person, or

(b)there are reasonable grounds for suspecting that—

(i)the respondent is, or has been, involved in serious crime (whether in a part of the United Kingdom or elsewhere), or

(ii)a person connected with the respondent is, or has been, so involved.

(5)It does not matter for the purposes of subsection (2)(a)—

(a)whether or not there are other persons who also hold the property;

(b)whether the property was obtained by the respondent before or after the coming into force of this section.

(6)For the purposes of subsection (3)—

(a)regard is to be had to any mortgage, charge or other kind of security that it is reasonable to assume was or may have been available to the respondent for the purposes of obtaining the property;

(b)it is to be assumed that the respondent obtained the property for a price equivalent to its market value;

(c)income is "lawfully obtained" if it is obtained lawfully under the laws of the country from where the income arises;

(d)"known" sources of the respondent's income are the sources of income (whether arising from employment, assets or otherwise) that are reasonably ascertainable from available information at the time of the making of the application for the order;

(e)where the property is an interest in other property comprised in a settlement, the reference to the respondent obtaining the property is to be taken as if it were a reference to the respondent obtaining direct ownership of such share in the settled property as relates to, or is fairly represented by, that interest.

(7)In subsection (4)(a), "politically exposed person" means a person who is—

(a)an individual who is, or has been, entrusted with prominent public functions by an international organisation or by a State other than the United Kingdom or another EEA State,

(i)the United Kingdom, or

(ii)an EEA state,

(b)a family member of a person within paragraph (a),

(c)known to be a close associate of a person within that paragraph, or

(d)otherwise connected with a person within that paragraph.

(8)Article 3 of Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015 applies for the purposes of determining—

(a)whether a person has been entrusted with prominent public functions (see point (9) of that Article),

(b)whether a person is a family member (see point (10) of that Article), and

(c)whether a person is known to be a close associate of another (see point (11) of that Article).

(9)For the purposes of this section—

(a)a person is involved in serious crime in a part of the United Kingdom or elsewhere if the person would be so involved for the

purposes of Part 1 of the Serious Crime Act 2007 (see in particular sections 2, 2A and 3 of that Act);

(b)section 1122 of the Corporation Tax Act 2010 ("connected" persons) applies in determining whether a person is connected with another.

(10)Where the property in respect of which the order is sought comprises more than one item of property, the reference in subsection (2)(b) to the value of the property is to the total value of those items.

362CEffect of order: cases of non-compliance

(1)This section applies in a case where the respondent and the specified responsible officer (if any), between them, fail, without reasonable excuse, to comply with the requirements imposed by an unexplained wealth order in respect of any property before the end of the response period.

(2)The property is to be presumed to be recoverable property for the purposes of any proceedings taken in respect of the property under Part 5, unless the contrary is shown.

(3)The presumption in subsection (2) applies in relation to property—

(a)only so far as relating to the respondent's interest in the property, and

(b)only if the value of that interest is greater than the sum specified in section 362B(2)(b).

It is for the court hearing the proceedings under Part 5 in relation to which reliance is placed on the presumption to determine the matters in this subsection.

(4)The "response period" is whatever period the court specifies under section 362A(6) as the period within which the requirements imposed by the order are to be complied with (or the period ending the latest, if more than one is specified in respect of different requirements).

(5)For the purposes of subsection (1)—

(a)a respondent or a specified responsible officer who purports to comply with the requirements imposed by an unexplained wealth order is not to be taken to have failed to comply with the order (see instead section 362D);

(b)where an unexplained wealth order imposes more than one requirement,...the respondent and the specified responsible officer (if any) are to be taken to have failed to comply with the requirements imposed by the order unless each of the requirements is complied with or is purported to be complied with.

(6)Subsections (7) and (8) apply in determining the respondent's interest for the purposes of subsection (3) in a case where the respondent to the unexplained wealth order—

(a)is connected with another person who is, or has been, involved in serious crime (see subsection (4)(b)(ii) of section 362B), or

(b)is a politically exposed person of a kind mentioned in paragraph (b), (c) or (d) of subsection (7) of that section (family member, known close associates etc of individual entrusted with prominent public functions).

(7)In a case within subsection (6)(a), the respondent's interest is to be taken to include any interest in the property of the person involved in serious crime with whom the respondent is connected.

(8)In a case within subsection (6)(b), the respondent's interest is to be taken to include any interest in the property of the person mentioned in subsection (7)(a) of section 362B.

(9)Where an unexplained wealth order is made in respect of property comprising more than one item of property, the reference in subsection (3)(b) to the value of the respondent's interest in the property is to the total value of the respondent's interest in those items.

362D Effect of order: cases of compliance or purported compliance

(1)This section applies in a case where, before the end of the response period (as defined by section 362C(4)), the respondent and the specified responsible officer (if any) between them comply, or purport to comply, with all of the] requirements imposed by an unexplained wealth order in respect of any property in relation to which the order is made.

(2)If an interim freezing order has effect in relation to the property (see section 362J), the enforcement authority must determine what enforcement or investigatory proceedings, if any, it considers ought to be taken in relation to the property.

(3)A determination under subsection (2) must be made within the period of 60 days starting with the day of compliance, or that period as it may be extended by virtue of section 362DA or 362DB (the "determination period").

(4)If the determination under subsection (2) is that no further enforcement or investigatory proceedings ought to be taken in relation to the property, the enforcement authority must notify the High Court of that fact as soon as reasonably practicable (and in any event before the end of the determination period).

(5)If there is no interim freezing order in effect in relation to the property, the enforcement authority may (at any time) determine what, if any, enforcement or investigatory proceedings it considers ought to be taken in relation to the property.

(6)A determination under this section to take no further enforcement or investigatory proceedings in relation to any property does not prevent such proceedings being taken subsequently (whether as a result of new information or otherwise, and whether or not by the same enforcement authority) in relation to the property.

(7)For the purposes of this section—

(a). . . . . .

(b)references to the day of compliance are to the day on which the requirements imposed by the order are complied with (or, if the requirements are complied with over more than one day, the last of those days), and

(c)where an order requires the sending of information in writing to, or the production of documents at, an address specified in the order, compliance with the order (so far as relating to that requirement) occurs when the written information is received, or the documents are produced, at that address,

and in paragraphs (b) and (c) references to compliance include purported compliance.

(8)In this section "enforcement or investigatory proceedings" means any proceedings in relation to property taken under—

(a)Part 2 or 4 (confiscation proceedings in England and Wales or Northern Ireland) (in relation to cases where the enforcement authority is also a prosecuting authority for the purposes of that Part),

(b)Part 5 (civil recovery of the proceeds of unlawful conduct), or

(c)this Chapter.

Case law

- R v Waya, [2012] UKSC 51
- National Crime Agency v Mrs Zamira Hajiyeva [2018] EWHC 2534 (Admin).
- NCA v Mansoor Mahmood Hussain et al [2020] EWHC 432 (Admin) [2020] 1 WLR 2145
- Mrs Zamira Hajiyeva v National Crime Agency [2020] EWCA Civ 108.

United States

Case law

- U.S. Supreme Court, Tot v United States, 319 U.S. 463 (1943)
- U.S. Supreme Court, Leary v the United States 395 US 6 (1969)
- U.S. Court of Appeal for the 9th Circuit, 22 June 1998, United States, Petitioner v. Hosep Krikor Bajakajian.

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