

The Use of Non-Conviction Based Seizure and Confiscation

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Cover and layout:
Documents and Publications
Production Department (SPDP),
Council of Europe.

This publication has not been copy-edited by the SPDP Editorial Unit to correct typographical and grammatical errors.

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Printed at the Council of Europe

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Introduction

” [T]he fight against serious crime, which has become an increasingly international problem, calls for the use of modern and effective methods on an international scale.”¹

Over the past thirty years, confiscation has been used as a tool to combat transnational crime, stripping away the rewards from those who engage in such nefarious activities. Fundamentally, the approach is directed at reducing criminal capital that could fuel further criminal activity, removing the incentive to commit further crime and ensuring that “crime doesn’t pay”.² Nonetheless, serious crime continues to generate significant benefits for those involved – as at 2016, illicit markets in Europe were believed to generate around 110 billion euros annually.³

Traditionally, the focus has been on “post-conviction confiscation” – recovering the proceeds of crime, via court order, after the crime itself has been proved in a criminal court to the criminal standard. The origins of such an approach may be traced to the 1988 Vienna Convention which provided for confiscation of the proceeds of crime in the context of drug-related offending only. Some 17 years earlier, in 1971, US President Richard Nixon had declared a “war on drugs”; the US was the fastest-growing market for controlled substances at that time, and an increase in demand for cannabis, cocaine and heroin for recreational use led to large-scale international drug trafficking throughout the 1970s and 1980s.⁴ Following international concern at the growth of the international drug trade, the Vienna Convention highlighted the “links between illicit traffic and other related organized criminal activities which

1. *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No.141), www.coe.int/en/web/conventions, accessed on 15 October 2020
2. Helena Wood (2019) *Reaching the Unreachable: Attacking the Assets of Serious and Organised Criminality in the UK in the Absence of a Conviction*, RUSI Occasional Paper, page 2, www.rusi.org, accessed on 15 October 2020
3. Regulation (EU) 2018/1805 on *Mutual recognition of freezing and confiscation orders*, <https://eur-lex.europa.eu>, accessed on 15 October 2020
4. Transnational Institute (2015) *The UN Drug Control Conventions, A Primer*, www.tni.org, accessed on 15 October 2020

undermine the legitimate economies” and so determined “to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing” as well as to “eliminate the root causes of the problem ... including...the enormous profits derived from illicit traffic.”⁵ Notably, in a relaxation of procedural safeguards judged to be proportionate to the scale of the problem, states were encouraged to “consider ensuring the onus of proof be reversed regarding the lawful origin of alleged proceeds”⁶

Over time, confiscation steadily broadened beyond drug offences. In 1990, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime went on to define confiscation as a penalty or measure ordered “following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property.”⁷

Advancing to 2000, the Palermo Convention⁸ required States to adopt confiscation measures, and specifically targeted the offences of participation in an organized criminal group, laundering the proceeds of crime, corruption, obstruction of justice and “other serious crime”. The Palermo Convention, like the 1988 Vienna Convention, mooted shifting the burden of proof, stating that States might “consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation.”⁹ The prospect of a reversed burden was further referenced in the 2003 United Nations Convention Against Corruption¹⁰ (2003 UNCAC) and the 2005 Council of Europe Convention on Laundering, Search Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.¹¹

The 2003 UNCAC also specifically raised the concept of “taking such measures as may be necessary to allow confiscation of...property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases” , expressly raising non-conviction based confiscation (NCBC) or asset recovery on the international stage. The concept of NCB recovery had already begun to gather momentum at a national level: for example, Antigua and Barbuda introduced their Money Laundering (Prevention) Act in 1996, in 2000 the United States Congress enacted the Civil Asset Forfeiture Reform Act, and in 2002 Australia, Colombia and the United Kingdom all introduced NCBC legislation.

In parallel, the European Union has encouraged the development of a confiscation regime in Member States through 4 Framework Decisions (2001/500/JHA; 2003/577/JHA; 2005/212/JHA; 2006/783/JHA) and a Directive on the Freezing and Confiscation of the Proceeds of Crime in the European Union” (2014/42/EU) (the “2014 European

5. *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988), www.unodc.org, accessed on 15 October 2020

6. *Idem.* Article 5(7).

7. *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No.141), Article 1(d).

8. *United Nations Convention against Transnational and Organised Crime* (2000), www.unodc.org, accessed on 15 October 2020

9. *Idem.* Article 12(7).

10. Article 31(8).

11. Article 3(4).

Union Directive”¹². In the 2014 European Union Directive, NCB recovery is a prominent feature. Confiscation is defined as final deprivation of property ordered by a court “in relation to” a criminal offence; it is not contingent on a conviction. Indeed, the 2014 European Union Directive expressly provides for NCB recovery in carefully prescribed circumstances:

“[w]here [post-conviction confiscation] 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.”¹³

The G8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets also encourage states “to examine the possibility to extend, to the extent consistent with the fundamental principles of their domestic law, confiscation by: permitting the forfeiture of property in the absence of a criminal conviction...”¹⁴

Recommendation 4 of the Financial Action Task Force’s 2012 Recommendations¹⁵ (last updated in 2019) similarly contains a following steer towards the implementation of an NCB recovery system:

“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.”

All of the above highlights the growing international support for the use of NCB recovery systems, in circumstances where a conviction is not feasible. Ultimately, what such a system seeks to prevent is a person’s ill-gotten gains escaping the reach of law enforcement merely because a criminal trial is unable to proceed. As traditional confiscation measures appear to be providing limited results (whilst 2.2% of the proceeds of crime were provisionally seized or frozen in the EU over the 2010-2014 period, only 1.1% of criminal profits was definitively confiscated),¹⁶ further development of NCB recovery looks to be on the horizon.

Debating the introduction of the United Kingdom’s NCB civil recovery system in parliament over a decade ago, Lord Goldsmith explained the rationale in the following terms:

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12. Note that Regulation (EU) 2018/1805 on the mutual recognition of freezing orders and confiscation orders, which comes into force from 19 December 2020 does not apply to civil proceedings for confiscation (see Recital 13 and Article 1(4)). However, it still envisages non-conviction confiscation (see Article 2(3)(d)).
 13. Directive (2014/42/EU) *Freezing and Confiscation of the Proceeds of Crime in the European Union*, Article 4(2), <https://eur-lex.europa.eu>, accessed on 15 October 2020
 14. G8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets (2004), paragraph 26.
 15. FATF *Recommendations 2012*, www.fatf-gafi.org, accessed on 15 October 2020
 16. Regulation (EU) 2018/1805, Introduction.

“Someone at the centre of a criminal organisation may succeed in distancing himself sufficiently from the criminal acts themselves so that there is not sufficient evidence to demonstrate actual criminal participation on his part. Witnesses may decline to come forward because they feel intimidated. Alternatively, there may be strong evidence that the luxury house ... the yachts and the fast motor cars have not been acquired by any lawful activity because none is apparent. It may also be plain from intelligence that the person is someone engaged in criminal activity, but it may not be clear what type of crime. It could be drug trafficking, money laundering or bank robbery. However, the prosecution may not be able to say exactly what is the crime, and thus the person will be entitled to be acquitted of each and every offence. If, in a criminal trial, the prosecution cannot prove that the person before the court is in fact guilty of this bank robbery or that act of money laundering, then he is entitled to be acquitted. Yet it is as plain as a pikestaff that his money has been acquired as the proceeds of crime.”¹⁷

Broadly, NCB recovery regimes have developed in two core strands: actions for recovery that are brought in connection with criminal proceedings but are not dependent on a criminal conviction and actions that are brought against the property itself independently of any criminal proceedings.

Thus far, NCBC systems have largely been creatures of the common law but there is no reason in principle why a system cannot work in a civil jurisdiction. Regimes have been adopted in multiple countries including Australia, Antigua, Barbuda, Bulgaria, Canada, Columbia, Fiji, Georgia, Ireland, Italy, Malaysia, Netherlands, New Zealand, Nigeria, Peru, The Philippines, South Africa, the United States and the United Kingdom.

Axiomatically, the development of an NCBC regime impacts on the rights of an individual and will spark debate over procedural fairness. Such systems can be controversial as, fundamentally, they seek to remove suspect property in the absence of the holder of the property having been found guilty of a criminal offence. It follows that any framework must be developed with the utmost care. Whilst certain NCB recovery procedures, such as those in place in Ireland, Georgia, the United Kingdom and Italy, have withstood legal challenge in the past, the legality of any individual regime will ultimately turn on the intricacies of the specific legislation under consideration. This paper addresses the key principles and model components to develop robust and procedurally fair NCB recovery regimes compatible with international standards.

17. House of Lords Debate 25 June 2002, vol 636, cols 1270-71, per Lord Goldsmith.

The international landscape

Within the European Union, there are no common rules on NCB recovery and little alignment between the systems that have developed. The lack of harmony has prompted the European Commission to undertake an analysis of non-conviction based confiscation measures in the European Union in 2019.¹⁸

A wider review of NCB recovery around the world further confirms that there is not a 'one size fits all' approach to capturing ill-gotten gains. In some countries NCB recovery does not feature at all. Elsewhere, different NCBC models have been developed and, in both common law and civil law jurisdictions, they are continuing to evolve at varying paces. Scope for judicial discretion, time limits for commencing an action, standards to be met, the presence of a reversed burden, consideration of the public interest and the situations that can give rise to NCB recovery all differ between jurisdictions.

Australia

In Australia, which has a federal system, there are a raft of NCB confiscation provisions at both the national and state levels. For example, at the national level, where the authorities suspect that an individual has "unexplained wealth" they can seek a preliminary "unexplained wealth order". The court may make such an order if satisfied there are reasonable grounds to suspect that a person's wealth exceeds by AUD 100,000 or more the value of the person's wealth that has been lawfully acquired. The applicant authority must set out the evidence for the suspicion. The order requires the individual to explain his or her wealth to the court. In the absence of a sufficient explanation and where the court is not satisfied that the wealth has not been generated by a criminal offence, a final unexplained wealth order will be made requiring the individual to pay the unexplained amount to the State.¹⁹ Fundamentally,

18. European Commission (SWD(2019) 1050 final) *Commission Staff Working Document: Analysis of non-conviction based confiscation measures in the European Union*, available at <https://db.euro-crim.org>, accessed on 15 October 2020

19. Proceeds of Crime Act 2002 (Cth), section 179E.

the framework centres on a reverse onus. Unlike the United Kingdom (UK) model for NCBC, discussed below, it does not require evidence in the first instance that the “unexplained” property is the proceeds of crime. Elsewhere in Australia, the state of Queensland opens the door to NCB recovery of property where, as a first step, the authorities form a suspicion that an individual is engaged in “serious crime-related activity” which is defined as a “serious criminal offence.”²⁰ The suspicion enables the authorities to apply to the court for an order restraining all property suspected of having derived from serious crime. In due course, the authorities may apply to the court for an order forfeiting to the state the restrained property in the absence of a conviction. The order may be made if the court is satisfied on the balance of probabilities that in the preceding six years the individual has engaged in serious-crime related activity. The court may refuse to make a forfeiture order if it is not in the public interest.²¹ Notably, the legislation expressly provides that a forfeiture order will be undisturbed where a conviction relating to the serious crime-related activity either before or after the order is quashed.²² Such a provision envisages that NCB recovery proceedings could be launched on the back of an overturned criminal conviction and highlights the clear division between the civil and criminal processes.

Bulgaria

Provisions targeting unexplained wealth also exist in Bulgaria. Property may be confiscated in civil proceedings where there is a lack of evidence that they derive from legal income sources. The standard of proof required to be met is lower than that in criminal proceedings.²³

Italy

One way in which NCB recovery is reflected in the Italian legal system is in its anti-mafia provisions. Where a person is proven to be habitually involved in the commission of criminal activities or proven to habitually live by means of the proceeds of crime, a “preventative” confiscation order may be made. Evidence that the person is a “danger” to society is required to be examined according to the same rules that apply to criminal evidence.²⁴

Nigeria

In Nigeria, NCB recovery is available in limited situations. One is where there is unclaimed property in the possession of the authority charged with combating economic crime, the Economic and Financial Crimes Commission, or property found in the possession of any person by an Economic and Financial Crimes Commission officer and suspected to be the proceeds of an unlawful activity. Another is where property has been seized in connection with corruption. Section 48 of the Corrupt

20. Criminal Proceeds Confiscation Act 2002 (Qld), section 16.

21. *Idem*, section 58.

22. *Idem*, section 61.

23. European Commission (SWD(2019) 1050 final)

24. Italian Anti-Mafia Code Article 1.

Practices and other Related Offences Act 2000 provides that in the absence of the prosecution or conviction for an offence of corruption, the Chairman of the Independent Corrupt Practices and other Related Offences Commission may apply to the court for a forfeiture order. The application must be made within 12 months of the seizure and the property may be forfeited where a High Court judge is satisfied that the property has been obtained as a result of or in connection with an offence of corruption. Notices are required to be published in the official Gazette as well as two English-language national newspapers calling on any person with an interest in the property to show cause as to why it should not be forfeited.²⁵

Peru

NCB recovery legislation (*Extincion de Dominio*) was introduced in Peru in August 2018. The legislation provides for Peruvian courts to issue recovery orders in circumstances where the asset holder cannot be convicted of a crime by reason of, for example, death or absconding. In this sense, the approach to NCB recovery is far more focused than that in the United Kingdom or in Australia. The court, in effect, must be satisfied that a criminal conviction is impossible. The legislation was first deployed in 2019 in relation to money held in a Luxembourg bank account believed to be corruptly acquired by a deceased general of the Peruvian army.²⁶

The Philippines

A form of NCB recovery exists in the Philippines' anti-money laundering legislation. Where there are "reasonable grounds to believe that probable cause exists" that property is related to unlawful activity, the Anti-Money Laundering Council can petition, through the Official Solicitor, for a property freezing order in the absence of a conviction. The respondent is given 15 days to oppose the freezing order. In due course a civil forfeiture application can be made.

United Kingdom

The United Kingdom takes a multi-faceted approach to NCB confiscation. Property of all kinds may be recovered following High Court proceedings where the value is at least £10,000. Legislation also provides for the recovery of cash, certain designated assets and money held in bank accounts where the value is at least £1,000 with proceedings taking place in the United Kingdom's lowest court, the Magistrates Court. The components are the same for both High Court and Magistrates Court NCB recovery. Property may be frozen where there is a reasonable suspicion that it is "recoverable". "Recoverable" property is defined as either having been obtained through unlawful conduct or intended for use in unlawful conduct. Particulars of the kind of unlawful conduct are required (i.e., drug offending) but knowledge of the precise criminal offence is not required.

25. Corrupt Practices and other Related Offences Act 2000, section 49.

26. Oscar Solorzano (2019) *Landmark asset recovery case puts Peruvian non-conviction-based confiscation legislation to the test*, Basel Institute on Governance.

In due course, property may be forfeited if a judge is satisfied to the civil standard (on the “balance of probabilities”) that it is recoverable property. Guidance issued by the government in January 2018 makes clear that civil recovery proceedings in the High Court may be appropriate where the only known criminality is overseas, the suspect is no longer in the jurisdiction, there is insufficient evidence for criminal prosecution or a criminal prosecution has not resulted in a conviction.²⁷ This posits that NCBC proceedings can be brought on the back of a failed criminal prosecution. In the context of cash and bank accounts, there is also potential for property to be forfeited in the absence of judicial oversight. Cash and money in bank accounts can be administratively forfeited if no objection is raised to the issuing of a “forfeiture notice” to affected persons. In the United Kingdom, judges and magistrates retain a discretion when it comes to NCBC. Although there is no legislative requirement to consider the public interest in the making of an NCB recovery order, the orders “may” be made and are not required to be made.

In all NCB confiscation cases, civil procedural law rather than criminal procedural law is applied.

Analysis

The above highlights the use of NCBC systems around the world. Axiomatically, the development of a framework for property forfeiture in the absence of a conviction is not unique to any one country or region. Although the differences between each system can be striking in that some systems adopt a reverse burden whereas others do not, common elements can also be identified. There would seem to be, for example, two stages to asset forfeiture with property first being seized or frozen before any forfeiture. Each model identified above also provides for the notification and participation of the individual affected in the forfeiture proceedings where their whereabouts are known. Moreover, it is clear that there must be a reasonable basis, supported by evidence, for an assertion by the authorities that property is tainted or is inconsistent with lawful income. In all models, there is also judicial oversight either by a specialist court or senior judge.

27. United Kingdom Government Guidance (2018) *The Proceeds of Crime Act 2002 (POCA) Guidance Under Section 2A*, www.gov.uk, accessed on 15 October 2020

Benefits and challenges of non-conviction based confiscation

Benefits

NCB recovery is attractive fundamentally because it sidesteps the limitations of a criminal prosecution and uncertainty of a criminal trial.

By definition, NCB confiscation presents a faster route to the recovery of ill-gotten gains than post-conviction confiscation, as there is no need to wait for a successful prosecution before starting proceedings. Aside from efficiency, NCB recovery may also prove advantageous in circumstances where criminal proceedings are not viable for evidential or public interest reasons.

Lower standard

Whereas in criminal proceedings the state is required to prove its case against an individual to the criminal standard, many NCB recovery systems such as those introduced in the United Kingdom, Ireland and Bulgaria feature a lower civil burden. By way of example, in the United Kingdom Part 5 of the Proceeds of Crime Act 2002 requires the applicant enforcement authority to prove, on the balance of probabilities as opposed to the criminal standard of beyond reasonable doubt, that property was obtained through unlawful conduct or intended for use in unlawful conduct. This low burden, which was considered controversial from its very inception and was widely debated as it was carried into law²⁸, is now a well-established feature of the United Kingdom's system.

Reversed burden

Further, the possible inclusion of a reversed burden in a NCBC system can make the route to recovering illicit gains relatively straightforward. Where a suspicion has been raised that property has an illegitimate source or there is a disparity between property and identified legal income, in some NCB systems, such as those in force in Australia

28. House of Lords Debate 25 June 2002, vol 636, cols 1205-74.

and Bulgaria, the burden flips to the holder of the allegedly criminal property to prove that the funds or property in question is not tainted²⁹. This removes the need for the authorities to delve into the intricacies of sources of wealth and complex structures facilitating the amassment of large funds, requiring the respondent to the proceedings to explain the position instead. Such an approach is extremely helpful in cases of fraud and financial crime, where great effort is likely to have gone into concealing transactions, such as through the use of shell companies, sham consultancy agreements or offshore trust structures, making such detail hard to unravel. The flipped burden serves to remove any strategic advantage from the respondent. Indeed, it goes a step further and puts the respondent to proof.

Absence of criminal procedural requirements

Additionally, a criminal prosecution may be precluded where a case has been built in contravention of rigorous criminal procedural rules.³⁰ Use of civil procedure also “opens the door to admission of different types of evidence that would not be admissible at a criminal trial including ... hearsay evidence.”³¹ This allows the State a chance to bring civil proceedings in circumvention of such procedural safeguards, effectively granting it “another bite at the cherry” where criminal proceedings are not possible.

In a criminal prosecution, the authorities may be required to pass through a public interest gateway before commencing a prosecution.³² Where such a gateway is not open, their hands will be tied unless they are able to pursue NCB confiscation instead.

Targeting of property and not individual

In some NCBC systems, such as those in the United Kingdom and Ireland, proceedings are brought against the property (*in rem*) and not the individual. The characteristics of an *in rem* NCBC regime are described in the Council of Europe’s Impact Study on Civil Forfeiture:

“it does not require either a civil or criminal conviction against an individual in order to confiscate his/her assets. Instead, ‘guilt’ is assigned to the property and prosecutors must only prove that the property in question was involved in an illegal activity. Hence, a possible case name for an in rem action could be The State v 100,000 Euros in a Ford van or The State v Apartment no. 4, Main Road. The owner or beneficiary of targeted property must then prove that the property was not involved or be able to provide his/her an ‘innocent owner defence’ or similar...”³³

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29. For example, the Vienna Convention and the Palermo Convention both suggest domestic measures requiring an offender to demonstrate the lawful origins of alleged proceeds of crime or other property liable to confiscation.
 30. For example, in the UK, if a suspect has been interviewed without having first being “cautioned” in breach of PACE Code C, potentially rendering the contents of that interview inadmissible in subsequent proceedings.
 31. Jennifer Hendry & Colin King (2015) *How far is too far? Theorising non-conviction-based asset forfeiture*, International Journal of Law in Context 11, 4, pages 398-411.
 32. For example, in the United Kingdom the Crown Prosecution Service is required to apply the “Full Code Test”, which is comprised of an evidential test and a public interest test, before it proceeds to prosecution.
 33. Council of Europe (2013) *Impact Study on Civil Forfeiture*, Belgrade, page 13, www.coe.int, accessed on 15 October 2020

The benefit of such an approach is that it can be used to target the property of persons at the very top of the chain against whom enforcement authorities may struggle to gather sufficient evidence to bring a criminal prosecution. The very nature of financial crime can render it hard to identify the individual involved and the exact nature of the criminality giving rise to what have all the hallmarks of ill-gotten gains. As Jennifer Hendry and Colin King, academics in the field of NCB confiscation, observe: “*The main difficulty facing law enforcement agencies appears to be the disconnected or cumulative nature of the criminal activity, which provides the “organisers” with a degree of distance from the “coalface”, as it were, and thus a certain level of immunity...*”³⁴

In practice, police time and public money can be wasted on the arrest and prosecution of easily replaceable foot soldiers, while those at the upper echelons of the criminal enterprise remain insulated against criminal liability,³⁵ with their property beyond the reach of law enforcement. Ultimately, “it makes a great deal of law enforcement sense to focus on seizing money and not on arresting the couriers and street-corner hoodlums.”³⁶

Further, *in personam* proceedings may in certain scenarios be impossible from a practical perspective. For example, at the most extreme end of the scale, the suspect may have died, or may lack capacity to stand trial. In one such case, an investment advisor defrauded clients of millions of dollars in savings but committed suicide when the FBI arrived with search warrants.³⁷ Alternatively, he or she may have absconded, and extradition may be impossible either because there is no valid treaty in place, whereabouts are unknown, the costs of the exercise would outweigh the benefits or because the host state refuses to cooperate. In such circumstances, where the criminal property itself is within the reach of the authorities, an action *in rem* (i.e. against the criminal property and not the individual) could offer a valuable solution as it allows for the property to be confiscated directly, circumventing the obstacles peculiar to the defendant in question and allowing, in relevant cases, compensation for any victims which would not otherwise be available. This solution was noted in the 2014 European Union Directive, which provided for NCB recovery in cases where post-conviction confiscation is not possible “at least where such impossibility is the result of illness or absconding of the suspected or accused person.”³⁸

Indeed, the initial criminal investigation may have been frustrated by a defendant destroying evidence, refusing to disclose documents, causing delay, or a simple lack of evidence. For example, where a courier does not know the name of the person who hired him³⁹ or, in a cross-border fraud, where critical documents are held in an uncooperative jurisdiction. In such circumstances it may be impossible to ascertain the true facts in order to bring a criminal case against the defendant or cause such

34. Jennifer Hendry & Colin King (2015) *How far is too far? Theorising non-conviction-based asset forfeiture*, International Journal of Law in Context 11, 4, pages 398-411, page 8.

35. *Ibid*, citing (Simser, 2009, page 20).

36. Cassella, *Choose your weapon* (2018), JMLC 21(3) pages 340-344.

37. *United States v. \$7,599,358.09*, 953 F. Supp.2d 549 (D.N.J. 2013).

38. Directive (2014/42/EU), Article 4(2).

39. Cassella (2018 JMLC 21(3)) *Choose your weapon*, pages 340-344, citing Cassella (2017); Cassella (2015a); through the sponsorship of the Max Planck Institute, Freiburg, Germany; Cassella (2015b).

delay that an investigation fails to progress. Alternatively, it may be impossible to clearly ascertain who the true holder of criminal property is (for example, where it is held via a nominee for an undisclosed beneficiary). In such cases, it can be more fruitful to focus on confiscating the proceeds than on pursuing the alleged offender.

Another common impediment is where jurisdictional privilege (otherwise known as “domestic immunity”) applies to protect the defendant. This can perpetuate a situation where high-profile political criminals are permitted to continue their criminal behaviour on the international stage. NCB recovery allows the ill-gotten gains of such individuals to be confiscated, even where they may have ensured through power and influence that they are personally invincible in the eyes of the law.

Moreover, the faster and easier process is still coupled with powers usually reserved for criminal proceedings such as asset freezing powers and production orders.

Challenges

At the same time, there are clear challenges to the development of NCBC systems. The removal of a person’s property in the absence of criminal procedural safeguards is controversial. Critics of NCBC systems do not consider that the scale of crime justifies such an infringement of a person’s civil liberties.

Impact on the individual

That such proceedings can take place after criminal proceedings have already been explored (and potentially exhausted to no avail), means that the respondent is left in suspense after criminal proceedings have concluded. The resulting legal uncertainty, and the stress caused to the defendant should not be discounted lightly.

The overlap between criminal and civil proceedings is also unclear. A lay client facing non-conviction confiscation proceedings might mistakenly believe that they face criminal proceedings, given the seriousness of the allegations. The impact may well be very similar – the stigma of confiscation proceedings is closer to that linked to criminal than standard civil proceedings: “while the ostensible rationale... is to recoup unlawfully acquired assets, and while these orders are directed at the property rather than the person, recovery also incorporates a substantial stigma and incorporates the blame that distinguishes criminal from civil measures, with the former connoting “should not do”⁴⁰

Further, by removing the need for an *in personam* action, property is taken from person(s) not convicted of a criminal offence. For instance, a component of NCBC systems is the ability to capture property that has passed into the hands of third parties who, although may have the knowledge that the property is tainted, are far removed from the illicit conduct. In any NCBC system, it is crucial to ensure the protection of the rights of *bona fide* third parties by keeping them informed throughout civil proceedings and granting them legal standing to object to and challenge any order.

40. Liz Campbell (2013b) *Criminal Labels, the European Convention on Human Rights and the Presumption of Innocence*, *Modern Law Review* 76(4) pages 705-706.

Impact on the authorities

The lower the burden of proof, the stronger the risk that a serious sanction (i.e. confiscation) is imposed which is disproportionate to the evidence provided. It could also encourage authorities to de-prioritise preparation for criminal proceedings, on the basis that the civil route is available instead.

Furthermore, pursuing serious criminality with civil sanctions comes at the risk of downgrading the seriousness of the offences in the eyes of the public and of offenders. In the United Kingdom, this was noted by Thomas LJ in *Regina v Innospec Limited*⁴¹ who held that a civil settlement would not be appropriate for those who committed such serious crimes as corruption of senior foreign government officials and they should not be viewed or treated in any different way to other criminals – “[i]t would be inconsistent with basic principles of justice for the criminality of corporations to be glossed over by a civil, as opposed to a criminal, sanction.” Civil proceedings do not result in the ultimate sanction – deprivation of liberty (custody), which for some offenders may be the only disincentive to further criminality.

It “has been argued with some force that the procedure has potential for use as an uneasy and unsatisfactory substitute for the criminal process.”⁴² NCB recovery is clearly a weapon that must be wielded with caution and with appropriate safeguards in place. Further, it should never be used as a solution where criminal proceedings are both possible and justified. On the other hand, where criminal proceedings are *not* possible, then NCB recovery provides a route to target alleged criminals where it will hurt them most – their pockets.

41. 2010 WL 3580845.

42. Blackstone's (2015) *Guide to The Proceeds of Crime Act 2002* (Fifth Edition, Edward Rees QC, Richard Fisher QC, Richard Thomas, paragraph 6.14.

Compatibility with Convention Rights

The compatibility of an NCB confiscation system with the European Convention on Human Rights (ECHR)⁴³ will turn on the particular features of that system. However, the European Court of Human Rights (ECtHR) have in a series of cases considered NCB confiscation systems, including those where a reverse burden is present. The cases reveal that as a matter of principle, a NCB confiscation system can be introduced and used to combat illicit property in a manner that aligns with the Convention rights.

Article 1 Protocol 1

"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.

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."

Fundamentally, NCB recovery interferes with an individual's right to peaceful enjoyment of property which is protected by Article 1 Protocol 1 of the Convention.⁴⁴ Where NCB confiscation measures have been introduced, the ECtHR has routinely treated confiscation of such property as control of the use of property.⁴⁵

The right to property, however, is a qualified right. An NCB recovery system will be entirely compatible with Article 1 Protocol 1 where three crucial elements are met.

43. *Convention for the Protection of Human Rights and Fundamental Freedoms*, www.coe.int, accessed on 15 October 2020.

44. *M v Italy* App. No. 12386/86 (ECHR 15 April 1991).

45. *Raimondo v Italy* App. No. 12954/87 (ECHR, 22 February 1994), *Riela v Italy* App. No. 52439/99 (ECHR 4 September 2001), *Sun v Russia* App. No. 31004/02 (ECHR 5 February 2009).

The interference must be prescribed according to law, pursue a legitimate aim and be proportionate.⁴⁶

The deployment of an NCB system as part of a wider crime-prevention strategy is unexceptional. In this regard, the ECtHR has repeatedly emphasised that states are afforded a wide margin of appreciation when identifying problems affecting the public interest which require measures of control and the appropriate way to apply those measures.⁴⁷ This is particularly so when it comes to policy aimed at combating crime.⁴⁸ Considering the proportionality of the interference with Article 1 Protocol 1 in *Arcuri*,⁴⁹ the ECtHR noted that the NCBC proceedings “were conducted in the presence of both parties and with respect for the rights of the defence before three successive courts. Those courts could not base their conclusions on mere suspicions and gave full reasons on all the points at issue, which meant that any risk of arbitrariness was avoided.”⁵⁰ It follows that to be compatible with Article 1 Protocol 1 participation in the proceedings, rights of appeal and the provision of reasons in support of any forfeiture order will be essential.

The margin of appreciation extends to NCBC systems which are sufficiently wide to capture property in the hands of third parties who are not judged to be bona fide purchasers, i.e. family members who hold property on behalf of another.

Article 6

Article 6 of the European Convention on Human Rights protects the right to a fair trial. In order to be Article 6 compliant, the recovery of assets must be open to challenge in court, and any NCB recovery regime must be both reasonable and proportionate.⁵¹

At the same time, the rationale behind NCB recovery is precisely to tip the scales in favour of the state. The reasoning for this is self-evident – in such cases there is often a significant “proof imbalance”, meaning that defendants are often in a stronger position to demonstrate their innocence than the state is to prove their guilt. For example, in transnational financial crime cases, the use of opaque and complex financial structures established across multiple jurisdictions, combined with the typically intelligent and well-educated nature of the accused, means the authorities are faced with exceptionally well-equipped opponents. An attempt has been made to re-draw the battle lines.

Certain NCB recovery regimes have already been found to be compatible with Article 6, but the position is not uncontroversial. Development of any new regime, or refinement of existing processes, will require careful consideration to ensure adherence.

46. *James v United Kingdom* App. No. 8792/79 (ECHR 21 February 1986).

47. *Arcuri v Italy*, App. No. 5204/99 (ECHR 5 July 2001).

48. *Raimondo v Italy*, App. No. 12954/87 (ECHR 22 February 1994).

49. *Arcuri v Italy*, App. No. 5204/99 (ECHR 5 July 2001).

50. *Idem*, page 8.

51. *Welch v. UK*, App. No. 17440/90 (ECHR 9 February 1995); *Phillips v. UK*, App. No. 41087/98 (ECHR 5 July 2001); European Commission Green Paper, *The Presumption of Innocence* (European Commission, COM (2006) 174, final, Brussels) page 7, <https://eur-lex.europa.eu>, accessed on 15 October 2020

Civil or criminal procedure?

There has been serious consideration by the ECtHR as to whether certain NCB recovery regimes constitute “civil” or “criminal” proceedings for the purposes of Article 6.

From a theoretical standpoint, it is possible to argue that the enhanced protections afforded to defendants in criminal matters should be applied as, at first blush, to apply more lenient civil procedure rules appears “unfair” when a defendant is at risk of having his or possessions confiscated.⁵² However, the ECtHR has held that certain NCB recovery regimes are properly classed as civil.

The test for classifying proceedings as civil or criminal was set out in *Engel v Netherlands*⁵³ and it consists of three criteria: (i) the classification of the proceedings under national law, (ii) their essential nature, and (iii) the severity of the penalty risked. When applying the Engel criteria in the context of Article 6(2), it will also be important to consider whether there is a “sufficient link” between the NCB recovery proceedings and any criminal proceedings to “justify” the application of Article 6(2) to the proceedings⁵⁴

The Engel criteria were directly applied to civil confiscation proceedings in the case of *M v Italy*⁵⁵. The ECtHR recognised that it was important to look “beyond appearances, whether the applicant acquired the status of an accused person and whether the confiscation of his property constituted “in substance” a penalty covered by the provisions in question”⁵⁶ It noted that “measures of great severity, but necessary and appropriate for protection of the public interest, are ordered even outside the criminal sphere.”⁵⁷ This view was reiterated in the case of *Butler v UK*⁵⁸, where the ECtHR held that a forfeiture order was a preventive measure that could not be compared to a criminal sanction “since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs”.

It follows that the prevailing view is that NCBC proceedings are civil in nature and as such, the more exacting criminal due process rights enshrined in Article 6 do not apply.

However, it is worth noting that this position has been criticised.⁵⁹ It has been argued that *in rem* forfeiture cannot be “anything but punitive” as it “is impossible to declare a car or house or bank account to be the proceeds of cocaine sales, for example, without simultaneously smearing its owner with the accusation of drug trafficking....Not only

52. See, for example, Colin King, *Civil Forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland* (2014) 34(3) Legal Studies 371.

53. *Engel v Netherlands*, App. No. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72 (ECHR 8 June 1976), paras 82-83.

54. In *SOCA v Gale* [2011] UKSC 49 para 133, the UK Supreme Court held that there was “no link at all” between criminal proceedings and the relevant NCB proceedings, because the latter were “not a “direct sequel” or “a consequence and the concomitant” of any criminal proceedings; they were free-standing proceedings instituted whether or not there have been criminal proceedings against the respondent or indeed anyone at all.”

55. App. No. 12386/86 (ECHR 15 April 1991).

56. App. No. 12386/86 (ECHR 15 April 1991), page 97.

57. *Idem*.

58. App. No. 41661/98, page 9.

59. See, for example, Colin King, *Civil Forfeiture and Article 6 of the ECHR: due process implications for England & Wales and Ireland* (2014) 34(3) Legal Studies 371.

does punishment in the form of property forfeiture then occur, but the owner has been to all intents and purposes found guilty, in the eyes of not just the state but of all of his/her fellow citizens.”⁶⁰ Indeed, in the case of *Air Canada v UK*⁶¹ the ECtHR decided by only five votes to four that seizure and then release of an aeroplane (upon payment of a penalty) did not constitute a fine. Judge Walsh, dissenting, pointed out that “[w]hile the condemnation is termed a decision *in rem* the penalty was levied *in personam*.”⁶²

Article 6(1)

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...”

As Article 6(1) applies to both civil and criminal proceedings, NCB recovery is clearly within scope and such proceedings must be both fair and public, as discussed in detail below.

Setting out the case

The defendant must be made aware of the case against him. For example, it is not enough for the authorities to say simply that there is no identifiable income giving rise to the property that is being sought to be confiscated. That being said, the enforcement agency “need not allege the commission of any specific criminal offence but must set out the matters that are alleged to constitute the particular kind or kinds of unlawful conduct by or in return for which the property ... was obtained.”⁶³

The burden of proof

A court being asked to make a confiscation order will need to be satisfied that the relevant funds are tainted by criminality; NCB recovery is not a mechanism for the arbitrary confiscation of property by the state. The court is, however, typically asked to apply the civil burden of proof (i.e. to “consider proof on a balance of probabilities or demand a high probability of illicit origin combined with the inability of the owner to prove the contrary”),⁶⁴ which renders it easier for a court to order confiscation than if the criminal standard (typically, “beyond reasonable doubt”) was applied. In the UK, this has been held to be sufficient.⁶⁵

60. RT Naylor, *Wash-out: a critique of follow-the-money methods in crime control policy* (Crime, L & Soc'l Change 1, 1999).

61. [1995] 20 EHRR 150.

62. *Idem*, at para 6 of his dissenting judgment.

63. *R v Green* [2005] EWHC 3168 (Admin) paragraph 38; *Director of the Assets Recovery Agency v Olupitan and another* [2007] EWHC 162 (QB).

64. Open-ended Intergovernmental Working Group on Asset Recovery (2019) *Mutual recognition of non-conviction-based freezing orders and confiscation judgments*, para 6, www.unodc.org, accessed on 15 October 2020

65. *SOCA v Gale* [2011] UKSC 49.

Admissibility of evidence

There are also evidential consequences to treating NCB recovery as a civil regime; evidence may be introduced which would not be admissible in a criminal hearing. A classic example is hearsay evidence (i.e. an out of court statement offered to prove the truth of the matter asserted within it). The danger of hearsay is that the maker of the statement is not in court and so cannot be challenged as to its truth and as to their credibility. Hearsay evidence is therefore only admitted in extremely limited circumstances in criminal proceedings, subject to heavy safeguards (e.g. where the maker of the statement is proved to be unable to give evidence). It is, however, permitted more generously in civil proceedings. When such evidence is admitted, it should be for the court to consider how much weight to attribute to it (in some cases it may be none).⁶⁶

Potential for reverse burden

As a matter of principle, the ECtHR has not taken issue with the presence of a reverse burden in an NCB system. States are given a wide margin of appreciation when it comes to policies directed at combating crime and corruption. The critical consideration will be whether the reversal of the burden is a proportionate response.

In *Gogitidze v Georgia* the ECtHR held that:

*“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.”*⁶⁷

The right to participate in proceedings

Finally, a defendant will need to be permitted the opportunity to participate in initial proceedings and any appeal. Those proceedings must, as noted in Article 6(1), subject to certain limited exceptions (e.g. in “special circumstances where publicity would prejudice the interests of justice”⁶⁸), be in public.⁶⁹ The rights of other affected persons, including *bona fide* third parties must also be protected (see Part 5).

66. For example, see *SOCA v Pelekanos* [2009] EWHC 2307.

67. App. No. 36862/05 (ECHR 12 May 2015), paragraph 108.

68. European Convention on Human Rights, Article 6(1).

69. *Saccoccia v Austria*, App. No. 699176/01 (ECHR 18 December 2008).

Article 6(2)

Article 6(2) of the Convention provides that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.” This means, amongst other things, that the “burden of proving his guilt is on the State and any doubt should benefit the accused.”⁷⁰

As alluded to, in *Butler v UK*, which concerned the civil NCB recovery of cash, the ECtHR considered that cash forfeiture was not a criminal sanction. As such, Article 6(2) did not apply. It follows that, at first glance, being a civil measure means the protection afforded in Article 6(2) does not arise.

However, the position is nuanced. There is an argument that voicing suspicions following an acquittal about an accused’s innocence of the offences he or she was charged with on a subsequent application is not permissible and will be in breach of Article 6(2) of the Convention.⁷¹ Grounding a civil case on an allegation that the individual has a disparity between his lawful income and assets when he or she has been acquitted in a criminal court of that very same matter would almost certainly invite an Article 6 challenge. Traversing the same ground in civil proceedings (i.e. assets, timing of acquisition, sources of lawful income) could be attacked as an attempt to go behind the acquittal.

Most recently, this concern has been foreshadowed by the ECtHR in *Georgia v Gogitidze* at paragraph 125 where the Court noted that:

*“In this connection the Court observes that the forfeiture proceedings in rem in the present case did not take place after the criminal prosecution of the first applicant, but on the contrary preceded it. Consequently, the second, more extensive, aspect of Article 6 § 2 of the Convention, the role of which is to prevent the principle of presumption of innocence from being undermined after the relevant criminal proceedings have ended with an outcome other than conviction (such as acquittal, discontinuation of the criminal proceedings as being statute-barred, the death of an accused, and so on), is of no relevance in the present case (see *Allen v. the United Kingdom [GC]*, no. 25424/09, §§ 103 and 104, ECHR 2013; *Geerings v. the Netherlands*, no. 30810/03, §§ 43-50, 1 March 2007; *Phillips*, cited above, § 35; and *Lagardère v. France*, no. 18851/07, §§ 58-64, 12 April 2012).”*

The position is not entirely clear, and the matter is yet to be the subject of detailed consideration before the ECtHR, but this passage appears to envisage that an acquittal in criminal proceedings could be undermined by subsequent civil proceedings for forfeiture in a manner which would could well offend Article 6(2) protections. In circumstances where a person has been acquitted, states should approach NCB confiscation on the same facts carefully.

70. European Commission Green Paper (COM (2006) 174, final) *The Presumption of Innocence*, European Commission, Brussels, page 5.

71. *Asan Rushiti v Austria*, App. No. 28389/95 (ECHR 21 March 2000), paragraph 31, which concerned an application for compensation following an individual’s acquittal.

Key components

In this part the focus is on the key components of an effective NCB system. In particular, states interested in exploring the introduction of an NCB system should incorporate the following features into any legislative framework with a view to clarity, effectiveness and compatibility with Convention rights and international standards.

Clear definition of property

Central to any NCB confiscation regime is the definition of “property”. A clear and wide definition of property will be required. This serves two aims – clarity for potential respondents to NCB proceedings over the type of property that may be confiscated in the absence of a conviction and flexibility for the state where criminal organisations seek new and sophisticated ways to engage in money laundering and other criminal activity. Property should not be limited to funds and tangible property but should also include, for example, pecuniary advantages, rights, interests, moveable and immoveable property.

So that NCB proceedings cannot be circumvented by the movement of property overseas, the definition should encompass property worldwide or “wherever situated”. It is also recommended that property which came into control or existence before the NCB system entered into force is expressly included.

Limitation period

The time limit for commencing NCB proceedings should be clearly specified. Tied to this, there is a need for clarity over when time starts to run. In some jurisdictions, the time limit commences from when the property was believed to have been acquired.

Clarity over when property can be confiscated

NCB systems can encompass “unexplained wealth” models, such as those in place in Bulgaria and Australia, to *in rem* proceedings as in the United Kingdom and Ireland. Irrespective of the type of NCB system considered for implementing, any legislative framework should set out in plain language when property will be vulnerable to NCB proceedings and ensure that there is clarity over the key ingredients.

By way of example, it is not uncommon for a state's NCB system to centre around a disparity between a person's assets and lawful income. In such a system a legislative definition of "lawful income" will be important. If the size of the disparity is relevant, it will be important for policymakers to ensure that there is no ambiguity over the size and how it is calculated.

Mixed property

The blending or layering of legitimate and illegitimate property is a money launderer's key concealment strategy. Any NCB system should be sufficiently robust to restrain and confiscate that part of the property that is illicit.

Such an approach is envisaged by Article 31(5) of the 2003 UNCAC and paragraph 11 of the 2014 European Union Directive. Article 31(5), (6) of UNCAC makes clear that where property has been "intermingled" the property shall be liable to confiscation up to the assessed value of the intermingled proceeds".

Identification of applicants

The applicant or category of applicant that may apply for an NCB confiscation order should be clearly defined. States may give thought to including in the category of applicant's tax authorities and financial enforcement authorities alongside conventional criminal enforcement authorities. As NCB proceedings are civil in nature, there is no reason why powers need to be limited to prosecuting authorities.

Application of civil as opposed to criminal standard

By definition, NCB proceedings are not criminal proceedings. They are appropriate where criminal prosecution is not feasible but illicit assets have been identified. For the system to be most valuable, a lower standard than that applied in criminal proceedings should be applied in order for property to be confiscated.

Judicial oversight

Judicial oversight is a fundamental component of any NCB recovery regime. The 2014 European Union Directive and both the 1990 and the 2005 Council of Europe Conventions all define confiscation as a penalty or measure "ordered by a court".

Other treaties have envisaged the possibility of non-judicial orders, defining confiscation to include the permanent or final decision of a court or "another competent authority", thus empowering "members of their executives to order confiscations in connection with acts of official corruption."⁷² However, the absence of judicial oversight is contrary to Article 1 Protocol 1 of the Convention – in *Arcuri v Italy* the ECtHR unanimously held that "the applicants' right to peaceful enjoyment of their

72. Radha (2014) *Ivory, Corruption, Asset Recovery, and the Protection of Property in Public international Law, The Human Rights of Bad Guys*, Cambridge University Press, page 107.

*possessions implies the existence of an effective judicial guarantee.*⁷³ At each stage of the proceeding, from restraint of assets to final confiscation, there must be judicial oversight.

Property freezing

In any confiscation system, whether conviction or non-conviction based, provisions for the freezing of assets by a court pending final determination will be essential. The purpose is to preserve the property at the earliest stage in order to prevent dissipation and concealment but also to, insofar as possible, maintain value in anticipation of confiscation to the State, repatriation to another jurisdiction or compensation to victims. Article 7 of the of the 2014 European Union Directive requires States to introduce freezing provisions.

At a minimum, there should be clear legislative provisions which set out:

- a. Who, on behalf of the State, may apply for restraint of property;
- b. The property able to be restrained;
- c. When property can be restrained. Axiomatically, the threshold will lower than that required to be met for confiscation;
- d. The evidence required in support of a restraint application;
- e. Who will be responsible for monitoring and maintaining the property pending determination of NCB proceedings and their duties;
- f. The period of restraint and when it will be extended or continued;
- g. The process for applying to vary or lift a restraint order by any person affected by the order.

To meet the risk of asset dissipation or the NCB proceedings being frustrated, States should give thought to including in any legislative framework the permissibility of *ex parte* freezing proceedings where a real risk arises. It will be necessary for the applicant, on behalf of the State, to appreciate the need for candour. Provisions should also set out the time period in which notification of the individual or any person affected must occur i.e., 30 days.

Where property has been frozen and a successful application has been made to lift the freezing order, the return forthwith of the property – and by a specified time limit – will be essential.

Living, business and legal expenses

The restraint of property can prejudice a person's ability to fund family living expenses, operate a legitimate business and legal representation. Any NCB confiscation system should include provisions for 'carving out' reasonable living expenses, business expenses and legal costs where a person can demonstrate that they are in need.

73. *Arcuri v Italy*, App. No. 5204/99 (ECHR 5 July 2001), page 6.

Reverse burden

It is open to states to consider the inclusion of a 'reverse burden' where property has been identified as being disproportionate to lawful income, property suspected of having been generated by criminal activity or a claim for confiscation has been made. The principal benefit of such an approach is that it compels the respondent to deliver up evidence of legitimate provenance and considerably eases the applicant authority's investigative burden.

In *Gogitidze*, the ECtHR considered that the inclusion of a reverse burden in what are civil *in rem* proceedings is compliant with Article 6(1). After a careful review of European materials supportive of a reverse burden, the Court observed at paragraph 122:

*"As to the applicants' argument that they should not have been made to bear the burden of proving the lawfulness of the origins of their property, the Court reiterates there can be nothing arbitrary, for the purposes of the "civil" limb of Article 6 § 1 of the Convention, in the reversal of the burden of proof onto the respondents in the forfeiture proceedings in rem after the public prosecutor had submitted a substantiated claim (see, among other authorities, Grayson and Barnham, cited above, §§ 37-49, as well as the Court's findings at paragraphs 103 and 104 above)."*⁷⁴

Participation by persons affected

Persons affected should also be afforded the opportunity to participate in proceedings. The Council of Europe Conventions require states to "adopt such legislative and other measures as may be necessary to ensure that interested parties...shall have effective legal remedies in order to preserve their rights."⁷⁵ Property holders are clearly envisaged as "interested parties" but thought should also be given to any other persons affected (for example, creditors of the property holders, or perhaps even those whose reputation will be tarnished by proceedings).

The right to participate is necessary to ensure compliance with Article 1 Protocol 1 of the Convention coupled with Article 6 of the Convention. Those affected must first be notified of the proceedings in order to decide how and the extent to which they wish to participate. When it comes to court proceedings, the *"property holder must have been able to participate fully and effectively in an adversarial proceeding through a legal representative, if desired, and by making submissions to the court on the basis of the evidence. The domestic court should in turn, have been required to follow pre-determined procedures and evidentiary rules and should have given equal consideration to the parties' arguments in a written judgment that connects findings of fact with the relevant law."*⁷⁶ Such participation rights should not only apply at first instance, but should also extend to any appeal proceedings. For example, in *Arcuri* the Italian

74. App. No. 36862/05 (ECHR 12 May 2015), paragraph 122.

75. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (1990), Article 5; Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005), Article 8.

76. Radha Ivory (2014) *Corruption, Asset Recovery, and the Protection of Property in Public international Law, The Human Rights of Bad Guys*, Cambridge University Press, page 251; *Sacsoccia v Austria*, App. No. 69917/01 (ECHR 18 December 2008).

proceedings were held to comply with Article 1 Protocol 1 of the Convention and Article 6 of the Convention where:

“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... 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.”⁷⁷

The right to participate in proceedings must also extend to the right to legal representation.

Third parties

Protection of bona fide holders of illicit funds is a common thread throughout the treaties, albeit that until the European Union Directive⁷⁸ none expressly prohibited the enforcement of confiscation orders at the expense of a third party’s competing claim.⁷⁹ An NCB recovery regime is particularly likely to affect the rights not only of the suspected or accused, but also of third parties, given the *in rem* nature of such proceedings – the authorities are not required to demonstrate any fault on behalf of the property holder, but simply to follow the illicit proceeds themselves, and so there is more chance of innocent third parties becoming embroiled than in traditional post-conviction *in personam* confiscation proceedings. The 2014 European Union Directive expressly states that it is “therefore necessary to provide for specific safeguards and judicial remedies in order to guarantee the preservation of [third parties] fundamental rights.”⁸⁰

The first protection required will be communication by the relevant authorities, who must notify third parties of any steps being taken so that such persons may decide on a course of action. In certain situations, such communication may need to be postponed due to the needs of the investigation, and this is specifically carved out in the European Directive.⁸¹

Third parties must then be provided with a “reasonable opportunity” to put their case to the authorities.⁸² This includes “the right to be heard for third parties who claim that they are the owner of the property concerned, or who claim that they

77. *Arcuri v Italy*, App. No. 5204/99 (ECHR 5 July 2001); *Agosi v the United Kingdom*, App. No. 9118/80 (ECHR 24 October 1986).

78. Directive (2014/42/EU).

79. Although note the 2005 Council Convention allows for refusal of recognition of foreign decisions where third parties did not have adequate opportunity to assert their rights: Article 32.

80. Directive (2014/42/EU), recital 33.

81. *Ibid.*

82. *AGOSI v the United Kingdom*, App. No. 9118/80 (ECHR 24 October 1986).

have other property rights ('real rights,' ius in re'), such as the right of usufruct.⁸³ Such third parties must be entitled to "claim title of ownership, or other property rights".⁸⁴

Of course, this does not protect those third parties who "knew or ought to have known" that the purpose of the transfer to them or the acquisition by them of the property was to "avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer or acquisition was carried out free of charge or in exchange for an amount significantly lower than the market value"⁸⁵; only the rights of *bona fide* third parties should be protected. The boundaries of such protection may prove nuanced and should be expressed clearly in legislation in order to ensure legal certainty. In order to determine the stage at which a third party accedes to such protections, an NCB recovery regime could, for example, hold that the good faith contract must already have been concluded.⁸⁶ Further, whether or not such property is automatically precluded from confiscation or whether the adjudicating court is simply provided with a discretion to refuse confiscation, where to do otherwise would be unjust or inequitable, is open to debate.⁸⁷

Investigative orders

Robust investigation tools are a key component of any NCB confiscation system. Lawmakers may consider the introduction of:

- a. Disclosure orders which compel any person to provide information relevant to an NCB confiscation investigation;
- b. Production orders which require entities i.e., banks and law firms and individuals to produce documents in their possession considered relevant to an NCB confiscation investigation;
- c. Customer information orders which require financial institutions to provide information about a customer suspected of criminal conduct i.e., whether they hold an account, account numbers;
- d. Account monitoring orders which enable enforcement authorities to monitor bank account activity;
- e. Unexplained wealth orders which can operate as a precursor to NCB confiscation proceedings – where a disparity between income and property is suspected an unexplained wealth order compels an individual to provide information with this information being able to be used in NCB confiscation proceedings at a later point.

83. Directive (2014/42/EU), recital 33.

84. *Idem*, Article 8(9).

85. *Idem*, Article 6(1)

86. For example, see the United Kingdom decision in *Executive Jet Support Ltd v Serious Organised Crime Agency* [2012] EWHC 2737 (QB) which holds that where such a contract has been concluded, then property to be transferred is not "recoverable" property under the Proceeds of Crime Act 2002.

87. For the latter approach, see section 266 Proceeds of Crime Act 2002, under the United Kingdom regime.

It will be important for the investigating authority to substantiate, before a court, the basis for the suspicion that a person is involved in unlawful activity or holds relevant material.

Mutual legal assistance

As noted in the 2014 European Union Directive, “[o]rganised criminal groups operate without borders and increasingly acquire assets in Member States other than those in which they are based and in third countries. There is an increasing need for effective international cooperation on asset recovery and mutual legal assistance.”⁸⁸

There is a well-developed regime of mutual assistance in criminal confiscation proceedings, starting with Article 7 of the Vienna Convention⁸⁹, Article 18 of the Palermo Convention⁹⁰, and running through to Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders. Such mutual assistance provisions must be applied to NCB regimes in order to ensure a coordinated approach to combating transnational crime.

For example, mutual assistance could be provided for in the following circumstances:

- a. Taking evidence or statements from persons;
- b. Effecting service of judicial documents;
- c. Executing searches and seizures, and freezing;
- d. Examining objects and sites;
- e. Providing information, evidentiary items and expert valuations;
- f. Providing originals or certified copies of relevant documents and records, including government, bank, financial corporate or business records;
- g. Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
- h. Facilitating the voluntary appearance of persons in the requesting state; and
- i. Any other type of assistance not contrary to the domestic law of the requested state.⁸³

Further, the importance of simply adopting uniform NCB regimes across states should not be underestimated when it comes to facilitating mutual assistance. As noted at recital 5 of the European Union Directive “adoption of minimum rules will approximate the Member States’ freezing and confiscation regimes, thus facilitating mutual trust and effective cross-border cooperation.”⁹¹

88. Directive (2014/42/EU), recital 2.

89. *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988), www.unodc.org, accessed on 15 October 2020

90. *United Nations Convention against Transnational and Organised Crime* (2000), www.unodc.org, accessed on 15 October 2020

91. Directive (2014/42/EU), recital 8.

Enforcement

Provisions in domestic legislation for the mutual recognition of NCB freezing and confiscation orders are an essential component of any NCB regime. In the UK, for instance, it has been estimated that in 2016 over £654 million in criminals' assets with a UK connection was hidden overseas.⁹² International cooperation in relation to NCB recovery is vital. If an NCB regime lacks provisions for the enforcement of freezing and confiscation orders made in other jurisdictions, the international effort to capture criminal property will lack teeth.

A domestic NCB regime should designate the competent authority with responsibility for facilitating enforcement requests and contain clear provisions setting out the process for making requests where there is evidence that property is located within that jurisdiction.

Countries are encouraged to look at each request carefully and, in particular, at the substance of the request. The Financial Action Task Force's Best Practices Paper on Confiscation contains the following guidance at paragraph 19:

"When evaluating a request for mutual legal assistance or international co-operation relating to non-conviction based confiscation, countries are encouraged to look beyond terminology and labels to the substance of the proceedings with a view to substantively evaluating the request. This ensures that such requests are not unreasonably refused due to confusion caused by the use of different terminology. For example, some countries are able to enforce orders for non-conviction based confiscation provided that the confiscation procedure can be likened to a case of criminal character even in the absence of criminal proceedings. In such cases, a request should not be refused on the basis that the requesting country uses the term "civil forfeiture", provided that this precondition is met."

Costs and compensation

Being civil proceedings, an unsuccessful NCB application to restrain or confiscate property can expose the applicant authority to costs. The potential costs exposure can serve as a major hindrance to NCB proceedings and it is open to states to consider costs-capping provisions.

At the same time, it is important to recognise that an ultimately unsuccessful confiscation proceeding can expose the state to a claim for compensation. During the period that the property has been restrained pending final determination, persons may have suffered loss as a result of their inability to enjoy, access and use their funds and assets. Any NCB regime should contain provisions setting out the process for the making and determination of compensation applications.

92. Home Office, Asset Recovery Plan, July 2019 at paragraph 50.

Conclusion

NCB proceedings represent an important weapon in the fight against illicit property and are gaining increasing recognition as a way forward. The alignment of any system with Convention rights will be case-specific but, in principle, there is no incompatibility. However, for an NCB framework to be effective and fair, judicial oversight is the touchstone. Provisions must clearly define the scope of property, enable the swift restraint of assets and asset-tracing, recognise orders made overseas and provide for respondent and third-party participation. No doubt, the crafting of a lasting NCB framework requires careful planning and robust debate. Once introduced, however, it can be a mighty tool against dirty wealth.

This paper addresses the key principles and model components to develop robust and procedurally fair non-conviction based asset recovery regimes compatible with international standards. It provides an overview of approaches to the non-conviction based asset recovery.

The Economic Crime and Cooperation Division (ECCD) at the Directorate General Human Rights and Rule of Law of the Council of Europe is responsible for designing and implementing technical assistance and co-operation programmes aimed at facilitating and supporting anti-corruption, good governance and anti-money laundering reforms in the Council of Europe member states, as well as in some non-member states.

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