



# CIVIL LAW TOOLS IN SEIZURE AND CONFISCATION OF PROCEEDS FROM CRIME

## REGIONAL WORKSHOP

(Przno, 15-16.5.2007)

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International standards and good practice!

## **PURPOSE OF WS:**

**EFFICIENT APPROACH FOR TARGETING  
PROCEEDS OF CRIME**

**NEED/REQUEST OF PROJECT AREAS IN  
CARPO (actions in the strategy)**

**NO LEGAL POSSIBILITIES**  
(EXCEPT ALBANIA, CROATIA 2006)

CRIMINAL OFFENCE

PROFIT



FINANCIAL (and criminal) INVESTIGATION  
**TEMPORARY CONFISCATION/FREEZING**

CONFISCATION



BUDGET ???



= THE CRIME DOESN'T PAY !



## ELEMENTS of parallel FINANCIAL INVESTIGATION

1. Identification of criminal offence/  
criminal
2. Tracing the illegal benefit (sum, form?)
3. Determine the property that can be confiscate
  - Proceeds of Crime
  - Equal value (legal) property,
  - **Other property, assumed to derive from criminal offence**
4. Proposal for **temporary confiscation:**  
issue of court freezing /seizing order

FINAL CONFISCATION –  
CRIME DOESN'T PAY

## **SCOPE – some questions:**

**Criminal offence (criminal procedure) / No criminal offence (civil procedure)**

**past criminal activities / criminal lifestyle**

**imbalance in (legally reported) income (of suspect) and property – assumption of illegal origin**

**possibility (procedure) for suspect to prove (probable) legal origin of property – arguments, evidence – standard of proof**

**total / partial confiscation / time period**

**scope of criminal offences (drugs, OC etc.)**

**SCOPE – some questions:**

**living costs – existence (hardship provision)**

**Extended confiscation – in addition to the existing systems (limited use)**

**Precise conditions – prevent abuse, imbalance**



# INTERNATIONAL STANDARDS

## Council of Europe:

- 2005 Convention on Laundering, Search, Seizure and **Confiscation** of the Proceeds from Crime and on the Financing of Terrorism (Warsaw) - **not yet in force** (art.3/4)

## EU

Council Framework Decision (2005/212/JHA) of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, OJ L 068 , 15/03/2005.

## United Nations:

- 1988 Convention Against Illicit Traffic In Narcotic Drugs And Psychotropic Substances (Vienna Convention) (art.5/4)
- 2000 Convention Against Transnational **Organised** Crime (Palermo Convention) (art.12/7)



## INTERNATIONAL STANDARDS

### 2005 Council of Europe Convention (art 3/4)

introduced obligation for the states to adopt such legislative or other measures as may be necessary to require that,

- in respect of a serious offence or offences as defined by national law,
- an offender demonstrates the origin of alleged proceeds or other property liable to confiscation to the extent that such a requirement is consistent with the principles of its domestic law.

**Possible reservation for its use (art 53/4)**

# INTERNATIONAL STANDARDS

## **Council Framework Decision (2005/212/JHA) on Confiscation of Crime-Related Proceeds, Instrumentalities and Property**

obligation for the MS to adopt (by 15.3.2007) necessary measures to enable extended powers of confiscation.

different possibilities for extended confiscation of

- property (wholly or in part),
- which belongs to a person convicted of an offence
- committed in the framework of criminal organisation (offences related to drug trafficking, counterfeiting of euro, money laundering and predicate offences, illegal migration, trafficking in human beings) or terrorism etc.:

# INTERNATIONAL STANDARDS

## Council Framework Decision (2005/212/JHA) on Confiscation of Crime-Related Proceeds, Instrumentalities and Property

- where a court based on **specific facts** is fully convinced that the property is derived from
  - (a) criminal activities or
  - (b) from similar criminal activitiesof the convicted person **during a period prior to conviction** for the offence, which is deemed reasonable by the court in the circumstances of the particular case,
- where it is established that the value of the **property is disproportionate** to the lawful income of the convicted person and a court based on specific facts is fully convinced that the property in question has been derived from the criminal activity of that convicted person.



# INTERNATIONAL STANDARDS

## Council Framework Decision (2005/212/JHA) on Confiscation of Crime-Related Proceeds, Instrumentalities and Property

Such confiscation may also extend to:

- the property acquired by the closest relations of the person concerned and;
- the property transferred to a legal person in respect of which the person concerned — acting either alone or in conjunction with his closest relations — has a controlling influence.

Provisions are connected to the property belonging to a person convicted of an offence, but article 3/4 leaves the possibility to MS to use procedures other than criminal procedure to deprive the perpetrator of the property in question.



# INTERNATIONAL STANDARDS

## 1988 UN Convention (Article 5/4)

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.

## 2000 UNTOC Convention (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.

## EU Millennium action plan, Recommendation 19

An examination should be made of the possible need for an instrument which, taking into account best practices operating in the MS and with due respect to fundamental legal principles, introduces the possibility of mitigating, under criminal, civil or fiscal law, as appropriate, the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime.

# Convention for the Protection of Human Rights and Fundamental Freedoms

ETS 005, Council of Europe, Rome, 4.11.1950 and its additional protocols.

- the right to a fair trial [\[1\]](#);
- the presumption of innocence [\[2\]](#);
- the protection of property [\[3\]](#).



# INTERNATIONAL STANDARDS

## The European Court on Human Rights (ECTHR)

The conclusions from the jurisprudence:

- the **presumption of innocence** is applicable to the criminal proceedings as a whole<sup>[1]</sup>, including the establishment of a confiscation order as its part, and the respect of this presumption must be evaluated for the whole trial rather than for each phase separately;
- the **use of presumptions** of fact or of law is admissible within reasonable limits and should be in proportion with the relevance of the case (the proportionality principle) and maintain the rights of the defence (the principle of equality of arms)<sup>[2]</sup>. The presumptions may never be irrefutable and the court must dispose of a margin of appreciation. **Therefore a total reversal of the burden of proof or a general confiscation is not allowed;**
- the right of **non-self-incrimination**, as a part of the right to a fair trial, is subject to a strict interpretation by ECTHR, but is not absolute: when sufficient and precise charges and evidence are brought forward, the defendants' attitude not to respond to anything can be considered to be a supplementary indication of guilt<sup>[3]</sup>. The statements obtained through administrative procedure, in which the suspect was bound to tell the truth are inadmissible in further criminal proceedings<sup>[4]</sup>.
- the ECTHR gives an autonomous definition of the notions "penalty" and "measure", and the applicability of the ECHR depends upon such qualification<sup>[5]</sup>. Relevant criteria are: whether the measure is imposed following conviction for a criminal offence, what is the nature and purpose of the measure, its characterisation under national law, the procedures involved in the making and implementation of the measure, and its severity.

Council of Europe  
European Commission



Conseil de l'Europe  
Commission européenne

## CARDS Regionalni program 2002/2003.

**Projekat: Razvoj pouzdanih i funkcionalnih policijskih sistema i jačanje borbe protiv glavnih kriminalnih aktivnosti i jačanje policijske saradnje (CARPO)**

**Fokus: Jačanje kapaciteta policije za borbu protiv teških krivičnih dela u Jugoistočnoj Evropi**

# Finansijske istrage i oduzimanje imovine stečene krivičnim delima

Priručnik za pripadnike policije i pravosuđa

Septembar 2006.



Council of Europe  
European Commission



Conseil de l'Europe  
Commission européenne

# CARPSlice

# DRAFTING THE LEGAL PROVISIONS ON EXTENDED CONFISCATION

## TOPICS FOR DISCUSSION

- amendments / special law
- the scope of the law

#### material provisions

- conviction (list of crime /punishment)
- presumption – imbalance of legal income and property
- presumption – time period of acquired property prior to criminal offence
- standard of proof (unless the defendant makes the legal origin of property probable)

#### procedure (criminal / separate – civil?)

- to prove - to the standard of proof - the legal origin during pre-trial (temporary confiscation) and trial procedure

# Albania – extended confiscation

art. 8 and 13/2 OK

When there are **sufficient data** that:

- ownership of assets activities are under threat or influence *by criminal organizations* or
  - might facilitate the activity of *persons* who are suspected
- the prosecutor asks the court to **compel an *owner* to justify the lawfulness of origin of assets** with a value that is not in conformity with his income or economic abilities...

art. 13

Court orders the sequestration of assets that

- might be** in the ownership of a *person* under investigations, when:
- their value do not respond to the income declared or the economic activity conducted by him;
  - sufficient data for **well-grounded reasons to believe** that these items are the product of unlawful activities or constitute an investment of them.

The prosecutor may ask the court to compel the ***person*** under investigation, **or *owner*** of assets with a value that does not comport with their income or economic abilities

to justify the lawfulness of their origin..



# Croatia –extended confiscation

82/2 CC (2006)

Kao imovinska korist iz stavka 1. ovoga članka smatra se i ona korist

koju je ostvarila grupa ljudi ili zločinačka organizacija

koja je u **vremenskoj povezanosti** s počinjenim kaznenim djelom i

za koju se **osnovano može smatrati** da potječe od tog djela,  
jer se njezino zakonito porijeklo ne može utvrditi.“

CPC ?

USKOK

DENMARK Art. 76 a Penal code:

- (I) Total or partial confiscation of property belonging to a person found guilty of a punishable act may take place when
- 1) the act committed is of a nature which may entail a significant gain, and
  - 2) according to the law, the act committed is punishable by imprisonment of six years or more or it is a violation of the legislation on euphoriants.
- (II) Under conditions mentioned in subsection (I) above total or partial confiscation of property which the spouse or cohabitant of the offender has acquired may take place unless
- 1) the property has been acquired more than five years prior to the punishable act upon which the confiscation according to subsection (I) is based or
  - 2) the matrimony or cohabitation was not in force at the time of acquisition.
- (III) Under conditions mentioned in subsection (I) above total or partial confiscation of property transferred to a legal person upon whom the offender alone or together with his closest relations has a decisive influence may take place. The same shall apply if the person in question received a significant part of the income of the legal person. Confiscation may not take place if the property was transferred to the legal person more than five years prior to the punishable act upon which confiscation according to subsection (I) above is based.
- (IV) Confiscation according to subsection (I-III) may not take place if the offender renders probable that the property has been acquired in a legal way or with legally acquired means.
- (V) In place of confiscation of certain property according to subsection (I-III) above an amount corresponding to the value of the property or a part of the value may be confiscated. amendments / special law

## Section 73d German Penal Code

"If an unlawful act has been committed pursuant to a law which refers to this provision, then the court shall also order the forfeiture of objects of the perpetrator or inciter or accessory if the circumstances justify the assumption that these objects were acquired as a result of unlawful acts, or for the purpose of committing them...

- **a particular gross element, namely being committed as a member of a gang or on a commercial basis. ( setting-up a criminal organisation, setting-up a terrorist organisation, counterfeit, aggravated pandering, aggravated theft, extortion, money laundering)**
- not against third parties, NOT BEFORE 1992.
- coherence between the unlawful act and the object  
MUST BE provable.