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Achieving Confiscation Abroad by the Authorities of Ukraine (Legal and Tactical Issues)

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Abstract

This research paper addresses the problem of depriving serious criminals of their financial powers to commit further criminal activities. It is focused on the confiscation of their unjustified wealth deposited abroad. The difficulties to achieve this result and the possibilities to overcome them are explained.

Keywords: *Crime, Confiscation, Cooperation, Letter Rogatory, Proceeds, Request*

INTRODUCTION

As of 02 December 2009 Ukraine has been a Party of the UN Convention against Corruption. According to Article 54 (1) of this Convention, each State Party shall provide mutual legal assistance with respect to property, acquired through a crime, by taking measures to permit its authorities to execute aconfiscation order issued in another State Party or, where its authorities have jurisdiction, to permit them to order the confiscation of such property of foreign origin. Other international legal instruments, Ukraine is a Party to, also require that different countries join efforts in tracing, constraining and confiscating proceeds of crime. Such is the UN Convention against Transnational Organized Crime, in short - the Palermo Convention (2003), also the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime - the Strasburg Convention (1990) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism - the Warsaw Convention (2005).

Constraint (freezing or seizing) and confiscation of crime proceeds in another country are carried out through the execution of requests, in general. Initially, the issuance, dispatch and execution of such requests were governed mostly by the rules for the letters rogatory: the requests for obtaining judicially admissible evidence from abroad. Gradually, a special legal framework for confiscation in foreign countries took shape. Nowadays, it is significantly different from the one for letters rogatory and demands serious attention and understanding.

METHODOLOGY

This research work is based on the knowledge of public international law on international judicial cooperation in criminal matters and the national criminal laws of some indicative foreign countries: substantive, procedural and the law on execution of criminal sanctions (punishments and security measures), and the peculiarities of their application in practice as well. Eventually, the author resorts to the comparative law approach to clarify the possibilities of cooperation between Ukraine and other countries with different confiscation systems for the purposes of depriving serious criminal offenders of their financial powers wherever their wealth subject to confiscation is. The need for such international cooperation occurs when the confiscation has been ordered or was requested to be ordered by one country while the target property is located, in whole or in part, in the territory of another expected to execute the foreign confiscation order or issue an own one for the property. Even in such cases, confiscation should be achieved so that crime does not pay.

Also, the holistic approach has been deployed to ensure the positive result of trans-border confiscation activities. This complex confiscation procedure is considered from a holistic perspective, involving the entire confiscation process ending up in a foreign requested country, and not only focusing on the own law and judiciary (investigators, prosecutors and judges) with its legal powers. Mostly, this is to determine what efforts of the requesters are likely to favourably influence the requested country's decisions and actions governed by different rules and procedures.

Collection of Evidence for Confiscation Abroad

1.1. In an increasing number of cases the properties liable to confiscation are, in whole or in part, somewhere abroad. In such cases, the responsible magistrate and the other Ukrainian officials in charge of the respective proceedings where the problem arises should know how to find the target property and also what to do if s/he succeeds in finding it.

When trying to find the location, the nature and the amount

of such property abroad, any interested magistrate and the country s/he works for can make use, alternatively or simultaneously, of two means for obtaining the necessary evidence and information. They can resort either to international legal assistance between judicial authorities or to international cooperation between administrative bodies. The specialized ones in Europe are Financial Investigation Units. The Ukrainian one is called the State Financial Service of Ukraine.

a. The first of the two means of obtaining the necessary evidence is international legal assistance. It consists of the execution of letters rogatory, mostly. Their execution is designed to result in the collection and provision of judicially admissible evidence about the proceeds from the investigated crime. This evidence is useable to substantiate their confiscation as well. In any case, the issuance of a letter rogatory requires pending criminal proceedings.Therefore, the initiation of an official criminal investigation is a must, even where the indications (the data) that a criminal offence has been committed are not sufficient. The relevant issue here is that the requested country cannot control the institution of the requesting country's criminal proceedings. It cannot refuse assistance on the grounds that, according to its authorities, the order in the requesting country for the initiation of the official criminal investigation seems unfounded to them.

b. The second means, that one can make use of to find the target property abroad, is the international cooperation between national administrative bodies. Such bodies carry out non-judicial cooperation, in general. It is a procedure expressly mentioned in a number of domestic laws. Such laws are UK Criminal Finances Act (2002), and the RepublikaSrpska Criminal Assets Recovery Act (2018). This administrative procedure does not require pending criminal proceedings but, at the same time, is comparatively new and not very well-known. This is why many countries are hesitant and even reluctant to respond to requests under this procedure.

Administrative requests are less reliable for another important reason as well. Despite being faster and less formal, they do not guarantee that the requested information can always be obtained. For example, the requested information is not necessarily obtainable if it constitutes some bank secrecy. This weakness, however, does not characterize letters rogatory. On the contrary, they are the appropriate device to open foreign bank secrecy for evidentiary purposes. According to Article 7 (5) of the UN Drug Convention of 1988[1] and Article 18 (8) of the UN Palermo Convention[2], *"Parties shall not decline to render mutual legal assistance... on the ground of bank secrecy".* Furthermore, the two UN Conventions prescribe that interested judicial authorities can use letters rogatory to request the provision of originals or certified copies of documents, bank, financial, corporate or business records[3]. Also, according to the aforementioned two Conventions, letters rogatory can be used for identifying or tracing proceeds and instrumentalities of crime as well. Nothing of this sort is globally provided for administrative requests. This is another serious argument to prefer letters rogatory to administrative requests in search of evidence relating to criminal assets and their confiscation.

1.2. A significant peculiarity of the evidence produced through the execution of letters rogatory should be highlighted. Sometimes, the focus of the requesting magistrate is on the predicate crime only. S/he does not take into consideration the connected money-laundering crime, although a suspicion that it has been committed exists, usually. As a result, the requesting magistrate forgets to expressly request evidence of the connected money-laundering crime also. When this magistrate receives, unexpectedly, pieces of evidence of the money-laundering crime, in addition to the predicate one (embezzlement, passive bribe, etc), s/he faces the problem as to whether the evidence concerning the money-laundering crime is admissible in court. Hesitations and difficulties regarding its admissibility may occur.

Yet, this evidence of the money-laundering crime would also be admissible within the same criminal proceedings, at least. The argument is that no restrictive rule exists for any evidence received from abroad for the criminal proceedings in support of which the evidence was requested. A restrictive rule exists when the extradition of a wanted person is obtained. This is the Speciality Rule. According to it, no evidence of crimes, for which extradition was not granted, shall be collected, including through a letter rogatory. *Per argumentum a contrario*, if evidence was produced through the execution of some letter rogatory, the magistrate in charge is allowed to make use of all obtained pieces of evidence even if they do not concern the announced crime for which they were requested, collected and sent to the requester. No restriction on making use of them exists at all.

1 Ukraine is a Party as of 28/08/1991.

2 Ukraineis a Party as of 21/05/2004.

3 However, letters rogatory open more doors but not necessarily all. Countries like Switzerland, for example, do not grant legal assistance in respect of fiscal offences that are subject to investigations by a foreign authority – Article 3 (3) of the Swiss Federal Law on International Mutual Assistance in Criminal Matters. The decision not to cooperate is not rooted in the rule of dual criminality; neither is it directly based on the banking secrecy standard, which may be lifted in certain cases that are provided for in Article 47 (5) of the Swiss Banking Law. The main reason why Switzerland does not provide international assistance in fiscal matters is the fact that bank secrecy represents a direct obstacle to tax-related investigations under Swiss law as well, and may only be suspended in cases of tax fraud (fraudulent evasion of taxes or duties by using false, forged or untrue information). Consequently, in the context of mutual assistance Switzerland is unable to grant foreign prosecuting authorities broader privileges than those Swiss authorities are entitled to use in their domestic investigations.

Moreover, even if the requested country is legally obliged to use the evidence obtained solely for its announced criminal proceedings, it is never prohibited from separating new proceedings from them (Article 217, Para. 3 0f the Ukrainian CPC), later. Thus, the allowed final result might be that the evidence obtained is lawfully used in other criminal proceedings and for crimes that were not on the radar of the requester at the time of forwarding the letter rogatory.

The Letter Rogatory for the Purposes of Future Confiscations Abroad

2.1. The preparation of such letters rogatory is an important and difficult job. When it comes to Europe, two conventions are to be taken into consideration, mostly: the Strasburg Convention (1990)[4] and the Warsaw Convention (2005)[5]. Both conventions contain legal frameworks for international judicial cooperation. They coincide to a very large extent.

The two Conventions have a common peculiarity. None of them supports requests for the so-called "fishing expeditions"[6]. Requests for such investigations lie outside the scope of application of both Conventions. Often, the "fishing expeditions" are general inquiries carried out even without the existence of any suspicion that a criminal offence has been committed. They target persons, actually, although their requests contain a statement (false, in general) that some offence is being investigated into. These "expeditions", however, do not constitute any reaction to probable violations of law, let alone represent any means to obtain any evidence of them.

To reduce the suspicion of attempting a "fishing expedition", the requesting country is expected to prepare and provide in its letters rogatory threshold information about the bank account(s) it is looking for. This necessary information is received through international police, customs, or another non-judicial (operational) cooperation. Then, it is given in the letter rogatory to increase the probability of success, in general.

If the requesting Party has no clue where the property sought for confiscation might be found, the requested Party is not obliged to search all banks throughout the country. According to Article 37 (1) (e) and (f) of the Warsaw Convention, the request is expected to contain: a description of the property in relation to which cooperation is sought, its location, its connection with the person or persons concerned, any connection with the offence, as well as any available information about other persons, interests in the property. Thus, the requesting Party should limit the subject of its request to certain types of bank accounts only and/ or accounts kept by certain banks only. This will enable the requested Party to restrict the execution of the request accordingly. Otherwise, the requested Party is likely to maintain that it is too difficult to execute the request because its execution "*involves an unreasonable burden on the State*", e.g. Section 5 (a) (1) (7) of the International Legal Assistance Law of Israel.

Once the process of international legal assistance is underway, the requesting country retains its investigative responsibilities for making the necessary evaluations and conclusions in the case. It cannot transfer its responsibilities to the requested country[7]. No attempt should be made to assign foreign authorities with any fact-finding tasks, such as establishing whether a given suspect has any property in the territory of that country. The interested magistrate can request investigative actions only. The interpretation of their results is solely his/her duty. The magistrate has to study the results received from the requested country and decide whether or not the circumstances that s/he is looking for have actually occurred[8]. This means that the letter rogatory does not delegate any criminal competence/jurisdiction to the requesting country. This occurs only in the cases of the transfer of criminal proceedings, a very different modality of international judicial cooperation in criminal matters - see the European Convention on the transfer of proceedings in criminal matters.

2.2. In Europe, one can make use of three conventions to acquire evidence from abroad for future confiscation. These are the two specialized conventions, the Strasbourg Convention and the Warsaw one, and also the European Convention on Mutual Assistance in Criminal Matters[ECMACM][9].

4 Ukraine is a Party as of 01/05/1998.

5 Ukraine is a Party as of 01/06/2011.

6 See Point 125 of the Explanatory Report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 2005, p. 21.

7 This might also be defined as some fishing expedition as far as the task to the other country is unacceptably broad, e.g. Tracing Illegal Assets - A Practitioner's Guide (author of the chapter - Pereira, P.G.). Basel Institute on Governance, International Centre for Asset Recovery. Basel, Switzerland, 2015, p. 59. However, in contrast to the fishing expedition per se, there is, in this case, at least, one alleged criminal offence actually being investigated into.

8 This peculiarity of international legal assistance is worth highlighting because even some countries believe that they can task us with fact-finding missions. Armenia is such an example. According to Article 475 of the Armenian CPC, outgoing letters rogatory shall contain, among other things, "a list of circumstances which must be found out" by the authorities of requested countries. Yet, no country is obliged to do anythinglike this for Armenia. The sole obligation of any requested country is to undertake the investigative actions which Armenia has requested and to send to the Armenian authorities the pieces of evidence that were collected. Thereafter, it is their job to draw conclusions about the existence or non-existence of circumstances, which might be relevant to their case.

9 Ukraine is a Party as of 09/06/1998.

To the extent the two specialized conventions also allow requests for evidence rather than solely information the judicial authorities of the Parties to all have three legal instruments at their disposal. Because they can choose, the Parties need to find the applicable instrument or sometimes, the most appropriate one. Usually, this is not a matter of free choice. It is much more a matter of law and validity of obtained products. Thus, Article 26.1 of the ECMACM stipulates that "*this Conventions hall, inrespect of those countries to which it applies, supersede the provisions of any treaties, conventions orbilateral agreements governing mutual assistance incriminal matters between any two Contracting Parties*". Hence, to be on the safe side, the requester must always mention this Convention in his/her letters rogatory. Moreover, it is advisable to begin with a reference to it. In this way, s/he recognizes the subsidiarity of other competing international instruments, including the two specialized conventions, namely: the Strasburg Convention and the Warsaw Convention. As a result, the requested countrywould not be in the position to blame the requesting magistrate for the lack of precision and eventually, delay or even refuse to execute his/her request. Thus, the magistrate reduces the risk to fail to obtain the necessary evidence from abroad.

2.3. Not all issues relating to international legal assistance are efficiently regulated by some overriding international instrument. ECMACM, in particular, is no exception. It is not always the legal instrument that gives the best result, if applicable at all. In some cases, e.g. when only information is needed for the preparation of an official letter rogatory, interested Parties should better make use of the two specialized conventions: the Strasburg Convention and the Warsaw Convention. Punctuality also requires knowing how to find the applicable one in a given situation.

It is well known that the Warsaw Convention updates and expands the scope of the Strasbourg Convention. Nevertheless, the Strasbourg Convention is still in force and shall not be underestimated, let alone ignored. On the contrary, if a country can achieve what it needs by resorting to the Strasbourg Convention its authorities should prefer it to the Warsaw Convention. The Strasbourg Convention must be preferred for pragmatic reasons. It has been applied for a much longer time and is much better known than the Warsaw Convention. Hence, if one resorts to the Strasbourg Convention, differences in interpretation with the requested Party are less likely to occur.

Certainly, there is room for making use of the Warsaw Convention as well. The requesting country must refer to this Convention in cases where the Strasbourg Convention does not allow reaching the goals it is in pursuit of. These are cases where the Warsaw Convention is the only appropriate instrument enabling us to obtain evidence from abroad. A good example is Article 17 [Requests for information on bank accounts] of the Warsaw Convention.Its Paragraph 6 reads: "*Parties may extend this provision to accounts held in non-bank financial institutions. Such an extension may be made subject to the principle of reciprocity*".

This provision makes the Warsaw Convention more useful and recommendable because, since the adoption of the Strasbourg Convention in 1990, moneylaundering techniques have significantly evolved. They increasingly target the non-bank sector and the deployment of professional intermediaries to invest criminal proceeds in the legitimate economy. In view thereof, if Parties are willing to cooperate for the purposes of tracing and confiscating such proceeds also, they need to make use of the above-quoted Article 17 (6) of the Warsaw Convention.

Also, one can make use of another significant innovation of the Warsaw Convention. It is the text that the requested Party may apply the requesting Party's rules governing provisional measures for future confiscation. Article 15 (3) of this Convention provides, in particular, that requested Parties must respect the formalities and the procedures of the requesting Party contained in its request for the constraint of property, even if they are unfamiliar to the given requested Party. It follows the requested Party should comply with these formalities or procedures of the requesting Party whenever they are not contrary to its fundamental principles. The idea of this innovation is to reduce the number of rejected requests on procedural grounds and thereafter, reduce the number of inadmissible pieces of received evidence in the courts of requesting Parties.

Possible Incompatibilities between the Two Countries' Laws to be Taken into Consideration

3.1. If the requesting country collects the necessary evidence of the location, nature and amount of the property liable to confiscation, it would be most interested in achieving its actual confiscation. The property may be located (in part or even in whole) in the territory of a foreign country. In this situation, Ukraine as the seeking country would be interested in preparing and dispatching further requests to that foreign country. Their objective would be to achieve the confiscation of the target property found in the territory of that country.

The applicable law for the desired confiscation is the law of that foreign country as it is the requested one. If that country is asked for something incompatible with the fundamental principles of its law, the request will not be granted, e.g. Article 55 (3) in conjunction with Article 46 (21) (b) of the Corruption Convention. Because such incompatibility varies from country to country, it is appropriate to clarify in advance the rules on confiscation in the foreign country that interested magistrates plan to approach.

Sometimes, European magistrates will need to study Sharia law to come closer to success. For example, should such a magistrate approach Libya with a request for confiscation, it would be good if s/he learns well in advance the text of Article 14 [Criminal Law and Sharia Law] of the Libyan Penal Code: "*This Code shall in no manner affect the individual rights provided for by Sharia law*." Therefore, if a property has been acquired on the basis of the Sharia law in Libya, the provisions of the Code as well as all other national laws there governing confiscation would not be applicable to this property.

3.2. There might be also some other, more general incompatibilities between the laws of the requesting country and the laws of the requested one. The first possible incompatibility is between the types of confiscations provided in the two countries laws.

a. In some foreign countries confiscation is both a criminal punishment and a security or precautionary measure ('forfeiture') as well, e.g. Bulgaria (Article 37.1.3 of its Criminal Code), China (Article 59 of its Criminal Code) and Greece (Article 76.1 of its Criminal Code). Hence, such countries are like Ukraine – seeArticles 51.7 and 59 and respectively, Articles 96-1 and 96-2 of its Criminal Code where the measure is called "special confiscation".Usually, in all such countries, the punishment is the leading sanction when it comes to crime-related confiscation.

In view thereof, if Ukraine requests a country of the afore-mentioned type and the national law of that country is applicable, success is likely given the compatibility of the confiscation laws of the two countries. Yet, difficulties for the Ukrainian authorities may occur where the crime for which the assistance is sought carries under the Criminal Code of Ukraine full confiscation [but the restriction under Article 59.2 stays] whereas the confiscation for the same crime under the law of the other country is only partial. In such cases, Ukrainian authorities may have to put up with the partial confiscation contemplated by the law of the requested country. However, the possibilities should be clarified with the responsible authorities of the other country before drawing up any final plan.

Difficulties may occur when in Ukraine the crime carries one of the two sorts of confiscation (punishment or security measure) while the same crime carries in the requested country the other sort of confiscation. Such a discrepancy also dictates establishing contacts with the responsible authorities of the other country for finding a way of obtaining the wanted confiscation there or concluding that confiscation in the given case is not feasible at all.

b. There are many other countries where confiscation is performable solely as a security measure. They do not contemplate in their penal laws any confiscation as a punishment, e.g. Bosnia and Herzegovina (Articles 40 and 69, "d" of its State Criminal Code) and Somalia (Articles 90 and 182-183 of its Penal Code). As a result, Ukraine may come across a situation where the target property is confiscatable under its law as a punishment, whereas under the law of the foreign country where the propertyis located, confiscation for the same crime constitutes a security measure only. In such cases, if the Ukrainian authorities want the confiscation of assets in such a foreign country, they would need to clarify with its authorities how to make them confiscate the assets, given the different types of confiscation in the two countries for the committed crime. This clarification is particularly important if the confiscation assistance sought is a non-treaty-based one. Apparently, the situation will be easier to manage in cases where the Ukrainian Criminal Code also prescribes wanted confiscation as a security measure. This would increase significantly the compatibility with the law of the potential requested country. Such a coincidence in the type of confiscation would make cooperation with that country more feasible.

In all cases, where confiscation is sought as a security measure, the requester must always bear in mind its peculiarities. Unlike confiscations as punishments, this other type of confiscation is achievable not only when the target property belongs to a person, who has been found guilty of a crime that carries such a confiscation. Besides, the laws of many foreign countries require also a connection of this property with the committed crime. Thus, according to Article 183 (2) of the Somali Penal Code, *"Confiscation shall be ordered: (a) of material objects which constitute the rewards for the offence [15 P.C.];b) of material objects whose manufacture, use, possession, custody or alienation constitutes an offence [15 P.C.], even where no conviction was pronounced..."*

Therefore, the confiscatable assets of the offender shall be related to his/her proven crime (being its object, instrumentality or/and some gain), regardless of whether or not s/he was convicted for it. Moreover, some foreign countries [following Article 54 (1) (c) of the UN Corruption Convention] may allow confiscation as a security measure, even without finding the owner guilty in accomplished criminal proceedings, especially when s/he enjoys immunity or has died or fled and cannot be trialled *in absentia*[10]. This makes it necessary to check in advance whether such is the foreign country from which Ukraine intends to request confiscation (civil forfeiture). It is to be clarified whether confiscation there is possible even without accomplished criminal proceedings against the owner. If required, the interested magistrate must make sure that, at least, the imposition of criminal punishment on the owner is not necessary and therefore, finding him/her guilty of the crime that carries the confiscation is sufficient[11].

10 This provision expressly requires the State Parties to "consider 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".

11 Under the Bulgarian Law on Combating Corruption and Forfeiture of Illegally Acquired Property (Chapters X – XIII), confiscation is achievable even if criminal proceedings against the suspected owner have not been instituted at all or after their initiation, have been terminated or suspended – Article 108 of the Law. The focus of this confiscation is the unjustifiable property of the person, actually. This is why his/her assets may be confiscated, in some cases, even when s/he is acquitted if no evidence of their legal origin has been presented by him/her. Article 24 (1) of the Albanian Antimafia Law is similar. It stipulates that confiscation shall be imposed when there are reasonable doubts that the person participated in organized criminal activities and it has not been proven that his/her assets have a legal origin or the s/he did not manage to justify the possession of assets, disproportionate with his/her incomes or profits gained through legal resources declared by him/her.

3.3. Incompatibility may pop up even where the intended confiscation is a security measure in both countries. This incompatibility occurs in cases where their laws on this confiscation for the committed crime are, nevertheless, conceptually different. Most often, the difference concerns the volume of the confiscated property.

The well-known traditional confiscation model (concept) is restricted to assets that are related to the proven crime: being its object, instrumentality or/and gain. This concept requires that the existence of confscable property with the convict and its link to his/her crime was proven with the same high evidentiary standard ["beyond reasonable doubt"] as the crime itself. This is why courts in countries with this traditional model do not confiscate any assets if their link with the crime is not proven like the crime itself.

However, there are countries, which follow other models of criminal confiscation, especially in relation to serious crimes, such as terrorism, organized crime, corruption and international crimes. The models in question contain looser requirements. They are new legal inventions designed to make the fight against serious crime more efficient. Two are these models. Their confiscatable property is larger in volume and, as a result, the neutralizing effect on convicts concerned is understandably stronger. Usually, these new models are developed for crimes, exhaustively enlisted in law.

A. The first such new model is **extended confiscation**. It has been introduced in Bosnia and Herzegovina (see below), Romania (Article 112-1 of its Criminal Code), Serbia (Article 3.2 and 28.2 of its Law on Seizure and Confiscation of Proceeds from Crime) and some other countries as well. Subject to confiscation there are not only the assets that derive from the crime for which the owner has been convicted. These countries also confiscate under their laws assets originating from any other criminal activities, if some evidence of a link of the assets to them exists. Thus, a lower evidentiary standard of proving this link is sufficient. According to Article 110a (1) of the Bosnian Criminal Code, there must be "*sufficient evidence to reasonably believe that the property gain is of criminal origin*". Article 114a of the Criminal Code of the Federation of Bosnia and Herzegovina [one of the entities of this State] is similar. It reads that „ *the court can also ... order confiscation of material gain for which the prosecutor provides sufficient evidence that there is reasonable suspicion that it was acquired through ... criminal offences*...".

So, some vague causal link of the target property to criminal activities is required; there should be a suspicion that the property of the convict (his/her non-reported/ unlawful property) is of criminal origin. In practice, any evidence seems sufficient. In contrast to criminal proceedings, where the crime of the accused must be proven beyond a reasonable doubt (say: 95 % +); in this extended conviction procedure, the level of proof is as lower one as in civil proceedings. There, theclaimant must prove his/her case only by a preponderance of the evidence (50 % +).

B. The other new model of confiscation as a security measure is the so-called **unexplained wealth confiscation**. It implies a larger volume of confiscation even compared to the previous model.

The unexplained wealth confiscation also requires a conviction [although most countries that adopted it make use also of non-conviction-based confiscation as well] but does not need a link of the target property with any criminal activities at all. Therefore, the prosecutor in charge is not tasked in any way with proving that the property claimed for confiscation derives from any crime. It is sufficient that the convict owns the property and its legal origin cannot be proven. In practice, it is, mostly, in the interest of the accused owner to explain and prove the contrary, namely: the legal origin of his/her property.

This confiscation has been introduced in Bulgaria (Law on Combating Corruption and Forfeiture of Illegally Acquired Property, Chapters X – XIII), Italy (Article 240-bis of its Penal Code), the UK (Articles 362a-362t of the UK Proceeds of Crime Act) and some other countries. It is similar to what has been provided for in Article 100 (9) (6-1) of the Ukrainian CPC. It prescribes that liable to special confiscation is "*the property (money or other assets, as well as the income from them) of a person, convicted of a corruption crime, legalization (laundering) of proceeds from crime, and of his/her related person, shall be confiscated if the legality of the grounds for acquiring rights to such property is not confirmed in court*".

Ukraine is interested in finding a way to obtain confiscation from allthe above-mentioned countries. Their new models of confiscation deprive to a larger extent the convicted owner of the financial power to commit new crimes. In view thereof, when the owner is convicted in Ukraine but his/her liable to confiscation assets are in another country, with a new model of confiscation, the Ukrainian authorities have the chance to more significantly neutralize this person. Additionally, if the requested country shares the confiscated assets with the country, which has applied for their confiscation, or even returns some of them (in line with Article 51 of the UN Corruption Convention), this would also bring positive consequences to Ukraine, this time financial ones.

If Ukraine seeks confiscation assistance particularly from countries with unexplained wealth confiscation for such crimes that Article 100 (9) (6-1) of its CPC refers to, no major incompatibility-related difficulties should exist. In the other cases, the Ukrainian authorities are expected to discuss with their counterparts from potentially requested countries how to overcome the inevitable difficulties.

3.4. As a general rule, potentially requested countries are like Ukraine when it comes to the confiscation in the issue. Most of them also implement some new model of confiscation, whose volume is larger.As mentioned, the new form might be an expanded confiscation or unexplained wealth confiscation. The unexplained wealth confiscation, in particular, has gained popularity not only in Ukraine but also in many

foreign countries as well. This enables the cooperation of Ukraine with them in the field of confiscation.

However, full coincidence in the confiscation regime of both Ukraine and such foreign countries does not always exist. Thus, the offence for which Ukraine needs assistance may exceptionally not constitute any crime, at all, in the other country. In this case, the Ukrainian request for confiscation would most probably be rejected entirely. The typical reason for such rejection might be that confiscations are coercive measures. Hence, international requests, the execution of which involves such measures, shall be granted only if dual criminality exists (explicitly Article 28 of the Iraqi Anti-Money Laundering and Counter-Terrorism Financing Law, 2015). This argument is likely to come from the comparison of the request for confiscation to the closest device for international judicial cooperation: the letters rogatory, whose execution also involves coercive measures. Most foreign countries demand dual criminality to grant such letters rogatory. As a result, they are expected to require the same for incoming confiscation requests as well.

In most situations, though, the offence would be a crime in the other country as well. Yet, this crime may carry the larger confiscation solely under Ukrainian law. In such cases, Ukraine is not likely to obtain the confiscation in the amount that its law prescribes. Since the same crime in the other country does not condition any larger confiscation (an expanded or unexplained wealth one) that foreign country is not expected to grant the Ukrainian request beyond the limits of the traditional confiscation. Two are the possibilities in such cases. If for some reason the crime in the other country does not carry any confiscation, the Ukrainian request would not be granted, at all. Respectively, if this crime carries confiscation but no more than the traditional one, the Ukrainian request would be granted within its limits only.

3.5. The Ukrainian authorities looking for confiscation assistance from foreign countries with any of the new models of confiscation should be well aware of the differences between them. Otherwise, they cannot correctly interpret the applicable law in the country where the target property is located, in whole or in part.

The criterion to distinguish between extended confiscation and unexplained wealth confiscation concerns the link between the owner's criminal activities and the target property. The former model requires finding some evidence of such a link whereas the latter model does not. Therefore, if the applicable law does not assign the interested state authorities with presenting in court any evidence of the link between the owner's criminal activities and the target property, the confiscation model is the unexplained wealth one. The link between the two under this model is concluded from another circumstance ascertained in the legal proceedings.

A typical such circumstance that leads to the conclusion that the link in question exists is the manifest (obvious) disproportionality of the convict's property to his/her lawful income. Once this disproportionality has been ascertained, the existence of the link is accepted *ex lege* to open the way to confiscation.Article 8 of the Montenegrin Law on the Seizure and Confiscation and Article 4.2 of the Republika Srpska (the other entity of Bosnia and Herzegovina) Criminal Assets Recovery Act are a good illustration of such legal presumption.

Apart from this required disproportionality, the two Articles explicitly mention also the link of the unlawful income to suspected criminal activities. However, this link shall not be proven because does not constitute any separate requirement for confiscation. It solely clarifies why the convict's property has become manifestly disproportional to his/her lawful income. In this sense, the link is a part of the required disproportionality. The two mentioned Articles explain, in particular, that the property of the convict has become manifestly disproportional because it originated from criminal activities. Thus, according to both Article 8 (2) of the Montenegrin Law and Article 4.2 of the Republika Srpska Law, "*Well-founded suspicion that material benefit was derived from criminal activities exists if the property of the perpetrator… is manifestly disproportionate to his lawful income*." **Per argumentum a contrario**, if the property is not manifestly disproportional to the lawful income, it is not linkable to any criminal activities at all for the purposes of confiscation.

Therefore, the link of the property to criminal activities is just an impressive explanation of its proven manifest disproportionality and its origin, in particular. If the property is manifest disproportional, then its exceeding part, not corresponding to lawful incomes, always comes from some criminal activities. Once the manifest disproportionality has been proven, no other piece of evidence is needed to additionally prove that the property derives from criminal activity. This is why the link cannot be regarded as another legal requirement for the confiscation of the property: as something needed apart from the requirement of the manifest disproportionality of the property.

Hence, the manifest disproportionality of unexplainable wealth is sufficient for its confiscation. This makes confiscation under the Montenegrin Law and the Republika Srpska Law based, actually, on the Unexplained Wealth theory. Certainly, a proven crime is needed for confiscation. But the crime shall not necessarily engender the confiscatable property. No evidence is needed that this crime or any other crime has any causal link to the confiscatable property.

It follows at the end that if Ukraine tries to obtain confiscation of property from such countries, which have introducedunexplained wealth confiscation, its representatives would not need to separately present to them any evidence of the aforementioned causal link. If the owner was convicted in Ukraine for a crime that triggers this confiscation in those countries, it would be sufficient

to prove to them thatmanifest disproportionality of the convict's property to his/her lawful income exists.

The Ability of Foreign Countries to Confiscate at an Incoming Request

4.1. The problems with confiscation abroad are not limited to the volume of the confiscated property only, especially in the cases of conviction-based confiscation. The other confiscation-related problems with any foreign country, where the target property is located, should be studied and assessed in advance. If some serious hurdle cannot be overcome by the foreign country the Ukrainian authorities intend to approach, transmitting a request for confiscation to it would hardly be justifiable.

Thus, to be able to execute any incoming request for confiscation some countries need their own conviction or, at least, an own indictment for the conditioning crime. **Per argumentum a contrario**, if their national criminal laws are not applicable to this crime, no indictment is possible, let alone a conviction. Eventually, such countries have no legal mechanism to carry out requested confiscation.

This is the situation with Serbia, for example. Its Law provides for confiscation of property found in its territory if some serious crime was committed and ascertained by an indictment of the prosecutor, at least. Pursuant to Article 28 (1) of this Law on Seizure and Confiscation of Proceeds from Crime, **"***After the legal entry into force of indictment and not later than one year following the finalconclusion of criminal proceedings the public prosecutor shall file a motion for the permanentseizure of the proceeds from crime*"**.**

However, to have an indictment and later, institute confiscation proceedings in Serbia, its national criminal law shall be applicable. If it is not, the judicial authorities there cannot issue any indictment and conduct confiscation proceedings, thereafter. No exception exists even in cases when a foreign country requests the confiscation.

Indeed, if the assets wanted for confiscation are located in the requested country, this usually indicates a money-laundering crime committed in part, at least, in its territory. In theory, this place of commission makes the applicability of local criminal law inevitable[12]. Hence, it seems that once the Serbian authorities receive an international request for confiscation, they can institute own criminal proceedings for money laundering in order to obtain a local indictment, at least, and then proceed with the requested confiscation. In practice, however, such money laundering is difficult to prove. As a result, in almost all cases of incoming requests for confiscation conditioned by crimes, committed abroad to which the Serbian criminal law is not applicable, its authorities would not be able to react positively.

12 See the texts of Article 6 (3) of the Chinese Criminal Code, Article 113-2 (2) of the French Criminal Code, Article 8 (1) (ii) of the Turkish Criminal Code, Article 16 (2) (ii) of the UAE Criminal Code, etc.

Probably, some investigators, prosecutors and/or judges may try to construe expansively the Serbian or other similar provisions, which allow confiscation. Such lawyers may try to include in the confiscation grounds also conditioning crimes committed abroad to which the local criminal law is not applicable. This is hardly feasible, though. At least, this is not the better option. To be on the safe side, any country needs a clear provision allowing requested confiscation also when its national criminal law is not applicable to the conditioning crime.

4.2. In this regard, Article 2 (2) of the Law of Azerbaijan on the Prevention of the Legalization of Criminally Obtained Funds is an interesting example. It is an attempt to offer a legislative solution to this problem when the criminal law of the requested country is not applicable to the conditioning crime and therefore, this crime is beyond that country's jurisdiction. The Paragraph in question reads**:** „*This Law shall apply to activities…outside the jurisdiction of Azerbaijan in accordance with the international instruments to which Azerbaijan is a Party*".

The problem with this Azeri legal text is that it refers to and, thus, relies on international law only. However, applicable international laws, in turn, prescribe that the property subject to confiscation is disposed of by the requested country "*in accordance with the provisions of its domestic law*". This is the rule under Article 15 of the Strasbourg Convention and Article 25 of the Warsaw Convention. So, the issue goes back to the domestic law provisions which, regretfully, do not prescribe a solution.

The same problem as with the Azeri law occurs also from Article 27 (1) of the North Macedonian Law on Judicial Cooperation in Criminal Matters. I treads: „ *The confiscation of property and the property benefits in a procedure of international legal assistance shall be made in accordance with the provisions of the Criminal Code, Law on Criminal Proceedings and international agreements*".

As a result, a "vicious circle" occurs. To get out of it, the domestic law of the requested country should expressly regulate this issue. There must be an explicit domestic provision that the confiscation procedure shall be carried out also in cases of incoming foreign requests for confiscation even when the conditioning crime is beyond the criminal jurisdiction of the country. Otherwise, the problem is only noted but not solved.

4.3. There are countries which have the necessary domestic laws to make their authorities capable of executing some incoming confiscation requests, at least, even when their Criminal Codes are not applicable to the conditioning crime. The authorities of the Federation of Bosnia and Herzegovina [Fed BiH], for example, are allowed to execute such requests when the order for confiscation is part of a foreign criminal judgment sent for recognition and enforcement in full. Thus, according to Article 37 (3) of the Federation Law onForfeiture of CriminalProceeds, this Bosnian entity is bound by *"decisions of the competent authorities in Bosnia and*

Herzegovina, which recognize and enforce foreign judgments, if these decisions contain a measure of forfeiture of property and proceeds of crime". Actually, the foreign judgment shall contain such a measure.

The quoted article is a step forward. The recognition and enforcement of foreign criminal judgments do not require that the requested country's Criminal Code is applicable to the crimes for which the judgments were issued. The inapplicability of its Code does not impede the recognition and enforcement of foreign criminal judgments, e.g. Articles 5 - 7 of the European Convention on the International Validity of Criminal Judgments.

Hence, the applicability of the Code of the requested country (the Fed BiH in this example) is not necessary for achieving the wanted confiscation, even if the crime conditioning the requested confiscation is beyond the criminal jurisdiction of that country. As a result, wherever the received foreign criminal judgment contains a request for confiscation (with or without an attached national confiscation order issued in the requesting country) the execution of this request would be an inherent part of the entire recognition and enforcement of the foreign judgment.

Thus, a foreign criminal judgment containing a confiscation measure may be recognized and enforced together with this measure, even if the Criminal Code of a requested country, such as the one of the Fed BiH, is not applicable to the conditioning crime of the convict. It follows that if the Ukrainian authorities want to confiscate something located in the territory of such a country, they need their own criminal judgment with a confiscation measure as well as a request for the recognition and enforcement of the judgment.

Regretfully, in all other situations, where no such foreign judgment is dispatched for recognition and enforcement, the wanted confiscation cannot be carried out, even in the Fed BiH, on the grounds that its own criminal law as a requested country is not applicable to the conditioning offence. It is worth noting that there are two other typical situations of non-applicable requested country's law, where a foreign judgment is not recognized and enforced, but, nevertheless, the requested confiscation should be carried out, pursuant to international agreements.

- The first such situation occurs when a given country receives a foreign request for the execution of a separate confiscation order issued in the requesting country. This order is not a part of any criminal judgment for the same crime, dispatched by the same requesting country with a request for the recognition and enforcement of the judgment.
- The second situation occurs when some country receives solely a foreign request for confiscation without any confiscation order issued in the requesting country at all. In this situation, as there is no foreign confiscation order to execute, the requested country is expected to produce its own one for the property described in the incoming request.

Both situations can be found in Article 13 of the UN Corruption Convention. This Article recommends Parties execute all incoming confiscation requests. It does not refer only to the situation when the requested countries' criminal laws are not applicable to the crime conditioning the confiscation. Article 13 of the Convention demands that confiscation should be carried out:

- when the received request is for the execution of a requesting country's order is not a part of any judgment of the same foreign country to be recognized and enforced, and

- when the received request is for the issuance by the requested country of its own confiscation order for the property described in the request.

To fill such gaps, each country is in need of a general rule to allow the execution of all requests for confiscation, basically. This, in turn, means to any requesting country that its authorities should verify to what extent the recommendation in Article 13 of the UN Corruption Convention has been complied with by the country they plan to approach. Thus, if a given foreign country has not produced any provision in its law to implement Article 13 of the Convention, cooperation with such a country would be more difficult. The interested authorities are expected to find what such countries have done and to decide if and how they should request them for confiscation.

Asset Sharing and Return of the Target Property

5.1. The asset sharing issue is another confiscation related-problem. It is, however, associated only with the efficiency of the confiscation rather than its feasibility.

Pursuant to Article 14 of the UN Palermo Convention, Article 57 of the UN Corruption Convention and Article 25 of the Warsaw Convention as well, countries executing foreign requests for the confiscation of assets found in their territories dispose of the assets in accordance with their national laws. Most often, requested countries make laws to benefit themselves. Their laws postulate that, in general, confiscated assets shall become their property.

However, requested countries do not necessarily retain all assets. Options for their redistribution exist. Apart from returning any seized item to its initial possessor if s/he has acted in good faith, the confiscated property may also be shared with the informant of its whereabouts. This asset sharing would stimulate such informants to cooperate. At the international level, the informant is the country which requests the confiscation as it indicates its location. Therefore, this country may benefit from **asset sharing** if the requested confiscation takes place at all.

Apart from multilateral agreements [e.g. Article 8 (3) of the UN International Convention for the Suppression of Terrorist Financing], bilateral treaties are the typical legal instruments for international asset sharing. This is why, if the Ukrainian authorities plan to request confiscation from another country, they must find whether a bilateral treaty on

asset sharing with that country exists. If this is the case, the share of Ukraine as the requesting country is prescribed in the text of the treaty, unless it stipulates that this share shall be determined by the requested country's law.

If no such treaty exists, Ukraine as the interested country may try to negotiate the so-called *ad hoc* agreement with the foreign country where the target property is located. Such an agreement would be applicable to the individual case only. Before negotiating, the Ukrainian representatives should find out whether or not the other country has any domestic rule on asset sharing. If it has and the rule is sufficiently flexible [e.g. Section Section 14 (5) of the Mutual Legal Assistance (Criminal Matters) Act of Pakistan], the probability of reaching a favourable agreement increases. Article 51 of the Somali Anti-Money Laundering and Countering the Financing of Terrorism Act, 2016, constitutes another example of such a rule. It reads as follows:

"*Property which has been obtained from the execution of a confiscation order shall be disposed of as follows, unless otherwise agreed: If the amount obtained from the execution of the confiscation order is below USD $5,000, or the equivalent to that amount, the amount shall accrue to the State of Somalia. Where the amount is more than USD $5,000 the parties shall agree on asset sharing proportions.*"

However, the share that might be reseived is not necessarily a result of negotiations.The other country's domestic rule may contemplate some non-negotiable percentage of the assets for the requesting country. Such a percentage exists in the European Union. Pursuant to Article 16 of the Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition of confiscation orders[13], when money has been obtained through the execution of a confiscation order, it remains in full with the executing (requested) country, if the amount is 10,000 euros or less. Otherwise, if the amount is over 10,000, then 50 percent of the amount obtained is transferred to the issuing (requesting) country.

The other legislative solution might be less strict regarding the share for the requesting country. Article 58 (1) of the UAE Law on International Judicial Co-operation in Criminal Matters stipulates that "*the revenues of the crimes for which judicial cooperation is rendered may be divided with the foreign judicial authority*" Therefore, the requesting country shall not receive everything by the door to negotiations for the amount of its share is wide open.

5.2. **The return of proceeds** from corruption crimes, in particular, to its country of origin is one of the core objectives and a "fundamental principle" of the Corruption Convention. This is whyall Parties are required to "*afford one another the widest measure of cooperation and assistance in this regard*" (Article 51). According to Article 57 (2) of the Convention, they shall adopt such legislative and other measures as may be necessary to enable its authorities to return confiscated property, requested by another Party, taking into account the rights of *bona fide* third Parties.

Like Ukraine, most of the other countries in the world are Parties to this Convention. Hardly, all of them, though, have implemented their obligation under the above-mentioned Article 57 (2). This makes it necessary for the Ukrainian authorities seeking confiscation from another country, especially one conditioned by a corruption crime, to check whether and to what extent that party has complied with Article 57 (2) of the Convention.

Very often, foreign countries have adopted a rule on the return of crime proceeds in relation only to corruption crimes but also to other crimes for which assistance is sought. In some countries, the rule is most general in scope. Such is Section 14 (5) of the Mutual Legal Assistance (Criminal Matters) Act of Pakistan Under it, the Pakistani "*central authority may enter into arrangements with the requesting country for transfer to its central authority the whole or part of any property, proceeds or instrumentalities of crime confiscated in Pakistan in response to a request for the execution of a confiscation order pursuant to this Act*". Similar isArticle 75 [Destination of proceeds of fines and confiscations], Paragraph 2 of the Kosovan Law on International Legal Cooperation in Criminal Matters reads: "*Confiscated property which is of a special interest to the requesting state may be returned to it if it so requires*".

Obviously, the more the requesting country knows the applicable law, the better its chances of success are. This is specifically valid when it tries to obtain assets from a foreign country.

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13 The legal basis for them was Article 34 of the Treaty on European Union, amended by the Treaty of Nice and before being repealed by the Lisbon Treaty. The continued basis for framework decisions is set out in transitional provisions of the Lisbon Treaty. Article 9 of the Protocol on Transitional Provisions provides that: "The legal effects of the acts of the institutions, bodies, offices and agencies of the Union adopted on the basis of the Treaty on European Union prior to the entry into force of the Treaty of Lisbon shall be preserved until those acts are repealed, annulled or amended in implementation of the Treaties. The same shall apply to agreements concluded between Member States on the basis of the Treaty on European Union".
A framework decision was a kind of legislative act of the European Union used exclusively within the EU's competencies in police and judicial cooperation in criminal justice matters. However, the framework decisions were not capable of direct effect. They are only required from EU countries to achieve particular results without dictating the specific means (legislative, operational) of achieving any of them.

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