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FREEZING AND CONFISCATION OF CRIMINAL PROCEEDS

Nicholas KAYE *

Introduction

The confiscation of proceeds of crime has long been seen within the EU and beyond as an important tool in the armoury of weapons to fight organised crime. The rationale for focusing on the confiscation of criminal proceeds is at least two-fold. First it addresses concerns that enormous criminal wealth, generated most notably by various forms of trafficking offences, risks destabilising financial systems and corrupting legitimate society. Second it attempts to undermine the *raison d'être* behind most organised crime activity, namely the maximisation of profit by illicit means. As such the confiscation of criminal assets seeks ultimately to reduce and prevent crime by making known that criminals will not be allowed to enjoy their illicit wealth. By the same token, focusing on confiscation of criminal wealth can send an important message by removing negative role models from local communities.

Confiscation is defined as a judicial order "resulting in the final deprivation of property"¹. The latter includes property of any description "whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property"². The notion of (criminal) proceeds is defined as "any economic advantage from criminal offences"³. To avoid the likely dissipation of suspected criminal assets prior to a confiscation order, the latter is frequently preceded by the freezing of assets during the course of an

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¹ Council Framework Decision 2005/212/JHA of 24th February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property. Note that the Framework Decision on the application of the principle of mutual recognition to confiscation orders substitutes the word "final" for "definitive" deprivation.

² Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freeing property or evidence.

³ Council Framework Decision on Confiscation of Crime-Related Proceeds, Instrumentalities and Property 2005/212/JHA of 24th February 2005.

investigation. Freezing in this context means a court or other competent authority order "temporarily prohibiting the transfer, destruction, conversion, disposition, or movement of property or temporarily assuming custody or control of property"⁴.

This article will first assess a number of international instruments which have sought to highlight and promote the confiscation of criminal proceeds. It will then consider the European Union approach to confiscation and finally highlight a number of areas which could be addressed in the not too distant future if we are to strengthen the EU regime for the confiscation of the proceeds of crime.

International Instruments on Freezing and Confiscation of Criminal Assets

The first serious attempt at international level to promote the confiscation of criminal proceeds was the UN Convention against illicit traffic in narcotic drugs and psychotropic substances (the "Vienna Convention") of 1988. While focused only on drug related crime, the Vienna Convention contains far-reaching and innovative provisions on the confiscation of criminal proceeds which have shaped and influenced many other instruments addressing criminal confiscation at international, regional and local and levels.

The Vienna Convention came into force in November 1990 and has been ratified by all 25 members of the European Union and concluded by the European Community. The Convention states that Parties shall adopt measures enabling the confiscation of proceeds (from drug-related crime) or property which corresponds to the value of such proceeds. To enable confiscation to take place, Parties must ensure that bank, financial or commercial records are available and that bank secrecy is not an obstacle. It addresses issues of international cooperation and mutual legal assistance relevant to giving effect to confiscation orders issued by competent authorities of another State. It provides for the confiscation of income derived from criminal proceeds and of the confiscation of property (in proportions representing the value of illicit property) where criminal proceeds have been intermingled with legitimate assets. It raises the issue of sharing confiscated assets among authorities of different Parties who have combined efforts to ensure effective confiscation and the possibility that confiscated assets may be used for crime prevention or other measures designed to reduce crime. Perhaps most significantly the Vienna Convention raises the possibility that Parties may consider reversing the onus of proof regarding the lawful origin of alleged criminal proceeds.

⁴ Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism of 16 May 2005.

The UN Convention against Transnational Organised Crime (the "Palermo Convention") of December 2000 is designed "to promote cooperation to prevent and combat transnational organised crime more effectively". The Convention identifies the confiscation of criminal proceeds as an important means to achieve this aim. It requires Parties to introduce measures to allow the confiscation of property derived from criminal activity and raises the possibility of reversing the onus of proof in confiscation proceedings. The Convention has been ratified by all but five Member States and has been concluded by the European Community.

The UN Convention against Corruption (the "UNCAC") of December 2005 is designed *inter alia* to promote international cooperation against corruption including in asset recovery. The UNCAC has been signed by 23 Member States as well as by the European Community and has so far been ratified by nine Member States. The UNCAC contains many of the confiscation-related provisions of the above UN Conventions. In addition the UNCAC sets out detailed provisions on recovery and return of confiscated assets including the obligation on Parties to adopt legislative measures to allow them to return confiscated property to the prior legitimate owners or to compensate the victims of the crime. The UNCAC also requires State Parties to "consider" taking any necessary measures to allow confiscation of property without a criminal conviction in circumstances where the offender cannot be prosecuted due to "death, flight, absence or in other appropriate cases".

A real milestone in promoting the confiscation of criminal proceeds is the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (the "1990 Strasbourg Convention"). This Convention has been ratified by all 25 Member States of the European Union. The drafters of the 1990 Convention considered that one of the most effective measures to fight organised crime was the confiscation of criminal proceeds. With this objective the Convention seeks to promote international cooperation in the identification, tracing, freezing and confiscation of criminal assets. Parties must adopt legislative measures to allow confiscation of proceeds of crime and provisional measures with a view to ultimate confiscation. Parties are obliged to cooperate to the greatest extent possible as regards investigations and proceedings aimed at confiscation. On request Parties have to take provisional measures such as the freezing of bank accounts, with a view to confiscation.

The 1990 Strasbourg Convention has been supplemented and updated by the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (the "Second Strasbourg Convention") which was opened for signature in May 2005. Recognising both the similarities and the distinctive features between money laundering and the financing of terrorism, the Second Strasbourg Convention has

a wider scope than the 1990 Convention and acknowledges that money used to support terrorist groups and carry out attacks does not necessarily have criminal origins. Like its 1990 sister, the Second Strasbourg Convention allows for the possibility of an all crimes approach to confiscation but also allows Parties to make reservations (though on a more limited basis than in 1990). The Second Convention sends an important message that mandatory confiscation may be desirable as regards certain very serious offences such as people trafficking but does not go so far as to oblige parties to legislate to this effect. On the other hand the Second Convention does require Parties in respect of serious offences to adopt legislative or other measures requiring an offender to demonstrate the lawful origin of alleged criminal proceeds.

Other significant developments in the Second Strasbourg Convention include obligations on Parties to provide information to requests from other Parties as to whether a natural or legal person who is the subject of a criminal investigation, has a bank account, to provide information on banking transactions and to monitor banking transactions. These provisions are largely drawn from the EU Protocol of 16 October 2001 to the Convention on mutual assistance in criminal matters between the Member States of the European Union⁵. However, when it is considered that there are some 46 members of the Council of Europe, including such diverse countries as Albania, Azerbaijan and Moldova, the potential impact of such provisions may go well beyond the EU instrument from which they are inspired.

EU Instruments on Freezing and Confiscation of Criminal Assets

The EU has long proclaimed the importance of focusing on the confiscation of criminal proceeds. The EU Action Plan to combat organised crime of April 1997 states: "The European Council stresses the importance for each Member State of having well developed and wide ranging legislation in the field of confiscation of the proceeds from crime..."⁶. Similarly three years later the so-called "EU Millennium Strategy"⁷ states that "The European Council is determined to ensure that concrete steps are taken to trace, freeze, seize and confiscate the proceeds of crime".

⁵ See below.

⁶ Official Journal L 251, 15th August 1997.

⁷ The Prevention and Control of Organised Crime: A European Union Strategy for the Beginning of the New Millennium (2000/C 124/01).

With this clear political support the EU has made significant strides over recent years to highlight the important role of criminal confiscation and to approximate Member States' approach to the freezing and confiscation of criminal assets:

The Joint Action on freezing and confiscation of the proceeds of crime of December 1998⁸ was a first attempt to ensure an EU wide implementation of the Council of Europe Strasbourg Convention. The Joint Action was modified by a Framework Decision on freezing and confiscation of June 2001⁹. Taken together the purpose of the Joint Action and Framework Decision was, among other things, to ensure a common minimum approach of Member States in terms of those criminal offences for which they should provide for confiscation. The approach is generally that if an offence is punishable by imprisonment of a maximum of more than one year, it must be possible under national law, to order confiscation of proceeds generated by that offence. The Joint Action and Framework Decision also require Member States to have in place a system of value confiscation and require Member States to ensure that all requests from other Member States relating to asset identification, tracing, freezing and confiscation, are processed with the same priority as is given to such measures in purely domestic proceedings.

These two instruments contain a number of interesting provisions that may not have been given the full prominence they deserve. For example the Joint Action says that to promote mutual assistance in the EU, Member States should prepare and regularly update "a user-friendly guide including information about where to obtain advice" on identifying, tracing, freezing and confiscating criminal assets. As an apparent precursor to the "CARIN" network¹⁰, the Joint Action also says that Member States "shall encourage direct contact between investigators ...and prosecutors...making appropriate use of available cooperation networks" to reduce where possible the number of formal requests for assistance.

⁸ Joint Action of 3rd December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds from crime. (98/699/JHA).

⁹ Council Framework Decision of 26th June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime. (2001/500/JHA).

¹⁰ The "Camden Assets Recovery Inter Agency Network" (CARIN) is an informal network made up principally of Member State experts working in the area of criminal asset identification and recovery. Through the exchange of best practice and national procedural information, CARIN aims to improve inter-agency cooperation in cross border identification, freezing and confiscation of criminal proceeds.

The Protocol to the Convention on Mutual Assistance in Criminal Matters¹¹ requires Member States, among other things, to respond to a request from another Member State as to whether a natural or legal person who is the subject of criminal investigation, holds or controls one or more bank accounts on its territory. It requires Member States to provide on request of another Member State the details of bank accounts and banking transactions and to request the monitoring of banking transactions. The obligation to determine whether a person holds or controls one or more accounts and to provide details of those accounts only applies in the case of investigations of more serious offences, including those which carry a prison sentence of a maximum of at least four years in the requesting State and two years in the requested State. The Protocol has entered into force in the majority of Member States.

The Framework Decision of July 2003 on mutual recognition of orders freezing property or evidence¹² extends the practice of mutual recognition to pre-trial orders with a view to allowing competent judicial authorities to seize property on request of another Member State's judicial authorities. It will facilitate and accelerate the execution of freezing orders between Member States where the order is issued for the purpose of securing evidence or with a view to subsequent confiscation of property. In certain cases, including money laundering, fraud, participation in organised crime groups, there can no double criminality requirement which might otherwise be an obstacle to execution of the freezing order. The instrument requires competent judicial authorities of the Member States to deal directly with one another and communicate the decision on a freezing order, where practicable, within 24 hours of its receipt. Member States were required to take the necessary measures to comply with the Framework Decision by August 2005.

The Framework Decision of February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property¹³ seeks to ensure an additional degree of approximation of Member States' law on criminal confiscation. The instrument addresses the notion of "extended confiscation". In essence this means that Member States should ensure that appropriate measures exist to allow a court to order the confiscation of assets of a person convicted of certain criminal offences where the assets in question are derived from criminal activity including but not

¹¹ Council Act of 16 October 2001 establishing in accordance with Article 34 of the Treaty on European Union, the Protocol to the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2001/C 326/01).

¹² Council Framework Decision 2003/577/JHA of 22 July 2003.

¹³ Council Framework Decision 2005/212/JHA of 24th February 2005.

limited to proceeds derived from the criminal activity for which the person has been convicted. The Framework Decision provides that for certain types of money-generating criminal offences committed within the framework of a criminal organisation (including money laundering, trafficking in human beings and drug trafficking), Member States shall at least ensure compliance with one of the following three options:

(a) Provide for confiscation of the convicted person's assets in circumstances where the Court is "fully convinced" that these were derived from criminal activity over a period of time prior to conviction which the Court considers reasonable. This means that the assets could be derived from any criminal activity.

(b) Alternatively Member States should provide for confiscation of the convicted person's assets where the Court is "fully convinced" that these were derived from "similar" criminal activity to that for which the person has been convicted. This option reduces the potential impact of the instrument and is likely to raise difficult questions surrounding the meaning of what constitutes a "similar" offence.

(c) The last of the three alternatives adopts a different approach from the first two options. It says that Member States shall provide for confiscation where it is established that the value of the convicted person's assets is disproportionate to his lawful income and the Court is "fully convinced" that the property has been derived from that person's criminal activity – which should be taken here to mean any criminal activity and not simply activity for which the person has been convicted or similar criminal activity.

The Framework Decision includes among its objectives that Member States should have effective rules in relation to the onus of proof regarding the source of assets held by a convicted criminal. However, unlike the Second Strasbourg Convention, the 2005 Framework Decision does not go so far as to say that Member States shall require offenders to demonstrate the lawful origin of their assets. Member States will have to decide whether they interpret this provision in that way.

The Framework Decision includes interesting ideas, though not binding, such as the notion that confiscation should be possible not only as regards the convicted person but also as regards property acquired by his "closest relations" and property transferred to a legal person over which the convicted person and/or his closest relations have a controlling influence. Member States have to implement the Framework Decision by March 2007.

The draft Framework Decision on the Application of the Principle of Mutual Recognition to Confiscation Orders¹⁴ establishes the rules according to which the judicial authorities of one Member State will recognise and execute in its territory a confiscation order issued by competent judicial authorities of another Member State. Provided that the confiscation order is based on conviction for one or more of the list of more than 30 criminal offences and is punishable by a prison sentence of at least three years in the issuing State, the confiscation order cannot be refused on ground that the act giving rise to the confiscation order would not have constituted an offence in the executing State. The instrument also contains provisions on the sharing of confiscated assets – unless otherwise agreed by the respective parties, the general rule being that the value of confiscated property will be shared equally between the issuing and executing State.

The Third Anti-Money Laundering Directive of October 2005¹⁵ contains important new provisions many of which are designed to reflect revisions of the Financial Action Task Force Forty Recommendations on money laundering and nine Special Recommendations on terrorist financing. The Directive may also have an important impact in how EU policy develops in the area of criminal confiscation. This is because for the first time the Directive requires Member States to "ensure they are able to review the effectiveness of their systems to combat money laundering or terrorist financing by maintaining comprehensive statistics on matters relevant to the effectiveness of such systems". The same provision goes on to state that such statistics shall as a minimum cover "how much property has been frozen, seized or confiscated" by competent authorities. The future availability of (hopefully) comparable statistical information should allow important inferences to be drawn regarding the effectiveness of Member States' different approaches to confiscation of criminal assets. Member States must implement the third anti-money laundering Directive into national law by mid-December 2007.

A more recent development can be found in the draft Council Decision concerning arrangements for cooperation between Asset Recovery Offices of the Member States¹⁶. This seeks to build on the informal cooperation which has taken place among Member State contact points working in the area of criminal asset identification, tracing and recovery in the CARIN network¹⁷. The draft Council

¹⁴ At time of writing the draft instrument exists in agreed draft form.

¹⁵ Directive 2005/60/EC of 26th October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing.

¹⁶ At time of writing the draft Decision has received political agreement in the Council and is due to be discussed in Parliament in the latter part of 2006.

¹⁷ See above.

Decision requires Member States to establish or designate a maximum of two "Asset Recovery Offices" whose function will be to facilitate effective cooperation and exchange of pre-investigative operational information in the criminal asset recovery area. It would also make the exchange of information subject to the procedures and timetable of the draft Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union¹⁸.

Next Steps in possible future EU measures in the Freezing and Confiscation of Criminal Assets

The Council and Commission Action Plan of June 2005 implementing the Hague Programme on strengthening freedom, security and justice in the European Union identifies a number of areas to strengthen the fight against financial aspects of organised crime. These include the examination of standards for the return of confiscated assets as compensation to identifiable victims or for public benefit purposes. The Action Plan also calls for a review and, if necessary the strengthening of present legislation on confiscation of criminal assets¹⁹. The European Commission is currently undertaking this work. It will assess possible lacunae in the current EU regime and if appropriate, how these might be remedied. It will also consider good practice in the return of confiscated assets to the rightful owner and assess to what extent a new EU instrument would be desirable to reflect recent developments in other international arena in the criminal confiscation area. At the same time the Commission will continue to push ahead with related work designed to ensure effective application of an EU criminal confiscation regime, notably in the development of a common framework for statistics in money laundering and related areas and the promotion of financial investigation as a law enforcement technique through the development of common EU training standards for financial investigation.

¹⁸ The draft Framework Decision on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union received political agreement in the Council in December 2005.

¹⁹ The timeline referred to in the Action Plan for the purpose of a possible proposal to strengthen EU legislation in this respect is 2008.