Recovery of Proceeds from Crime – Time to Upgrade the Existing European Standards?

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Article

ABSTRACT

Asset recovery has been at the forefront of recent international initiatives in the areas of criminal law and judicial cooperation in criminal matters. In this spirit, the Conference of the Parties to the Warsaw Convention on money laundering and the financing of terrorism aims to further improve the existing framework standards of the Council of Europe. This is to be done by means of an "Asset Recovery" Protocol to the 2005 Warsaw Convention, which will seek to strike a balance between the task of depriving criminals of their illicit gains and the parallel obligation to respect the rights of the accused and of third parties, in accordance with the principles stemming from case law of the European Court of Human Rights. This article outlines the rationale behind this initiative and the main targets of reform.

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I. Introduction

In 2005, at the Third Summit of the Heads of State and Government of the Council of Europe held in Warsaw, the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, commonly known as "the Warsaw Convention" (CETS No. 198), was opened for signature. It entered into force in May 2008, having been ratified by six states.[1] With currently 39 ratifications since its adoption (and five other countries – including the European Union as an international organization – as signatories), the Warsaw Convention embodies the commitment of at least 37 Council of Europe member states and 2 non-member states (including, since 2022, Morocco) in the fields of combatting money laundering/terrorist financing and confiscating the proceeds from crime.

To date, the Warsaw Convention remains the only comprehensive treaty covering both the prevention and repression of money laundering, as well as financing of terrorism, recovery of proceeds of crime, and international co-operation. Its unique features include being the only international treaty that grants national authorities the power to halt suspicious transactions at the earliest stage and to prevent their movement through the financial system. In addition, specialised Financial Intelligence Units (FIUs) of member states are obliged to stop such transactions at the request of a foreign counterpart FIU. The progress brought about by the Convention has been broad, swift, tangible, and is clearly reflected in the way it has further inspired revisions of the relevant Financial Action Task Force (FATF) and EU standards.

Today, 15 years after the entry into force of the Warsaw Convention, the Conference of the Parties (COP), which monitors its implementation,[2] aims to further improve the framework of standards set by the Convention in the specific area of asset recovery. This new initiative, which is currently underway, ensures a follow-up to the relevant decisions taken at the Fourth Summit of the Heads of State and Government of the Council of Europe (held in Reykjavik on 16 to 17 May 2023), taking into account the findings and challenges set out in the Secretary General's 2023 Report on the state of democracy, human rights, and the rule of law, entitled "An Invitation to Recommit to the Values and Standards of the Council of Europe."

In this article, I will outline the rationale behind the above initiative and, in particular, the main elements of the proposed "Asset Recovery" Protocol to the Warsaw Convention.

II. The Asset Recovery Gap

Serious and organised crime continues to pose a significant threat to the rule of law and, more generally, to the safety and security of society, both at a national and global level. Whilst there are no precise or absolutely reliable statistics, the likely value of assets generated by profit-driven, illegal activities appears to be substantial. A 2021 study by the European Commission on the profits generated by organised crime estimated that the annual revenues of the nine main criminal markets in the EU were between €92 billion and €188 billion (mid-point of €139 billion) in 2019.[3] These immense profits allow criminals to further fund their illicit activities and infiltrate the legal economy and public institutions.

In light of the above, both experience from practice and academic research tend to confirm the (somewhat mundane) statement that depriving criminals of the assets gained through their activities is an essential element in the fight against organised and financial crime. Asset recovery deters criminal activity by removing its impetus, while protecting the integrity of the financial system and the broader economy by reducing the circulation of illicit income. Indeed, the effective application of asset recovery measures has proven to be a key tool in dismantling the extensive networks of criminal organisations operating at an

international level. Moreover, and no less importantly, it allows for the compensation of the victims of crime, thereby promoting social cohesion and justice.

The existing conventional framework of the Council of Europe (CETS No. 198, but also the European Convention on Mutual Assistance in Criminal Matters, and the Conventions against Corruption, Cybercrime and Trafficking in Human Beings, and their additional protocols)[4] provides a solid operational basis for the recovery of proceeds of crime. In many aspects, the standards established therein, especially in the provisions of the Warsaw Convention, exceed the global standards as set out by the FATF and the United Nations (in the United Nations Convention against Corruption – "UNCAC"),[5] thus providing a stronger position to pursue asset recovery for those countries that have ratified the relevant instruments.

Nevertheless, since the adoption of CETS No. 198 in 2005, the rapidly evolving criminal landscape, as well as a number of common challenges identified within the context of mutual country assessments, have revealed an urgent need to further foster international cooperation when it comes to asset recovery. Indeed, the findings of the assessment processes carried out by the main global and regional monitoring mechanisms (the FATF, the Committee of Experts on the Evaluation of AML (Anti-Money Laundering) Measures and the Financing of Terrorism-MONEYVAL, and the COP) indicate that the results achieved in this area are very modest. Although no fully accurate statistical data could be provided, it is estimated that less than 2% of criminal proceeds are routinely recovered.[6] These results are certainly not sufficient to claim that "crime does not pay" – a phrase commonly used by lawmakers and competent authorities to describe a crucial goal in the fight against financial and organised crime.

MONEYVAL, whose 5th mutual evaluation round is due to end in 2024, has also discussed the state of play in this field in the context of a review of results achieved and the negotiation of its strategy for the years 2024 to 2027, which was adopted by the ministers responsible for Anti-Money Laundering/Counter-Terrorist Financing (AML/CFT) at their high-level meeting in Warsaw on 25 April 2023.[7] Its 2022 Activity Report notes:[8]

> Moreover, successful confiscations of ill-gotten funds as a criminal measure are rather rare in comparison with the estimates of the proceeds of crime. Countries should resort not only to freezing but also to seizure and confiscation of criminal funds. In at least ten countries (39%), enhancing the powers and resources of the countries' asset recovery and management offices will be crucial to improving their effectiveness.

The poor results achieved so far are partially attributed to the lack of a comprehensive binding international legal framework specifically aimed at the recovery of criminal proceeds, and international cooperation to this end. In response to this situation, a number of initiatives have been launched by the main stakeholders in the relevant field –more specifically:

- FATF, as a global standard-setter in AML/CFT, has recently revised its standards on asset recovery (Recommendations 4 and 38), against which states will be assessed globally in the next evaluation round;
- At the European Union level, the European Commission presented a proposal for a new European Parliament and Council Directive on asset recovery and confiscation[9];
- Interpol has declared police cooperation on asset recovery one of its main priorities[10].

This brings us to the heart of current discussions on the next steps to be taken. The Council of Europe, comprised of 46 member states and with several of its conventions open to non-member states, has historically been at the forefront of asset recovery standards. Most importantly, the Council of Europe places

greater emphasis on an area which is perhaps to some extent neglected by other comparable mechanisms and organisations, namely achieving an equitable balance between the overarching task of combatting money laundering and terrorism financing and the parallel obligation to *respect the rights of the accused and of third parties*, taking into account the principles stemming from case law of the European Court of Human Rights.[11] It therefore constitutes a unique forum to address, in an equitable and proportionate way, the existing gaps in the framework of asset recovery and sharing, and to further enhance its comprehensiveness.

In this spirit, the COP, as the guardian of the standards enshrined in the Warsaw Convention, has been continuously discussing the need to ensure that the Convention, as the only international treaty specifically devoted to money laundering and the financing of terrorism, remains relevant and up to date, enabling Parties to respond to evolving challenges. Such discussions were initiated as early as in 2012. In 2013, the COP concluded that a more general review of the Convention's international cooperation provisions should not be undertaken until a critical mass of states had ratified the Convention and the outcome of the negotiations on the EU 4th AML Directive and the then pending Confiscation Directive (Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU) was known.[12] Now that these steps have been taken, the time has come for the Council of Europe to take concrete steps to revise its asset recovery rules.

As a first step, this issue was put on the agenda of the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) as a recurring item. In close cooperation with the COP, the PC-OC carried out a comprehensive "Study on the possible added value and feasibility of preparing a new binding instrument in the CoE on international co-operation as regards the management, recovery and sharing of assets proceeding from crime"[13] in 2019, which should be considered a key reference document for future work in the field of asset recovery. Following the findings of this study, the COP and the PC-OC held a number of consultative meetings, culminating in the organisation of a joint session in November 2022. The meeting brought together representatives of both institutions and experts from around the globe (relevant international organisations, specialised institutes, think tanks, etc.) to discuss and consider the development of an additional instrument in the field of asset recovery.

More recently, in April 2023, ministers from states and territories that are members of MONEYVAL adopted a high-level declaration and strategic priorities, which, *inter alia*, provide for closer synergies between MONEYVAL and the COP, and require MONEYVAL to support the Council of Europe in any further development of the Warsaw Convention.[14] In June 2023, the issue of asset recovery was discussed at the 83rd plenary meeting of the European Committee on Crime Problems (CDPC), where it was decided to further examine the proposals and finalise the elements to be included in the draft terms of reference of an ad-hoc committee to be tasked with the preparation of a draft additional protocol supplementing the Warsaw Convention. Lastly, at its most recent, 15th plenary meeting, in November 2023, the COP took note of the planned establishment of the ad-hoc committee, which is expected to undertake its work in close cooperation with the Conference of the Parties during the period of 2024 to 2026.[15]

III. Areas of Reform in the Field of Asset Recovery

Three key areas have emerged from the discussions to date as the most critical in terms of the added value that the proposed Protocol can bring. These are:

- Pro-active management of seized and confiscated assets aimed at preserving and/or increasing the value of the assets concerned, and ensuring transparency, accountability, and public confidence in the effectiveness of such management;

- Providing concrete tools and mechanisms to State Parties to share confiscated assets;
- Introducing – in a manner that is mindful of the need to respect fundamental rights and freedoms – non-conviction-based (NCB) confiscation procedures, and enabling the execution of NCB forfeiture decisions rendered in foreign jurisdictions.

(1) Looking at **asset management**, it is important to note that the Warsaw Convention provides for a broad and general obligation to manage frozen and seized proceeds of crime, and property of equivalent value. Inadequate management measures have been found to thwart the entire asset recovery process. Executing foreign confiscation requests takes time, which is why preserving the value of assets is of significant importance. Consequently, a consistent asset management system needs to be applied across the State Parties to avoid asset depreciation and unduly high maintenance costs.

A number of good practices in this context have already been developed by State Parties and were thoroughly reviewed by the COP in its recent Thematic Monitoring Report on Article 6 CETS No. 198 (Management of Frozen or Seized Property). At the same time, issues related to the management of confiscated assets have recently been raised by the Parliamentary Assembly of the Council of Europe and should be considered both in the context of the effectiveness of domestic frameworks, and in the context of international cooperation. These issues include introducing, or further promoting, the possibility of social re-use of confiscated assets; establishing a centralised institution at the national level responsible for managing such assets (including both movable and immovable property), with the necessary powers and resources to administer the assets concerned and make them available for social purposes, in co-operation with local public and non-governmental bodies; giving priority to using confiscated funds to compensate direct and indirect victims, according to a sufficiently broad definition; using part of the confiscated assets and items to enhance police and judicial capacity to identify, seize, and confiscate as many criminal assets as possible; as a state requesting the return of funds seized from a requested state, providing the latter, in adherence to the principles of transparency and accountability, with precise assurances as to the manner of disposal of the returned funds (restoration to legitimate owners, compensation of victims, social reuse, etc.); and informing the public on how returned confiscated assets will be utilised, managed, and monitored in order to maintain public confidence in the system.

(2) The **sharing and return of confiscated assets** are inextricably linked to their proper management and a key element in the asset recovery process. Many of the major financial crimes committed today have a transnational component and require the cooperation of numerous jurisdictions, through financial intelligence, law enforcement, and mutual legal assistance channels. Such cooperation often results in successful prosecutions. Nevertheless, when assets are finally confiscated, they usually stay in the jurisdiction where they were originally seized. They are rarely returned or shared with the country of origin of the proceeds or with jurisdictions that contributed to the investigation, resulting in a considerable number of victims facing difficulties in obtaining compensation for the harm caused by crimes committed against them. The World Bank estimates that only 3% of the proceeds are returned to developing countries.[16] This contributes to the growing economic disparities between nations and raises questions about the fairness of international legal norms and principles.

Article 25 of the Warsaw Convention already provides that a State may, at the request of another Contracting State give special consideration, in accordance with its domestic law or administrative procedures, to the concluding agreements or arrangements with other Contracting Parties on the sharing of such property on a regular or case-by-case basis. The proposed Protocol would aim at ensuring that State Parties have an *obligation* to enter into asset sharing negotiations and agreements, including a fair partitioning of the assets. The Protocol could also seek to further streamline and regulate one of the key requirements of CETS No. 198, namely State Parties' obligation to give priority consideration to victims' compensation when acting on a

foreign confiscation request. Further issues that have emerged as potential topics for discussion include ensuring transparency and accountability at every stage of the process; mandating States to consult at an early stage on who will bear the relevant costs; a formal requirement for the member state holding the asset to engage proactively and spontaneously with another State Party where it is clear to the holding State Party that the confiscated assets belong to legitimate owners in that other State, or that compensation is likely to follow; and introducing an asset-sharing model similar to the relevant EU provisions, but with an "opt out" in any given case by agreement of the States involved.

(3) When it comes to the **introduction of a legal framework for NCB confiscation**, no binding rules have been set by the Council of Europe in respect thereto. This mechanism may, however, provide an advantageous solution for effectively addressing the need to secure the final confiscation of assets under particular circumstances (e.g., when the statute of limitations for the underlying crimes has run out), as long as the measures undertaken constitute a lawful and proportionate interference with the peaceful enjoyment of one's possessions. On the other hand, State Party approaches to NCB confiscation differ notably. In many cases, opposing legal principles and human rights reservations are cited as a barrier to the introduction of this measure into domestic law. Equally, whilst NCB confiscation is being increasingly adopted by States Parties, a unified approach has yet to be developed in rendering international assistance in NCB confiscation cases. The matter therefore calls for careful consideration and analysis. At a minimum, the proposed Protocol could seek to foster international cooperation among the State Parties in obtaining evidence for purposes of NCB confiscation procedures, and to encourage State Parties to endeavour to recognise and execute foreign NCB confiscation orders as best as they can.

IV. The Way forward

Whereas the global landscape of fighting organised crime has considerably changed in recent years, the scarce statistics on the confiscation of proceeds from illicit activities that do exist show that significant improvements are still needed. In this context, practical obstacles to cross-border confiscation and the confiscation of illicit assets where, for various reasons, perpetrators cannot be criminally convicted, still present the key areas of concern. As noted in the Explanatory memorandum to Resolution 2218 (2018) of the Parliamentary Assembly of the Council of Europe:[17]

> [t]he fundamental threat to the rule of law and democracy posed by the massive financial resources accruing in the hands of transnational organised criminal groups urgently requires that the overwhelming majority of States that are not (yet) under the influence of these networks fully co-operate among themselves in order to seize a sizeable chunk of these criminal assets, year after year, so that the financial power of the criminals can be contained and even rolled back.

This high-level statement forms a basis for what is considered to be a key priority area the future protocol to the Warsaw Convention (CETS No. 198) should cover. To sum things up, an additional Protocol would allow the Parties to benefit from a smooth and streamlined cooperation, enabling them to at a minimum (i) benefit from asset management in a way that preserves or even increases the value of the seized/confiscated property and that also disposes of such property for the compensation of the victim or for social purposes, in a manner that is efficient and transparent; ii) enable direct access to and enforcement without delay of asset sharing agreements and arrangements among the Parties; and (iii) provide mutual legal assistance in cases involving NCB confiscation. These elements would make the future protocol a unique legal instrument which would provide for swift and prompt cooperation among all of its Parties.

The Council of Europe, a pan-European standard-setter with vast experience in this matter, is conscious of the permanent threat posed by organised and economic crime, but also of the need to ensure that any measure taken does not have a disproportionate impact on fundamental human rights. Its knowledge and expertise are thus indispensable in steering and supervising the negotiation and finalisation of the upgraded standards in the asset recovery area. In order to live up to that ambition, close cooperation among its relevant bodies, its member states and expert community is not only necessary, but also the expected way forward in this direction.

1. CETS No. 198, available at: <https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=198>. All hyperlinks in this article were last accessed on 19 February 2024.↩
2. See <https://www.coe.int/en/web/cop198> for more information about the convention.↩
3. European Commission, Directorate-General for Migration and Home Affairs, *Mapping the risk of serious and organised crime infiltrating legitimate businesses – Final report*, edited by E. Disley, S. Hulme and E. Blondes (eds), Publications Office, 2021, available at: <https://data.europa.eu/doi/10.2837/64101>. See also the overview of confiscation and asset recovery at the following Commission website: <https://home-affairs.ec.europa.eu/policies/internal-security/organised-crime-and-human-trafficking/confiscation-and-asset-recovery_en>.↩
4. CETS nos. 30, 141, 173, 174, 185 and 197.↩
5. Chapter V, Art. 51-59 UNCAC are devoted to asset recovery, notably: direct recovery of assets through the use of civil proceedings (Art. 53), international cooperation for confiscation (Arts. 54 and 55), and return and disposal of assets (Art. 57).↩
6. See for example Europol, *Does crime still pay? Criminal asset recovery in the EU*, 1 February 2016, accessible at <https://www.europol.europa.eu/publications-documents/does-crime-still-pay>.↩
7. MONEYVAL *Strategy on anti-money laundering, combating the financing of terrorism and proliferation financing* (2023-2027).↩
8. MONEYVAL *Annual Report for 2022*, July 2023, p. 13.↩
9. COM(2022) 245 final.↩
10. See press release of 22 September 2022: "FATF and INTERPOL intensify global asset recovery", available at: <https://www.fatf-gafi.org/en/publications/Methodsandtrends/FATF-INTERPOL-intensify-global-asset-recovery.html>.↩
11. See in this respect European Court of Human Rights, *Criminal Asset Recovery - Selected Judgments and Decisions*, March 2013.↩
12. See Meeting Report of the 5th meeting of the Conference of the Parties, Strasbourg, 12-14 June 2013.↩
13. M. Polaine, PC-OC(2019)04REV, Strasbourg, 30 August 2019, available at: <https://rm.coe.int/pc-oc-2019-04-final-reportre-v30-08-19/1680972d47>.↩
14. Declaration of Ministers and High level delegates of the member states and territories of MONEYVAL, Warsaw, 25 April 2023. See also Basic Objective 4.1. – MONEYVAL Strategy on anti-money laundering, combating the financing of terrorism and proliferation financing (2023-2027).↩
15. See Meeting Report of the 15th meeting of the Conference of the Parties, Strasbourg, 9-10 November 2023.↩
16. Specific figures have been produced by the STAR Initiative on the repatriation of proceeds in foreign bribery cases, whereby only 3.3% are being returned or ordered returned to the countries whose officials were bribed or allegedly bribed; see *"Left out of the Bargain - Settlements in Foreign Bribery Cases and Implications for Asset Recovery"*, 2014.↩
17. <https://pace.coe.int/en/files/24507/html>.↩

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