

Asset recovery

Working with the EPPO at decentralised level –
Training materials for prosecutors and investigating judges



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A - The importance of asset recovery

Asset recovery is the task of recovery of assets that have been wrongfully taken: either stolen, fraudulently misappropriated or otherwise disposed of in a criminal intent to remove them from their rightful owner.

Other terms to describe the process of recovering the proceeds or instrumentalities of crime are “asset confiscation” or “asset forfeiture”.

A - The importance of asset recovery

Differences in domestic legislations and improvements in finance, transportation and communications technologies in the 20th and 21st centuries have made it easier for criminals to conceal massive amounts of stolen wealth in different places, such as offshore financial centres.

Criminals profit from differences in legal systems, the high costs in coordinating investigations, lack of international cooperation and different regimes of bank secrecy.

A - The importance of asset recovery

background and figures:

According to the World Bank, the cross-border flow of proceeds from criminal activity, corruption and tax evasion is estimated between US\$1–1.6 trillion per year. US \$20–40 billion of this flow originated in bribes to public officials from developing and transition countries.

Global money laundering transactions are estimated (by UNODC) at 2 to 5% of global GDP, or roughly \$1-2 trillion annually or between EUR 615 billion and EUR 1.54 trillion each year

A - The importance of asset recovery

social impact:

As stated by the World Bank in 2004, "corruption is... the single greatest obstacle to economic and social development. Corruption undermines development by distorting the rule of law and weakening the institutional foundation on which economic growth depends. The harmful effects of corruption are especially severe on the world's poorest, who are most reliant on the provision of public services, and are least capable of paying the extra costs associated with fraud and corruption".

A - The importance of asset recovery

social and legal impact:

Illicit transactions are a strategic threat to the economy of countries and their reputation, yet - according to the United Nations Office of Drug Crime (UNODC) -, less than 1% of global illicit financial flows are currently seized by authorities.

Money laundering facilitates economic crimes and illegal activities such as corruption, terrorism and drug and human trafficking.

The use of the internet and the increase in cybercrime is not only causing new types of money laundering to evolve, it is also making it harder and harder to combat.

A - The importance of asset recovery

Although there are different views on exactly what a successful and just confiscation regime should look like, confiscation is nonetheless widely recognised and promoted as a powerful weapon in the fight against serious crime and corruption. When successfully implemented, it has the potential:

- to protect the legitimate economy from corruption and the infiltration of illegal assets
- to bolster tax revenues in the legitimate economy
- to generate assets that can be used for the public good
- to assist in upholding the rule of law
- to undermine criminal incentives and deter illicit activities

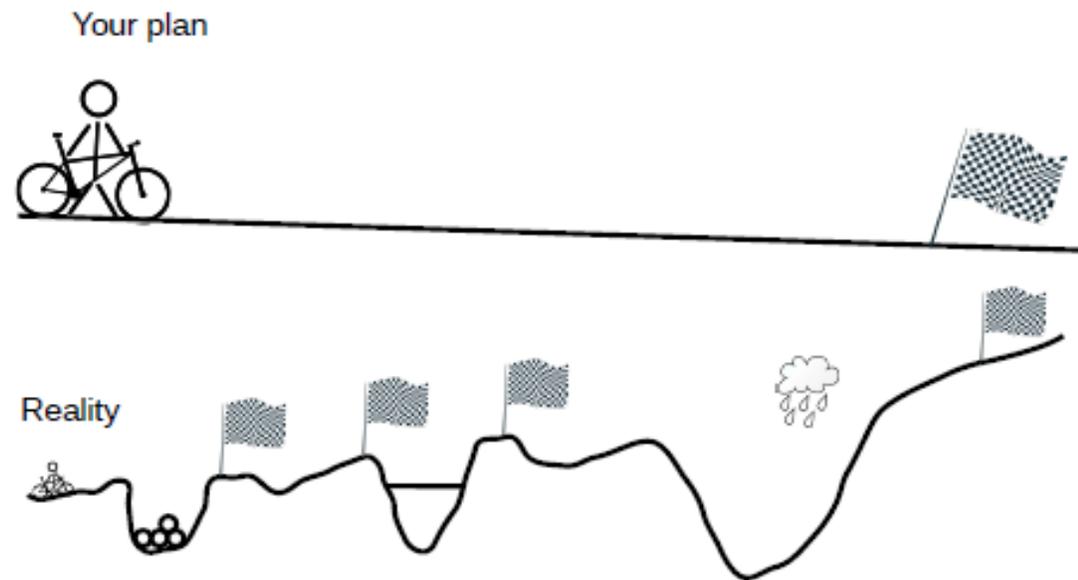
A - The importance of asset recovery

Recovering stolen assets is important for a variety of reasons

- Money as the incentive for criminal acts
- Loss for the victim to be protected: the EU as victim = all of us
- Deterrence for criminals

B - Processes of asset recovery

Asset recovery includes numerous processes such as the tracing, freezing, confiscation, and repatriation/ allocation of proceeds stored in foreign jurisdictions.



B - Processes of asset recovery

- Pre-Investigative/ intelligence gathering phase
(time to collect data)
- Investigative Stage: proceeds are located and identified
(time for: - requests for mutual assistance – information on bank accounts - temporary measures –seizure/freezing)
- Judicial phase – criminal conviction and decision on confiscation
(time to put things on a final legal basis)
- Disposal phase - property (or value) is confiscated
(time for - asset sharing agreements - compensation of victims)

B - Processes of asset recovery

Tracing > Find it

Freezing > Hold it

Confiscation > Keep it

Allocation > Use it

C - Tools for asset recovery

- International cooperation: the UNCAC
- EU tools for asset recovery
- Domestic tools for asset recovery

C - Tools for asset recovery

International cooperation: the UNCAC

Example of an international tool: the United Nations Convention against Corruption (UNCAC)

The UNCAC is the only legally binding universal anti-corruption instrument.

As defined under the UNCAC, asset recovery refers to recovering the proceeds of corruption.

The legitimate interests of countries wishing to recover illicit assets had to be reconciled with the legal and procedural safeguards of the countries from which assistance will be sought.

C - Tools for asset recovery

International cooperation: the UNCAC

The agreement on asset recovery is considered a major breakthrough and many observers claim that it is one of the reasons why so many developing countries have signed the UNCAC.

In the course of the negotiations, countries seeking to recover assets sought to establish presumptions that would make clear their ownership of the assets and give priority for return over other means of disposal. Countries from which the return was likely to be sought had some concerns about the language that might have compromised basic human rights and procedural protections associated with criminal liability and the freezing, seizure, forfeiture and return of such assets.

C - Tools for asset recovery

International cooperation: the UNCAC

Asset recovery is covered by Chapter V of the Convention (Articles 51–59)

Chapter V of the UNCAC establishes asset recovery as a "fundamental principle" of the Convention. The provisions on asset recovery lay a framework, in both civil and criminal law, for tracing, freezing, forfeiting and returning funds obtained through corrupt activities. The requesting state will in most cases receive the recovered funds as long as it can prove ownership. In some cases, the funds may be returned directly to individual victims.

C - Tools for asset recovery

International cooperation: the UNCAC

If no other arrangement is in place, States Parties may use the Convention itself as a legal basis.

Article 54(1)(a) of UNCAC provides that: "Each State Party (shall)... take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another state party"

Article 54(2)(a) of UNCAC also provides for the provisional freezing or seizing of property where there are sufficient grounds for taking such actions in advance of a formal request being received.

C - Tools for asset recovery

International cooperation: the UNCAC

Recognising that recovering assets once transferred and concealed is an exceedingly costly, complex and an all-too-often unsuccessful process, Chapter V of UNCAC also incorporates elements intended to prevent illicit transfers and generate records that can be used where illicit transfers eventually have to be traced, frozen, seized and confiscated (Article 52).

The identification of experts who can assist developing countries in this process is also included as a form of technical assistance (Article 60(5)).

C - Tools for asset recovery

EU-tools for asset recovery

1. Directive 2014/41/EU: *European Investigation Order (EIO)*
2. Directive 2014/42/EU: *Freezing and Confiscation*
3. Regulation 2018/1805: *Mutual recognition of Freezing Orders and Confiscation Orders*
4. Directive 2019/1153: *Use of financial and other information*

C - Tools for asset recovery

1. Directive 2014/41/EU

- Purpose: Investigations to obtain information/ evidence
- Tools:
 - Searches
 - Interception of telecommunication
 - Hearing
 - Request for data
 - Covert operations

C - Tools for asset recovery

2. Directive 2014/42/EU (“Confiscation Directive”):

- Value confiscation (art. 4)
- Extended confiscation (art.5)
- Third-party-confiscation (art.6)
- Pre-trial seizure (art.7) > freezing property
- Pre-trial selling/ surety (art.10) > management of frozen and confiscated property

C - Tools for asset recovery

3. Regulation 2018/1805/EU on the mutual recognition of freezing orders and confiscation orders

entry into force on 19 December 2020

C - Tools for asset recovery

3. Regulation 2018/1805/EU

Article 1: Subject matter

1. This Regulation lays down the rules under which a Member State recognises and executes in its territory freezing orders and confiscation orders issued by another Member State within the framework of proceedings in criminal matters.
2. This Regulation shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles enshrined in Article 6 TEU.
3. When issuing freezing orders or confiscation orders, issuing authorities shall ensure that the principles of necessity and proportionality are respected.
4. This Regulation does not apply to freezing orders and confiscation orders issued within the framework of proceedings in civil or administrative matters.

C - Tools for asset recovery

3. Regulation 2018/1805/EU

Double criminality: dual system, already known from EAW and EIO

- Listed criminal offences (art 3.1)
- Other criminal offences (art 3.2)

C - Tools for asset recovery

3. Regulation 2018/1805/EU

non-recognition and non-execution (especially: art. 8 and art. 19):

- Ne bis in idem
- Privilege/ immunity
- Freedom of press/ expression
- Freezing certificate is manifestly incorrect / incomplete
- Not a criminal offence under the law of the executing State
- Manifest breach of fundamental rights
- Rights of affected persons
- Trial in absentia

C - Tools for asset recovery

3. Regulation 2018/1805/EU

Management and disposal of frozen and confiscated property: art. 28

- Law of the executing state (art. 28.1)
- Prevention of depreciation in value (art. 28.2)
- Frozen property and money obtained after selling such property remain in the executing state (art. 28.3)
- handling of cultural objects (art. 28.4)

C - Tools for asset recovery

3. Regulation 2018/1805/EU

Disposal of confiscated property: art. 30

- Priority is given to the victims
- < EUR 10.000: 100% for the executing state
- > EUR 10.000: 50/50 between executing state and issuing state

Costs: art. 31

- generally: MS bear their own costs (art. 31.1)
- proposal in the case of large or exceptional costs (art. 31.2)

C - Tools for asset recovery

3. Regulation 2018/1805/EU

Liability and Reimbursement: art. 34

- rule: executing state is liable to an affected person
- internally: the issuing state shall reimburse the executing state
- BUT: if damage (or part of) is exclusively due to the executing state, then the states agree on amount reimbursed

C - Tools for asset recovery

4. Directive (EU) 2019/1153...

...on the use of financial and other information to combat serious crimes grants law enforcement authorities and Asset Recovery Offices with direct access to bank account information for the purposes of fighting serious crime and aims to improve the cooperation between law enforcement authorities and Financial Intelligence Units and facilitate the exchange of information between Financial Intelligence Units.

C - Tools for asset recovery

- domestic tools for asset recovery

(statements of the MS experts)

D - Asset recovery and EPPO

“[I] want the EPPO to be a flexible, result-oriented institution, whose effectiveness of proceedings will be accompanied by strict compliance with the fundamental guarantees of the persons who are subject to the investigations. In order to properly achieve its mission, the EPPO will have to be fully independent, acting only in the interests of the EU, without taking any instructions from either European or national authorities. **I also want it to become a center of excellence in the area of financial investigations and seizure of criminal assets, by implementing advanced standards in forensic accounting and data analysis.** My previous experience as the Chief Prosecutor of the Romanian National Anticorruption Directorate makes me also acutely aware of the challenges we are facing.”

(Laura Codruța Kövesi in 2019/ Group of States against Corruption (GRECO) 20th General Activity Report)

D - Asset recovery and EPPO

- Regulation 2017/ 1939
- Domestic laws in relation to EPPO

D - Asset recovery and EPPO

Regulation 2017/ 1939

Article 38: Disposition of confiscated assets

Where, in accordance with the requirements and procedures under national law including the national law transposing Directive 2014/42/EU of the European Parliament and of the Council, the competent national court has decided by a final ruling to confiscate any property related to, or proceeds derived from, an offence within the competence of the EPPO, such assets or proceeds shall be disposed of in accordance with applicable national law. This disposition shall not negatively affect the rights of the Union or other victims to be compensated for damage that they have incurred.

D - Asset recovery and EPPO

- Domestic laws in relation to EPPO

(statements of the MS experts)