



# Seminar 5: Asset recovery within the European Union: Council Framework Decisions of 2003, 2005 and 2006 and new developments in this area

**Copenhagen (DK), 24-25 October 2012**

Specific Grant Agreement JUST/2010/JPEN/AG/FPA/001  
Framework Partnership Agreement JLS/2007/JPEN-FPA/017

Improving Judicial Cooperation in Criminal Matters in the area of Freedom, Security and Justice, Institutional Processes and Topical Areas



## Gaps and shortcomings of the current EU regulatory framework

## New directions in EU legislation

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# EU Asset recovery

## – current framework and new directive

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## Topic and purpose of today's session

- Core of the seminar: Improving Judicial Cooperation in criminal matters
- Asset recovery within EU
  - Familiarity with EU rules on asset recovery
  - Familiarity with foreign legal systems
  - Familiarity with each other
    - A phone number?
    - And trust?

## Part I

### Current framework – gaps and shortcomings

#### Mutual Trust and Recognition TFEU art. 67

- TFEU Article 67(1)
  - The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. [...]
- Political and historical reasons for this “disclaimer”
- But other good reasons?

## Mutual Trust and Recognition TFEU art. 67

- TFEU Article 67(3).
  - The Union shall endeavor to ensure a high level of security through measures to prevent and combat crime [...] through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters [...]
- Mutual recognition – explicitly mentioned in the Treaty

## Mutual Trust and Recognition TFEU art. 82

- Article 82 (2)
  - 2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions [...EU] may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.
- Essence: Mutual recognition, but respect for national traditions.
  - Coherence and national acceptance of each criminal law system is important
    - Legitimacy and efficiency

## Mutual Trust

### – the reason for legislative proposals

- COM(2012)85 Proposal on confiscation:
  - “In this context, the Commission proposes a Directive laying down minimum rules for Member States with respect to freezing and confiscation of criminal assets through direct confiscation, value confiscation, extended confiscation, non-conviction based confiscation (in limited circumstances), and third-party confiscation. The adoption of those minimum rules will further harmonize the Member States' freezing and confiscation regimes, and thus facilitate mutual trust and effective cross-border cooperation.”
- Trust and efficiency

## Obstacles to confiscation

### – mutual trust?

- Matrix Insight Report 2009:
  - An evaluation of effectiveness
  - “Independent” evaluation of effectiveness?
  - No evaluation of human rights aspects required, but a part of the report
  - Found that judges and magistrates were skeptical about the value of criminal asset confiscation
    - Why??
      - Psychological factor?
      - Practical obstacles?
      - Legal obstacles?
      - Human rights aspects?
      - Criminological aspects?
      - ??

## Gaps and shortcomings, current framework

- Why ask for gaps?
  - Dynamic Political Environment
  - Reasoning is political with an aim
  - Proceeds of crime are X, confiscations are Y
  - Looking for gaps => demands for new legislation
  - Human rights gaps...?
  - Gaps in each and one of the national systems?
  - Gaps reflect cultural differences (legal cultural) and coherent national criminal law is important
  - Subsidiarity – relationship between national and international regulation

## Gaps and shortcomings, current framework

- Gaps – anyway
  - The link between criminal conviction and confiscation
    - No conviction, no confiscation (dead, fled, ill)
    - No proof of link between this particular asset and the criminal conduct of a certain person (extended confiscation)
    - Beyond reasonable doubt... (balance of probabilities)
    - Asset has been transferred to third party (third party confiscation)
    - Solution: Civil asset forfeiture?

## Confiscation and human rights

- Does ECHR art. 6 (1)+(2) apply?
- Does ECHR art. 7 apply?
- ECHR Prot. 1, art. 1 ?
- Confiscation = criminal charge? (Phillips case – all assets within 6 years purchase)
  - National classification of proceedings
  - Nature (character) of the proceedings
  - Nature and severity of the sanction
- Confiscation = penalty (Welch case)
- Confiscation = all guaranties in art. 6(2)?
  - Mr. P case

## Coffee break



## Part II

### New direction – proposal for a new directive

#### DIR 2012 – Legal basis

##### TFEU art. 82(2)

To the extent necessary to facilitate mutual recognition of judgments [...the EU may], establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

They shall concern:

- (a) mutual admissibility of evidence between Member States;
- (b) the rights of individuals in criminal procedure;
- (c) the rights of victims of crime;
- (d) any other specific aspects of criminal procedure which the Council has identified [...]

##### TFEU art. 83(1)

The [EU] may, by means of directives [...] establish minimum rules concerning **the definition of criminal offences and sanctions** in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis.

These areas of crime are the following [...]

## DIR 2012 – Legal basis

- Confiscation = “definition of criminal offences and sanctions” (Art. 83(1))
- => defined by EU as criminal sanctions
- => human rights implications
- => no legal basis for regulating civil forfeiture?

## DIR 2012 – New elements

- Further harmonization (leaving alternative ways of implementation behind, FRA 2005, art. 3(2))
- Extended confiscation (art. 4)
  - Not only proceeds of crime. Other property belonging to convicted.
  - Substantially more probable
  - Exceptions (prescription, ne bis in idem)
- Non-conviction based (art. 5)
  - No conviction, but “would have led to a criminal conviction”
  - Death, permanent ill, fled etc.

## DIR 2012 – New elements

- Third party confiscation (art. 6)
  - Proceeds of crime transferred to 3P
  - Other property transferred to avoid confiscation
  - Only if
    - 1) Received under market value and a “reasonable person in the position” would suspect to be derived from crime (or transferred to avoid C.) and
    - 2) Confiscation at the convicted is unlikely to be possible (or unique objects)
- Procedural measures (art. 7-11)
  - Freezing measures
  - Safeguards
  - Determination of the extent of the confiscation
  - Reporting

## DIR 2012 – Purpose

- Widening the possibility of confiscation
- Harmonizing the rules on confiscation
  - Approximation (minimum rules)
  - Enhance mutual trust
  - Enhance efficiency of confiscation in cross border cases
- I.e. fight crime and withdraw illegal means from the legal market

## DIR 2012 – Application

### Art. 4(2b)

How can one determine (and apply) – according to national implementation law – art. 4 (2b): "have already been subject to criminal proceedings which resulted in the final acquittal of the person" ...?

(...problem related to extended confiscation of property belonging to the accused, when previously acquitted of for example drug related crime)

(...not impossible, but a challenge...)

## DIR 2012 – Application

Art 5. "proceedings which could ... have led to a criminal conviction".

- The court de facto ruling on "guilt" and "criminal offence committed", without a real criminal trial?
- Compare art. 8(5) – defense "relating to the establishment of the criminal offence".
- This is not civil forfeiture in the common law systems (not a proceeding against a person – no possibility of conviction necessary).
- This is confiscation based on criminal law (blame etc.), but no real trial, no hearing of the accused etc.

## DIR 2012 – Human rights issues

- The DIR proposal deals with HR on one page
- Conclusion: No violations (seems to be based on obiter dictum in Walsh, app. 43384/05 (decision – inadmissible))
- “According to domestic law, recovery proceedings are regarded as civil, not criminal. [...] *The domestic courts considered that the purpose of the proceedings was not punitive or deterrent but to recover assets which did not lawfully belong to the applicant [...]* **The Court also notes that there was no finding of guilt of specific offences** and that the High Court judge in making the order was careful not to take into account conduct in respect of which the applicant had been acquitted of any criminal offence. “ (emphasis added).

- DIR Art 5. “proceedings which could ... have led to a criminal conviction”.
  - => Establish (personal) guilt. “led to CONVICTION”
- Walsh case: No personal guilt involved. Civil asset forfeiture. But are EU-rules civil (legislative basis)?
- ECHR Art. 6 applies to confiscation proposed in the DIR? Phillips case (app. 41087/98)
  - Confiscation part of sentencing
  - Art. 6 applies to the whole proceeding, however, presumption of innocence does not
  - Proposed model = independent proceeding (no prior conviction) => “criminal” confiscation without establishment of personal guilt...



## DIR 2012 – Human rights issues

- Right to take part (if not waived his rights) – or obtain a fresh determination
  - Permanently ill...not waived his rights? Enough with a defense lawyer (Art. 8(5)? Otherwise the case must be reopened, if he recovers?
  - Dead?
- Which kind of court in your country?
  - Civil and/or administrative court? (Proposal p. 11)  
=> could have led to conviction