CONFISCATION OF INSTRUMENTALITIES AND PROCEEDS OF CORRUPTION CRIMES:
STANDARDS, BEST PRACTICES, CHALLENGES

OECD ACN THEMATIC STUDIES

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Confiscation and its goals
International standards
Objects of confiscation measures
Corruption offenses entailing confiscation
Types of confiscation
Scope and burden of proof, defense
Application of confiscation measures
RECOMMENDATIONS
Principles and goals of confiscation

UNDERLYING PRINCIPLE: Nobody should benefit from crime

TREND: Not only proceeds from a specific corruption offence are subject to confiscation, but also those assets whose lawful origin has not been established in adversarial proceedings

GOALS:
- prevention
- recovery
- punishment
CONFISCATION SHALL MEAN THE PERMANENT DEPRIVATION OF PROPERTY BY ORDER OF A COURT OR OTHER COMPETENT AUTHORITY

(Article 2, United Nations Convention against Corruption 2003)

CONFISCATION MEANS A FINAL DEPRIVATION OF PROPERTY ORDERED BY A COURT IN RELATION TO A CRIMINAL OFFENCE

(Article 2, Directive 2014/42/EU)
Confiscation of instrumentalities and proceeds of crime is a mandatory provision of all international anti-corruption documents:

- Article 31, United Nations Convention against Corruption 2003
- Article 19, Council of Europe Criminal Law Convention on Corruption 1999
- European Union Convention against Corruption Involving Officials 1997
Challenges

- Outdated provisions on confiscation as a criminal sanction
- Limited scope of confiscation
- Confiscation of assets transferred to third parties
- Not mandatory for all corruption offences
- Advanced forms of confiscation are rare
- *Bona fide* third party rights not protected
- Poor enforcement
- Lack of statistics
Targets for confiscation

- Third-party owned
- Instrumentalities
- Direct proceeds
- Indirect proceeds
- Beneficial ownership
- Value-based
- Mixed proceeds
Indirect proceeds

- Not all possible indirect proceeds and benefits thereof are covered
- No clear rules of assessment
- Lack of well-established case-law

RECOMMENDATIONS:

Clarify the concept of proceeds to cover all possible indirect proceeds of corruption crimes, including subsequent reinvestment or transformation of direct proceeds, and benefits from any kind of proceeds.

Establish clear regulation and methodology to assess derivative (indirect) proceeds of corruption.

Develop case-law in confiscation of indirect proceeds of corruption.
Third-party owned proceeds

- Not all countries provide for confiscation of instrumentalities and proceeds of crime held by third parties
- Terms and limits of confiscation are not clearly established

RECOMMENDATIONS:
Provide for confiscation of instrumentalities and proceeds of crime that were transferred to **knowing third parties**, both natural and legal persons
Establish **clear criteria** (both objective and subjective) for its application
Introduce **effective guarantees** for bona fide owners (notification, presence, right to be heard, to appeal against judgments, etc.)
Criteria to be used

**OBJECTIVE**

KNOWING third parties transferred free of charge or in exchange for an amount significantly lower than the market value

OR

formally transferred at the market value but to affiliated person and without the actual payment

**SUBJECTIVE**

third party knew or ought to have known that the property acquired through or as a result of a crime

OR

third party knew that the purpose of transfer was to avoid confiscation
Typology

Criminal confiscation

Sanction
Procedural
Instrumentalities and Proceeds

Conviction based
Non-conviction based
Extended

Civil confiscation
## Types of confiscation in ACN countries

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<th>Type of confiscation</th>
<th>ACN countries</th>
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<td>Criminal confiscation as a sanction</td>
<td>Armenia, Kazakhstan, Kyrgyzstan, Latvia, Ukraine</td>
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<td>Criminal confiscation of instrumentalities and proceeds of crime (<em>special confiscation</em>)</td>
<td>Azerbaijan, Armenia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Romania, Serbia, Slovenia, Ukraine, Croatia, Montenegro, Estonia</td>
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<tr>
<td>Criminal extended confiscation</td>
<td>Lithuania, Moldova, Poland, Romania, Serbia, Croatia, Montenegro, Estonia</td>
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<td>Civil conviction-based confiscation</td>
<td>Georgia, Ukraine</td>
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<td>Civil non-conviction based confiscation</td>
<td>Albania, Slovenia</td>
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<tr>
<td>Administrative confiscation</td>
<td>Azerbaijan, Bulgaria, Kyrgyzstan, Romania, Estonia</td>
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Criminal confiscation as a sanction

MEANING:
All property of convicted person is subject to confiscation including the one that has been acquired on a legal basis and from legitimate sources.

- discharges a punitive function
- has no clear limits
- contradicts the proportionality principle

RECOMMENDATION:
Consider a transition from this type of confiscation to the confiscation of instrumentalities and proceeds of crime (special confiscation) in combination with criminal extended confiscation or an autonomous (non-criminal) confiscation of unjustified assets with the reversed burden of proof.
Special confiscation

**MEANING:**
Only specific objects relating to committing offence – instrumentalities and proceeds of crime as well as profits from them, are subject to confiscation

- clear link (crime-asset)
- mostly conviction-based
- factors hindering the effectiveness: absconding or serious illness of the accused, termination of a case on specific grounds etc.

**RECOMMENDATION:**
Consider introduction of non-conviction based special confiscation when the special confiscation is not possible because of offender’s death or other circumstances hindering seriously and continuously criminal prosecution, in adversarial proceedings and with all procedural guarantees ensured

- for offenses that might have resulted, directly or indirectly, in financial benefits, and
- where such proceedings could have led to criminal conviction if the offender had been able to stand trial
Budva case (Montenegro)

- Senior politician involved
- Instructions to officials of municipality of Budva town to enter into commercial agreement with a particular company (construction of 7-storey building)
- The company would pay fewer taxes and municipal payments – politician would receive in exchange a benefit of 2 floors of the building
- Defendants: politician, municipal officials and company (corruption + organized crime)
- Result: plea agreement with politician and company with conditions obliging to return material benefit
- €19 million recovered
Criminal extended confiscation (1)

**MEANING:**
Confiscation of the property or its value which exceeds the **legal income** of the [convicted] person

- usually based **upon conviction** for committing corruption crimes or money laundering of particular **severity** and/or resulting in **pecuniary gain**
- applied to the property of a **convicted person** and **knowing third parties**
- applied to cases where value of the property is **disproportionate to the legal income** of the person (or exceed the limit stipulated by law)
- property acquired within the **time-limits** stipulated by law is considered
- **presumption of criminal origin** of property and **reversal of burden of proof**
- all assets value of which **exceeds legal income** of a person are subject to confiscation
<table>
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<tr>
<th>Country</th>
<th>Regulations</th>
<th>Application</th>
<th>Time criteria</th>
<th>Criteria for excess</th>
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<tr>
<td>Lithuania</td>
<td>Art. 72-3 of the Criminal Code</td>
<td>Less serious, serious, more serious intentional crime; possibility to gain financial benefits</td>
<td>Five years before and after the crime</td>
<td>250 monthly subsistence wages</td>
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<tr>
<td>Estonia</td>
<td>Art. 83-2 of the Criminal Code</td>
<td>This type of confiscation should be expressly provided for in a sanction imposed by a Criminal Code article (bribe taking and giving, active and passive bribery in the private sector, embezzlement or fraud if committed by an official, money laundering)</td>
<td>Ten years before the first-degree crime*</td>
<td>Any difference</td>
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<td>Five years before the second-degree crime*</td>
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<td>* Only to third parties</td>
<td></td>
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<td>Romania</td>
<td>Art.112-1 of the Criminal Code</td>
<td>Corruption crimes and money laundering that entail potential punishment of at least four years of imprisonment and could generate financial benefits</td>
<td>Five years before and, where necessary, after the crime and before initiation of proceedings</td>
<td>Flagrant excess</td>
</tr>
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<td>Moldova</td>
<td>Art. 106-1 of the Criminal Code</td>
<td>The Article contains a list of crimes (all corruption crimes and money laundering), where act should be motivated by greed</td>
<td>Five years before and after the crime, before the verdict date</td>
<td>Significant excess</td>
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<td>Poland</td>
<td>Art.45 of the Criminal Code</td>
<td>A crime that has resulted or may result in financial benefits, or an organized crime entailing potential penalty of at least five years of imprisonment</td>
<td>From five years before the crime to the date of verdict</td>
<td>No</td>
</tr>
<tr>
<td>Serbia</td>
<td>Special law</td>
<td>Aggravated corruption and money laundering crimes + proceeds from them exceed 1.5 million dinars</td>
<td>No</td>
<td>Flagrant excess</td>
</tr>
<tr>
<td>Croatia</td>
<td>Art.78 of the Criminal Code</td>
<td>Corruption offenses under the jurisdiction of the Office for Office for the Suppression of Corruption and Organized Crime, where such crimes resulted in financial benefits</td>
<td>No</td>
<td>Any difference</td>
</tr>
<tr>
<td>Montenegro</td>
<td>Special law</td>
<td>Corruption and money laundering crimes listed in Article 2 of the Law, where such crimes resulted in financial benefits</td>
<td>No</td>
<td>Flagrant excess</td>
</tr>
</tbody>
</table>
RECOMMENDATION:

- **Envisage** in the legislation the **criminal extended confiscation** in addition to the special confiscation if appropriate

- Application: in case of conviction for corruption and money laundering resulting in **potential financial benefits**

- Extend the confiscation to the property of the **convict and knowing third parties** provided that the **cost of which mismatch legal income** (or the difference exceeds the limits established by law) and the property has been acquired **within the timeframes** established by law

- Introduce the **presumption of criminal origin of property** with the simultaneous reversal of burden of proof to the convict and/or knowing third parties

- Court shall be satisfied that the property in question **is derived from criminal conduct** (based on such a clear disproportion)
Three officials of the Ministry of Finance involved

Extortion and receiving a bribe (€ 50,000) under conspiracy from director of private company

Confiscation of target of crime (special confiscation) +

Confiscation of 1,063,609.87 Croatian Kuna from mother of the Accused 1 (extended confiscation)

The assets owned by his wife, mother and farther were compared with their incomes, personal expenses and interest rates on loans; as a result significant discrepancy in Croatian Kuna 1,433,765.87 was found

Accused 1 provided evidence to prove more likely his previous savings (Deutsche Marks 100,000) and equivalent in Kuna was deducted from the amount subject to confiscation

Court found that the discrepancy was the result of the criminal model of behavior of the Accused 1 and applied the so called “extended confiscation of pecuniary gain” holding to confiscate amount of money (1,063,609.87 Croatian Kuna)
Autonomous (non criminal) confiscation

MEANING:
Confiscation designed to deprive the perpetrators of unjustified assets through simplified approach to prove the illegal nature of the relevant assets

Civil / Administrative
Conviction-based/ Non-conviction based

RECOMMENDATION:
Consider introduction of autonomous (non-criminal) confiscation under the civil or administrative procedure of the unsubstantiated assets with the reversed burden of proof upon the offender and knowing third parties and using alleviated standards of proof (preponderance of evidence, balance of probabilities or similar standards) in cases clearly defined by law and subject to fair trial guarantees

States may consider the possibility of requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent it is consistent with the ... principles of domestic law and the nature of ... proceedings.

(par.8, art.31 of UNCAC)
Corruption in public procurement (Georgia)

- Five public officials responsible for public procurement ensured that large-scaled public contracts have been awarded to private companies where they had the beneficial ownership.
- Crimes: abuse of power and embezzlement of state property.
- Criminal investigation + financial investigation (prosecutor responsible for asset recovery) ➔ Civil suit.
- Defendants in civil suit: 5 convicts, 9 family members, 5 associated persons.
- Prosecutor: none of the defendants had a source of income to ensure acquisition of so many valuable assets within the period under consideration.
- Defendants failed to provide the evidence to deny the claim.
- Court confiscated all unjustified assets under the civil law in the amount of USD 5,600,000.00 (money, 30 houses, 3 motor vehicles, 2 plots of land, 3 office premises, stocks, restaurant, plant, filling station and bank).
Civil confiscation and the ECtHR

...As regards property presumed to have been acquired either in full or in part with the proceeds of drug-trafficking offences or other illicit activities of mafia-type or criminal organizations, the Court did not see any problem in finding the confiscation measures to be proportionate even in the absence of a conviction establishing the guilt of the accused persons.

The Court also found it legitimate for the relevant domestic authorities to issue confiscation orders on the basis of a preponderance of evidence which suggested that the respondents’ lawful incomes could not have sufficed for them to acquire the property in question.

Indeed, whenever a confiscation order was the result of civil proceedings *in rem* which related to the proceeds of crime derived from serious offences, the Court did not require proof “beyond reasonable doubt” of the illicit origins of the property in such proceedings. Instead, proof on a balance of probabilities or a high probability of illicit origins, combined with the inability of the owner to prove the contrary, was found to suffice for the purposes of the proportionality test under Article 1 of Protocol No. 1.

The domestic authorities were further given leeway ...to apply confiscation measures not only to persons directly accused of offences but also to their family members and other close relatives who were presumed to possess and manage the ill-gotten property informally on behalf of the suspected offenders, or who otherwise lacked the necessary *bona fide* status.

RECOMMENDATION:
Take actions to ensure that agencies applying confiscation have enough resources in each of the three areas to ensure effective application of confiscation measures. Provide regular training on financial investigations, court proceedings and practices in application of confiscation of corruption-derived assets.
Discussion questions

• What legislative and practical challenges does your country face?

• Is the confiscation effective in your country? Why yes or why not? What areas should be improved?

• Are there recent precedents of successful confiscation of corruption-derived assets?