

Enforcing non-conviction-based confiscation in Europe

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1 Introduction

In cases of mutual legal assistance (MLA) in criminal matters, law enforcement authorities are often confronted with a variety of legal provisions potentially applicable to a case. A norm of a bilateral MLA treaty and a norm in domestic MLA law may address the same issue. Choosing the solution that is more favourable to the assistance required is the rationale behind the “favourability principle”.² A refusal of MLA, however, should be the *ultima ratio*, meaning the measure of last resort.

Favourability is deliberately formulated in very broad terms in the UNCAC³ with a view to enable States Parties to provide MLA to “the widest measure”.

One such application of the favourability principle is the granting of MLA when a Requesting State seeks to recover assets from a Requested State through non-conviction-based confiscation (NCBC). According to the favourability principle, the requested state should only be permitted to refuse MLA when its legal fundamentals are seriously and concretely endangered.

2 Objectives of the panel

1. Advocate for an interpretation of favourability that promotes NCBC as a valid basis to recover ill-gotten assets.
2. Encourage the introduction of the obligation to “sufficiently explain” the decision of the Requested State to refuse MLA on the grounds that NCBC is irreconcilable with its legal framework.
3. Pledge for a policy dialogue aiming at revising such a rule or practice so as to meet UNCAC’s standard.⁴

¹ The views and opinions expressed in this paper are those of the author and do not necessarily reflect the official position of the Basel Institute on Governance or its International Centre for Asset Recovery.

² BGE 132 II 178, 2.1 / CCR RR.2007.48, 2.4. In Switzerland, for instance, the courts have consistently permitted the application of domestic law where it is more favourable to cooperation than treaty law.

³ Art. 46 UNCAC [...] “2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings [...].

⁴ If a State party’s current mutual legal assistance laws and treaties are not broad enough to cover all of the corruption offences covered by the Convention, amending legislation may be necessary, Legislative guide for the implementation of the United Nations Convention against Corruption, p. 202

3 Scenario

The scenario is taken from recent international asset recovery cases in which tens of millions of dollars have been recovered by the Peruvian authorities from Switzerland by means of NCBC. It targets the (narrow) situation in which a decision based on the Peruvian NCBC model is enforced in Switzerland, where confiscation remains fundamentally attached to criminal law. The scenario is however useful for other similar jurisdictions and is the basis to further discuss a model of NCBC that is “enforceable” in European civil law States.

This presentation is divided in three parts:

1. Conceptualization of confiscation.
2. A discussion of the “supposed affected rights” in NCBC procedures.
3. Lessons learned from international asset recovery efforts involving Peru and Switzerland.

4 What is confiscation?

During the Middle Ages, confiscation was a widely unpopular measure with the general public, as it was often applied for malicious purposes. The abolition of confiscation was therefore a key issue for reformers during the Age of Enlightenment and featured, in particular, as a demand in the first declarations of human rights.⁵

Only in the context of the growing international trade in illegal drugs was the wider concept of the confiscation of ill-gotten gains reintroduced, with a distinctively different conception and scope than its medieval predecessors: in most countries, confiscation is now considered a reparative measure that only seeks to target illicit wealth.

According to UNCAC, confiscation is the permanent deprivation of assets by a competent authority. In most cases, a confiscation order is rendered because assets are the proceeds of crime. In simple terms, proceeds of crime must be taken away in order to ensure that “crime does not pay”.

The reparative rationale of confiscation has important consequences for its procedural treatment in many countries. In common law jurisdictions, as well as a rising number of European and Latin American countries, confiscation is treated as a “civil” measure closer to the “unjust enrichment” of civil law than to a sanction imposed by criminal law. A direct consequence of this interpretation is that fundamental safeguards of criminal procedure such as the presumption of innocence do not apply as it is not a criminal accusation. This enables the confiscation of illicit assets in simplified procedures.

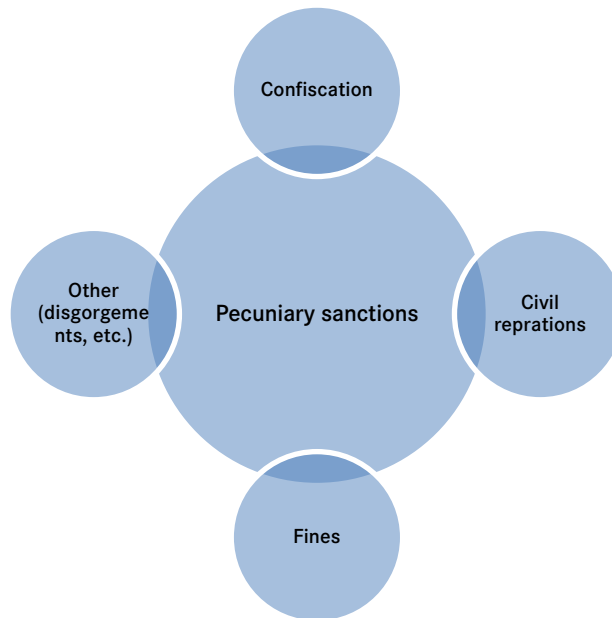
States applying this conception do not consider confiscation as an “accusation in criminal matters” according to art. 6 § 2 ECHR⁶ as it has remedial (as opposed to punitive) effects and is not directed against a person but against an asset.

In its modern understanding, even when confiscation is considered to be a pecuniary sanction, it is neither a civil reparation nor a fine. A civil reparation is based on the concept of harm while a fine is a criminal sanction, and as such calibrated to the culpability of the offender. Confiscation, on the other hand, has

⁵ Pieth, M. Article 3, OECD Convention on Bribery, A commentary, 2nd Edition, 305.

⁶ See art. 8(2) of the Interamerican Convention on Human Rights.

its basis in the provenance of the funds derived from the crime. It is said that confiscation in its basic form targets the assets that are the “proceeds” of crime (reparative measure).



Box 1: European Court of Human Rights – relevant cases

Dassa Foundation v. Liechtenstein, 10 July 2007, Appl. No. 696/05

“ [T]he forfeiture of property ordered as a result of civil proceedings in rem, without involving the determination of a criminal charge, is not of a punitive but of a preventive and/or compensatory nature and thus cannot give rise to the application of the provision in question” (referring to the presumption of innocence as per Art. 6(2) European Convention on Human Rights).

Butler v. the UK, 27 June 2002 Appl. No. 41661/98, 9

“[T]he forfeiture order was a preventive measure and cannot be compared to a criminal sanction, since it was designed to take out of circulation money which was presumed to be bound up with the international trade in illicit drugs. It follows that the proceedings which led to the making of the order did not involve 'the determination [...] of a criminal charge'.

Gogitidze and others v. Georgia (2015), 12 May 2015, Appl. No. 36862/05, para. 105, 121

“The Court reiterates its well-established case-law to the effect that proceedings for confiscation such as the civil proceedings in rem in the present case, which do not stem from a criminal conviction or sentencing proceedings and thus do not qualify as a penalty but rather represent a measure of control of the use of property within the meaning of Article 1 of Protocol N° 1 [European Convention on Human Rights (ECHR)] cannot amount to the “determination of a criminal charge” within the meaning of Article 6 § 1 of the Convention and should be examined under the “civil” head of that provision”.

5 Peru’s NCBC law: Extinción de Dominio

The Peruvian Extinción de Dominio law follows the same reasoning as the one exposed in the ECHR caselaw. It is directed against the asset and has a reparative nature. Its essential aim is to take assets

linked to crimes out of circulation in a special and modulated proceeding depending on its object (the asset). In any event, it is not intended to punish the perpetrator of the crimes.

Box 2: The distinguishing features of NCBC and criminal confiscation

	Extinción de Dominio	Traditional criminal confiscation
Procedural focus	<i>In rem</i> The confiscation is targeted against the illicit assets (<i>in rem</i>). The asset holder is essentially a third party.	<i>In personam</i> The confiscation is part of proceedings targeted against an individual or a company and usually ordered as part of the conviction or thereafter.
Standard of proof	Balance of probabilities The standard of civil law is applicable, which roughly translates into a 50%+1 certainty. A criminal conviction is not required.	Beyond reasonable doubt The standard of criminal law is applicable, which roughly translates into a 95% certainty. Confiscation must follow a previous criminal conviction.
Spread	Latin America A steadily increasing number of Latin American countries are introducing this type of law. Similar laws exist in many common law countries and even a few countries of the civil law tradition.	Near universal Virtually all countries know some form of criminal confiscation.

The main problem is that a pure *in rem* action - directed against the asset itself - is an alien concept to European civil law countries. This concept, imported from the US legal arsenal, enables the use of a completely different procedure governed by civil standards but granting, however, effective procedural rights to the asset holder in a twofold judicial process.

6 Fundamental rights in play

The Peruvian Extinción de Dominio law grants due process and fundamental rights without restriction. They are in fact fundamental principles of this piece of legislation.⁷ The asset holder is granted a large number of procedural rights, including the right to a fair hearing, the right to inspect the casefile, the right to provide evidence, as well as the right to appeal and to a review of the judicial sentencing, among the most important.

When a constitutional right is deemed violated, the Constitutional Tribunal may be called to rule on the alleged violation. Likewise, the Inter-American Court of Human Rights remains an option when the legal requirements are met.

But what are the fundamental rights affected by NCBC?

The discussion in Europe and Latin America revolves around two fundamental rights that could potentially be affected if confiscation laws become more incisive: the right to property and the protection of procedural guaranties.

⁷ Art. 2.6 Preliminary Title, Legislative Decree N° 1373.

6.1 Property rights

The impact of NCBC on an essential right in the modern interpretation of the liberal State has been at the centre of the debate in the last decade and must be seriously considered.

It essentially opposes two interests: on the one hand, the criminal policy imperatives, and on the other, the protection of property rights essential to the economy of the State. Legislative developments arising from criminal policy discourse have increased the focus on “effectiveness” in recent years, generating a large number of differing typologies of NCBC.

Latin American States had brought innovative understanding to overcome the difficulties linked to the protection of the right to property: *property must have a licit origin to deserve the protection of the State and it must be exercised according to social and public interest*. The judge needs therefore to establish in a court of law that the assets are the proceeds or the instruments of the crime - in other words they arise from the crime or will serve to perpetrate it - or that property has been abused to commit crimes (for instance when an account serves to stash dirty money that will be used to buy the favours of a decision-maker).

Property rights are not “absolute” in the sense that they can suffer limitations when confronted with other similar or superior interests. This is the case for instance when the activity of the State develops more incisive confiscation rules to protect collective abstract interests⁸ aimed at accomplishing the socio-ethical premise that “crime should not pay”.

Constitutional courts had repeatedly ruled that the limitations to the right to property in NCBC laws are compatible with criminal policy obligations when its *noyau dure* is protected. This protection exists for instance when the asset holder is given all necessary means to exercise an effective defence of his / her property rights before a court of law.

Another concept introduced to limit the abuse of property arises from the Constitution itself. The constitution protects property rights only when they were acquired by licit means. If, on the contrary, prosecution authorities have objective reasons to believe that this property has originated in a crime, the property can be the object of a NCBC procedure and the asset holder is given all necessary procedural means to defend his/her property.

6.2 Procedural rights

Procedural rights and safeguards of the Extinción de Dominio in Peru

The aim of the confiscation pursuant to the Extinción de Dominio legislation is a reparative one. Rather than seeking punishment of an individual, its purpose is to guarantee the legality of property. The entire process leading up to the confiscation is governed by the due process guarantees of the national constitution⁹. This includes the right to an effective defense, the right to submit own elements of proof and a double appeals mechanism¹⁰.

⁸ Such as the protection of the economy or the national security.

⁹ Art. 139(3) Constitución Política del Perú.

¹⁰ Art. II(2.6) Decreto Legislativo 1373 (Tutela Jurisdiccional y Debido Proceso).

Furthermore, Chapter II of the Legislative Decree establishing the Extinción de Dominio in Peru contains a range of additional procedural guarantees protecting the asset holder from undue infringements of his or her due process and property rights.

A persistent argument is that NCBC procedures do not grant, in general, the same procedural rights as criminal confiscation. For some, NCBC tools circumvent the defences of the criminal proceedings and therefore limit the fundamental rights of the defence. In most cases, indeed, the procedural guarantees are modulated according to the nature of the action: remedial and *in rem*. In general, NCBC does not include a general presumption that the assets under investigation are licit, as it is the case in proceedings against persons.

In dubio pro reo (literally “the doubt benefits the offender”), the corollary of the presumption of innocence, is also modulated when applied to *in rem* procedures. The prosecution still supports the burden of proof but if a doubt persists it does not benefit the defendant. In practice, the burden of proof is lowered to the civil standard of balance of probabilities/preponderance of evidence, which means that the judge decides on the confiscation when he or she thinks that it is more probable that the assets arise from a crime than they don’t.

7 What lessons were learned?

7.1 NCBC procedures are better placed to recover illicit assets

Several interconnected asset recovery cases in Peru show that NCBC procedures are necessary and adequate in certain scenarios. In the Peruvian cases, the criminals (the beneficial owners of the Swiss accounts) fled Peru upon the initiation of the criminal investigation. As the Peruvian constitution prohibits *in absentia* trials, it would have been impossible to confiscate through criminal proceedings as a criminal prosecution cannot take place.

It must be highlighted that the offenders’ behaviour paralysed prosecution. They absconded the country with a view to escape prosecution. For those reasons, it is unacceptable to let them escape the criminal accusation and enjoy the benefits of their crimes, simply because of old-fashioned legislation and narrow interpretations of concepts pertaining to confiscation.

The applicability of the Extinción de Dominio procedure to assets located abroad provides considerable advantages. Assets belonging to individuals who have fled, died or are too sick to stand trial can be pursued and confiscated. Furthermore, the lowering of procedural standards enables investigations to be brought to court that might be unpromising in a criminal law setting.

7.2 Impact on MLA

The success of Peruvian asset recovery in these cases relied heavily on the active involvement and support of Swiss authorities. For the cooperation to succeed, the nature of the investigatory or judicial proceeding in the victim country is highly relevant for Switzerland’s ability to cooperate. In this respect, it was determined that the Peruvian NCBC law complies with Swiss human rights and public order

standards.¹¹ The Swiss Federal Supreme Court¹² and the Federal Criminal Court¹³ have both confirmed that Switzerland can cooperate with civil and other NCBC procedures and is also capable of enforcing the resulting decisions. Switzerland cooperates in MLA matters not only in criminal proceedings but also in foreign *in rem* proceedings aiming at recovering assets that are linked to crimes.

Likewise, the European Court of Human Rights has repeatedly confirmed the compliance of NCBC models with the European Convention on Human Rights.¹⁴ It has held that confiscations are in fact non-punitive, wherefore the application of civil procedure complies with the highest and strictest international human rights provisions in Europe. It also stated that: "[C]ommon European and even universal legal standards can be said to exist which encourage the confiscation of property linked to serious criminal offences such as corruption, money laundering, drug offences and so on, without the prior existence of a criminal conviction".¹⁵

¹¹ See: Swiss Federal Criminal Court, Decision N°RR.2016.147, 30 January 2017.

¹² For example: Swiss Federal Supreme Court in Decision N°132 II 178. The case concerned a civil procedure, independent of any criminal prosecution or conviction of the offender. In addition, the requesting state had no intention of opening criminal proceedings in the matter giving rise to the request for MLA. The court found that the civil procedure for the confiscation of illicitly obtained assets can be assimilated to criminal proceedings, provided that the competent authorities in the requesting state have the capacity to make a criminal law assessment. See case list in appendix for further decisions of this nature.

¹³ For example: Swiss Federal Criminal Court, Decision N°RR.2016.147, 30 January 2017.

¹⁴ Cf. for example: European Court of Human Rights, *Dassa Foundation v. Liechtenstein*, 10 July 2007, Appl. No. 696/05.

¹⁵ European Court of Human Rights, *Gogitidze and others v. Georgia*, 12 May 2015, Appl. No. 36862/05, para. 105.