



# RECOMMENDATIONS

## for introducing civil forfeiture of property used in the commission of crime

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# TABLE OF CONTENTS

<b>1. Key reasons for introducing</b>	<b>03</b>
<b>2. International standards and initiatives</b>	<b>04</b>
<b>3. Overview of models of civil forfeiture</b>	<b>05</b>
3.1. United States of America	06
3.2. United Kingdom	07
3.3. Italy	08
<b>4. Civil forfeiture and human rights</b>	<b>09</b>
<b>SOURCES</b>	<b>10</b>

## 1. Key reasons for introducing

In practice, there are cases where there is convincing evidence of illegal acquiring of property in criminal proceedings, but such evidence is insufficient to establish the participation of a person in the commission of a criminal offense. In some cases, the prosecution cannot initiate or conduct criminal proceedings because a suspected person fled the jurisdiction, there is no possibility of extradition, he or she had an immunity from prosecution, or had died.

In such circumstances, the civil forfeiture of assets becomes a very useful remedial legal tool designed to recover the proceeds of unlawful activity, as well as property used to facilitate unlawful activity. [1]

The Council of Europe points that there are two underlying policy reasons for civil forfeiture:

- First, gains from unlawful activity ought not to accrue and accumulate in the hands of those who commit unlawful activity. Those individuals ought not to be accorded the rights and privileges normally attendant to civil property law. In cases of fraud and theft, the proceeds ought to be disgorged and distributed back to victims;
- Second, the state as a matter of policy wants to suppress the conditions that lead to (further) unlawful activities, and assets in an individual's hands that facilitate carrying out of unlawful activities such as profits from the drug trade creates a risk that he or she will continue to use that property to commit unlawful activity. [2]

An advantage of an *in rem* action is that it does not require either civil or criminal conviction against an individual in order to confiscate his/her assets. Instead, 'guilt' is assigned to the property and prosecutors must only prove that the property in question was involved in an unlawful activity. Therefore, the focus shifts from people who are responsible for crime (**in personam**) to property (**in rem**) that is acquired by crime or used to facilitate crime.

"There is, increasingly, a body of expert opinion from around the world holding the view that *in rem* actions are, in many circumstances, the most effective way to counter many forms of corruption, economic crime and other transnational organised crime", according to the analysis of the Council of Europe. [3]

Although this model was primarily characteristic of systems based on Anglo-Saxon law, it is very important to point out that civil forfeiture of property proved to be equally effective in continental law systems as well, thus increasing number of legal systems introducing legal regulations on civil forfeiture of property.

## 2. International standards and initiatives

The United Nations Convention against Corruption obliges each member state to consider whether civil property seizure should be introduced into its legal system. [4] Article 54 stipulates that each State Party, in order to provide mutual legal assistance with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

Through its Office on Drugs and Crime, the United Nations also developed a model of the law on civil forfeiture, which, although it is intended for countries that use common law, is a useful basis that can be adapted to each country, including legal systems based on continental law. [5]

Moreover, pursuant to Article 3 of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, each party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property.

The European Commission recommends introducing of new legal instruments for confiscation without a criminal conviction, “when there is a suspicion that assets are the proceeds of serious crimes, due to their disproportion with the declared income of their owner and to the fact that he/she has habitual contacts with known criminals. In this instance a case may be brought before a civil court (which may order the confiscation of assets) based on an assumption, on the balance of probabilities, that the assets may be derived from proceeds of crime. In these cases the burden of proof is reversed and the alleged criminal should prove the legitimate origin of the assets”. [6]

Recommendations of the Financial Action Task Force (FATF) state that „countries should consider adopting measures that allow such proceeds or instrumentalities to be confiscated without requiring a criminal conviction (nonconviction based confiscation), or which require an offender to demonstrate the lawful origin of the property alleged to be liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law.”

An important proponent of civil forfeiture has been the Commonwealth and its 53 member states (including, from Europe, Cyprus, Malta and the UK). The Commonwealth produced a set of draft model legislative provisions on civil forfeiture which are capable of being adapted for both civil law and common law systems. [7]



### 3. Overview of models of civil forfeiture

Two states have been the pioneers in civil forfeiture: the US and Italy, since the middle of the last century. [8] Examples of **in rem** legislation can now be found in very different legal systems, such as Italy, the Netherlands, the United States, the United Kingdom, the Philippines, Australia, Canada and Colombia. [9]

Although the civil confiscation regimes of the countries that accepted civil forfeiture of property used in the commission of crime differ in many respects, they all have common features:

- threshold of proof for confiscation is lower than the criminal one;
- in such cases, no conviction is required because the procedure is in rem, that is, only against the proceeds from the crime. [10]

Threshold of proof is most often reduced to the level of "balance of probabilities", because the subject of the proceedings is not the criminal activity of the defendant, but the origin of the property. [11]

In civil forfeiture system, it is not necessary to prove direct connection between illegally acquired funds and a specific criminal offense, only the criminal origin of such property, in accordance with the standards applicable in civil proceedings. [12]

The same standards apply to the owner of the property being confiscated, who, in accordance with the same rules, may provide the court with relevant evidence that it had acquired the property in a lawful manner or had taken appropriate measures to prevent its unlawful use. [13]

Such acting should not be an issue to any conscientious acquirer, i.e. to the conscientious owner of the property, because anyone who had acquired property in a legal manner should be able to prove it relatively easily, especially because a lower standard of proving is required. [14]

Also, in this procedure, the existence of a clear disproportion between the legitimate income and the property of the owner would be determined, which means that property shall not be seized in all cases where it does not match the lawful income, but only if there is an "obvious disproportion" between these two values. Burden of proof of the apparent disproportion between legal income and assets lies with the state, thus there is no total burden of proof on the part of the owner or holder of the property.

### 3.1. United States of America

The United States is considered the country with the highest results in confiscation of assets acquired through crime. [15] For example, in the federal system alone, \$2.8 billion was recovered in 2011, while two thirds of that money were recovered through conviction-based forfeiture. [16]

The United States introduced the Racketeering Influenced and Corrupt Organisations Act back in 1970 („RICO”), which contained civil forfeiture powers.

This issue is now regulated by numerous laws at the federal and state levels, and in 2000, the US implemented the Civil Asset Forfeiture Reform Act. [17] Most commonly used are mainly provisions related to drug trafficking, money laundering and organized crime. [18]

Regardless of the criminal proceedings, complaint for forfeiture of property may be filed before or after the indictment is filed, but also in cases where there is no indictment. [19]

The burden of proving the link between property and criminal offense lies with the state, but the threshold of proving is lower than in criminal cases.

Confiscation is permitted in cases where the property originated from the crime or was used to commit it, and when in the course of the proceedings that connection is proved on the basis of the standard of proof "superiority / preponderance of evidence / highest possible probability". [20]

The person from which the property is seized, at the same level of the standard of proof, should:

- prove lawful origin of the property, that is, to dispute the evidence of the State that the property was acquired through criminal activities; or
- establish an “innocent owner” defence. i.e. “that he/she had no knowledge that the property had been used in a crime or in a proceeds case, that he/she had acquired the property in good faith at full value without notice of its criminal origin”. [21]

US law defines precisely what is considered property of the proceeds of crime, and it includes:

- any increase in the value of those assets (e.g. an increase in the value of real estate purchased from money obtained by drug trafficking),
- estimated value of the service and benefits of criminal offenses, even when no specific payments have been made (e.g. in the case of human trafficking or forced labor). [22]



## 3.2. United Kingdom

In the UK, it was the Proceeds of Crime Act 2002 (POCA) [23] that introduced civil forfeiture. This law enables civil action to be taken by the appropriate authorities to restrain and recover assets and instrumentalities that represent the proceeds of crime. [24]

Civil forfeiture shall be implemented in cases:

- where a suspected person had died, fled the jurisdiction or where he or she had an immunity from prosecution and/or from civil suit,
- when in a criminal proceeding it is not possible to confiscate property gain because that proceeding was not initiated due insufficient evidence, the charge was dismissed or defendant acquitted. [25]

The first criterion for initiating a civil forfeiture is that the prosecution is not initiated or concluded by a judgment. In addition, there must be evidence of a crime for civil forfeiture that led to the emergence of the disputed property, wherein a civil standard of proof, that is, "balance of probabilities" is sufficient. [26] In doing so, evidence may be used that would not be sufficient in criminal proceedings. Lastly, recoverable property must be identified and have an estimated value of at least £10,000 and must be obtained within last 12 years. [27]

It is sufficient to prove that the property originates from any unlawful conduct of the person whose property is seized, it is not necessary to originate from a specific crime. It is up to the defendant to prove the lawful source of the seized property and it is his duty to dispute the prosecutor's allegations that the property is of unlawful origin. [28] A freezing order may also be initiated prior to civil forfeiture order.

In addition, unexplained wealth order has recently been introduced into UK legislation, which provides for an obligation of individuals to provide detailed information on how they acquired property, both real estate and movable property.

The use of this mechanism does not require criminal proceedings to be initiated in advance, and applies to property of at least £ 50,000. Unexplained wealth order can only be used against property owners who are:

- "politically exposed persons" [29] - from a country outside the European Economic Community who are not required to prove that they have committed any criminal offense; or
- involved into "serious crime" [30], - including citizens of the UK and the EU.

In these cases, it is necessary to prove "reasonable grounds for suspecting" that the known, lawful sources of that person's property are not sufficient to enable the acquisition of the property to which the order relates.

### 3.3. Italy

The Italian legal system, among other things, provides for the so-called "preventive confiscation", which is a sort of hybrid between the criminal and civil system of confiscation of property acquired by crime. [31]

Italy adopted the Rognoni-La Torre Act in 1982 in response to the increasing economic power of organized crime [32], while in 2011, it introduced additional mechanisms through the so-called Anti-Mafia Code. [33]

Preventive confiscation allows the confiscation of property by certain categories of persons, regardless of whether they are being prosecuted and without a court ruling establishing that a crime has been committed.

The purpose of these measures is not to punish a person, but for a state to take possession of unlawfully acquired property from persons who pose a danger to society in order to prevent the commission of criminal offenses. These are measures that are administrative, and although these proceedings are not conducted in criminal courts, they are subject to different rules than criminal procedures, with the application of lower standards of proofs. [34] In these proceedings, the burden of proof is shifted to the suspect.

Since it is a procedure independent of criminal one, it is based on two key circumstances: that there is a presumption of that person's danger to society, which does not have to be crucially related to that person's previous accusations and crimes, and that there is a disproportion in the property of a person to whom the measure is pronounced. [35]

These types of measures can be applied against persons suspected of being part of mafia organizations as well as persons suspected of crimes of slavery, child prostitution, child pornography, human trafficking, smuggling of narcotics, cigarettes and the like, as well as corruption and other offenses against official duty. The measures can also be applied against the organizers and funders of these criminal activities. [36]

Illegal revenues of suspected members of mafia organizations are determined according to the lifestyle they lead, their finances, assets and economic activities. [37] The investigation was extended to family members, including spouses, children if they had lived with the suspect for more than five years, and any other legal entity, company, union, association, or organization in which he or she could dispose of part or all of their property. [38]

The court may order preventive confiscation when the suspect disposes the property directly or indirectly, its value is disproportionate to the reported income or economic activities, or there is sufficient circumstantial evidence and reasons to believe that it was acquired by the crime or it is the result of its commission and the owner of the property cannot prove its legal origin. [39]

## 4. Civil forfeiture and human rights

The fact is that the application of civil forfeiture may limit some basic human rights. In this regard, the most important objections may be to respect the presumption of innocence, retroactive application of the law and respect for the right to peaceful enjoyment of property.

However, it should be emphasized that this procedure is conducted against a property (**in rem**) and not against an individual (**in personam**). Thus, the presumption of innocence in these cases is irrelevant because the proceedings are not concerned with determining the guilt or innocence of an individual, but of property.

We point out that these remarks have already been considered by the appellate and constitutional courts [40] of the states allowing the civil forfeiture of property, as well as by the European Court of Human Rights. [41]

It is also important to point out that the law can be applied to property illegally acquired before the law enters into force and that the objection to retroactive application of the law is excluded. Therefore, there is no decision making on criminal charges in the proceedings, thus, it is outside the scope of application of Article 6 paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, the objection to retroactive application and Article 7 of the Convention is not applicable precisely because the proceedings do not concern decision making on criminal charges. [42]

The right to the peaceful enjoyment of property laid down in Article 1 of Protocol 1 to the Convention is not an absolute right and is subject to the prescribed restrictions. This right is not violated in cases where interference with this right is provided by law (the principle of legality), when it pursues a legitimate aim (the principle of necessity) and when it is proportional (the principle of proportionality). [43]

The state has the right to adopt those "laws it deems necessary to regulate the use of property in the general interest." [44] The seizure of unlawfully acquired property, which aims to prevent unlawful or otherwise dangerous use to society, is lawful and in the public interest. [45]

The US Supreme Court also found that this form of seizure does not constitute a violation of the so-called "double charge clause", i.e. civil forfeiture does not constitute a penalty. [46]

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