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**“NON-CONVICTION BASED CONFISCATION OF ASSETS
AS A TOOL IN FIGHT AGAINST ILLEGALLY ACQUIRED ASSETS”**

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Table of Contents

LIST OF ABBREVIATIONS 3

INTRODUCTION 4

CHAPTER 1: Introduction to the Non-Conviction Based Asset Confiscation 7

§1.Characteristics and Main Types of NCB Regime7

§2.Conviction Based Confiscation and Non-Conviction Based Confiscation of Assets:

Similarities and Differences13

CHAPTER 2: Human Rights Perspective of the NCB Confiscation of Assets.....18

CHAPTER 3: The Experience of Foreign Countries on the Asset Confiscation

Mechanisms..... 24

CHAPTER 4: Applicability of NCB Confiscation Mechanism in Armenia33

§1.Existing Regulations and Current Initiatives Towards Incorporation of NCB Confiscation33

§2.Introduction to the Possible Model of NCB Asset Confiscation under Armenian Legislation

35

CONCLUSION38

BIBLIOGRAPHY 40

LIST OF ABBREVIATIONS

UN - United Nations

FATF - the Financial Action Task Force

UNCAC - United Nations Convention against Corruption

NCBC - Non-Conviction Based

CBC - Conviction Based Confiscation

RA - Republic of Armenia

ECHR - European Convention for the Protection of Human Rights and Fundamental Freedoms

ECtHR- European Court of Human Rights

CC- Criminal Code

CPC- Criminal Procedure Code

COE- Council of Europe

INTRODUCTION

Over the past few years the topic of asset confiscation mechanisms has become one of the most debated in framework of multiple international organizations and countries. Certain sources claim asset confiscation “to be one of the most effective tools to tackle profit-based crime”.¹ With several jurisdictions across the world implementing this measure within their legislation, to comply with the international standards, the confiscation has become “a global phenomenon as an instrument to recover instrumentalities and proceeds of crime”.²

In this context, adopting “follow the money” concept in fight against crime has become a common approach among many countries. Underlying idea of the concept is that focus has shifted from investigating, arresting and prosecuting offenders to taking away their money.³

Meanwhile, Armenia has entered a phase, where it is intended to foster the introduction of new mechanisms in fight against corruption. Unfortunately, the existing mechanisms are not forceful enough to reach significant results. Moreover, the imperfections of RA confiscation mechanism leads to certain legal deadlock, specifically, when the person who committed a crime has immunity, died, is hiding, or his identity is unknown, the confiscation of those assets will not be possible under current Armenian mechanisms. Thus, Armenia is currently struggling to find efficient and feasible mechanisms that will allow the relevant authorities to extract corrupted property in a manner that will not contradict human rights guarantees and will display anticipated results at the same time.

Thus, the emphasis within this Paper is increasingly placed on the NCB asset confiscation mechanism, as it offers the necessary tools and measures to combat corruption offences and stop the circulation of proceeds of corruption, depriving offenders of illicit gains.⁴ However, the person who committed a crime and illegally acquired assets is not the main actor and the centre of criminal persecution, rather pursuit is circled around the property that has tainted origin. Simultaneously, NCB

¹ Adriano Martufi, *Confiscating assets without a prior conviction violates fundamental rights?*, Leiden University Press (2018), available at <https://leidenlawblog.nl/articles/confiscating-assets-without-a-prior-conviction-violates-fundamental-rights#> last visited 10 May, 2019.

² Ibid

³ Edwin W. Kruisbergen, Edward R. Kleemans, Ruud F. Kouwenberg, “Explaining attrition: Investigating and confiscating the profits of organized crime”, (2016) *European Journal of Criminology*, 13(6), p. 103-104, available at <https://doi.org/10.1177/1477370816633262> last visited 10 May, 2019.

⁴ OECD, “*Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia*”, Anti-Corruption Network for Eastern Europe and Central Asia (2018), p. 6-7, available at <http://www1.oecd.org/corruption/acn/OECD-Confiscation-of-Proceeds-of-Corruption-Crimes-ENG.pdf> last visited 10 May, 2019.

confiscation mechanism presents certain concepts unfamiliar to Armenian legal system. Moreover, those concepts are likely to result in human rights issues.

Hence, the specific research question for this paper is *whether NCBC of assets is applicable under Armenian regulations?* The outcome of the research shows that, if for human rights protection is carefully guaranteed in the process, the NCBC mechanism may be applicable under Armenian regulations. Additionally, the Slovenian example may serve as a possible model for Armenia. To reach that conclusion, an extensive examination has been conducted within the paper.

Namely, notion, main characteristics and types of NCBC are studied. Additionally, the comparison between the CBC and NCBC confiscations is presented, outlining the main peculiarities of each regime. However, the main concentration of the paper is placed on NCBC (in rem) forfeiture.

Further, the paper also scrutinises human rights issues that can potentially emerge with the implementation of NCBC, where ECHR landmark cases are reviewed and the Court's approach is presented within Chapter 2. Further, the research contains examination of different countries' experience in implementing confiscation mechanisms in Chapter 3, where the most relevant examples of countries' practices are presented. Here, the OECD reports, providing extensive scrutiny of a certain countries' legal systems within the framework of implementation of NCBC, is inspected. Finally, the analysis of existing Armenian regulations in the field of asset confiscation is examined, followed by the discussion of current commitment of Armenia in incorporating civil confiscation into Armenian legislation. Ultimately, within the scope of the paper certain proposals regarding NCB confiscation model are introduced based on the analysis of relevant Armenian legislation, as well as international standards. Conclusion will recapitulate the outcome of paper analysis, which will be followed by a bibliography, enumerating all the used sources in the paper.

As far as the cited literature is concerned, the paper is based on broad examination of a number of scholarly articles, international organisations' reports, research articles, books by respectable agencies, which are useful for understanding the characteristics of NCBC and main issues that may potentially arise from its incorporation.

Furthermore, relevant ECHR and foreign countries court decisions, which have fundamental importance for interpretation of the NCBC mechanism in the ambit of human rights protection, are cited in the paper.

What is more, "Stolen Assets Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture" has vital importance for the research as it is designed as a practical tool to help countries recover stolen assets. It is the first publication that provides legal and practical Key

Concepts that NCB asset forfeiture system should encompass to be effective in recovering assets. Thus, the Guide is a helpful reference source, which provides technical assistance in further incorporation of NCB asset confiscation in domestic legislation.

Another crucial source of literature is comprehensive study carried out by OECD called “Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia”. The source illustrates an example of essential contribution to the research as it provides in-depth analysis of critical procedural issues concerning confiscation and discusses possible remedies. Namely, it offers insight into the issues including evidentiary thresholds, burden of proof in case of NCBC, the corruption offences that trigger confiscation, as well as Eastern Europe and Central Asia countries’ approaches concerning these issues. Therefore, the study assists in designing the outlook regarding regulations that might have the potential of successful implementation in Armenia.

The limitation of this study is the lack of relevant domestic literature, the main reason of which is that NCBC mechanism is a newly initiated and examined institute in Armenia. Therefore, the research itself intends to contribute to filling existing literature gaps by examining valuable international sources.

Also, considering the provided word limitations, in-depth study of procedures of seizure and confiscation will not constitute the subject of this study.

Chapter 1: Introduction to the NCB Asset Confiscation

§1. Characteristics and Main Types of NCB Regime

There is no doubt corruption is still considered one of the weaknesses of practically every country of the World.⁵ NCB asset forfeiture may potentially turn into a tool for recovering proceeds of corruption crimes, if employed accurately, respecting human rights and guarantees. It is a legal mechanism that provides for confiscation of stolen assets without the need for a prior criminal conviction.

UNCAC, under Article 2(g), provides the definition of asset confiscation; that is “Confiscation, which includes forfeiture where applicable, shall mean the permanent deprivation of property by order of a court or other competent authority.”⁶ The same definition is envisaged in UN Convention against Illicit Traffic in Narcotic Convention Drugs and Psychotropic Substances.⁷

The term “confiscation” is also defined in Article 1 of COE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime as “a penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences resulting in the final deprivation of property”.⁸

What concerns terms confiscation and forfeiture, most of the doctrinal articles as well as international conventions do not distinguish the terms. Thus, in the scope of the paper, the terms will be used interchangeably.

Concerning the NCB asset confiscation, international conventions do not provide the exact definition thereof. Notwithstanding, it can be described as “confiscation for which a criminal

⁵Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan, June 2007, p.8, available at <https://siteresources.worldbank.org/NEWS/Resources/Star-rep-full.pdf> Last visited 10 May, 2019.

⁶United Nations Convention Against Corruption (2004), Article 2(g) Last visited 10 May, 2019.

⁷United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988), Article 1(f), available at https://www.unodc.org/pdf/convention_1988_en.pdf Last visited 10 May, 2019.

⁸Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, (1990), Article 1, available at <https://rm.coe.int/168007bd23> Last visited 21 March, 2019.

conviction is not required”.⁹

During the recent decade, a growing number of jurisdictions have adopted NCB asset forfeiture regimes. Certain sources claim that NCBC can be established in both civil and common law jurisdictions, as it “transcends the differences that exist between systems”.¹⁰

From common law countries, the most vivid examples are United States and United Kingdom, which have enacted NCBC laws. Meanwhile, civil law jurisdictions, such as Italy and Slovenia, also adopted civil confiscation mechanisms, that are unique to specific country.¹¹ However, in some countries, including Armenia, Belarus, Latvia asset confiscation still performs a punitive function. Thus, those countries abstained from incorporating civil confiscation measures.¹²

NCBC mechanism has been recommended at regional and multilateral levels by a number of organisations.¹³

For example, the United Nations Convention against Corruption (UNCAC) under Article 54(1) (c) urges countries to consider permitting NCB asset forfeiture of stolen assets **when the offender cannot be prosecuted**, by reason of death, flight or absence or in other appropriate cases.¹⁴

What is more, the Financial Action Task Force, in the scope of its Recommendations requires the countries to consider adopting measures that allow illicit proceeds or instrumentalities to be confiscated **without requiring a criminal conviction** (NCBC) or **which require an offender to demonstrate the lawful origin of the property** alleged to be liable to confiscation.¹⁵

⁹EUROJUST, News, Issue No. 13, June 2015, p. 2, available at [http://www.eurojust.europa.eu/doclibrary/register/documents/eurojust%20news%20issue%2013%20\(june%202015\)%20on%20the%20freezing%20and%20confiscation%20of%20the%20proceeds%20of%20crime.pdf](http://www.eurojust.europa.eu/doclibrary/register/documents/eurojust%20news%20issue%2013%20(june%202015)%20on%20the%20freezing%20and%20confiscation%20of%20the%20proceeds%20of%20crime.pdf) Last visited 10 May, 2019.

¹⁰ Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray, “Stolen Assets Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture”, The International Bank for Reconstruction and Development / The World Bank, (2009), p. 17 Last visited 10 May, 2019.

¹¹OECD Anti-Corruption Network for Eastern Europe and Central Asia “Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia”, 2018, p. 50-64, available at <https://www.oecd.org/corruption/acn/OECD-Confiscation-of-Proceeds-of-Corruption-Crimes-ENG.pdf> Last visited 10 May, 2019.

¹² Ibid, p.7-9

¹³Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray, “Stolen Assets Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture”, The International Bank for Reconstruction and Development / The World Bank, (2009), p. 1-2, available at http://siteresources.worldbank.org/FINANCIALSECTOR/Resources/Stolen_Asset_Recovery.pdf Last visited 10 May, 2019.

¹⁴United Nations Convention Against Corruption (2004), Article 54(1)(c), available at https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf Last visited 10 May, 2019.

¹⁵International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation, The FATF Recommendations, October 2018, p.10 available at <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf> Last visited 10 May, 2019.

As it can be noticed, the mentioned two international instruments urge member states to consider adopting NCBC mechanisms.¹⁶

When examining the conventional requirements of UNCAC and FATF, we see that in case of UNCAC the grounds which make the prosecution of the person impossible within criminal procedures are mentioned. The list of those grounds, however, is not exhaustive. Hence, we may conclude, that UNCAC recommends model of confiscation that allows forfeiting property without prior criminal conviction.

As for FATF recommendation, it suggests two possible models: first, confiscation without prior accusatory verdict of the court, second, shifting of burden of proof. These, two models are to be differentiated, as they require two different procedures. In case of shifting the burden of proof, there will still be requirement for prior conviction. However, if the States adopt the first model, putting an obligation on the offender to prove lawfulness of his assets' sources can be used as an additional procedural tool. This means, that the first model may include the second one and transfer the burden to the offender, but not vice versa.

Besides the international requirements, the need for the incorporation of the mechanism by countries may mainly rise because of the impasse that might be created because of lack of relevant domestic regulations. This means that there can occur situations making the criminal liability of a person impossible. As mentioned in UNCAC, certain circumstances can make the prosecution impossible and allow the States to confiscate the tainted assets of perpetrators. Those may include cases when an offender has died, or when the person, who committed the crime, is immune, is hiding, the property acquired through the criminal offence has been found under the possession of a person other than the offender or statute of limitation for the crime has expired. The cases when there is insufficient evidence to proceed with criminal prosecution¹⁷, are often considered as proper grounds to apply NCBC, however, these grounds are controversial. Namely, the lack of evidence in criminal procedure is an indicative of person's innocence, thus when the authorities do not find sufficient evidence to incriminate the person within criminal procedure, the application of an alternative measure may raise human rights issues.

¹⁶ Nevertheless, the Conventions themselves do not constitute an obligatory requirement for the States. Instead, those as part of so called "soft law" only make recommendations for the States, which means that there can be no legal or political consequences, if the States do not implement the NCB confiscation as a tool against corruption.

¹⁷ Another ground can considered to exist when the evidence is not satisfactory to overcome the provisional proof threshold applicable in criminal proceedings.

Additionally, EU Directive 2014/42 asserts that when confiscation on the basis of a final conviction is not possible, it should still be possible under certain circumstances to confiscate instrumentalities and proceeds, at least in the cases of **illness or absconding** of the suspected or accused person.¹⁸

Thus, in rem confiscation is a possible remedy considering that in personam forfeiture is not possible under the mentioned conditions.

However, NCB asset confiscation should never be a substitute for criminal prosecution. While NCB asset forfeiture can be an effective tool to recover assets connected to crime, it should not be used as an alternative to criminal prosecution when a jurisdiction can prosecute the violator. However, NCBC should precede a criminal indictment or parallel criminal proceedings. Also, the NCBC option should be preserved to be instigated if criminal prosecution becomes unavailable or is unsuccessful. Meanwhile, it will still be necessary to prove that the assets are tainted.¹⁹ If the legislator is ruled by this principle, no issue of double jeopardy will rise, as the tainted assets of accused person are confiscated if criminal proceedings fail.

Also, the range of offences that instigates NCBC is important to be determined in the laws. Those are the bases for initiating confiscation procedures and logically need to be connected with corruption. In general, states establish the exhaustive list of corruption-related offences within their legislation. For instance, Articles 289-294 of the CC and Articles 10-13 of Law “On the Prevention, Detection and Punishment of Corruption Offenses” of Romania trading in influence and buying influence, accepting and giving bribe, illicit acts by members of courts, judges, illicit acts by foreign public officials, corruption in the private sector are considered as corruption offences.²⁰

NCBC itself has two main **types**, which are preventive confiscation and extended confiscation.

The *preventive* confiscation mechanism, which is adopted by countries such as Italy, seeks to remove from the legal economy those assets which were acquired illegally and thus “contaminate

¹⁸ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, Paragraph 15, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0042&from=FR> Last visited 10 May, 2019.

¹⁹ Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray, “Stolen Assets Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture”, The International Bank for Reconstruction and Development / The World Bank, (2009), p. 29 Last visited 10 May, 2019.

²⁰OECD Anti-Corruption Network for Eastern Europe and Central Asia “Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia”, 2018, p. 44-46 Last visited 10 May, 2019.

healthy economic relations”.²¹ Here, **owner of the assets is not punished at the personal level** since the objective is to prevent him from using those assets to commit further crimes. Hence, the preventive confiscation is a measure that aims at limiting the danger posed by the person who expresses his danger to society, using the illicitly gained assets, and corrupts the healthy state of the economy.²²

The main feature of preventive confiscation is that competent tribunal has to ascertain the degree of danger posed by a person and, in particular, the high probability of being found guilty through a separate fact-based (and not suspicion-based) inquiry, even though the person might have already received a conviction for a related crime. Hence, a previous conviction is not a fundamental requirement.²³

As for the *extended* confiscation, it applies where a person has been convicted of an offence that produces an economic benefit. Assets may be confiscated even if they are not proceeds of crime for which the offender has been convicted.²⁴

Article 5(1) of EU Directive 2014/42²⁵ provides that “Member States shall adopt the necessary measures to enable the confiscation, (...) of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court (...) is satisfied that the property in question is derived from criminal conduct”²⁶

Further, Para. 19 of the mentioned Directive states that “In order to effectively tackle organised criminal activities there may be situations where it is appropriate that a criminal conviction be followed by the confiscation not only of property associated with a specific crime, but also of additional property which the court determines constitutes the proceeds of other crimes. This

²¹ “The Italian experience in the management, use and disposal of frozen, seized and confiscated assets”, CAC/COSP/WG.2/2014/CRP.3, (Open-ended Intergovernmental Working Group on Asset Recovery) Eighth meeting Vienna, 11-12 September 2014, p. 6, available at https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2014-September-11-12/Combined_CacCosp-Wg2-2014-CRP3.pdf Last visited 10 May, 2019.

²² Ibid, p. 4-6

²³ Ibid, p. 6-7

²⁴ M. Simonato, “Confiscation and fundamental rights across criminal and non-criminal domains”, Vol. 18, Issue 3, 2017, p. 366, available at <https://link.springer.com/content/pdf/10.1007%2Fs12027-017-0485-0.pdf> Last visited 09 May, 2019.

²⁵ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, Article 5(1), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0042&from=FR> Last visited 10 May, 2019.

²⁶ OECD (2018), Review of Legal and Regulatory Asset Recovery Framework in Greece, p.25 Last visited 10 May, 2019.

approach is referred to as extended confiscation.”²⁷

What regards standard of proof, the Directive sets forth the criteria of “balance of probabilities” providing, that it must not be established that the property is derived from criminal conduct. So, it could be sufficient for the court to consider on the **balance of probabilities, or to reasonably presume** that it is substantially more probable, that the property has been obtained from criminal conduct than from other activities. Also, the fact that the property of the person is disproportionate to his lawful income could be among those facts giving rise to conclusion of court that the property derives from criminal conduct.²⁸

Additionally, the Directive under Article 8(6), (7) provides certain safeguards for the person whose property is affected by a confiscation order. Among such safeguards are the right of access to a lawyer throughout the confiscation proceedings and the right to challenge the order before a court. Also, reasons for confiscation order need to be given and the order needs to be communicated to the person affected.²⁹

In this situation, a court convicts a particular person of a crime and also awards a decision on the confiscation of property, when either the national court believes that the property was obtained through similar unlawful conduct of the person convicted, committed before the actual conviction. Establishing a direct link between the property and the offence is not necessary if the court concludes that part of the person's property was obtained through other unlawful conduct, for which the court finds the person guilty.³⁰

It can be concluded, that the preventive and extended confiscations both do not instigate punishment in personal level, rather the mechanisms pursue the property. The difference between the two types of NCBC is, firstly, in their sphere of application. Namely, the extended confiscation is very much linked to the parallel **criminal procedure**. Its aim is to deprive an offender of the property that has not been proved to be proceeds of crime in scope of criminal procedure; however, the offender has been convicted for committing a corruption crime. On the other hand, preventive confiscation a clear-cut example of confiscation held under **civil procedures**. Here, the burden of proof may shift to the offender and evidentiary standards may be lowered. The main purpose of this type of confiscation is to remove the illicit property from economic circulation. It is aimed against the

²⁷ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, paragraph 19

²⁸ Ibid, Para. 21

²⁹ Ibid, Article 8(6), (7)

³⁰ EUROJUST, (General Case 751/NMSK – 2012): Report on Non-Conviction-Based Confiscation, (2013), p. 10 Last visited 10 May, 2019.

property and does not require for a final judicial verdict.

However, the international practice shows that foreign states are more inclined to adopt the extended confiscation regime, rather than preventive.³¹ This tendency of states can be explained with the safeguards that extended confiscation ensures, such as presumption of innocence, while preventive confiscation as a civil procedure does not provide such guarantees and is relatively more independent from criminal procedures than extended confiscation, which is more likely to raise human rights issues.

§2. Conviction Based Confiscation and Non-Conviction Based Confiscation of Assets: Similarities and Differences

Different confiscation regimes exist in different countries, sometimes even combinations of those. Two main confiscation mechanisms can be distinguished as **conviction based confiscation** and **non-conviction based confiscation**.

So, both the CBC and NCBC mechanisms share the same objective for the states, which is to forfeit the proceeds and instrumentalities of crime. Secondly, in both cases proceeds should be confiscated and used to compensate the victim, whether it is the state or an individual. Confiscation of instrumentalities ensures that such assets will not be used for further criminal purposes.³² Lastly, crime serves as a ground for initiating both CBC and NCBC procedures, which are the procedural continuation of criminal investigations held to discover those crimes.

Where these asset forfeiture regimes differ is, firstly, in the **procedure used** to confiscate the tainted assets. CBC is otherwise known as confiscation **in personam**, as it is an **action against the person** and part of criminal charge.³³ So, CBC requires a **criminal trial and conviction**.

³¹ Only Italy has adopted preventive confiscation mechanism in pursuit against Mafia. While most part of civil law jurisdictions, such as Greece, preferred to incorporate extended confiscation.

³² Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray, "Stolen Assets Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture", The International Bank for Reconstruction and Development / The World Bank, (2009), p. 13-16 Last visited 10 May, 2019.

³³ Ibid

Conversely, NCBC (otherwise: **confiscation in rem**) is considered an **action against the asset** itself and not against an individual. NCBC targets profits deriving from an offence, rather than individuals who allegedly committed the offence.³⁴ It is a **separate action from any criminal proceeding** and requires proof that the property is tainted or is proceed or an instrumentality of crime. Additionally, certain States, who apply the NCB confiscation of property, consider it to be “an ancillary measure, rather than a sentence”.³⁵

Secondly, the CBC can only be imposed as **part of sentence** in criminal case and requires a prior conviction. Reversely, the NCBC can be filed **before, during, or after criminal conviction** or even if there **is no criminal charge** against a person.³⁶

Thirdly, in case of criminal conviction only the property that belongs to a criminal can be forfeited, while in case of NCBC mechanism the property can also be confiscated if it is transferred to or acquired by third parties (ex. affiliated person or company).³⁷ Additionally, EU Directive 2014/42/ stresses the importance to confiscate the property of third parties who at least knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation.³⁸

Finally, the **standard of proof** applied during CBC and NCBC procedures is another difference between these regimes. Namely, in case of CBC, the confiscation is merely the continuation of the prior criminal procedure, where the standard of “**beyond a reasonable doubt**” is applicable. Whereas, the NCBC is a simplified approach, as it applies a lower standard of proof, than the one used in criminal proceedings.³⁹ According to the general approach, the criminal conduct must be established on a “**balance of probabilities**” standard of proof, which, in comparison with “proof beyond reasonable doubt standard, requires a lower degree of satisfaction”.⁴⁰ Applying the balance of

³⁴ Adriano Martufi, *Confiscating assets without a prior conviction violates fundamental rights?*, Leiden University Press (2018) Last visited 10 May, 2019.

³⁵ EUROJUST, (General Case 751/NMSK – 2012): Report on Non-Conviction-Based Confiscation, (2013), p.12, available at http://www.procuracassazione.it/procuragenerale-resources/resources/cms/documents/EUROJUST_20130402_NCBC_Report.pdf Last visited 10 May, 2019.

³⁶ Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray, “Stolen Assets Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture”, The International Bank for Reconstruction and Development / The World Bank, (2009), p. 14 Last visited 10 May, 2019.

³⁷ However, these regulations shall not be so construed as to prejudice the rights of bona fide third parties.

³⁸ Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the Freezing and Confiscation of Instrumentalities and Proceeds of Crime in the European Union, **Article 6**. Last visited 09 May, 2019.

³⁹ Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray, “Stolen Assets Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture”, The International Bank for Reconstruction and Development / The World Bank, (2009), p. 58-63 Last visited 07 May, 2019.

⁴⁰ LawTeacher, Criminal or civil standard of proof [Internet], November 2013, Available at <https://www.lawteacher.net/free-law-essays/criminal-law/criminal-or-civil-standard-of-proof-law-essays.php?vref=1>. Last visited 10 May, 2019.

probabilities standard creates an obvious advantage of easing the burden of proof for the government.

⁴¹ In case of balance of probabilities “a presumption, is an inference of the truth of proposition or fact drawn by process of probable reasoning in the absence of actual certainty. If a presumption is raised, the party against whom presumption exists has burden to overcome the presumption by balance of probabilities. Failing this, the *prima facie* presumption is converted to an uncontroverted fact. For example, a statute may create a rebuttable presumption that unexplained wealth accumulated during a period of service as a public official was attributable to corruption that results in forfeiture of increased wealth, unless the official can sufficiently explain how the increase in wealth occurred through legitimate means.”⁴²

Even UNCAC, under Article 31(8), calls upon States Parties to consider the possibility of requiring an offender to demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation.⁴³ In other words, “the burden must remain on the prosecution to establish the case and the basis for the presumption, and the claimant must be permitted to offer a reasonable or credible explanation to rebut the presumption.”⁴⁴

However, the differences between the common law and civil law countries’ legal systems are very crucial factors to consider, as evidentiary standard of “balance of probabilities” is mostly used in common law jurisdictions and is quite unfamiliar to civil law countries like Armenia. Therefore, from this perspective, while determining the standard of proof for specific country, **peculiarities of its legal system need to be taken into account.**

In this context, it is important to also understand the correlation between *NCBC and illicit enrichment regulations*. Namely, unexplained wealth orders (otherwise: UWOs) are sometimes considered to be a part of NCBC. These UWOs combine all of the characteristics of NCBC regime with illicit enrichment regulations by shifting the burden of proof to the asset owner who needs to provide evidence that the assets were legally acquired. However, the prosecutor or other authorized

⁴¹ In case of NCB confiscation proceedings only the illegitimacy of the sources of property, that is, property is proceeds or an instrumentality of crime, needs to be established, while in case of CBC proceedings, the authorities need to prove that a person has committed a crime, his guilt and the link between the crime committed and the property that is to be confiscated.

⁴² Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray, “Stolen Assets Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture”, The International Bank for Reconstruction and Development / The World Bank, (2009), p. 58-60 Last visited 10 May, 2019.

⁴³ United Nations Convention Against Corruption (2004), Article 31(8) Last visited 10 May, 2019.

⁴⁴ Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray, “Stolen Assets Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture”, The International Bank for Reconstruction and Development / The World Bank, (2009), p. 61 Last visited 10 May, 2019.

body has to show the nexus between criminal offence and the property when making an UWO request to the court.⁴⁵ UWO mechanism applies merely within civil proceedings, where a comparison of the actual property of a person is made against the income declared by the person to establish a clear disproportion between the actual and declared property.⁴⁶

Nonetheless, UWO and illicit enrichment regulations differs mainly because the illicit enrichment is fully regulated in the criminal limb, it is considered as a separate offence and the consequences of committing that offence is criminal punishment and conviction of a person. Hence, in this case person is convicted in a personal level. Meanwhile, the difference between illicit enrichment and other offences is that at certain point burden of proof may be shifted to the offender, which has to prove the legitimacy of his sources. Notably, the offence of illicit enrichment itself raises doubts concerning its constitutionality⁴⁷, as some regard it as derogation from presumption of innocence.⁴⁸

Conversely, UWO is demonstration of NCBC confiscation mechanism, which means that there can be no prior conviction and the procedure is outside the criminal limb.

It is also important to stress, that despite the fact that NCBC itself does not require a prior conviction and the assets of a criminal can be forfeited even without court decision which declares the perpetrator guilty, nonetheless, the civil confiscation has to be based on prior criminal investigation. In other words, a minimum threshold needs to be established for the authorized bodies

⁴⁵ Maira Martini, *Unexplained wealth order as an anti-corruption tool*, Transparency International, November 2015, p. 1-2, available at https://knowledgehub.transparency.org/assets/uploads/helpdesk/Unexplained_wealth_order_as_an_anti-corruption_to_ol_2015.pdf Last visited 10 May, 2019

⁴⁶ EUROJUST, (General Case 751/NMSK – 2012): Report on Non-Conviction-Based Confiscation, (2013), p.10, available at http://www.procuracassazione.it/procuragenerale-resources/resources/cms/documents/EUROJUST_20130402_NCBC_Report.pdf Last visited 10 May, 2019

⁴⁷ Transparency international article “The Unconstitutional Nature of “Illicit Enrichment” means amnesty for all officials” 10 May, 2019, available at <https://ti-ukraine.org/en/news/the-unconstitutional-nature-of-illegal-enrichment-means-amnesty-for-all-officials/>. Last visited 10 May, 2019

⁴⁸ On February 26 the Constitutional Court of Ukraine recognized as unconstitutional the Criminal Code article 368-2 that criminalizes illicit enrichment of public officials. Certain sources claim that decriminalization of illicit enrichment will mean complete amnesty for absolutely all public officials with questionable wealth. Recent developments show that certain states started to annul the crime of illicit enrichment, questioning its correspondence with human rights.

Meanwhile, ECHR in its case of *Salabiaku v France* (10519/83) reiterated that illicit enrichment legislation is consistent with the presumption of one’s innocence as long as 1) the prosecution is responsible for proving that criminal activities led to the change in one’s assets, and 2) the presumed activities can be rebutted and contested. **The same approach can be adopted in case of NCBC, where again reversal of burden of proof is applied and the offender takes the obligation to proof the lawful origin of his property.**

to initiate a financial investigation, to find necessary bases for confiscation. This means, that states cannot have limitless discretion in commencement of confiscation procedures. States cannot arbitrarily and even randomly point out a certain person as an offender and put a burden on the latter to prove the lawfulness of the source he acquired his property from. Thus, there has to be certain link between the criminal offence committed by a person and civil confiscation initiated against his property. Either criminal persecution or prior criminal proceedings against the person should be established to have certain bases for further confiscation proceedings. This is to verify that the civil confiscation cannot be absolutely independent from criminal conviction, since the authorized bodies need to have lawfully obtained evidence, based on certain minimum evidentiary standard, which proves the illegitimacy of the property source. In those cases, when perpetrator dies or has absconded, the State has the opportunity to, at least, track and forfeit his illicit assets. However, civil confiscation cannot be initiated and conducted without causal link to the criminal procedures, as mentioned above.

Summarizing Chapter 1, we may conclude, while implementing NCBC mechanism, states should guarantee that at least the following safeguards are preserved:

1. Relationship between NCBC case and any criminal proceedings, including a pending investigation, should be defined. Thus, NCBC should be available when criminal prosecution is unavailable or unsuccessful.

2. Applicable evidentiary and procedural rules should be as specific as possible. Mainly, fundamental concepts such as the standard (burden) of proof and use of rebuttable presumptions should be defined by law.

3. Assets derived from the widest range of criminal offenses should be subject to NCBC. Thus, the specific list of corruption crimes should be stipulated by law.

4. Preservation and investigative measures taken without notice to the asset holder should be authorized when notice could prejudice the ability of the jurisdiction to prosecute the forfeiture case. On the other hand, persons having a potential legal interest in the property subject to confiscation are entitled to notice of the proceedings.⁴⁹

⁴⁹ Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray, “Stolen Assets Recovery: A Good Practices Guide for Non-Conviction Based Asset Forfeiture”, The International Bank for Reconstruction and Development / The World Bank, (2009), p. 27-105 Last visited 10 May, 2019.

Chapter 2: Human Rights Perspective of the NCB Confiscation of Assets

When States considers implementing a new conceptual mechanism, it is impossible to avoid certain risks that could be involved in the process. Like all regulations, the NCBC mechanism has not been incorporated into a single legal system without legislative challenges, raising questions of its compliance with human rights. “It is axiomatic that legislation for asset confiscation must satisfy international human rights standards and the Rule of Law”.⁵⁰

The question about the nature of confiscation arises because national laws often do not label confiscation measures as penalty, but rather a preventive measure, like in case of Italy, or as measure

⁵⁰ Council of Europe, “Expert Opinion on: Draft Law of Ukraine On amendments to certain legislative acts of Ukraine regarding the ensuring of unjustified assets recovery into the revenue of the State”, ECCU-PCF- UA-6/2016, p. 16, available at <https://rm.coe.int/16806d5002> Last visited 10 May, 2019.

not aimed at the punishment of the culprit but at removal of illegal proceeds from economy.⁵¹ Thus, one of the most debatable issues is whether criminal nature attributable to confiscation orders, even in the absence of a prior conviction, would require the respect of the full set of safeguards applicable to criminal cases.

Furthermore, ECtHR in a number of cases touched upon the compliance of NCBC provisions with the rights and freedoms protected under the ECHR. However, the Court has a “casuistic approach that makes it difficult to identify a solid framework to assess the legitimacy of confiscation regimes.”⁵²

Mainly, there are considered to be three human rights under ECHR protection, which are engaged in the context of asset confiscation. The first is right to fair trial under Article 6 of the ECHR⁵³, the second is a right against retroactivity under Article 7⁵⁴, and the last one protects rights to property under Article 1 of Protocol 1⁵⁵.

To start with, Article 6 is crucial as identification of protectable fundamental rights and the extent of their protection, depends on a question concerning the nature of a confiscation: whether it is a criminal sanction, or it can be viewed under civil limb. In the first case, full set of principles and safeguards applicable to criminal law must apply (Article 6(2) and Article 6(3)). Conversely, some features of civil procedures such as the standard of proof called “balance of probabilities” cannot be engaged (instead of “beyond reasonable doubt” standard) as it will contradict due criminal standards.

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In case of Raimondo v. Italy⁵⁷ ECtHR reiterated that preventive confiscation applicable under Italian regulations cannot *be considered having criminal nature and does not have a punitive nature*. Hence, the court considered that when exercising the preventive confiscation, the *guarantees under Article 6 of ECHR that apply for criminal matters, are not applicable*.

⁵¹ M. Simonato, “Confiscation and fundamental rights across criminal and non-criminal domains”, Vol. 18, Issue 3, 2017, p. 369 Last visited 10 May, 2019.

⁵² Ibid, p. 366

⁵³ European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November, 1950), Article 6

⁵⁴ Ibid, Article 7

⁵⁵ Ibid, Article 1 of Protocol 1

⁵⁶ M. Simonato, “Confiscation and fundamental rights across criminal and non-criminal domains”, Vol. 18, Issue 3, 2017, p. 368-369 Last visited 10 May, 2019.

⁵⁷ Raimondo v. Italy, Judgment of 22 February 1994, application no. 12954/87, available at, <http://hudoc.echr.coe.int/eng?i=001-57870> Last visited 10 May, 2019.

Further, in the case of Gogitidze and others v. Georgia⁵⁸ the Court construed that in rem confiscation cannot amount to the determination of a criminal charge under Article 6 § 1 and does not stem from a criminal conviction, that is why it should be examined under the civil head of that provision. Also, ECtHR recognised the legitimacy, in the anti-corruption field, of ‘internationally acclaimed standards’ concerning *in rem* confiscation measures that entail, *inter alia*, the possibility of lowering the standard of proof. ECtHR stressed that States have a wide margin of appreciation with regard to what constitutes the appropriate means of applying measures to control the use of property.

59

However, in the recent G.I.E.M. S.r.l. and Others v. Italy⁶⁰, the Court found violation of Article 6, with respect to the applicants complaining that they had been affected by confiscation measures without having been formally convicted. As the Court stated, “Even though no prior criminal conviction had been handed down against the applicant companies or their representatives, the impugned confiscation measure was nevertheless attached to a “criminal offence” based on general legal provisions. (...) The nature and purpose of the confiscation of the applicants’ property had been punitive, as the confiscation measure was a mandatory sanction, not subject to proof of genuine harm, and could thus be applied even in the absence of any actual activity to transform the land.”⁶¹ Such conclusion stems from the implementation of **Engel criteria**⁶², namely the guidelines developed by the Court to ascertain whether a sanction, without being formally defined as criminal, can be regarded as having substantially punitive nature for the purposes of Convention. Thus, the Court concluded that in case confiscation measure is carried out by the State, the latter will be obliged to respect and ensure the safeguards⁶³ enshrined by the Convention in criminal matters.⁶⁴

As it can be noticed, the ultimate approach of the Court is not absolute, specifically concerning the standards that the Court implied in the G.I.E.M. and Gogitidze cases. In the first case ECtHR used the *Engel criteria* and found punitive nature in preventive confiscation, stating that there will be

⁵⁸ Gogitidze and others v. Georgia, Judgment of 12 August 2015, application no. 36862/05, § available at <http://hudoc.echr.coe.int/eng?i=001-154398> Last visited 10 May, 2019.

⁵⁹ M. Simonato, “Confiscation and fundamental rights across criminal and non-criminal domains”, Vol. 18, Issue 3, 2017, p.376-377

⁶⁰ G.I.E.M. S.r.l. and Others v. Italy, Judgment of 28 June 2018, application no. 1828/06, 34163/07, 19029/11, available at <http://hudoc.echr.coe.int/eng?i=001-184525> Last visited 10 May, 2019.

⁶¹ *Ibid*, § 222

⁶² Engel and others v. the Netherlands, Judgment of 8 June 1976, application no. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72), available at <http://hudoc.echr.coe.int/eng?i=001-57479> Last visited 10 May, 2019.

⁶³ G.I.E.M. S.r.l. and Others v. Italy, §260 Last visited 10 May, 2019.

⁶⁴ Adriano Martufi, *Confiscating assets without a prior conviction violates fundamental rights?*, Leiden University Press (2018) Last visited 10 May, 2019.

violation of Article 6, if the person does not enjoy the rights and safeguards applicable for criminal procedures during the civil confiscation. Hence, the Court concluded that the confiscation does not amount a penalty.

In another case of Phillips v. the United Kingdom⁶⁵ ECtHR examined a complaint by the applicant who had been convicted of drug trafficking. In his application to the ECtHR, Phillips referred to violations of his presumption of innocence under Article 6(2). The applicant complained that in contrast to the usual obligation on prosecution to prove elements of the allegations against the accused, the burden was on the applicant to prove, on the balance of probabilities, that he acquired the property in question other than through drug trafficking. Since the applicant was not able to provide any record explaining the source of this money, the judge assumed that it was a benefit of drug trafficking. On the basis of the judge's findings, there could have been no objection to include the matters in a schedule of the applicant's assets for the purpose of sentencing, even if the statutory assumption had not applied. It is important to note, that the Court examined the case within the criminal limb of Article 6, which means that the Court indirectly recognized that the safeguards (such as presumption of innocence) applicable under criminal processes were applicable in the present case.

So, it stems from the case-law of the Court that the application of various types of presumptions in the confiscation process does not constitute a problem in terms of Article 6, if they are accompanied by adequate safeguards of a fair trial. Only the total reversal of the burden of proof upon a defendant or accused is not allowed.⁶⁶

As for Article 7, it also depends on, whether the confiscation will be examined under criminal or civil limb. Thus, in case it is viewed under criminal section, there may raise human rights issues, such as retroactivity. This can be construed when analyzing the following decisions of ECtHR.

In decision of Varvara v. Italy⁶⁷ ECtHR considered the confiscation measure as a penalty, and punishing a defendant whose trial has not resulted in a conviction as incompatible with Article 7, violating the principle of legality. This decision *has been widely interpreted as requiring the*

⁶⁵ Phillips v. the United Kingdom, Judgment of 5 July 2001, application no. 41087/98, available at <http://hudoc.echr.coe.int/eng?i=001-59558> Last visited 10 May, 2019.

⁶⁶ OECD Anti-Corruption Network for Eastern Europe and Central Asia "Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia", 2018, p. 21 Last visited 10 May, 2019.

⁶⁷ Varvara v. Italy, Judgment of 24 March 2014, application no. 17475/09, available at <http://hudoc.echr.coe.int/eng?i=001-128094> Last visited 10 May, 2019.

confiscation order to be based on a formal declaration of criminal liability, in which only the guarantees under Article 7 would be ensured by the States.⁶⁸

In Welch v. United Kingdom⁶⁹, dealing with the retrospective application of a confiscation measure related to drug trafficking, which was considered by UK as a preventive measure, the ECtHR held that **in reality the confiscation amounted to a penalty** within the meaning of Article 7 ECHR, and therefore it could not have retroactive application. To reach such a conclusion the ECtHR observed, that the purpose of the measure is not conclusive, since the ‘aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of punishment.’⁷⁰

Summarizing the above-mentioned decisions, we may conclude, that the Court declares violation of Article 7 and breach of principle of legality, when the confiscation measure has a punitive purpose and constitutes a penalty. Thus, in those cases the confiscation laws cannot be applied retroactively.

What concerns Article 1 of Protocol 1, which protects right to property, the crucial factor is whether the Court will deem confiscation measures as interference with the property right and whether that interference will be considered proportionate by ECtHR.

In Gogitidze and others v. Georgia⁷¹ the applicant challenged the compliance of confiscation order with Article 1 of Protocol No. 1. The Court reiterates that “far from being a purely administrative confiscation, the impugned measure in the instant case **was linked to the prior existence of a criminal charge** against a public official and thus represented **by its nature a civil action in rem** aimed at the recovery of assets. The confiscation **amounted to interference** through control of use of property, but **that interference was lawful** and **pursued a legitimate aim** of fighting against corruption in public service.⁷² Hence, the Court concluded that civil confiscation in the present case, do not qualify as penalty but rather a **measure of control** of property use within Article 1 of Protocol N. 1.

⁶⁸ Adriano Martufi, *Confiscating assets without a prior conviction violates fundamental rights?*, Leiden University Press (2018) Last visited 10 May, 2019.

⁶⁹ Welch v. United Kingdom, Judgment of 09 February 1995, application no. 17440/90, available at <https://rm.coe.int/16806ebd5d> Last visited 10 May, 2019

⁷⁰ M. Simonato, “Confiscation and fundamental rights across criminal and non-criminal domains”, Vol.18, Issue 3, 2017, p. 370 Last visited 10 May, 2019.

⁷¹ Gogitidze and others v. Georgia, Judgment of 12 August 2015, application no. 36862/05, § available at <http://hudoc.echr.coe.int/eng?i=001-154398> Last visited 10 May, 2019.

⁷² M. Simonato, “Confiscation and fundamental rights across criminal and non-criminal domains”, Vol.18, Issue 3, 2017, p. 366-368 Last visited 10 May, 2019.

In case of Phillips v. the United Kingdom⁷³ the applicant also referred to violations of his property right under Article 1 of Protocol 1. The Court, however, did not find violations.⁷⁴ In particular, considering that UK Drug Trafficking Act **was designed to combat** the serious problem of **drug trafficking**, by punishing offenders and reducing the profits available to fund future drug-trafficking ventures, Court found that **the intervention**, which the applicant had been subjected to, **was proportionate** given the difficulty in establishing the link between assets and drug trafficking.⁷⁵

Meanwhile, in Paulet v. the United Kingdom⁷⁶, the ECtHR has affirmed **that an interference** with the right to property **violates** the principle of proportionality, compromising the **fair balance between individual right and general interest**, when an **excessive burden** is imposed on the property-owner.⁷⁷ Here, the applicant complained that the confiscation orders, following a conviction, had been **disproportionate as it amounted to the confiscation of his entire savings** over four years of work, without any distinction made between his case and those involving more serious offences such as drug trafficking.⁷⁸

Thus, we may conclude that Court has clarified that ECHR requires a **legal** basis for any interference with the ‘peaceful enjoyment’ of one’s possessions (**lawfulness**), and that such an interference, based on public interests, **is proportionate** to the **legitimate aim pursued (proportionality)** and does not create an obvious imbalance between **individual right and general interest**.⁷⁹

Overall, it is obvious that the Court finds that safeguards and limits differ depending on whether confiscation measures are criminal in nature or not. The criminal limb of Article 6 ECHR, as well as Article 7 ECHR, applies confiscation measures whose nature is that of a penalty, whatever the national label is. The assessment of the nature carried out by the ECtHR is, therefore, crucial to determine the violation of those conventional rights.⁸⁰

⁷³ Phillips v. the United Kingdom, Judgment of 5 July 2001, application no. 41087/98, available at <http://hudoc.echr.coe.int/eng?i=001-59558> Last visited 10 May, 2019.

⁷⁴ OECD Anti-Corruption Network for Eastern Europe and Central Asia “Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia”, 2018, p. 17-19 Last visited 10 May, 2019.

⁷⁵ Ibid, p. 49

⁷⁶ Paulet v. The United Kingdom, Judgment of 13 May 2014, application no. 6219/08, available at <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-142961%22%5D%7D> Last visited 10 May, 2019

⁷⁷ Ibid, § 65

⁷⁸ M. Simonato, “Confiscation and fundamental rights across criminal and non-criminal domains”, Vol.18, Issue 3, 2017, p. 374-375 Last visited 10 May, 2019.

⁷⁹ Ibid, p.373-376

⁸⁰ Ibid, p.377

Additionally, in their case-law US Supreme Court⁸¹ and Northern Ireland Court of Appeal⁸² touched upon issue of balancing in rem confiscation applicable under States' legislation and the constitutional rights, such as the presumption of innocence and the right to fair trial.

⁸¹ United States v. Ursery, 518 U.S. 267, 278 (1996), available at <https://supreme.justia.com/cases/federal/us/518/267/> Last visited 10 May, 2019.

⁸² Walsh v. Director of the Assets Recovery Agency, [2005] NICA 6 (Northern Ireland Court of Appeal), available at <https://www.casemine.com/judgement/uk/5b46f21b2c94e0775e7f2542#> Last visited 10 May, 2019.

Chapter 3: The Experience of Foreign Countries on Asset Confiscation

Mechanisms

When examining the experience of different jurisdictions, it becomes vivid that confiscation of proceeds of crime is possible outside the criminal proceedings in countries, including Italy, Slovenia, United States and United Kingdom. However, regimes of civil forfeiture in those countries differ from each other substantially. NCBC systems in such countries as US and United Kingdom have broad sphere of application. UK, for instance applies extended confiscation mechanism. Ukraine and Georgia, on the other hand, are among the countries that apply conviction based civil forfeiture, which means that prior conviction of a criminal is compulsory for asset confiscation.⁸³

Italy

Italy incorporated the NCB **preventive** confiscation mechanism in 1982. The primary purpose for implementation of the confiscation procedure was combat against criminality that took over Italy.⁸⁴ The confiscation mechanism is characterised under the preventive confiscation type, as Italian regulations deprive the criminal offenders of their property and other economic resources, to prevent the future possibility of committing similar offences.

In 1982, the Italian authorities enacted a new law against the mafia conspiracy, which provided for confiscation of property illegally acquired by criminals and their associates. This law is intended to prevent the accumulation of wealth of the Mafiosi.⁸⁵ According to the established procedure, the district attorney or the chief of police are authorised to propose the seizure of property suspected of being derived from crimes, and a court of law decides to either accept or reject such a motion and, where appropriate, orders confiscation of illegally acquired assets.⁸⁶

⁸³ OECD Anti-Corruption Network for Eastern Europe and Central Asia “Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia”, 2018, p. 50-64, Last visited 10 May, 2019.

⁸⁴ “The Italian experience in the management, use and disposal of frozen, seized and confiscated assets”, CAC/COSP/WG.2/2014/CRP.3, (Open-ended Intergovernmental Working Group on Asset Recovery) Eighth meeting Vienna, 11-12 September 2014, p. 2 Last visited 10 May, 2019.

⁸⁵ P Arlacchi, “Effects of the new anti-mafia law on the proceeds”, 01.01.1984, p. 91-100, available at https://www.unodc.org/unodc/en/data-and-analysis/bulletin/bulletin_1984-01-01_4_page008.html Last visited 10 May, 2019.

⁸⁶ Ibid,

NCBC is currently regulated in Italy also under law no. 575⁸⁷, Article 2-bis of which states, that preventive confiscation can be applied towards the members of criminal groups and their affiliated persons to deprive them of the proceeds of crime, those who allegedly committed certain offences (illicit drug trafficking, money laundering, etc.) as defined under the CC.⁸⁸

To apply preventive confiscation, it is necessary and sufficient for the danger that a person poses to the public and possibility of committing a crime by that person to be proved. The minimal threshold for proving this is bringing evidence on the interconnection between the person and criminal groups.⁸⁹

The prosecutor or the Commissioner of Police, competent to request the application of precautionary measures, shall carry out, with or without the help of the Financial Police, investigations into the lifestyle, financial means and property of the persons who may be the subjects of the precautionary measure of special surveillance for public security with or without obligatory residence. When there exists an actual danger that the goods deemed liable for confiscation pursuant to article 2-ter may be lost, withheld or alienated, the Prosecutor or the Commissioner of Police may request the court with jurisdiction on the application of the precautionary measures to provide for the seizure of the said goods before the date of the sitting has been decided.⁹⁰

Also, the burden of proving that the property is legally acquired at all stages of the confiscation process lies with the owner of the property.⁹¹

From the point of interrelation with constitutional rights and guarantees, such as the presumption of innocence, **preventive confiscation** in Italy is an act of striking out the illicit proceeds from economic circulation, and is not deemed as criminal punishment. Hence, the presumption of innocence and the guarantees attached to it do not apply.

⁸⁷ Law no. 575/65 of Italy, Article 2-bis available at <https://wipolex.wipo.int/en/legislation/profile/IT> Last visited 10 May, 2019.

⁸⁸ Ibid

⁸⁹ EUROJUST, (General Case 751/NMSK – 2012): Report on Non-Conviction-Based Confiscation, (2013), p.121-123 Last visited 10 May, 2019.

⁹⁰ Ibid

⁹¹ Barbara Vettori, “Tough on Criminal Wealth: Exploring the Practice of Proceeds from Crime Confiscation in the EU”, (2007), p. 78-84, available at

<https://books.google.am/books?id=BU1p9FhcNYQC&printsec=frontcover&hl=ru#v=onepage&q&f=false> Last visited 10 May, 2019

Unites States

18 U.S.C 981 on Civil Forfeiture⁹² is basis of the NCBC under US jurisdiction. Currently, the restoration of proceeds of crime is carried out in two mechanisms:

- Criminal Procedure, in which case the confiscation of property is imposed as a penalty based on a conviction (in personam);
- Civil Procedure, regardless of any criminal proceedings. In this case, the prosecutor will file a suit against certain property (in rem).⁹³

Under US law, courts do not have to hold accusatory verdict, or even criminal persecution does not need to be initiated.

In order to initiate the asset forfeiture proceedings, the authorised body starts to conduct proceedings against property (in rem). The confiscation proceedings can also be initiated in personam, but at that time independent proceedings against all persons entitled to the illicit property must be held, which will be ineffective and time-consuming.

Any property, acquired as a result of crime, envisaged in US Criminal Code, as well as the property, used for the commission of a crime or assistance thereof, can be subject to confiscation. In particular, any property acquired as a result of smuggling, corruption, extortion, money laundering, terrorism financing and other crimes can be confiscated by the State.

The civil forfeiture proceedings consist of two phases,

- Pre-trial stage, during which any property subject to forfeiture may be seized by Attorney General,
- Judicial stage, that begins when a person, whose property has been seized during the pre-trial stage, has appealed the decision on seizure.

Thus, before beginning of proceedings, the owner of this property is being informed about seizure and the right to appeal against the decision. In the event property owner appeals the decision on seizure, the case goes through stage, where parties obtain evidence and substantiate their claims.⁹⁴

As a result, in the judicial stage, Attorney General must bear the burden of proving, with “balance of probabilities” principle, the fact of existence of criminal conduct and causal link between

⁹² 18 U.S.C 981 on Civil Forfeiture of USA, available at <https://www.law.cornell.edu/uscode/text/18/981> Last visited 10 May, 2019.

⁹³ Ibid

⁹⁴ Stefan D Cassella, “Civil Asset Recovery: The American Experience”, *Euclid: The European Criminal Law Associations' Forum* (2013), p. 99-102

the crime and the property. On the other hand, the other party has obligation of proving the lawful origin of property.

If, however, the parties do not appeal the decision on seizure of property, the property will be confiscated without judicial phase, based on the Attorney General's decision on confiscation.⁹⁵

United Kingdom

NCBC under UK legislation is also available. More specifically, UK Proceeds of Crime Act⁹⁶ (PCA) used to regulate both the conviction based and the non-conviction based confiscation procedures. However, the Criminal Finances Act 2017(CFA)⁹⁷, which recently entered into force, amends the PCA to expand the provisions for confiscating funds to deal with terrorist property and proceeds of tax evasion. Thus, currently, the NCBC is carried out under the CFA regulations.

Chapter 3 of CFA⁹⁸ makes provision for (NCB) asset forfeiture, that allows for assets to be seized, not only in the absence of criminal conviction but also using the civil standard of proof. During this civil procedure, the rules of criminal evidence do not apply; makes possible admission of different types of evidence that would not be admissible at a criminal trial, including inferences from silence, previous behavior and hearsay evidence.⁹⁹

“In NCB forfeiture proceedings, such safeguards are sidestepped in spite of such proceedings being, in essence, concerned with matters of criminal law. Indeed, the only salient difference amounts to the fact that what is being targeted is not individual liberty but, rather, an individual's property, as such the protection provided appears far less robust for personal property and assets than if the deprivation concerned either personal integrity or freedom.”¹⁰⁰

The suit for confiscation can be initiated by the National Crime Agency or by the Director of Public Prosecutions, who are considered as relevant authority under UK CFA.¹⁰¹ The relevant bodies bring the suit for asset confiscation to the Crown Court. The suit may be filed even in those cases, when no legal proceedings have been instituted towards the property in the past. Additionally, the suit

⁹⁵ Stefan D. Cassella, “Asset Forfeiture Law in the United States”, (2013), p. 2-15

⁹⁶ UK Proceeds of Crime Act 2002, available at <http://www.legislation.gov.uk/ukpga/2002/29/data.pdf> Last visited 10 May, 2019.

⁹⁷ UK Criminal Finances Act 2017, available at http://www.legislation.gov.uk/ukpga/2017/22/pdfs/ukpga_20170022_en.pdf Last visited 10 May, 2019.

⁹⁸ Ibid, Chapter 3

⁹⁹ Jennifer Hendry, “How Far Is Too Far? Theorising Non-Conviction-Based Asset Forfeiture”, 2016, Cambridge University Press, p. 3-5, available at

<http://eprints.whiterose.ac.uk/89915/1/Jennifer%20Hendry%20and%20Colin%20King%20How%20Far%20Is%20Too%20Far.pdf> Last visited 10 May, 2019.

¹⁰⁰ Ibid, p. 18

¹⁰¹ UK Criminal Finances Act 2017, Article 362A(7) Last visited 10 May, 2019.

may be filed if, for example, a litigation process has been initiated and the accused person was acquitted.

When initiating confiscation proceedings, it is not necessary to prove that specific crime was committed by a specific person, rather the existence the offence envisaged under the UK Criminal Code and the relationship between the offence and the subject property are sufficient, considering the peculiarities of civil proceedings.¹⁰²

So, in the course of proceedings, burden of proof lies with the state bodies. However, balance of probabilities principles, which is less than complete certainty, is applicable in the confiscation procedures, unlike criminal proceedings, where beyond reasonable doubt principle applies.

UK is also unique in its approach with regards to bribery claims, which shows different mechanisms, through which state confiscates illicit assets of public officials through civil claims. These tools may be “appropriate when criminal solutions are unworkable or unsuccessful, or in circumstances where a civil mechanism offers a better financial outcome.”¹⁰³ The mechanisms are completely independent of criminal procedures and include only filing a civil action against a person (without interference of criminal investigative and prosecution bodies). Examples of such mechanisms are tort of bribery, contractual claims and termination, breach of fiduciary duty, conspiracy.¹⁰⁴

Georgia

Civil forfeiture in Georgia is regulated in the Chapter XLIV-1 of the Civil Procedure Code¹⁰⁵. In accordance with its provisions, the civil forfeiture is applicable, in particular to: the assets, acquired through racketeering, assets of illegal origin (acquired as a result of violation of law), unjustified assets (the lawful origin of which the defendant cannot demonstrate), belonging to the public official or any other person associated with him.

In order for confiscation procedure to commence the prosecutor must file a suit for confiscation of property throughout ten years after the verdict has been entered into force for the

¹⁰² Jennifer Hendry, “How Far Is Too Far? Theorising Non-Conviction-Based Asset Forfeiture”, 2016, Cambridge University Press, p. 5-15 Last visited 10 May, 2019.

¹⁰³ Cooley Alert, “Civil Claims for Bribery: an Overview of the English and Common Law Position”, April 2015, available at <https://www.cooley.com/news/insight/2015/civil-claims-for-bribery-an-overview-of-the-english-and-common-law-position>, Last visited 10 May, 2019

¹⁰⁴ Ibid

¹⁰⁵ Civil Procedure Code of Georgia, available at <https://matsne.gov.ge/en/document/download/29962/98/en/pdf> Last visited 10 May, 2019.

crimes mentioned above. In the criminal proceedings, the prosecutor has to prove, beyond the reasonable doubt, the precise property to be confiscated. Thereby, the burden of proof lies with the prosecutor entirely, whereas the defendant has no obligation to prove legality and origin of the presumed proceeds of crime. However, after the court has accepted the suit brought by the prosecutor, the respondent, which is the person, declared guilty, bears the burden of proving lawful origin of the property.¹⁰⁶

The court recognises the property as acquired in the course of committing criminal offence unless the lawful origin of the property is proven by any documentary or any other evidence examined during the proceedings. The standard of proof based on “balance of probabilities” is used. By this standard, the court weights the evidence and renders decision in favour of the party whose version is most likely to be true.¹⁰⁷ If, as a result of the investigation, the court recognizes the property as obtained as a result of criminal activity, it is to be returned to its legitimate owners, by the Article 356-5 of the CPC of Georgia.¹⁰⁸

It can be noticed, the civil confiscation in Georgian model depends on the criminal conviction; hence the NCBC is not established under Georgian legislation.

Ukraine

Currently three confiscation regimes exist under Ukraine regulations. Two of the three regimes are regulated through criminal framework, namely the Ukrainian CC and CPC, while the third regime is governed under the CPC, however still tied to criminal proceedings.¹⁰⁹

The civil forfeiture mechanism in Ukraine appeared in 2015, when Civil Procedure Code (CPC) was amended by new Chapter 9, “The Specific Features of Proceedings Related to Recognition of Assets as Unjustified and Their Recovery”.¹¹⁰

In accordance with Article 233-1 of the CPC, the claim to recognize the assets as unjustified recovering them from persons, specified in the article, shall be submitted by Prosecutor for the benefit of the State over general limitation period of 3 years from the date, when the judgment,

¹⁰⁶ OECD Anti-Corruption Network for Eastern Europe and Central Asia “Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia”, 2018, p.74-75 Last visited 10 May, 2019.

¹⁰⁷Ibid

¹⁰⁸ Civil Procedure Code of Georgia, Article 356-5 Last visited 10 May, 2019.

¹⁰⁹Council of Europe, “Expert Opinion on: Draft Law of Ukraine On amendments to certain legislative acts of Ukraine regarding the ensuring of unjustified assets recovery into the revenue of the State”, ECCU-PCF- UA-6/2016, p.21-29 Last visited 10 May, 2019.

¹¹⁰OECD Anti-Corruption Network for Eastern Europe and Central Asia “Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia”, 2018 , p.75-76 Last visited 10 May, 2019.

declaring public officials guilty of committing corruption crimes or money laundering, came into legal force.¹¹¹

So, it is provided in Article 233-2 of the CPC¹¹² that the court may recognize the assets as unjustified in case it was not proven in the court, based on the provided evidence, that the assets have been legally obtained.¹¹³

Slovenia

Civil forfeiture, which is not based on conviction, proved to be the most effective in Slovenia amongst the other civil law countries. In rem confiscation procedure is stipulated under “Law on Forfeiture of Assets of Illegal Origin”¹¹⁴ (hereinafter: Law) or ZOPNI adopted in 2011, which was amended of 2014. The Law is aimed to prevent acquisition and use of the assets of illegal origin. This purpose can be achieved through confiscation of such assets directly from the owners of these assets, or from the persons to whom the assets have been transferred.¹¹⁵

Civil forfeiture in Slovenia does not depend on person’s conviction and is applicable to such crimes, as giving and accepting bribe, gaining benefits from illegal intermediation, and any other intended crime, which is punishable of at least 5 years of imprisonment, provided that the person is suspected of owning the assets of illegal origin to the amount exceeding 50.000 Euros. The

¹¹¹ Ukraine Civil Procedure Code, Article 233-1, available at <https://wipolex.wipo.int/en/text/439810> Last visited 10 May, 2019.

¹¹² Ibid, Article 233-2

¹¹³ According to the OECD recent report, “the legislation of Ukraine on the civil forfeiture is not framed well enough to divide the obligation to prove between the parties to the proceedings. Article 233-2 of the CPC establishes only an obligation for the court to recognise the assets as unjustified in cases, if, based on the provided evidence, the court establishes that the assets, which are claimed to be recognised as unjustified, have been acquired legitimately. At the same time, in the criminal confiscation procedure of Ukraine, the burden of proof is born by the prosecution, entirely.” OECD Anti-Corruption Network for Eastern Europe and Central Asia “Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia”, 2018 , p. 83 Last visited 10 May, 2019.

¹¹⁴ Law on Forfeiture of Assets of Illegal Origin of Slovenia, (Zakon o odvzemu premoženja nezakonitega izvora (ZOPNI)), available at <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO6267> Last visited 10 May, 2019.

OECD Anti-Corruption Network for Eastern Europe and Central Asia “Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia”, 2018 , p. 47 Last visited 10 May, 2019.

¹¹⁵ Review of implementation of the United Nations Convention against Corruption (Implementation Review Group), Sixth session, (CAC/COSP/IRG/2015/CRP.7), 22 May 2015, p.5-8 , available at https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/1-5June2015/V15_03661e.pdf Last visited 10 May, 2019.

procedure, established by the Law, is directly against the assets, not against a person, owning the assets.¹¹⁶

According to Article 4 of the Law, a defendant (in confiscation procedure) is a person, who died before or during the investigation of the court proceedings. However, there are reasons to suspect him of having committed crime. Under Article 5 of the Law, the assets shall be considered to have illegal origin unless it is demonstrated that these assets have been acquired from legitimate sources. Concerning the assets, it is presumed that they have been acquired from illegitimate sources, if the apparent discrepancy is found between the total value of assets and income net of taxes paid by the persons, against whom proceedings have been commenced. During assessment of such discrepancy it is necessary to take into account total value of all assets, which are owned by, or are used by the person.¹¹⁷

The procedure of civil forfeiture in Slovenia includes a financial investigation, a provisional arrest of the property, civil court proceedings, and confiscation itself. The financial investigation is conducted by the prosecutor, who is competent to commence the pre-trial or trial proceedings of the relevant crimes. The latter shall act as a claimant in the proceedings for civil forfeiture. The prosecutor should commence financial investigation, if during criminal pre-trial or trial proceedings there were reasonable grounds to suspect that a person has committed one of the corruption crimes listed in the Law. Alternatively, as basis for initiation of investigation may serve reasonable suspicion that these persons have, possess or use the assets, for which there are grounds to suspect that they have illegal origin and such assets are not treated as the proceeds of crimes or proceeds, related to crimes.¹¹⁸

Upon completion of financial investigation, the civil forfeiture proceedings in the Court of Slovenia shall start with the claim to be filed by the prosecutor against the owner of assets as defendant, and will be conducted under civil procedure rules. Article 27 of the Law implies that, during such proceedings, plaintiff must provide the facts and evidence, raising suspicion of illegal origin of the assets of defendant. The defendant may dispose of presumption of illegal origin of assets if he proves the lawful origin of assets. The final decision on the confiscation or the claim dismissal shall be made in the civil proceedings court.¹¹⁹

¹¹⁶ Ibid

¹¹⁷ Ibid, p. 77-78

¹¹⁸ Ibid

¹¹⁹ Ibid

In the civil forfeiture, which is not based on conviction, applied in Slovenia, the burden of proof lies with the prosecutor, who must provide facts and evidence raising suspicion of illegitimacy of the assets belonging to defendant. If the prosecutor provides the facts and evidence, the burden of proof shifts to the defendant. So, the defendant has to dispose of certain presumptions in a court of civil proceedings.¹²⁰

Additionally, Slovenia provided the statistical data¹²¹ on the recovery of assets, which indicates the successful implementation of NCBC mechanism.¹²²

Review

Based on the analysis of legal acts of foreign countries, we may conclude, that the most clear-cut model of NCBC exists under Slovenian, US and UK regulations. Italian confiscation regimes are straightforward against Mafiosi, thus its rules of confiscation target only specific scope of crimes, related to Mafia organisations. USA and UK, on the other hand, are among common law countries; this means that differences between Armenian and US or UK legal systems are likely to hinder the lucrative incorporation into Armenian legislation the confiscation laws in a similar way as in common law countries.

Meanwhile, Slovenia is the only civil law country that applies NCBC mechanism and with successful statistics. Thus, we conclude that the most feasible model to look to when deciding to incorporate NCBC laws is Slovenia.

¹²⁰ Ibid, p. 85

¹²¹ During the period from 2013 to 2016 the assets have been confiscated in the total amount of EUR 1 998 169, which is an impressive result. Thus, the legislation of Slovenia on civil forfeiture got positive feedback from OECD experts during the 3rd round of Slovenia evaluation in June 2014 as part of mutual evaluation of OECD Working Group on combating bribery of foreign public officials.

¹²² Ibid, p. 79-89

Chapter 4: Applicability of NCB Confiscation Mechanism in Armenia

§1. Existing Regulations and Current Initiatives towards Incorporation of NCB Confiscation

Armenia is among countries where confiscation performs a punitive function. The only procedure allowing confiscation of proceeds of crime is stipulated under Article 103.1 of the CC of Armenia¹²³, which was amended in 2014, with the aim of implementing the international standards. Confiscation procedure in RA is provided under criminal confiscation regime and is considered as a

¹²³Criminal Code of Armenia, Article 103.1(1), (April 18, 2003), available at <http://www.irtek.am/views/act.aspx?aid=150015> Last visited 10 May, 2019.

criminal sanction, although it is not prescribed in RA Criminal Code as type of criminal punishment. Criminal confiscation can be imposed on the offender, notwithstanding the execution of confiscation of property (զույգի բռնագրավում), a punishment under Article 55 of the CC¹²⁴. Further, the confiscation of illegally acquired property under Article 103¹ is a measure of criminal nature, which means that it can be applicable exceptionally within principles and mechanisms of criminal procedure.

According to Article 103.1, any property derived or acquired, directly or indirectly, through commission of an offence, as well as profit or other benefits made from using such property (except for the property belonging to bona fide third parties and the property to be used to recover the damages of victim, civil plaintiff) shall be confiscated.

The procedure of the criminal confiscation is regulated by the CPC of Armenia and since the criminal confiscation under current Armenian regulations is the legal consequence of criminal conviction the court may impose confiscation order only upon the accomplishment of criminal trial and only after the accused person is declared guilty of committing crime by final judicial act.

Accordingly, in Armenia, it is the obligation of the prosecution alone to bear the burden of proof in the confiscation procedure. In order to apply the confiscation as a sanction, the guilt of a person in committing a crime must be proven “beyond the reasonable doubt”. It is also worth mentioning, that Article 103.1(4) of CC provides the list of property that can be subject to confiscation.¹²⁵¹²⁶

So, under Armenia current legal framework civil forfeiture mechanism is not applicable. Thereby the absence of the NCBC mechanism under Armenian legislation leads to impasse in certain circumstances. Specifically, in those cases, when the person, who committed the crime, has, for example, immunity, died, is hiding, the confiscation of those assets will not be possible. Moreover, this considerably reduces the possibility of extracting the illegally acquired assets from economic turnover.

Additionally, according to the statistics Armenia provided for OECD Anti-Corruption Network for Eastern Europe and Central Asia study, during the period between 2013 and 2014, for money laundering cases the total amount of about EUR 46 600 (including EUR 45 246 on one criminal case) were confiscated on three criminal cases.¹²⁷ Notably, these are not very satisfying results, compared to Slovenia, which once again indicates that current confiscation mechanisms are not sufficient.

¹²⁴ Ibid, Article 55

¹²⁵ Criminal Code of Armenia, Article 103.1 (4) Last visited 10 May, 2019.

¹²⁶ OECD Anti-Corruption Network for Eastern Europe and Central Asia “Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia”, 2018, p. 66 Last visited 10 May, 2019.

¹²⁷ Ibid, p. 90

In light of the on-going practice of countries adopting the NCBC mechanisms, Armenia initiated adopting in rem asset confiscation regime, with the aim of fight against corruption.

Starting from 2017 preliminary examination has been carried out by Central Bank of RA, which adopted Concept Paper¹²⁸ that includes the review of NCBC mechanisms, as well as practice of certain states in the field of asset confiscation through criminal and civil procedures.

Upon the RA Prime Minister's decision¹²⁹ in 2018 a working committee has been established, which has to further examine the NCB asset confiscation mechanism and the international standards and practices, in order to incorporate the NCBC in Armenia. The working committee consists of representative from certain state bodies, including at least Ministry of Justice, the Prosecutor's Office, the Central Bank's Financial Monitoring Center, other relevant agencies, as well as representatives from judicial sector. Based on the results of the study, the committee is aimed to come up with a package of legislative amendments.¹³⁰

§2. Introduction to the Possible Model of NCB Asset Confiscation under Armenian Legislation

Taking into account results of the research, there are certain suggestion to present regarding NCBC model that can be introduced in the Armenian legislation, and also certain considerations that the legislators need to pay close attention to before incorporating the mechanism into Armenia.

¹²⁸ Հայաստանի Հանրապետության կենտրոնական բանկի ֆինանսական ուսումնասիրությունների կենտրոնի կողմից մշակված «Հայեցակարգ առանց մեղադրական դատավճի հանցավոր հանապարհով ստացված գույքի բռնագանձման ինստիտուտի ներդրման վերաբերյալ», (2017)

¹²⁹ ՀՀ վարչապետի՝ 1 մարտի 2019 195 – Ա որոշում աշխատանքային խումբ ստեղծելու և դրա անհատական կազմը հաստատելու մասին available at <https://www.e-gov.am/decrees/item/19731/> Last visited 10 May, 2019.

¹³⁰ Ibid, Հավելված՝ ՀՀ վարչապետի՝ 1 մարտի 2019 195 – Ա որոշման

1. NCBC can be implemented through making amendments to existing RA legal acts (ex. RA Civil Procedure Code) or adopting a separate law regulating the legal relations. The latter will present more comprehensive legislation and is likely to overcome risks of legal gaps.

2. Currently, the list of corrupt offences is specified under the Order No.3 of the Prosecutor General¹³¹, while following the example of certain European countries seems more rational, as the list of corruption offences needs to be adopted within CC, to stipulate in the law the exact scope of offences that trigger confiscation. Narrowing down the list of offences instigating NCBC is necessary also considering that certain states provided very extensive scope of crimes, which is also **overcomplicating the laws**.

3. The scope of objects that can be subjected to confiscation needs to be envisaged in the law, regulating confiscation procedure.

4. After the comprehensive observation of international standards (particularly, ECHR case-law), experiences of foreign countries and studies of doctrinal sources, it can be concluded that there is no single model of confiscation without conviction that will not put States before the risk of violating certain constitutional and conventional rights. For example, certain safeguards, as giving the person, whose property has to be confiscated, a right to appeal the confiscation decision, is of fundamental importance.

5. The differences between Armenian and common law countries is very important to consider, before trying to integrate a measure that might contradict national regulations and legal principles. For instance, the standard of proof of “balance of probabilities”, that is commonly applicable in UK and US, is completely unfamiliar to Armenian legislation. Thus, its incorporation will have to overcome many obstacles, since “beyond reasonable doubt” standard of proof has been rooted in Armenian legislation for decades. Hence, shifting to another standard of proof tends to be very risky. Conversely, there is the example of Slovenia, civil law country, which successfully survived this transition.

Besides that, on the one hand the presumption of innocence is envisaged under RA Constitution 66, which entails that the accused does not have to prove his innocence, but rather the State has to prove he is guilty.¹³² On the other hand, under Article 310.1 of CC RA¹³³, the criminal offence of

¹³¹ ՀՀ գլխավոր դատախազի՝ 19.01.2017թ. N3 հրամանի հավելված, available at <http://www.prosecutor.am/myfiles/files/Cank.pdf> Last visited 10 May, 2019.

¹³² Constitution of Armenia (with December 2015 amendments) Article 66, available at <http://www.irtek.am/views/act.aspx?aid=150151> Last visited 10 May, 2019.

¹³³ Criminal Code of Armenia, Article 310.1 Last visited 10 May, 2019.

illicit enrichment has been introduced in 2016, which can be construed as nothing but the first attempt of Armenia to establish exception from the presumption of innocence.

6. While considering the possible model of confiscation, the authorities given to prosecutors in Armenia should be considered. Particularly, Article 29(2) of the RA Law on Prosecutor's Office entitles the prosecutor to file a civil claim for confiscation in case of violations against state interests.

134

Moreover, under Article 29(4) of the Law on Prosecutor's office, the prosecutor while filing a lawsuit for the protection of state interests is entitled to all the rights and bears all the obligations that are designated for the plaintiff, which include the rules of burden of proof.¹³⁵ Therefore, amendment to Article 29 of the mentioned Law, will be necessary, to authorise the prosecutor to run a civil suit in those cases, where the latter is notified about criminal origin of certain property. Thus, the grounds for filing a civil suit should be extended. Hence, in such cases the prosecutor will be given a right to file a civil suit for confiscating property in the scope of his obligation of protecting the state interests.

7. Further, the exact grounds for commencement of prosecutorial actions towards civil confiscation must be reflected in the respective regulations of Civil Procedure Code or separate legal act on civil confiscation. In particular, as bases for initiation of civil confiscation procedure may serve:

- death, fleeing or immunity of the person, who allegedly committed the crime,
- the identity of perpetrator is unknown, but the illegally obtained property has been found,
- the property acquired through the criminal offence has been found under the possession of a person other than the offender,
- expiration of statute of limitation for criminal liability.

8. As far as procedural regulations are concerned, it is necessary to entrench procedural norms within the Civil Procedure Code of RA¹³⁶, as the exact judicial process in case of filing a civil suit by prosecutor is not currently envisaged in the Code. Hence, the Code also needs to be amended and procedure of civil action for civil confiscation needs to be established under a separate section, where the norms governing issues on subjects of confiscation lawsuit, stages of confiscation, interim

¹³⁴ RA Law on Prosecutor's Office, 17.11.2017, Article 29(2), available at <http://www.irtek.am/views/act.aspx?aid=150222> Last visited 10 May, 2019.

¹³⁵ Ibid, Article 29(4)

¹³⁶ Civil Procedure Code of Armenia, 09.02.2018, available at <http://www.irtek.am/views/act.aspx?aid=150488> Last visited 10 May, 2019.

measures that might be applied and other regulations for in rem confiscation proceedings should be stipulated.

9. Concerning the issues on burden of proof, the same approach as in the majority of countries that apply NCBC mechanisms should be adopted. More specifically, when the prosecutor receives information from physical, legal persons or media that person has illegally acquired a property, the prosecutor is obliged to prepare materials. In the event when the prosecutor carries out an investigation and finds out an apparent discrepancy between the legitimate income of the person and the value of the property, the prosecutor instigates a civil suit to confiscate property. In other words, during pre-trial stage the prosecutor carries the burden of proving the fact of illegal acquisition of the property. However, the threshold of proving the given facts is lower than the criminal procedure standard of beyond a reasonable doubt, since these proceedings are outside of the criminal law field and are not targeting a person, but his property. Additionally, the person should be entitled to protect his rights towards the property, by having the right to appeal.

What concerns the burden of proof during the trial stage, it should be carried out in the general manner prescribed under Articles 60-63 of Civil Procedure Code¹³⁷. This means that in accordance with Article 60 of the Civil Procedure Code, the court must distribute the burden of proof between the parties.¹³⁸ Thus, the prosecutor is obliged to prove that the illegal source of the property subject to confiscation and the owner of the property must prove lawfulness of the source. Ultimately, if the fact of acquisition of property from illegal source is proved, the property confiscation will be carried out, based on court decision, that can be appealed in higher instance courts, which will be an additional guarantee for the respondent.

10. This means that in scope of this Paper, relatively more realistic approach for NCBC is deemed the civil confiscation similar to the regulations adopted by Slovenia, considering the similarities in that Armenia and Slovenia share in their legal systems.

Notwithstanding the abovementioned, it is undoubtedly hard to foresee the exact consequences that incorporation of NCBC mechanism might induce. There will certainly appear unanticipated repercussions and problematic circumstances. No matter how broadly examination of the international experience is carried out, the mechanism cannot work identically as in other countries, simply because of the differences in legal systems. Thus, the amendments will prove their effectiveness only after a certain period of its application.

¹³⁷ Ibid, Articles 60-63

¹³⁸ Ibid, Article 60

CONCLUSION

When summarizing the results of the research the following conclusions can be outlined:

The NCBC is designated as civil law mechanism among majority of countries examined. The embedded legal mechanisms allow countries to remove illegally acquired assets from the economic circulation by returning them to the legitimate owners or confiscating in favour of state. The NCBC procedure is different from criminal confiscation, which exists under current Armenian regulations, mainly because it provides lower threshold of proof and distributes the burden of proof between the parties. In particular, during NCBC the standard of proof of “balance of probabilities”, which is very common in UK and USA, applies, facilitating the proving burden of the State.

Further, the NCBC proceedings are held against a property (in rem) and not against a person (in personam). This also means that the nature of the NCBC measures is remedial, rather than punitive as in case of criminal sanctions.

ECtHR approach regarding the NCBC is not very absolute, as within *Gogitidze* and *G.I.E.M. S.r.l.* cases the Court found no violation of rights to fair trial and property under ECHR, while under the *Varvara* case the Court held that confiscation order should be required to be based on a formal declaration of criminal liability. In any case, it can be construed that the *Engel criteria* is being used by the Court to determine, whether confiscation orders constitute a penalty or not. Further, from the *Gogitidze* and *Phillips* cases we may conclude that the Court deems the confiscation as a proportionate interference with the person’s right to property considering the importance of fight against trafficking and corruption.

The analysis of the present Paper indicates that although there is certain tendency of States to incorporate the NCBC mechanism, there are also issues concerning, in particular, retroactivity of laws, presumption of innocence and evidentiary standards that are not precisely regulated currently. There are no clear solutions, which means, there is also a great risk, that in case of implementation of the given mechanism, possible human rights violations are inevitable.

Concerning the possible model for Armenia, Slovenian regulations seem to be the most feasible ones, as the country has the same (civil law) system as Armenia. Conversely, no matter how perfectly structured USA and UK models may seem, the differences between Armenian and common law countries are too profound to overcome for the incorporation of the NCBC mechanism. As for

Italy, the country's primary aim of introducing NCBC was and continues to be the pursuit against Mafia. This is to clarify that Italian regulations can hardly serve as a legal basis for Armenia.

On the other hand, Georgia and Ukraine refrained from incorporating the NCBC mechanism, and currently continue to confiscate assets based on prior-conviction of a person. This means that the Post-Soviet Countries still have hesitations regarding the applicability of the NCBC mechanism.

As NCBC cannot be an absolutely independent procedure from criminal, the ultimate model for Armenia can be asset confiscation as a part of prosecutors' authority to file a civil confiscation suit in the scope of state interests' protection. Meanwhile, the procedural regulations should be established under RA Civil Procedure Code or through separate legal act. The evidentiary standard of proof should be lower for confiscation procedures and the burden of proof should be distributed between the parties to the proceedings.

With respect to grounds for initiation of civil confiscation procedure the following grounds can be distinguished:

- death, fleeing or immunity of the person, who allegedly committed the crime,
- such circumstances where the identity of perpetrator is unknown,
- property acquired through the criminal offence has been found under the possession of a person other than the offender,
- expiration of statute of limitation for criminal liability,
- in certain cases, insufficiency of evidence to proceed with criminal prosecution.

To recapitulate, every legislative initiative, ultimately, bears certain risks and it is up to the country, to take the risk or not. The model suggested in the paper can be one of the possible solutions, nevertheless, one point is clear, criminal confiscation mechanism, as it exists under the current Armenian regulations, needs to be reassessed and amended.

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