MUTUAL LEGAL ASSISTANCE IN CRIMINAL ASSET RECOVERY

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SUMMARY

Despite the efforts to combat illicit financial flows, money laundering and corruption, millions of lei are taken out of the country every year and hidden in other countries in the form of goods. The phenomenon of border crime is on the rise and legislation in this area remains stagnant. As the legislative provisions are partially present in various laws or conventions, some necessary provisions are missing at all. Thus, the need for a systematization and completion of legislation in the field of international legal assistance in criminal matters remains one of the priorities.

The practice of other states has proven to be the most appropriate source of inspiration for improving and supplementing the legislation of the Republic of Moldova, the fact that is shown in this research.

Transnational crime has shown the need for improving mechanisms to combat its impact, and facilitating the recovery of criminal assets has led the international community and the Republic of Moldova to adopt numerous conventions and treaties that still remain to be incomplete and insufficient for our country.

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Effective prevention and combating of transnational crime involving various forms of manifestations, such as drug smuggling, terrorism and terrorist financing, corruption, human trafficking, illegal migration, smuggling and other organized crime, not only identify criminals and prosecute their responsibility, in order to achieve the purpose of the criminal proceedings, but they are equally important to recover the material damages caused by the committed crimes, in order to remove them from the criminals and to compensate the victims who suffered from these crimes.

There are various legal bases for asset recovery but they should be differentiated from each other. The first of these is based on criminal law. Here, we differentiate between providing support to a foreign criminal lawsuit and conducting our own proceedings in the Republic of Moldova due to crimes committed abroad. Secondly, the transfer of illegally obtained goods in a foreign country can be obtained through a process in accordance with civil law and through the enforcement of a foreign judgment. It is possible both to initiate a lawsuit in the Republic of Moldova with subsequent execution, and to execute a foreign court decision in the Republic of Moldova.

However, we consider it difficult for practitioners in the Republic of Moldova to partially accumulate the provisions regarding the recovery of criminal property, namely international cooperation in this field from various treaties, conventions or laws. Analysing the legisla-

tion of European states, we found that countries that enjoy excellent success in the field of recovery of criminal assets, also have clear and systematised legislation in this regard.

Thus, the aim of this paper is to identify gaps in national legislation and compare national provisions with international ones (treaties and conventions) or other states to come up with suggestions to improve the legislation of the Republic of Moldova by supplementing it with new provisions indispensable to practitioners combating crime.

We took German law as a good example, which provided for the smallest details of the procedure for recovering criminal assets, especially in the field of international cooperation.

Germany is based on the Law on International Legal Assistance in Criminal Matters, which regulates the manner and preconditions for providing support for criminal proceedings in another country. This is the basis for mutual legal assistance. What is of interest to us are the numerous paragraphs on the confiscation and extradition of criminal asset [7, p. 4].

Nevertheless, Germany has become a signatory to important international multilateral agreements aimed at facilitating the cross-border recovery of assets, such as the European Union Conventions, the Council of Europe (such as the European Convention on Legal Assistance in Criminal Matters, adopted in Strasbourg from 20.04.1959 with the Additional Protocols, enforced for the Republic of Moldova from 05.05.1989, Convention on Money Laundering, Detection, Seizure and Confiscation of Proceeds from Criminal Activity from 08.11.1990, enforced for the Republic of Moldova from 01.09.2002), United Nations Conventions (such as the United Nations Convention against Transnational Organized Crime from 15.11.2000, New York, enforced for the Republic of Moldova from 16.10.2005).

However, in accordance with German legal rules, enforcement of mutual legal assistance is possible without an existing international law agreement. Section 59 of the above-mentioned German Law on Legal Aid is a broad-based provision that allows even investigative actions to be carried out in pursuit of assets. In addition to this law, the provisions of the German General Law on Criminal Procedure also apply to acts of mutual legal assistance. The purpose of recovering assets under German criminal law is not to punish the criminal, but to restore legal financial circumstances. However, a basic precondition is always that the assets to be recovered and even extradited stem from a crime or are bought for such a crime [7, p.13].

Making a comparison in this respect with Law no. 371 from 01.12.2006 on international legal assistance in criminal matters in the Republic of Moldova similar to the German one, it gives a better clarity in the matter of legal assistance related to people and less clarity in the field of criminal assets. Thus, if art. 31 of the law of the Republic of Moldova provides with the following content ,,Assets resulting from the commission of the crime that is the object of the request for rogatory commission shall be confiscated or seized according to the legislation enforced" [4, art. 31], then, the similar German law provides for a more detailed procedure in this regard, in the first stage, the regional court issues an order declaring that the final and binding foreign decision is enforceable (sections 54, 55 of the Law on German legal aid). If such an order is issued, enforcement assistance will be provided in the second stage. If the assistance is granted, the foreign decision will be equated with a German decision requiring confiscation or seizure (section 56 of the German Law on Legal Aid). Moreover, there is also section 76 of the German Law on Legal Aid, which specifies in whose competence the second stage will be, i.e. enforceable stage. To this end, it is usually provided that the Federal Ministry of Justice and Consumer Protection, together with the Foreign Office, decide in this regard, for certain measures and in relations with certain states, that

this competence is delegated to other offices (e.g. ministries of justice or prosecutors in 16 federal states). This usually takes place in non-international treaty assistance; however, the jurisdiction usually remains with the federal government [7, p. 15].

Returning to the law of the Republic of Moldova, the term ,,according to the legislation in force", what about the provisions that are missing in our legislation? Researching the above-mentioned international treaties that are also in force for the Republic of Moldova, we can see a new mechanism for our country of confiscation ,,confiscation that is not based on a sentence of conviction" or ,,civil confiscation". Thus, according to art. 54 par. 1 (a) of Law no. 158-XVI for the ratification of the United Nations Convention against Corruption ,,... each State Party shall, in accordance with its domestic law: (a) take such measures as may be necessary to enable its competent authorities to respond to a decision." And then (c) provides that ,,... each State Party, in accordance with its domestic law: intends to take the necessary measures to allow the confiscation of such assets in the absence of a conviction, when the perpetrator cannot be prosecuted because of death, escape or absence or because of other appropriate reasons" [4, art. 54]. Thus, does it follow that the recognition of a foreign confiscation decision in the absence of a conviction takes place only in the case of corruption crimes? What about the European countries that have a wider range of crimes for which this measure is provided? We consider it possible to complete the legislation in force, for the beginning, with the recognition of the confiscation of some assets in the absence of a conviction, taking over in this chapter the provisions considered in section 73, letter d) and section 74 letter a) in German Criminal Code, the provisions on extended confiscation according to which the recovery of assets can be undertaken separately from a conviction under criminal law, a measure known internationally as ,,civil confiscation". A precondition for the execution of foreign decisions taken in this type of procedure is that a criminal procedure has been initiated in a foreign country and that substantial elements of a crime have been proven. Therefore, in practice, it is important to provide details of the actual procedure and its details in the requesting State in order to allow an assessment by the participating authorities and courts in Germany.

Based on suspicion of illegal activity related to funds, UK law enforcement agencies can seize cash, including UK bank balances since 2018. The seizure application must be submitted to the magistrate's court and law enforcement agencies can request confiscation of assets if they are able to prove the likelihood that the money came from criminal activity. [8] This shows that a civil confiscation can take place not only in cases of corruption, but the Republic of Moldova is not prepared from a legislative point of view for the recognition of foreign judgments and, moreover, procedurally is not prepared for a possible extradition of criminal assets.

We consider a good example of the procedure for recognition and extradition of criminal assets presented in the Convention on Money Laundering, Detection, Seizure and Confiscation of Income from Criminal Activity which is in force for the Republic of Moldova. However, we believe that its provisions need to be applied to other crimes, not just money laundering. The above-mentioned law contains a chapter dedicated to international cooperation and to the smallest detail described the assistance in the criminal investigation phase, even the detailed procedure regarding bank accounts, provisional measures, confiscation procedure (obligation to confiscate, execution of the confiscation measure, confiscated goods and their maximum value), reasons for refusal and postponement of confiscation, protection of

the rights of third parties, central authority, expenses, damages. [2] But even this we consider incomplete.

Asset recovery ends substantially with asset forfeiture, so this is why we consider the above-mentioned Law incomplete. However, we ask ourselves: what happens to these subsequent assets? The question, which is also procedurally provided for in the example we are guided by, is that of Germany. Thus, in Germany, characteristic of criminal proceedings, which derive from the monopoly of state power, is that, in general, the proceeds go primarily to the state. If a confiscation or seizure decision issued by a foreign court in criminal proceedings is executed, the property generally remains in the executing State. There are two exceptions in this regard: Compensation of victims and the division of assets, or more precisely the money from their capitalization between the participating states. Moreover, on a legislative basis, with regard to the use of the assets finally confiscated, German criminal law provides for the transfer of assets to the German state (sections 73e, 74e German Penal Code). The recognition of a foreign judgment enforcing a sanction for the recovery of assets has a corresponding effect (section 56 (4) of the German Law on Legal Aid). With regard to section 56b of the Law on German Legal Aid, German law provides for the possibility to treat more flexibly the use of proceeds from the recovery of assets through mutual legal assistance in criminal matters. Accordingly, the participating States may agree to distribute the recovered assets. In German opinion, whether an agreement can be reached must be decided on a case-by-case basis. A precondition is to ensure reciprocity (section 56 (1) of the German Law on Legal Aid) [7, p. 10].

The German law on legal aid considers that foreign orders that can be classified as seizure, confiscation, also with equivalent value or confiscation from a third party are mandatory [1, art. 12]. A prerequisite under section 49 (4) of the German Law on Legal Aid is that third parties have adequate opportunities to exercise their rights. Furthermore, the decision cannot be contrary to a decision of German civil law in the same case. Finally, the decision does not have to relate to the rights of third parties over real estate in Germany [7, p. 14].

In the case of an ongoing foreign procedure, section 66 of the Law on German Legal Aid provides for the possibility of surrendering objects that can serve as evidence. Surrender of the proceeds and instruments of the crime is not excluded (see section 66 (1) no. 2-4 of the German Law on Legal Aid). However, it must be ensured that the surrender does not affect the rights of third parties and, if handed over, takes place under conditions that the objects will be returned on request without undue delay [1, art. 12]. This usually requires express assurance from the requesting state.

Thus, we can see that Germany introduced the provisions on third parties in the United Nations Convention against Transnational Organized Crime. But according to their legislation they gave it a general character and did not limit these provisions only to crimes in the category of organized crime. Conventions and treaties are a perfect source of inspiration for supplementing national legislation. However, we believe that they can have an even greater value if we do not limit their provisions, giving them a new life in the context of national legislation, taking over some provisions and adjusting to what we need.

Starting from practical desideratum, based on political considerations, the institution of extended confiscation would be a coherent and much more effective legal instrument in the fight against crime, usually organized.

Although it is a kind of confiscation, which involves a forced and gratuitous transfer to the state of certain goods, extended confiscation differs from special confiscation, in terms of both content, its legal nature and the conditions of application [6, p. 135].

In the specialized doctrine, the idea was promoted that extended confiscation does not present the features of a security measure and, in particular, the one regarding their preventive character, and its strong repressive character brings it closer to the specifics of complementary punishments [3, p. 98], an opinion which appears to be well-founded.

It is in this context, taking into account that the legislation of the Republic of Moldova contains extensive confiscation, that it inevitably affects the interests of third parties. Thus, we consider it absolutely necessary to introduce provisions that would protect the citizens of our state in case of a possible confiscation decision received from a foreign state through which the interests and rights of third parties will be affected.

Article 12, paragraph 8, of the Convention against Transnational Organized Crime specifically provides for the need to protect third parties in good faith. In the case of automatic confiscation, innocent third parties should use this tool as a post-confiscation rescue to protect their interests in the confiscated assets. Notification of third parties would allow them to participate in criminal confiscation proceedings so that they can present evidence against confiscation and be able to protect their interest in the assets. Alternatively, if the court considers and rejects a third party's request against confiscation, the possibility should be allowed for the third party to subsequently submit the same request in another state in response to a request for the execution of a foreign confiscation order.

At the same time, once a third party raises the question of an asset belonging to them, it must be established whether their right to that asset was registered before the crime was committed or whether the person knew that the asset was acquired from the proceeds of the crimes. Often, the main problem that arises in practice is that the criminal buys goods together with a third party, investing their share with income coming from committing crimes, while the other party has invested income that has legal origin.

Common property may be unacceptable in a confiscation process based on a foreign judgment. One way to solve this problem could be to introduce provisions by which the third party will be offered two solutions: 1. capitalization at a fair market value, as a result of which the third party will receive the value of its share, or; 2. alternatively, in a case where the third party wishes to retain ownership, they may redeem the offender's share from the State at a fair market price.

Thus, coming to the idea of capitalizing on goods, we cannot leave this phase of recovering assets without attention. According to the Handbook on International Cooperation for the Confiscation of the Proceeds from Crime published by the UN Office on Drugs and Crime, it offers us some solutions in terms of capitalization costs.

Regardless of the decision taken on the confiscated property, there will be many cases in which the property will eventually have to be sold. The existence of assets or goods manager would allow the state to respond immediately to this type of scenario. Thus, assets manager would have the power to dispose of the confiscated assets as well as to dispose of them quickly in the event of impairment of those assets. The manager/administrator may use public tenders for this purpose or any other procedure provided for by national law. In many cases, state-owned assets need to be improved before capitalization. The assets manager may have the power to use state funds to restore or improve assets to be disposed of at a higher

price. In such a case, the costs for this improvement will be deducted from the income received from the alienation of the assets [5, p. 87].

Today, for this purpose, there is the Agency for the Recovery of Criminal Assets which has jurisdiction over the assessment and administration of criminal assets, but there are no legal provisions that would require an assessment of assets that are the subject of a decision issued by a foreign court. This is necessary, especially in cases where we are talking about confiscation based on value. Thus, if the value of the damage caused by the criminal is 20.000 euros, and the foreign court requests the confiscation of a property located on the territory of the Republic of Moldova whose value is 60.000 euros. Then the question arises in defence of our citizens' rights: would it not be fair from a legislative point of view to include the opportunity for the competent body to issue a valuation report of the property that would confirm the legality of the recognition of this decision?

In conclusion, we believe that criminal groups have not wasted time in embracing today's globalized economy and the sophisticated technology that goes with it. Nevertheless, our efforts to combat them have so far remained very fragmented, and our weapons are almost obsolete.

The serious problem of transnational crime and the need for improved mechanisms to combat its impact and facilitate the recovery of criminal assets have led the international community to adopt numerous conventions and treaties. If the states that are party to these treaties, including the Republic of Moldova, were as well organized as sophisticated criminal organizations, there would be no need for the numerous guides and manuals in the field of criminal assets recovery. The reality is that international cooperation is not as effective, and fails to prevent the profitability of organized crime.

The recommendations we have suggested at each stage of assets recovery are not new, but the problem is that they are not in their place. There is a strict need to supplement Law no. 371 of 01.12.2006 on international legal assistance in criminal matters with new provisions, which will provide a clear procedure that needs to be followed in order to recover criminal assets in an international cooperation, so that any prosecutor or judge can initiate a procedure for the extradition of criminal assets located in another state or vice versa, the extradition of assets located in our country to another state, being sure in the legislative basis which it stands on and that the decisions taken by it have a clear legal basis, which leaves no gaps or bypasses.

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