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**Mutual recognition of freezing and confiscation
orders between efficiency and the rule of law**

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Confiscation models, practical obstacles and legal issues

BULGARIA

(the point of view of the Prosecutor's Office)

the terminology:

Regulation no. 1805/2018 defines (art.2, para.2) ‘confiscation order’ as a final *penalty* or *measure*

The respective terms used in the Bulgarian legal system are "*confiscation*" of property and "*deprivation in favor of the state*" both used in connection to criminal proceedings.

Confiscation of a property under the Bulgarian Criminal Code (CC) is a penalty included in the system of criminal sanctions.

Deprivation in favor of the state is measure, in most cases, a consequence of the conviction, generally provided for in Art. 53 CC and supplemented with various property measures included as sanctions for the commission of specific crimes in the Special Part of the CC.

In addition, the term “forfeiture” is used about the procedure under the Law for Combating Corruption and Illegal Assets (LCCIAF). It is a forfeiture of unlawfully acquired assets and shall be conducted without prejudice to the criminal proceeding.

This kind of procedure has been declared to lay outside the scope of Directive 2014/42/EU (Decision CJEU on 19 of March 2020 case C-234/18).

The national legal framework of confiscation consists of three main elements:

A/ confiscation within criminal proceedings:

- ▶-confiscation of property as a penalty in criminal proceedings
- ▶- a property measure named "deprivation in favor of the state" under Art. 53 of the General part of the CC

B/ confiscation outside the criminal proceedings - “civil forfeiture” of illegally acquired property under LCCIAF

Types of confiscation in the Republic of Bulgaria

(using the terminology of the Directive 2014/42/EU):

1. direct confiscation:

- The property measures provided for in Art. 53, para. 1 and para. 2 of the CC. Para. 1 "..., confiscated in favor of the state shall be: a) objects belonging to the culprit that were intended or served for the perpetration of an intentional crime... b) objects belonging to the culprit, which were subject of intentional crime - in the cases expressly provided in the Special Part of this Code"

Para. 2 stipulates that "Confiscated in favor of the state shall also be: a) articles that have been subject or means of the crime, the possession of which is forbidden, and b) direct or indirect benefit, gained through the crime, if they are not subject to return or restoration".

- The approach adopted by the legislator, that confiscation of such property is applied "notwithstanding the penal responsibility", means that it is possible to be carried out both in the case of a final conviction of the guilty person, and in case of impossibility (for some reasons) such a sentence to be ruled.

- Article 53, para. 1, item "b" of the CC indicates that the subject of an intentional crime is confiscated when this is provided for in the Special Part of the CC. These are the specific measures provided for specific crimes in the Special Part of the CC, which are applied upon conviction only for this type of crime.
- The specific measures constitute *lex specialis* in relation to the general rule in Article 53, para. 1, item b) of the CC. They sometimes expand the scope of deprivation of property that has been used for a crime beyond the property belonging to the perpetrator, in other cases provide for confiscation of value.

2. confiscation of the value:

➤ First, this type of confiscation is provided in Art. 53 of CC – para. 1 “confiscated in favor of the state shall be: a) objects belonging to the culprit that were intended or served for the perpetration of an intentional crime; **where the objects are missing or are expropriated, their equivalent shall be awarded**”,

and para. 2 says “confiscated in favor of the state shall be: ... b) direct or indirect benefits gained through the crime, if they are not subject to return or restoration; **where the benefit is missing or is expropriated, its equivalent shall be awarded**”.

- In addition, some of the specific measures provided for specific crimes in the Special Part of the CC also provides for confiscation of the value.

For example, for financing of terrorism Art. 108a, para. 8 of the CC provides that “where the object of the crime financing of terrorism may not be found or has been transferred, payment of its equivalent sum shall be ruled”. The provisions related to ML (Art. 253, para. 6 of CC and Art. 253a, para. 3 of CC) also stipulate that the object of money laundering or the property into which it has been transformed shall be forfeited to the benefit of the state, and where absent or transferred, its equivalent shall be confiscated.

3. extended confiscation:

As an extended confiscation might be considered the penalty “confiscation” under Art. 44 – 46 of CC.

It is a compulsory appropriation without compensation of property in favour of the state, of assets belonging to the culprit or of part thereof, of specified pieces of property of the culprit, or of parts of such pieces of property.

This type of confiscation is included as a penalty for certain crimes such as crimes against the Republic, human trafficking, embezzlement and fraud, smuggling, tax crime, bribery and others.

4. confiscation without conviction:

Although it was accepted by the CJEU that the so-called "civil forfeiture" established by the LCCIAAF does not fall within the scope of Directive 2014/42/EU, this procedure should be mentioned at the first when talking about confiscation without conviction. The basis of this type of confiscation is the forfeiture of unlawfully acquired assets from a person who has been charged (in the course of pre-trial proceedings) with a crime of a certain scope, outlined by the LCCIAAF.

The civil forfeiture mechanism is completely separate from criminal proceedings, and the procedure combines elements of civil, administrative and criminal proceedings. The court decision to confiscate property does not depend on whether the accused has been convicted of the crime.

Within the criminal proceedings, here should be included Art. 53 of the CC, which is applied "notwithstanding the penal responsibility". It means that deprivation in favour of the state of such property is possible both in the case of a final conviction against the guilty person, and in the case of impossibility (for some reason) to rule a sentence, but only if the circumstances of the case were such that the perpetrator would be found "guilty" and having committed a "crime".

In other words, Art. 53 of the CC applies only if the reason for the termination of the criminal proceedings does not affect the guilt of the perpetrator. If the act is not a crime or the perpetrator is not guilty, confiscation under Art. 53 of the CC cannot be enacted.

5. confiscation from a third party:

The civil forfeiture under LCCIAAF applies to third parties. The proceedings are under the Civil Procedural Code and are based on whether the person or members of his/her family own property, for the acquisition of which there is no legal source.

Within the criminal proceedings - according to Art. 53, para. 2 (b) CC, the benefits of criminal activity can be confiscated when they are held or owned by third parties. The subject of a crime under Art. 53, para. 2, b. "a" CC, when it represents items prohibited for possession, is also subject to confiscation, even if it is in the possession of third parties.

- The means of the crime (tools) can be confiscated under Art. 53 of the CC only if they belong to the perpetrator and therefore this measure does not apply to third parties.
- Some of the specific measures in the Special Part of the CC also provide for confiscation of the subject or means of the crime, even if they are owned by third parties. For example, the provisions regarding TF and ML (Art. 108a, para. 8 of the C , Art. 253, para. 6 and Art. 253a, para. 3 of the CC) are not limited to property that belongs to the perpetrator and the confiscation in these cases also applies to third parties.

Legal nature of the confiscation models

- The confiscation of means, subject of the crime and benefits from the crime under Art. 53 CC and the Specific measures provided for in the Special Part of the CC are defined as “measure of a property nature”. The depriving in favour of the state is a consequence of a committed crime and can be equated with that of confiscation.
- The procedure under LCCIAF is directed not against the person, but against the property, regardless of the criminal process. It is not based on a conviction. The rule is known as civil forfeiture or “in rem”.

Procedure for application:

The deprivation in favor of the state under Art. 53 of the CC as well as the Specific measures in the Special part of the CC:

- imposed by a court; one exception - material evidence (the possession of which is prohibited by law) in favor of the state upon termination of the pre-trial proceeding.
- the court orders this measure as part of the verdict (Art. 301 of CPC).
- competence – the court, competent to decide the criminal case (rules are set in Art. 35 of the CPC).
- *ex officio*, the court is obliged to apply it when the conditions are present.

standard of proof/burden of proof

- Article 53 of the CC, as well as Specific measures in the Special part of the CC are applied by the court together with the sentence (Art. 301 of the CPC).
- The standard of proof is related to the proof of the crime, i.e. the judge must be convinced of the defendant's guilt - according to Art. 303, Para. 1 of the CPC, the sentence cannot rest on assumptions, and according to para 2, the court recognizes the defendant as guilty when the accusation *is proven beyond doubt*. The burden of proof rests on the representative of the prosecution - the prosecutor.
- The law does not permit a reversal of the burden of proof.

- The penalty "confiscation" under Art. 44-46 of the CC is imposed by a court when passing a sentence in a criminal case. Regarding the standard of proof and the reversal of the burden of proof – same as above.
- Art. 53 CC is applied “notwithstanding the criminal liability” regarding all crimes. When deciding whether to impose this measure, the court examines whether the elements of the offence are present, in such a way that if the culprit had not fled or died, he would have been convicted. Therefore, no lower standard of proof can be expected than in cases where a conviction is possible.

Confiscation procedures which fall within the concept of “proceeding in criminal matters” provided for by the Regulation(EU) no. 1805/2018

All types of confiscation procedures described above fall within the concept of “proceeding in criminal matters” which is provided for by the Regulation (EU) no. 1805/2018, except of the ***Civil forfeiture under LCCIAF.***

The Regulation is implemented in Bulgaria:

At the time of the entry into force of Regulation (EU) 1805/2018, two separate laws for the recognition of orders of competent judicial authorities of other States were already effective in Bulgaria – one in relation to freezing orders and the other in relation to effective confiscation orders, freezing orders and other financial sanctions.

The implementation of Regulation (EU) 1805/2018 has been carried out by the Bulgarian legislator by an amendment to:

- the Recognition, Execution, Issuance and Transmission of Property Freezing Orders Act (the Freezing Orders Act) and
- the Recognition, Execution, Issuance and Transmission of Orders of Confiscation or Forfeiture and Decisions Imposing Financial Sanctions Act (the Confiscation Orders Act)

the types of criminal offences:

The types of criminal offences that have most often been the reason for issuing certificates and transmitted from or to Bulgaria, the practice shows the following.

The most common crimes for which foreign judicial authorities issue and send confiscation orders are fraud, tax crimes and human and drug trafficking.

the types of assets :

The types of assets that have been subject to confiscation (freezing order) are diverse. Most often, it is a matter of movable property – money in bank accounts. In most cases, the holder of the bank accounts is a legal person whose manager has been sentenced of a tax crime – entering into fictitious transactions and tax evasion. There are also cases of immovable property – apartments.

Competent authorities in Bulgaria under Regulation (EU) 1805/2018:

- for the issuance of a freezing certificate pursuant to Article 2, paragraph 8 of the Regulation – the court of first instance, the proceedings being initiated on the grounds of a request from the prosecutor. The freezing order is then transmitted by the prosecutor for execution directly to the competent authority in the executing State, when it comes to the pre-trial phase. When it comes to the trial phase, the order is transmitted by the Bulgarian court to the competent authority of the executing State (Article 28).

Competent authorities in Bulgaria under Regulation (EU) 1805/2018:

- for the execution of a freezing certificate pursuant to Article 2, paragraph 9 of the Regulation, the competent authority in Bulgaria under Article 11 of the Freezing Orders Act, which refers to Article 400 of the Civil Procedure Code, is the bailiff
- for the issuance of a confiscation certificate pursuant to Article 2, paragraph 8 of the Regulation – under Article 25, paragraph 2 of the Confiscation Orders Act – the court of first instance

Competent authorities in Bulgaria under Regulation (EU) 1805/2018:

- for the execution of a confiscation certificate pursuant to Article 2, paragraph 9 of the Regulation – under Article 22 of the Confiscation Orders Act, the decision on confiscation is transmitted for execution to the National Revenue Agency. This competence is based on Article 3, paragraph 1, item 16 of the National Revenue Agency Act, according to which the Agency “executes orders for confiscation or forfeiture of property and decisions imposing financial sanctions, issued in a Member State of the European Union, and recognized and enforceable in the Republic Bulgaria”.

Refusals:

- In Bulgaria, there are cases of refusal to recognize for execution confiscation or forfeiture orders of foreign countries. The most frequent grounds for refusal are: the act for which the person has been sentenced and confiscation of property is requested does not constitute a criminal offence under our legislation; no evidence has been gathered to deny the claims of the person whose property is confiscated that he/she has not been notified of the criminal proceedings against him/her; in the meantime, the property has been disposed of, for which a confiscation certificate has been received and another person (legal or natural) is already its owner.

Note:

- There are cases of incompleteness in the received Certificate from the issuing State and they are removed by consultations with the relevant authority.

In Bulgaria, no cases have been reported in which the recognition and acceptance for execution of a foreign authority's order for property confiscation or freezing to have been refused because the certificate is not presented, is incomplete or clearly does not comply with the order enclosed.

Difficulties in implementing Regulation (EU) 1805/2018:

It should be clarified that the problems do not refer only to the implementation of the Regulation, but to all orders for seizure or confiscation issued by foreign authorities and sent for recognition and execution in Bulgaria during the last years.

- in identifying the competent court; - translation of the certificate or the orders to be applied; - in identifying the assets to be confiscated; - delay of the procedure when the certificates are not accompanied by the confiscation order; - problems related to guaranteeing the right to effective legal remedies (Article 33 of the Regulation), impossibility to fulfil orders (Article 22 of the Regulation), multiple orders for the same person or assets.

Difficulties :

1. As an executing country - significant problem is the determination of the competent court that would examine the proceedings under Art. 16, para. 1 of the Confiscation Orders Act.

Usually the court of the Republic of Bulgaria, which is the only competent authority for the issuance of a property freezing order or a an order of confiscation, refers to EUROJUST for assistance, and only in few cases to the Ministry of Justice. In some cases, the requested information is comprehensive. In other cases, the information is incomplete, which is mainly due to differences in terminology and the legislation of the Member States.

Difficulties :

2. There are often difficulties due to the quality of the translation of Certificates, in some cases the translation is inaccurate and incomprehensible.

For example, it cannot be established from the translated text whether the request is to freeze property in pending criminal proceedings, or to recognize and execute a final decision of confiscation, or it concerns confiscation that has been ordered in civil proceedings (they are not subject to recognition under the Confiscation Orders Act).

In order to be clarified this issue the respective order is requested.

Difficulties :

Regarding translation, difficulties have arisen also due to the absence, incompleteness and/or insufficient quality of the translation of the certificate and/or the interpretation of the text, when the translation is not precise in terms of the legal terminology used.

In such cases, the Bulgarian court assigns the translation to a translator from the List of translators of the Sofia City Court, who are found to be proficient in legal terminology.

When the translation is made by the executing State, namely by the Bulgarian court, no reimbursement of expenses is required from the State transmitting the order, since, according to Article 13, paragraph 1 of the Confiscation Orders Act, the costs are borne by Bulgaria.

Pursuant to paragraph 2 only in case of large and excessive costs incurred in the criminal proceedings in relation to the recognition and execution of the foreign order, the Bulgarian court may propose to the issuing State to share the expenses.

Difficulties :

3. The court in Bulgaria, as an executing authority, often has to demand from the issuing authority to submit the property freezing or confiscation order, and the translation of these documents. For this purpose, the Bulgarian court gives the issuing State a reasonable time to prepare the translation and deliver the documents to the Bulgarian court. Communication is usually carried out through Eurojust being the most efficient and fastest connection, or through the Ministry of Justice. The documents are requested and received at the e-mail address specified by the Bulgarian court.

Problems for the Bulgarian authorities in the mutual recognition, arising from the type of seized/frozen assets:

- The main problems are related to determining the competent court that would examine a received Certificate of property confiscation, when the immovable property is located in different cities and the competence falls with different district courts, accordingly. Such difficulties also arise when the legal persons whose properties or bank account balances are to be confiscated change their company seat by registering at addresses in different district cities.

Problems for the Bulgarian authorities in the mutual recognition, arising from the type of seized/frozen assets:

- Pursuant to Article 44, paragraph 1 of the Criminal Procedure Code, jurisdiction disputes between courts are decided by the Supreme Court of Cassation and this delays the process and creates time frame for disposal or concealment of the property which is subject to confiscation or serves as collateral.

Thank you for your attention!

Questions

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