

MUTUAL ASSISTANCE IN CRIMINAL MATTERS

FORFEITURE OF THE PROCEEDS OF CRIME

A paper prepared for the Commonwealth Secretariat
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1. The purpose of this paper is to identify the legal and practical issues which arise in what is increasingly recognised as being a most important and fast-developing area of criminal law enforcement. There are, of course, outline provisions dealing with "Tracing, Seizing and Confiscating the Proceeds or Instrumentalities of Crime" in the Harare Scheme for Mutual Assistance in Criminal Matters in the Commonwealth, and recommendations for the improvement of those provisions are to be considered at the Meeting (see LMM(90)12). Related material can also be found in LMM(90)3 (Dr Gilmore's paper on International Action against Drug Trafficking) and the issue of bank secrecy (discussed in LMM(90)8 from the Government of New Zealand) is also very relevant.

2. It needs constantly to be stressed that the importance of adequate legal provisions and practical mechanisms for the forfeiture of the proceeds of crime is not limited to the area of drug trafficking. That is undoubtedly the area in which the greatest "return" (i.e. illicit profit) is to be found, and for that reason it is associated in some countries with organised crime and racketeering. It is also an area in which the signature of the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 has required the attention of Governments, and that Convention will need detailed implementing legislation. This does not, however, lead to a necessary conclusion that legislative provision should be limited to drugs offences; the United Kingdom, having first legislated in the drug trafficking field, has twice extended the scope of its legislation, firstly for other general criminal offences and secondly in the special context of terrorism. Although contained in three distinct statutes, much of the legislation is identical in the three contexts.

Tracing the proceeds of crime

3. As is well-known, a major problem for criminals (and a major opportunity for law enforcement agencies) is that of "laundering" their profits. In the case of sophisticated commercial frauds this will typically involve the use of a large number of bank accounts in several jurisdictions. For obvious reasons, jurisdictions with bank secrecy laws or with relatively lax control over the establishment and operation of banks are preferred. In the case of drugs successfully sold at "street" level, the profits will initially be in the form of used bank-notes, and drug syndicates have to find means of depositing this cash into bank accounts (for future laundering and recycling) without attracting undue attention.

4. Tracing raises three practical issues: the effect of bank secrecy laws; the creation of a reporting obligation on banks and other financial institutions; and the monitoring of cross-border transfers of money.

5. Bank secrecy laws, were they in absolute terms, would be a formidable obstacle to effective law enforcement in this field. There is growing recognition that tracing the proceeds of crime (at least in the case of serious crime, including drug trafficking, and organised crime) is an appropriate justification for an exception to bank secrecy laws. The Swiss Confederation accepted this in its negotiations with the United States towards

what became the first of the recent series of bilateral mutual assistance treaties negotiated by the United States Government. It is notable that the provision of the Drug Trafficking Offences Act 1986 (United Kingdom), that an order to make material available for the purpose of an investigation into drug trafficking "shall have effect notwithstanding any obligation as to secrecy or other restriction upon the disclosure of information imposed by statute or otherwise", has been reproduced unchanged, despite the very different approach to bank secrecy, in the Bahamas: Tracing and Forfeiture of Proceeds of Drug Trafficking Act 1986, s.22(8)(b) (Bahamas). In the drugs context, Article 5(3) of the UN Convention of 1988 expressly provides that, in carrying out its Convention obligation to legislate for the identification, tracing and seizure of proceeds of drugs offences, a Party shall enable its authorities to obtain bank, financial and commercial records and that a Party may not decline to act in that respect on the ground of bank secrecy.

6. In modern legislation, there is a growing practice of imposing upon banks and similar financial institutions an obligation to report certain types of financial transaction (chosen because of their potential relevance in money laundering) or more generally to report transactions creating a suspicion of money-laundering activities.

7. An indication of the range of possible provisions can be obtained from the comprehensive legislation introduced in Australia. Under the Cash Transaction Reports legislation, a "cash dealer" is under an obligation to report "significant cash transactions" to the Director of the Cash Transaction Reports Agency. The term "cash dealer" is given a very wide interpretation, including for example securities dealers, unit trust managers, bullion dealers, casino operators and bookmakers. A "significant cash transaction" is one involving the transfer of currency of not less than \$Australian 10,000. If foreign currency is involved the report is required within a day of the transaction; fifteen days is allowed in other cases. Under the Proceeds of Crime Act 1987, a judge may make a "monitoring order" directing a financial institution (a bank, building society or credit union) to give information to a law enforcement authority; the information which may be obtained relates to transactions conducted through an account held by a specified person. Related provisions require financial institutions to retain for a seven-year period certain classes of document of value in tracing the movement of funds, for example opening and closing accounts, transmitting funds abroad, and opening or using a deposit box.

8. A different technique is used in the United Kingdom. It is an offence to assist another to retain the benefit of drug trafficking, and this will be committed by anyone (including a bank) which, suspecting the source of the funds, facilitates their concealment, removal from the jurisdiction, or other acts serving to enable the funds to be retained or controlled by the criminal. Disclosure of the suspicion to the police is made a defence, and the effect is to impose a duty of disclosure once suspicions are aroused. The House of Commons Home Affairs Committee, reporting in 1989, supported this approach (despite some concerns as to its observance by the smaller banks, including overseas banks with branches in London, perhaps as a result of ignorance of the relevant provisions) in preference to the Australian approach of mandatory reporting of all transactions over a certain value.

9. So far as drugs offences are concerned, States ratifying the UN Convention will be obliged to legislate to implement Article 3. This requires the creation of a range of criminal offences. These include

"the conversion or transfer of property, knowing that such property is derived from [drugs offences] ... for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence ... to evade the legal consequences of his actions"; and "the concealment

or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from [drugs offences]."

So far as international co-operation is concerned, these offences are expressly excluded from the categories of "fiscal" and "political offences".

10. It will have been noted that the Australian provisions as to the reporting obligation deal expressly with the transmission of funds overseas. This is of obvious importance, and practical difficulties have been experienced, or are feared, where States have dismantled exchange controls or are entering into regional arrangements which reduce border controls. It is important in such contexts that the law enforcement considerations are kept in mind and made the subject of special legislation if necessary.

Seizure of property: restraining orders

11. Once relevant property has been identified it is clearly of the greatest importance that it be made subject to some procedure by which its further removal or dissipation is restrained. The usual legislative provision is for some sort of "restraining order" to this effect, well described as the criminal law equivalent of the Mareva injunction.

12. In most legislation, restraining orders are sought ex parte; speed and confidentiality are of the essence. It is usually necessary to provide for a limited period of validity, so that either the order expires unless confiscation proceedings are commenced within a prescribed number of days or it has to be renewed (or is open to challenge) in subsequent inter partes proceedings. If the whole of an individual's property is restrained, there must be some provision enabling him to obtain sufficient funds for reasonable living expenses and legal costs. Some States have also found it desirable to make fairly full provision to safeguard the interests of third parties; others leave such protection to the confiscation stage.

Confiscation

13. An order for the confiscation of property, although an essential weapon in the armoury of law enforcement agencies in this field, does raise a number of legal issues of some complexity, and these may have constitutional implications. These arise out of the practical realities of the case. It is almost inevitable that funds illegally obtained will be mixed, perhaps inextricably mixed, with funds obtained by more orthodox means; it is most unlikely that clear and accurate accounts will be maintained; an assortment of third parties will have interests in the funds, some of whom will be wholly innocent of complicity in the criminal enterprise. There will be a range of degrees of independence of the third parties: some will be associates of the criminals, some family members, some corporate bodies wholly or partly controlled (perhaps through a series of nominees and holding companies) by those involved in the offences.

14. This state of affairs has prompted legislators in a number of jurisdictions to place the burden of proof upon those resisting a confiscation order. In the Guyana legislation in the drugs area (the Narcotics Drugs and Psychotropic Substances (Control) Act 1988), all the offender's property is liable to forfeiture unless it is shown to have been innocently acquired. In the United Kingdom Drug Trafficking Offences Act there is a presumption (described in the Act as an "assumption") that property received in the six years before criminal proceedings were commenced was a payment or reward for drug trafficking. There may well be States in which such a reversal of the burden of proof would raise constitutional issues, which could not necessarily be avoided by classifying

the forfeiture proceedings as "civil" rather than criminal in nature. Devising procedures for the protection of third party interests is a complex matter, but a number of legislative models now exist.

15. The recent report of the United Kingdom House of Commons Home Affairs Committee drew attention to two weaknesses in the legislation of that State which may well be present elsewhere. If confiscation powers are expressed in terms of property obtained or derived from criminal activity, this may not catch (as many would think desirable) moneys obtained by the subsequent legitimate use of that property, such as interest earned on funds deposited in an interest-bearing account. The making of a confiscation order may also have the effect of "closing the accounts", operating once for all, so that the subsequent discovery of additional funds derived from the relevant offences may be too late for effective confiscation.

Money-laundering

16. Widely-drawn money-laundering offences are of considerable importance. The Canadian Criminal Code, in a provision added in 1988, creates this offence:

Everyone commits an offence who uses, transfers the possession of, sends or delivers to any person or place, transports, transmits, alters, disposes of or otherwise deals with, in any manner and by any means, any property or any proceeds of any property with intent to conceal or convert that property or those proceeds and knowing that all or a part of that property or of those proceeds was obtained or derived directly or indirectly as a result of

- (a) the commission in Canada of an enterprise crime offence or a designated drug offence; or
- (b) an act or omission anywhere that, if it had occurred in Canada, would have constituted an enterprise crime offence or a designated drug offence.

17. This is of particular importance in the context of mutual assistance between States. As discussions of the Harare Scheme have revealed, there are constitutional difficulties in a number of countries in providing for the confiscation of property within that State as a consequence of the conviction in another State of X, who is not the current possessor of the property. The creation of a money-laundering offence on the Canadian model, which will be committed within the State where enforcement is sought by the current possessor of the funds and which can itself attract restraining and confiscation order powers, removes most if not all of these difficulties.

Resources

18. A final, and obvious, point: however well-drafted the legislation, covering all the problem areas neatly and effectively and making full provision for mutual assistance in the context of international crime, nothing will be achieved unless law enforcement agencies have the resources they need. In a number of States, some or all of the funds confiscated are made available for the specialist agencies involved. Tracing the proceeds of crime can be a very expensive and time-consuming operation, making heavy claims on the limited skilled manpower available to law enforcement agencies; there are considerable political advantages in ensuring that the funds recovered are at the very least clearly identifiable as the results of the investment of these resources.