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EUROPEAN COMMITTEE ON CRIME PROBLEMS
(CDPC)

COMMITTEE OF EXPERTS
ON THE OPERATION OF EUROPEAN CONVENTIONS
ON CO-OPERATION IN CRIMINAL MATTERS
(PC-OC)

Contribution of the Slovak Republic to the special session on International co-operation as regards the seizure and confiscation of proceeds of crime, including the management of confiscated goods and asset sharing

The Slovak Republic has the experience, as a Requested State, with requests for legal assistance based on 1959 Convention and its Additional Protocol, aiming at seizure/freezing of the proceeds of crimes (in particular money on the bank accounts). It seems that 1959 Convention does not provide the sufficient legal basis for such a cooperation. Therefore the Slovak Republic wishes to discuss the following issues:

I. Application of the European Convention on Mutual Assistance in Criminal Matters

a) To what extent, if any, the European Convention on Mutual Assistance in Criminal Matters (Strasbourg 20 April 1959) and its two Additional Protocols may be applied for the purposes of seizure of the proceeds of crimes (in particular money on the bank account)?

The aim of the European Convention on Mutual Assistance in Criminal Matters is in particular the cross-border obtaining evidence and things necessary for criminal proceedings. The Explanatory Report highlights the broad scope of cooperation covered by Article 1 para 1. Article 3 para 1 of the said Convention provides for the purposes of the letters rogatory, which is the „procuring evidence or transmitting articles to be produced in evidence, records or documents". In addition to this, Article 6 para 2 of the Convention presupposes that property (in the French version „objet") will be returned to the requested state. The Explanatory Report provides an important clarification, that the word „property /objet/" refers to the evidence in Article 3 para 1. It also states that „the requesting Party may not dispose of such property even in a case, where under its own legislation it is obliged to decide the question of its ownership.

With regards to Article 6 para 1 the Explanatory Report makes a reference to Article 20 of the European Convention on Extradition.

Additional Protocol to the 1959 Convention changed the rules in order to the refusals for the fiscal offences. However, we are of the opinion that it should be interpreted within the meaning of the mother Convention. Therefore it should be applied in relation to property (objet) within its meaning provided in Article 3 para 1 of the 1959 Convention (including Article 6 of the 1959 Convention).

We believe that 1959 Convention cannot be used for the purposes of seizure/freezing of proceeds of crimes (in particular money on bank accounts).

b) In case of a positive answer to question a):

i) What kind of guarantees exist for subsequent confiscation and the responsibility of the states concerned for any damages?

It is important to have a clear understanding of the subsequent measures. The 1959 Convention does not provide for any further measures after the seizure (the aim of which is, according to the Explanatory memorandum, production of evidence). There is even no provision allowing to ask for guarantees that the future confiscation of proceeds is expected. Finally, no provision of 1959 Convention regulates the confiscation. If some states believe that 1959 Convention could provide legal basis for seizure/freezing with a view to confiscation, how do they consider the issue of damages?

ii) Is it possible to apply 1959 Convention to seizure/freezing of money on the bank account (in particular with a view to confiscation)?

We have no difficulties with cash, which may be used as evidence without any doubts. However, money on bank account may have different legal status in the Parties to the Convenion. It is clear that drafters of the 1959 Convention could not have had an idea about the possible development in technologies and the existence of „virtual" money.

We also believe that such the development was one of the reasons for the adoption of modern legal instruments on money laundering and financing of terrorism either within the United Nations or the

Council of Europe. The modern Council of Europe instruments contain provisions on international cooperation in criminal matters, in particular on seizure or freezing with a view to confiscation and confiscation itself.

In some states money on the bank account is considered a claim, not a thing (objet) in a legal term.

We believe that 1959 Convention cannot be applied for the purposes of seizure/freezing money on the bank account.

II. Application of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg 8 November 1990) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw 16 May 2005)

Basically the following issues arise in relation to the application of provisions on international co-operation:

a) Dual Criminality, Seizure/Freezing and Confiscation

The Warsaw Convention (Article 28 para 1 lit g) as well as Strasbourg Convention (Article 18 para 1 lit e) contain the obligation to take provisional measures, such as freezing or seizure to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request. For provisional measures, dual criminality is considered in abstracto. However, for the purposes of confiscation, dual criminality is considered in concreto.

In practice, the time between provisional measures and final measures may take years. It seems that there is a gap between provisional measures and confiscation. What decision should be taken in the Requested State on the request for freezing/seizure of e.g. bank account, where it is clear at the time of the execution of a request, that no confiscation is possible (e.g. due to an absence of dual criminality in abstracto)? Should a request be refused? If not, who should be responsible for possible damages? (For instance, the freezing/seizure of money for a few years may cause a bankruptcy).

b) Grounds for refusal – fiscal excuse (Article 18 para 1 lit d), Article 28 para 1 lit d)

The fiscal nature of the offence is covered by the dual criminality issue, as well as the separate provisions in both Conventions. The fiscal nature of the offence is the ground for refusal itself, which may be applied to the request for provisional measures.

Under the so called fast-track procedure the tax offences will be added to the list of crimes under Warsaw Convention. However, Article 28 para 1 lit d) and g) is not covered by the fast track procedure and therefore, will remain unchanged. Would it be possible to apply such grounds for refusal to provisional measures in tax crimes? Grounds for refusals are the „may“ provision, which provide the Parties with the possibility to apply it. Would this possibility remain uchainged after the addition to the list of offences is adopted?