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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)

**Legal assistance in criminal, administrative
and civil proceedings related to the liability of legal persons
and non-conviction based confiscation**

Discussion paper

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Legal assistance in criminal, administrative and civil proceedings related to the liability of legal persons and non-conviction based confiscation

Many of anti-criminal international treaties concluded in the last 25 years in the framework of the United Nations and some other intergovernmental organizations, including the Council of Europe, and aimed at criminalizing some kinds of natural persons' behavior contain, *inter alia*, obligations to ensure that a legal person (legal entity) can be held liable for any criminal offence established in accordance with these treaties, committed for its benefit by a natural person holding a certain position and where the lack of supervision or control by a natural person holding a certain position has made possible the commission of such criminal offences for the benefit of that legal person by a natural person under its authority.¹

Subject to the legal principles of a Contracting Party, the liability of a legal person² may be criminal, civil or administrative.³ For instance, according to the special study conducted several years ago in relation of G8 States, Canada, France, Japan, UK and USA established criminal liability of legal persons, although in Germany, Italy and the Russian Federation, such liability is administrative.

Besides, many countries introduced into their legislation and practice the so-called "**non-conviction based confiscation**" (NCBC), including the "*value confiscation*", as a very effective tool in fighting organized crime, especially in instances where criminal prosecution, and consequently conviction-based confiscation, is not possible, e.g. when the defendant is dead or escaped abroad or there is a lack of sufficient evidence necessary to start a criminal prosecution.⁴

The NCBC is executed through civil or administrative proceedings. It is important to note that the burden of proof is laid down on persons who possess the property allegedly being the proceeds from crime.⁵

No doubt, that there should be proper international legal basis to ensure effective inter-state co-operation, including mutual legal assistance, in cases of criminal, administrative and civil proceedings related to the liability of legal persons and the NCBC.

But it seems that the existing legal basis for such co-operation is in general quite unsatisfactory.

The European Convention on Mutual Legal Assistance in Criminal Matters (1959) has no direct provisions concerning cooperation in cases related to liability of legal persons and the NCBC.

¹ See, for example: Art. 2-3, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997); Art. 18, the Criminal Law Convention on Corruption (1999); the United Nations Convention against Transnational Organized Crime (2000); Art. 12, the Convention on Cybercrime (2001); Art. 26, the United Nations Convention against Corruption (2003); Art. 22-23, the Council of Europe Convention on Action against Trafficking in Human Beings (2005); Art. 10, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (2005); Art. 10, the Council of Europe Convention on the Prevention of Terrorism (2005); Art. 26, the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2007); Art. 11, the Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes involving Threats to Public Health (2011).

² The notion "corporate liability" is used in several conventions instead of the notion "legal person".

³ In some treaties this norm is provided directly, and in other conventions there is the provision that each Party shall ensure that legal persons held liable in accordance with these conventions, shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

⁴ The UN Convention against Corruption (2003) provides that each State Party shall, in accordance with its domestic law, consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight, absence or in other appropriate cases (Art.54, paragraph 1 "c").

If I'm not mistaken, in Europe this measure was first introduced by Italy in the anti-mafia laws in the beginning of 70-s of the XX-th century.

⁵ The NCBC, as a special measure, had been challenged before national courts in some countries, as well as in the European Court of Human Rights, on the grounds of alleged breaches of human rights and procedural safeguards as set forth in relevant international instruments as well as domestic laws. But in all these cases the NCBC was found to be fully compliant with human rights and procedural safeguards (G8 Roma-Lyon Group – CLASG. Italian project on confiscation: Legal issues and international cooperation. 2009).

Paragraph 1 of Article 1 ("Scope") stipulates that the "Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party."

The explanatory report to the 1959 Convention says that Article 1, paragraph 1 applies only to judicial proceedings as opposed to administrative proceedings. As regards the concept of "judicial authorities" mentioned in that paragraph, some experts pointed out that in their countries "public prosecutors" were regarded as administrative authorities, whereas in certain others they were judicial authorities.⁶ The explanatory report goes on that "This paragraph, which is of a general character, is to be interpreted in a broad sense. It covers not only those forms of mutual assistance specifically mentioned in the Convention, but also every other kind of mutual legal assistance, including requests for assistance made in connection with:

- (i) proceedings in respect of an *Ordnungswidrigkeit* under German law; an *Ordnungswidrigkeit* is an offence which, while not classified as a criminal offence, is punishable by a fine imposed by an administrative authority; the accused person has, however, a right of appeal to the ordinary courts. To make it quite clear that mutual assistance can only be invoked in the judicial stage of such proceedings, the Committee of Experts inserted the phrase "at the time of the request for assistance" in this paragraph;
- (ii) injured party claims for damages in criminal proceedings;
- (iii) application for pardon or review of sentence;
- (iv) proceedings for the compensation of persons found innocent.

In Austria the amount of compensation payable to persons found innocent was a matter not for criminal jurisdiction but for the civil courts. Under Turkish legislation compensation could be obtained only by application to the administrative authorities."

In any case, it is obvious that the international co-operation on the basis of the provision of such a general nature depends on the legislation and good will of the requested party.

That's why there was the following addition included into Art. 1 of the European Convention on Mutual Assistance in Criminal Matters (1959) by Art. 1 of the 2001 Second Additional Protocol thereto:

"4. Mutual assistance shall not be refused solely on the grounds that it relates to acts for which a legal person may be held liable in the requesting Party."

In the introduction to the Explanatory report to the 2001 Second Additional Protocol there is an explanation of some background of its elaboration: "the PC-OC identified certain difficulties that States met when operating under the European Convention on Mutual Assistance in Criminal Matters, as well as its Protocol" and "it also identified situations bordering the area covered by that Convention, yet not included in its scope".

Frankly speaking, it seems not so easy to interpret and duly implement the above mentioned addition to Art. 1 of the 1959 Convention, introduced by the 2001 Second Additional Protocol.

The commentary on Article 1 of the 2001 Second Additional Protocol, made in the Explanatory report thereto is extremely short, and it seems to be of a little use to explain the content and essence of the novella under consideration:

"17. paragraph 4 makes it clear that the scope of the Convention covers mutual assistance in proceedings against legal persons or in proceedings in respect of facts for which a legal person may be held liable".

I see that there may be different interpretation of Article 1, paragraph 4 of the 1959 Convention (as amended by the 2001 Second Additional Protocol thereto) – from a very narrow to a very wide

⁶ A provision (Article 24) was accordingly adopted in order to enable the Parties to state which authorities they consider as judicial authorities within the meaning of this Convention.

interpretation. For example, first, the Convention applies only to any proceedings related to the criminal liability of legal persons. Secondly, it embraces legal assistance in any proceedings related to the criminal liability of legal persons, as well as to the civil and administrative liability of legal persons connected with criminal offences committed by natural persons. Thirdly, the Convention applies to any proceedings related to the criminal, civil and administrative liability of legal persons.

In addition there is a problem of applying or not applying (interpreting) the adjective “mutual” to the notion “legal assistance” (see the heading and Article 1 of the 1959 Convention).

I doubt very much that even for the State Parties of the 2001 Second Additional Protocol there is enough legal basis to render each other legal assistance (mutual or not):

- a) in proceedings related to criminal, administrative and civil liability of legal persons;
- b) and non-conviction based confiscation.

No doubt that Council of Europe member States should strengthen their ability to provide international cooperation in the above mentioned matters.

That's why I suppose that it would be quite necessary for the PC-OC to consider this issue in order to elaborate and submit to the CDPC some proposals in that regard.

May be, it would be wise to consider the whole issue of modernizing the 1959 Convention by elaborating the Third Additional Protocol thereto. There were some other proposals put forward to that regard, including by the author of this paper.

As some food for consideration I may suggest discussing the following provision to be introduced into the 1959 Convention:

“The Contracting Parties shall render to each other, *mutatis mutandis*, legal assistance in any proceedings related to criminal, civil and administrative liability of legal persons (corporate entities), connected with criminal offences committed by natural persons as well as to any proceedings related to non-conviction based confiscation”.
