

Project No.JUST/2010/KPEN/AG/1546 “Possibilities of solution of topical problems of restorative justice in the European Union”

**Training course “Legal regulation on confiscation of property in Latvia and European Union; ensuring effective execution mechanism”**

**17-18 October 2012, Riga**



*Tieslietu ministrija* 



Search ID: gwan455

Cross-border execution of  
confiscation of property. Good  
practices – United Kingdom.

David J Dickson

Riga 18 October 2012

*Tieslietu ministrija*



# The Issue

- Recover the proceeds of crime
- Balance to be struck : punitive or in the public interest
- Community payback



# Mutual Legal Assistance: Overview

- Criminal law is predominantly national
- But criminality is not confined to national borders; cooperation in criminal matters (between nations, authorities) is a practical necessity
- Requests between judicial authorities to recover evidence
- Eurojust: increased operational role
- European Judicial Network



# MLA: Legal Base

- Convention of MLA 20.4.59
- Additional Protocol 17.3.78
- Second Additional Protocol 8.11.01
- **Crime (International Co-operation) Act 2003**
- **Proceeds of Crime Act 2002 (External Requests & Orders)  
Order 2005 (SI 3181/2005) effective 1.1.06**



# MLAC 1959

- Criminal matter judicial authorities make the request To procure evidence
  - Say if evidence of witnesses to be on oath
  - Officials of requesting state may be present
- Search and seizure:
  - MS may apply double criminality
  - May be contained in the EAW Request
- May delay transmission of evidence if domestic proceedings



# MLAC 1959 II

- Evidence will be recovered under rules of executing MS National law
- Does this cause any issue of admissibility under issuing MS National law
- Routes of transmission of recovered evidence
- Describe why the request is made
- Are proceedings ongoing
- Time critical: explain your timeframe
- Explain why you wish officers/prosecutor to be present: ought not to be refused if likely to be beneficial and avoid need for further request to be issued (Art 4.2 as amended by 2<sup>nd</sup> Add Protocol)



# MLAC 2001

- Allowed the requesting MS to request evidence recovered in a manner that ensures the evidence is admissible in domestic proceedings;
- “even if unfamiliar to the requested party



# Freezing Orders : Legislative Framework

- **Framework Decision 2003/577/JHA**
- **Crime (International Co-operation) Act 2003**
- **Outgoing: sections 10-12**
- **Incoming: sections 20-25**
- **SSI 345/2009: Act of Adjournal (Criminal Procedure Rules Amendment No. 5) (Miscellaneous) 2009 : in force: 27 October 2009**



# Domestic Freezing Orders

- Crime (International Co-operation) Act 2003 sections 10-12
- Definition: “an order for protecting evidence which is in the participating country pending its transfer to the UK”
- Application:
  - On premises specified in the order (precision)
  - Likely to be of substantial value (proportionality)
  - Likely to be admissible evidence at trial (approximation)
  - Does not consist of / include items subject to legal privilege



# Availability

- Proceedings instituted / investigation ongoing into Listed Offence: FD Art 3(2)
- reasonable grounds to suspect evidence exists in the participating country;
- request under ordinary MLA s7 CICA 03 will be made for transmission of evidence
- envisaged by FD Art 2 (d) and 3.1 to apply to proceeds of crime



# Process for obtaining DFO

- application by LA/PF to Sheriff
- sent to LA (ICU) for onward transmission within 14 days of the date of the order being made
- certificate to be attached and translated into language required by notification to the Council (CICA 03 silent as to form but will be that in FD and attached to SSI: i.e. MR)
- that certificate to be signed by the Sheriff



# Overseas Freezing Order

- received by Lord Advocate (ICU)
- order and certificate in form in FD (CICA 03 silent)
- investigation/proceedings instituted into listed offences: FD Article 3(2)
- LA nominates Court and copy of FO sent to the Court and the Prosecutor
- Court will consider the application;
- form of warrant to search: Form 36.9B
- Prosecutor to be given opportunity to be heard



# Overseas FO II

- Court may refuse to give effect to the order where *ne bis in idem* applies / incompatible with Convention rights (? introduces test of proportionality and right of person to be heard)
- warrant to search premises and for property referred to in the FO
- property and evidence widely defined: FD Article 2 (d) & (e)
- but no definition in CICA 03 and s20(2)(a) provides for “protecting evidence in the UK [that] may be used in any proceedings or investigation in the participating country” but does not specifically provide for proceeds of crime/confiscation as does the equivalent provisions under Sch. 4 and incorporated into the Terrorism Act 2000



# Overseas FO III

- The FO may be postponed if it would prejudice an enquiry in the UK
- If the evidence is held under Court order and may not be removed outwith Scotland
- the recovered evidence will be transmitted to the only where:
  - ordinary request for that is made under ILOR and s7
  - or under confiscation provisions (broadly similar)
  - therefore to give full effect to the FO it must be accompanied by an ordinary MLA request
- however provision for PF or “any other person affected by the order” to make application for the property to be released but only where the overseas freezing order ceased to have effect in the participating country or *ne bis in idem* / incompatibility with Convention Rights established



# History of Proceeds of Crime Legislation in the UK

- Rv Cuthbertson [1980] AC 470: Misuse of Drugs Act 1971
- Hodgson Report 1984
- Drugs Trafficking Offences Act 1986 : confiscation limited to drug trafficking where court assessed benefit and value of available assets
- Criminal Justice Act 1993: general proceeds of crime
- Proceeds of Crime Act 1995: disclosure obligation on the accused and court enabled to draw adverse inferences from the unreasonable failure by the accused to provide an explanation
- Proceeds of Crime Act 2002 (POCA)



# Proceeds of Crime Act 2002

- Established ARA now part of SOCA
- Extended court power to confiscate assets
- Enhanced post conviction powers of enforcement
- Newer and stricter ML offences
- Introduction of civil recovery regime: forfeiture where it could be shown there were reasonable grounds for suspecting on the balance of probabilities that assets were the proceeds of crime



# POCA 2002 II

- 3 tier system for recovering the proceeds of crime
- Criminal confiscation
- Civil recovery
- taxation



# Warning

- ARA seen as a failure as it cost £60m to recover £8m
- SOCA took over its function
- Balance to be struck : punitive or in the public interest
- This apparent failure did not show the amount of restrained assets nor the disruption caused to organised crime through ARA activity



# Criminal Confiscation

- Aim to have the court make an order for confiscation related to established particular criminal conduct or general criminal conduct/criminal lifestyle
- *particular criminal conduct case*, the benefit relates directly to the offence or offences before the court
- *general criminal conduct/criminal lifestyle case* such benefit does not require to be linked to the offence or offences of which the accused is convicted nor to any previous offences.
- Confiscation proceedings have no role in plea negotiation



# Investigation

- 5 types of investigative orders available under POCA for criminal confiscation cases to allow a full financial analysis
- Customer information order
- Account monitoring orders
- Disclosure order
- Production order
- Search warrants



# Restraint Orders

- Aim: interdict an accused and other specified persons from dealing with their realisable property in order to ensure that such assets are still available at the time criminal confiscation proceedings are being considered
- Application made on an *ex parte* statement to the court



# Prosecutor's Statement

- Served on the accused on conviction & Court has a copy
- contains matters relevant to the court's consideration of criminal confiscation proceedings in deciding the recoverable amount,
- (a) whether the accused has a criminal lifestyle; and
- (b) the amount of his benefit from either his particular criminal conduct or general criminal conduct.
- information about the accused's available assets (the available amount) in order to assist the court determine the exact amount of the confiscation order to be made
- In general criminal conduct/criminal lifestyle case: statutory assumptions additionally apply



# Burden on the accused

- Within the specified period confirm or deny the terms of the prosecutor's statement;
- Failure to do so amounts to acceptance of its terms;
- general criminal conduct/criminal lifestyle case: aim: to determine by use of the assumptions the balance of income over expenditure that amounts to expenditure which cannot be explained by legitimate transactions



## General Criminal Conduct/criminal lifestyle case

- POCA 2002 Schedule 4 offences: ML, people/drug/arms trafficking, directing terrorism, counterfeiting, intellectual property, blackmail, brothel keeping
- Course of criminal conduct:
  - (a) if the accused is convicted of at least 4 charges on one set of proceedings from which the accused has benefitted or
  - (b) Convicted on at least 2 separate occasions in the past 6 years of an offence constituting conduct from which the accused has benefitted
  - (c) The benefit in each case being at least £5000.



# Presumptions

- Any property transferred to the accused at any time after the relevant date { } was obtained as
  - Result of general criminal conduct
  - The earliest time he appears to have held it
- Any property held after the date of conviction was obtained by the accused
  - As a result of his criminal general criminal conduct
  - At the earliest time he appears to have held it



# Presumptions II

- Any expenditure incurred by the accused at any time after the relevant day was met from property obtained by him as a result of his general criminal conduct
- For the purpose of valuing property obtained (or assumed to have been obtained) by the accused, he obtained it free of any other interests
- But the court must not make any of those assumptions in relation to particular property or expenditure if—
  - (a) the assumption is shown to be incorrect, or
  - (b) there would be a serious risk of injustice if the assumption were made.
- (7) If the court does not make one or more of those assumptions it must state its reasons.”





# Money laundering

## Three stages

Placement: the movement of criminal funds into the economy

Layering: transactions which hide the true source of the funds

Integration: creates the appearance the funds have come from a legitimate source



# Suspicious Activity Reports

- Submitted to SOCA
- Add value to law enforcement to ally with other available intelligence
- Clients but also customers, suppliers, acquisition targets
- Details of person, reason for suspicion, why unusual or suspicious, legal entity
- Valuable and necessary tool to (1) ensure LEA aware of the extent of money laundering (2) can seek to investigate (3) deterrent effect



# Money laundering offences

- POCA s327: conceal, disguise, convert, transfer or remove from the jurisdiction property which the person knows or suspects is the proceeds of crime
- POCA s328 : enters into or becomes concerned in an arrangement, he knows or suspects will facilitate another person to acquire, retain, use or control criminal property
- POCA s329: person acquires, uses or has possession of property he knows or suspects represents the proceeds of crime



# Money laundering : defences

- To have made an authorised disclosure to and obtain appropriate consent from the authorities before doing the act which forms the criminal conduct of the charge



# Money laundering : establishing the charge

- Prove property derived from crime:
  - (1) by showing the property derived from conduct of a specific kind or kinds and that conduct was unlawful
  - (2) through evidence of how the property was handled, it was clear it could only be derived from crime.



# UKCA

- <http://www.homeoffice.gov.uk/police/mutual-legal-assistance/Assistance-from-UK/>

