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THE EU MUST REVAMP ITS APPROACH TO ASSET RECOVERY IF IT IS SERIOUS ABOUT FIGHTING CORRUPTION AND MONEY LAUNDERING

POLICY BRIEF



ANALYSIS AND RECOMMENDATIONS

On 7 May 2020, the European Commission adopted an action plan for a comprehensive policy on preventing money laundering and terrorism financing¹, and launched a public consultation to gather the views of citizens and stakeholders. Transparency International EU (TI EU) contributed its views to this important consultation.

While we believe that significant improvements to EU anti-money laundering policy continue to be necessary and should be introduced, the EU should also ensure that its anti-money laundering efforts are combined with a more effective policy to recover and return stolen assets.

This brief, attached to our submission to the Commission's consultation, explains why tackling corruption and money laundering must go hand in hand with an effective policy to recover stolen assets laundered through the EU financial system. **The recovery of illegal assets held within the EU is critical if the EU wants to stop serving as an attractive destination for corrupt individuals and their money.** Asset recovery makes crime less lucrative, saps criminals of their power, deprives them of "seed money" and provides resources to compensate victims². Preventing money laundering is not only about having good compliance systems in place to detect anomalies and suspicious transactions. It is also about deterring criminals by making sure the risk of being sanctioned and seeing their assets confiscated is too high.

In this brief we highlight key recommendations for improving the EU asset recovery framework, focusing on the recovery of the proceeds of grand corruption³, i.e. public funds misappropriated by high-level officials in third countries. These recommendations are also identified and analysed in more details in our report *Into the Void: the EU's struggle to recover the proceeds of grand corruption*⁴, which analyses the deficiencies in the EU asset recovery policy framework.

What is the problem?

In recent years, **scandals involving money-laundering and embezzlement** by foreign politicians and business magnates have laid bare the EU's role as an enabler of corruption. These scandals show how many corrupt individuals from countries outside of the EU, are enjoying luxurious lifestyles and impunity in Europe⁵. Although some notorious cases have made the headlines, this does not always lead to convictions or the confiscation of assets.

[Europol](#) estimates that only 2.2% of crime proceeds are seized, and an even smaller percentage (1.1%) are confiscated. Very little is returned to victim populations⁶. In a recent report⁷, the Commission acknowledges that *"results in terms of assets confiscated are not satisfactory and the confiscation rates in the EU remain very low"*.

Often confiscation does not happen because it is too difficult to secure a conviction in the country where the offence was committed. Delays in proceedings can be due to poorly-functioning legal or judicial systems, or because the individuals targeted are in power and have control over these institutions. Such failings make it difficult to rely on international cooperation mechanisms as foreseen in the United Nations Convention on Anti-Corruption⁸ (UNCAC) to recover assets. **By failing to address loopholes in asset recovery policy, the EU is allowing dirty money to be diverted through Europe and thereby enabling the impoverishment of the countries where the money originated.**

Over the past decade, the EU has put considerable effort into enhancing its asset recovery framework. First by adopting the Directive on the freezing and confiscation of instrumentalities and proceeds of crime in the EU⁹ in 2014 (the 2014 Directive), currently under review, and more recently with a Directive on combating money laundering by criminal law in 2018¹⁰. The current framework provides various criminal law instruments that may help EU states in their international asset recovery efforts.

However, **there are still important legislative gaps that make it difficult to freeze, confiscate, and dispose of stolen assets in a proactive and autonomous manner**, i.e. without prior request from the victim state, and/or without prior conviction or initiation of criminal or forfeiture proceedings in that jurisdiction. Moreover, the current EU policy framework does not address the last phase of international asset recovery processes, i.e. the repatriation of confiscated assets to the country of origin.

Recommendations

TI EU believes that the EU cannot tackle efficiently money laundering in Europe without rethinking its overall approach to asset recovery. **Transnational corruption committed by high level officials takes away huge sums of money from countries, depriving their populations of basic services. It is essential that this issue is addressed in a systemic and comprehensive fashion at EU level.**

In its last report, the Commission recognised the need for a *“broad modernisation of the EU legislation on asset recovery and further strengthen[ing of] the competent authorities’ capacity to ensure that crime does not pay.”* This is a welcome and long-awaited step. The upcoming revision of the 2014 Directive should provide an opportunity for introducing instruments and provisions that will allow for more proactive enforcement during all phases of the process, including not only freezing and confiscation, but also repatriation, an issue currently overlooked in EU legislation.

In particular, the EU reform should include provisions to allow for:

The confiscation of stolen assets in situations where securing a prior conviction is not possible

Instruments should be introduced to ensure that Member States can initiate confiscation proceedings autonomously. This is particularly critical in transnational corruption cases where a prior conviction cannot be secured in the country where the predicate offence was committed. A number of countries already provide for this kind of confiscation, known as non-conviction-based confiscation through either civil or criminal proceedings. In the current EU framework, non-conviction-based confiscation is foreseen only in limited cases when the accused or suspected individual absconds or is ill. The EC recently admitted that *“the introduction of further measures in the area of non-conviction-based confiscation is feasible and has potential benefits in increasing the levels of freezing and confiscation of proceeds of crime.”*

We agree that non-conviction-based confiscation should be extended to other situations. In particular it should apply in transnational corruption cases, where justice often cannot be delivered in Europe due to judicial failings and rampant corruption in a third country. This should be done in keeping with the principles of the rule of law as defined by the European Commission¹¹. Provided that, in accordance with these principles, sufficient safeguards are in place, these measures can offer a particularly effective way to make crime less financially rewarding. This would include making sure these measures do not aim to establish whether the defendant is guilty or not but rather to target the assets.

The return of assets to the country of origin for the benefit of the victim populations

The goal of asset recovery should be to mitigate and redress the damage caused by corruption. In the case of cross-border corruption involving misappropriation of public funds, every effort should be made to return the confiscated assets to the country of origin for the benefit of the population that has been harmed.

Current legislation fails to address the disposal of confiscated assets in grand corruption cases involving third countries, i.e. who should use the assets and how. The 2014 Directive contains only a soft provision as regards the social reuse of assets which applies mainly to domestic cases¹². For cross-border cases involving third countries, Member States are expected to apply the UNCAC framework. This framework is an international cooperation instrument which only works where there is genuine political will from both victim and holding countries to cooperate over asset recovery and does not include provision for disposing of assets which have been autonomously confiscated¹³. As a result, whenever confiscation is ordered in an autonomous manner (without cooperation from the country of origin), the assets usually end up transferred to the treasury of the EU state that ordered the confiscation¹⁴.

Instead, the EU should ensure that confiscated assets held in the EU are always repatriated and used for the benefit of the populations from which they have been misappropriated¹⁵. Our recommendations were reflected in a recent resolution by the European Parliament¹⁶ calling on the Commission to *“pay particular attention to rules on the use of confiscated assets for public interest or social purposes, and to work to ensure the return of confiscated assets to victims in countries outside the EU”*. Moreover, Member States such as France are already in the process of adopting similar legislation (see below).

Are the proceeds of corruption no longer welcome in France?

Over the past few years, France has shown its willingness to address transnational corruption and has been particularly active at chasing kleptocrats who are using France as a destination for their dirty money. In June 2020, Rifaat al-Assad, the uncle of Syrian President Bashar al Assad, was sentenced by a French Court to four years in prison for money laundering and embezzlement of public funds. The Court considered al-Assad’s wealth to be of unlawful origin and ordered the confiscation of his properties in France and in the United Kingdom, worth respectively €90 million and €29 million. The decision follows a legal campaign by

Transparency International France and Sherpa, which also led to the conviction of kleptocratic Vice President of Equatorial Guinea, Teodorin Obiang.

In an upcoming reform, France also intends to address the issue of asset return. A parliamentary report “Investir pour mieux saisir, confisquer pour mieux sanctionner” (Working to better seize, confiscate and sanction), commissioned by the Prime Minister and published on 26th of November 2019, lays the groundwork for future legislation by highlighting the principles of transparency, accountability, solidarity, integrity and efficiency that should be the basis for any future regulation of the restitution of assets. Transparency International has been supporting these efforts at national level, insisting on the need for a well-governed and inclusive process involving civil society both in the country where the money is held and the country where it is returned to. The French initiative should inspire EU leaders to adopt a similar legislation at EU level.

The future EU reform should stipulate the principles underpinning the return of confiscated assets to victims in third countries (please see the Annex for details). Asset recovery processes should respect the principles of transparency, accountability, inclusiveness, efficiency and integrity and ultimately aim at redressing the damage caused by grand corruption in the country of origin of the assets and providing remedy to the population harmed by the corrupt conduct of their rulers. These principles should govern all stages of the asset recovery process: i) consignment and management of recovered funds; ii) decision making over restitution arrangements and ultimate use of recovered funds; iii) selection of the third parties to manage and facilitate the return and disposal of the funds; iv) disbursement to recipients and implementation of projects ; v) monitoring and reporting.

In this last phase, cooperation between countries involved in the return process is critical, so establishing EU-level mechanisms to organise the repatriation of confiscated assets to the country of origin could prove particularly effective in cases where multiple EU jurisdictions are involved. In the past, mechanisms for the collective repatriation of confiscated assets have proved most successful.

The systematic collection and publication of data on EU countries' asset recovery efforts

The EU should require Member States to collect and publish data on asset recovery efforts. In particular, information on assets frozen or confiscated, compensations or restitutions ordered, and assets returned, as well as indications on the type of offences that led to the illegal acquisition of assets (e.g. corruption, drug trafficking, etc.) and on whether the decision to confiscate was the result of civil or criminal proceedings should be included. Member States should also publish statistics on concluded cases and information on laws and results. These should be in an accessible central location, such as a dedicated website and timely press releases should be issued on specific cases. Data should be harmonised at EU level to facilitate cross-country comparison.

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ENDNOTES

1. Communication from the Commission on an Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing. Retrieved from: https://ec.europa.eu/finance/docs/law/200507-anti-money-laundering-terrorist-financing-action-plan_en.pdf
2. Council of Europe, Fighting organised crime by facilitating the confiscation of illegal assets, 26 March 2018. Retrieved from: <http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbnVveG1sL1hSZWY-vWdJlLURXLWV4dHluYXNwP2ZpbGVpZD0yNDUwNyZsYW5nPUVO&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRClBVC1YUWYUERGLnhzbA==&xsltparams=ZmlsZWlkPTIONTA3>.
3. According to Transparency International, Grand Corruption occurs when: A public official or other person deprives a particular social group or substantial part of the population of a State of a fundamental right; or causes the State or any of its people a loss greater than 100 times the annual minimum subsistence income of its people; as a result of bribery, embezzlement or other corruption offence. For more details, see: https://www.transparency.org/news/feature/what_is_grand_corruption_and_how_can_we_stop_it
4. Transparency International EU, "Into the Void: The EU's struggle to recover the proceeds of grand corruption", 2019, p.28. Retrieved from: http://transparency.eu/wp-content/uploads/2019/09/Asset_recovery_report.pdf
5. In our 2019 infographic "Ill-gotten gains - Fighting grand corruption in the European Union" we used notorious examples to show to what extent the EU has become home for corrupt money. For example, it is believed that the daughter of the former President of Uzbekistan Gulnara Karimova has hidden as more than € 1 billion in bank accounts or invested in real estate in at least 9 EU countries.
6. Europol, Does crime still pay?, Criminal Asset Recovery in the EU – Survey of Statistical Information, 1 July 2016, pp.4,11. Retrieved from <https://www.europol.europa.eu/publications-documents/does-crime-still-pay>
7. Report from the Commission to the European Parliament and the Council, Asset recovery and confiscation: Ensuring that crime does not pay, COM/2020/217 final. Retrieved from: https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20200602_com-2020-217-commission-report_en.pdf
8. UN General Assembly, United Nations Convention Against Corruption, 31 October 2003, A/58/422. Retrieved from: <https://www.refworld.org/docid/4374b9524.html>
9. Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042>. The Directive establishes minimum rules on the freezing of property with a view to possible subsequent confiscation and on the confiscation of property in criminal matters. EUR-Lex (official website to EU law, international agreements and other public documents)
10. EUR-Lex, Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law. Retrieved from: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1673&from=EN>
11. Communication from the Commission to the European Parliament, the European Council and the Council, Further strengthening the Rule of Law within the Union State of play and possible next steps, COM/2019/163 final. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0163&from=EN>
12. Even though the ultimate use of confiscated assets falls within the competence of Member States (i.e. it is not an EU competence to rule over the ultimate use of confiscated property that is regarded as state property), the EU may still provide some guidance
13. Article 57.3(c) provides that "[holding states] shall give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime" But they are actually under no obligation to do so. UNODC, UNAC, 2001, p.47. Retrieved from: https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf
14. Save the possibility for asset sharing between EU jurisdictions that were involved in the case.
15. Transparency International EU, "Into the Void: The EU's struggle to recover the proceeds of grand corruption", op. cit.
16. European Parliament in its resolution adopted on 10 July 2020 on a comprehensive Union policy on preventing money laundering and terrorist financing – the Commission's Action Plan and other recent developments (2020/2686(RSP)).

ANNEX

Civil Society Principles for Accountable Asset Return

Joint submission to the UNGASS against corruption of: Africa Network for Environment and Economic Justice (ANEEJ), CiFAR – Civil Forum for Asset Recovery e.V., Civil Society Legislative Advocacy Centre - CISLAC Nigeria, Human Rights Watch, I Watch (Tunisia), The International State Crime, Initiative, Transparency International EU, Transparency International France

These principles have been developed through a consultative, 18 month process involving civil society organizations from across the globe. They are minimum, framework standards and are designed to be supplemented by country and case specific detail by civil society. These principles should be applied to both international and domestic asset recovery.

Transparency and participation

1. Asset recovery cases, including settlements, reconciliation agreements and negotiated agreements, should be conducted transparently and accountably from start to end, to the extent compatible with rules on confidentiality of investigation.

As far as possible, relevant authorities - both domestic and international - and including judicial authorities, where permitted, should publicly provide, from the earliest legally possible opportunity, the following information in an accessible manner and format to the public, including any identified victims of corruption:

- timely and accessible case information on the progress and status of asset recovery cases, including case names;
- the nature, type and estimated value of the assets under investigation;
- the legal framework through which the asset recovery process was initiated and is being undertaken;
- the nature, type and estimated value of assets seized and a timeline of planned steps for return;
- the negotiating framework, modalities for asset return and disbursement, and the foreseen role of civil society in the return;
- the disposition, administration and monitoring of returned assets. This should include an independent tendering process for third-party stakeholders involved in the disbursement of funds; due diligence on third-party/intermediary actors involved in the disbursement and monitoring of assets, and independently audited reports on the disbursement and management of funds; and progress of programs – all to be published publicly and available in an accessible format.

2. All recovered assets must be traceable by the general public at all stages of the process of asset recovery, from the confiscation, seizure and sale of assets through to the return and disbursement of assets. This could include, amongst other methods, that recovered funds be separated from the general state budget and placed in a special account or an agreed independent mechanism until assets have been fully disbursed.

3. Independent civil society organisations, including victims' groups/representatives, should be

able and enabled to participate in the asset recovery process. This includes:

- identifying the mechanisms and processes that allowed for initial harm to occur;
- identifying how the harm can be remedied including providing information on how the harm was committed, as well as proposals to prevent recurrence and a timeline for achieving this;
- contributing to decisions on the return and disposition of assets including social programs dedicated to victims of corruption and identifying needs;
- fostering transparency, accountability and due diligence in the transfer, administration, disposition, monitoring and reporting of recovered assets; and,
- as far as permitted by confidentiality rules, fostering transparency and accountability in the investigation.

4. Multilateral, bilateral and case-specific agreements or arrangements should be made public in a timely fashion and accessible manner, including when recovery is part of reconciliation arrangements, and should involve independent civil society representatives.

These agreements should be concluded to ensure the transparent, accountable and effective use, administration and monitoring of the returned proceeds of corruption are in line with the principles set out here.

Integrity

5. In no cases should the disposition of the recovered assets benefit directly or indirectly natural or legal persons involved in the commission of the original or on-going offence(s). This includes situations where those directly or indirectly involved in the original corruption remain in positions of power and are able directly or indirectly to benefit from the disposition of the recovered assets; or influence the decision-making process.

6. A process should be in place to monitor the disbursement of funds that includes an independent complaints mechanism.

Any suspicion of irregularities concerning the management of recovered assets should lead to the opening of an investigation by independent authorities. Where the return is international, investigations should be opened by both the origin and returning jurisdictions and transfers should be suspended pending the outcome of the investigation.

When countries are not compliant with UNCAC Articles 9, 10 and 13 (transparency and accountability in public financial management; public reporting and participation of society), monitoring for irregularities in international returns should be particularly stringent.

Accountability

7. Anti-corruption, rule of law and accountability mechanisms should be in place to provide oversight of recovered assets. As a minimum, this should include:

- Transparent and accountable public procurement and tendering processes that meet international standards;

- Transparent and publicly available registers of companies, with beneficial ownership declared;
- Establishment of regulations on conflict of interest;
- Independence of the judiciary and access to a fair trial;
- Freedom of association and freedom of the press, without which any meaningful monitoring by the civil society would be impossible.

When these are not in place, alternative arrangements should be considered in consultation with a broad base of independent civil society organisations that are truly representative of citizens, including where possible victims' groups/representatives, to ensure accountability and transparency in the management and oversight of recovered assets.

This does not affect the principle that the recovered assets remain the property of the people of the country from which they were stolen.

Victim restitution and other beneficiaries

8. Without prejudice, victims should be provided access to justice in domestic and international cases of illicit activities including bribery and money laundering. They should be informed of case developments in an accessible format; and be provided opportunities to positively engage in cases e.g. through victim impact statements.

Where possible, victim groups and their representatives should be afforded 'standing' in relevant jurisdiction outside their own, to allow them to bring cases against state officials and their representatives to the courts, particularly in instances where domestic judicial systems would not allow or are susceptible to being partial.

Where victims of the abuse of power by public officials can be identified individually or as a group, they should allow the opportunity to be provided restitution for the damage caused. This principle should not apply to those involved directly or indirectly in the commission or facilitation of the offence(s).

9. Without prejudice to the restitution of identified victims and with the understanding that the recovered assets remain the property of the people of the country from which they were stolen, recovered assets should be used to benefit the people of the country from which the assets were stolen.

'Benefit the people' in this context means improving the living standards of populations and/or strengthening the rule of law and prevention of corruption in line with international human rights obligations in the country or countries where the underlying offences occurred, and thus contributing to the achievement of the Sustainable Development Goals.

10. A wide range of stakeholders, including a broad base of representative, independent civil society organizations should be involved in determining how recovered assets should be used to best repair the harm caused and to benefit the people of the country. Where possible and where victims' groups do not exist, independent civil society should also be empowered to help identify, and where possible, to represent victims and their interests.

Transparency International EU is part of the global anti-corruption movement, Transparency International, which includes over 100 chapters around the world. Since 2008, Transparency International EU has functioned as a regional liaison office for the global movement and as such it works closely with the Transparency International Secretariat in Berlin, Germany.

Transparency International EU leads the movement's EU advocacy, in close cooperation with national chapters worldwide, but particularly with the 24 national chapters in EU Member States.

Transparency International EU's mission is to prevent corruption and promote integrity, transparency and accountability in EU institutions, policies and legislation.

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