

International Association of Judges

Third Study Commission

Criminal organizations: Identification, Seizure and Forfeiture.

ANSWERS TO THE QUESTIONNAIRES

From the Spanish Judges Association

Question 1:

Has your country signed and ratified the Convention and the Protocols thereto. If yes, on what date.

Yes, Spain signed The UN Convention against Transnational Organized Crime and Protocols on December 13 2000, and ratified them on February 21, 2002.

Also it has adhered to the Protocol against the Illicit Manufacturing of and trafficking in firearms, their parts and components and Ammunition on January 25, 2007

Question 2:

Has your country special legislation for

2.1. the identification,

2.2. the seizure (freezing),

2.3. the forfeiture,

of property of criminal organizations? If yes, could you specify to what extent?

If no, is there any such legislation under consideration.

Answer:

2-1 In the identification of assets, the Criminal Code concerning the forfeiture provides that it shall be deemed criminal activity the heritage that comes from every person convicted of crimes committed within the criminal or terrorist organization or group or because of a terrorist crime whose value is disproportionate to the legally income obtained by each one of these persons. Consequently, the accused must prove the legality of the assets.

2-2 In relation to the seizure of assets during the processing instruction, it may be seized those goods and capital that have been used for carrying out the criminal offense or that have been obtained as a consequence of these facts. Criminal Code (article 374), for crimes of drug trafficking, allows to seize and place in ledge by the court from the first time goods, instruments and proceeds, to ensure the effectiveness of its confiscation.

Judicial authority may agree that, if it comes from lawful commerce and with the guarantee due for its conservation and while the procedure is carrying out, the subject of forfeiture can be used temporarily by the Judicial Police in charge of the repression of illegal drug traffic.

2-3 Criminal Code regulates the seizure of property of the criminal organizations in Article 127. This article requires to forfeit all the gains made within a criminal or terrorist organization of crime presumption.

Any penalty imposed for intentional crime or offense entails the loss of the effects that have come from them, the instruments they have been executed with and the profit obtained whatever the transformations they may have experienced. The seizure occurs unless they belong to a bona fide third party not responsible for the crime that has been legally acquired them. Those seized assets will be sold if they are of lawful commerce, applying their product to cover offender's civil liability and, if they are not, the destination they will be given will be the prescribed provisions and, failing that, they will be disabled.

In the area of drug trafficking and money laundering section 374 of

the Criminal Code, it allows the confiscation of the value on other goods, even of lawful origin provided that they are from the suspects. The criminal judge can declare the nullity of the act or legal business transfer or the encumbrance on property crime.

Question 3:

Has your country set up one or more specialized agencies to identify and seize the proceeds of organized crime?

Answer:

In Spain there are some Departments of the Police specialized for the detection and prosecution of organized crime and also for investigation the economic and heritage movements of the criminal activities.

Question 4:

4.1. What assets are subject to seizure?

4.2. What assets are subject to forfeiture?

4.3. Does an asset need to have been seized in order to be forfeited?

4.4. What is the process for seizure of assets? (please summarize)

4.5. What is the process for forfeiture? (please summarize).

4.6. Does in your country the judge plays a role in the process mentioned in 4.4. and 4.5.?

Answer:

4-1 All those assets, both movable and real estate, which, belonging to the accused, have value and can guarantee the execution of a conviction and the civil liability that comes from the committed crime. The Judicial Secretary, responsible of the execution, will seize the goods seeking to take into account the greater ease of disposal and its less onerous for the debtor; If the application of these criteria was too difficult, it is regulated an order for goods embargo: money; credits and rights; jewellery and art

objects; income in money; interests, rents, and other kind of goods; movable estate or livestock; real estate; salaries, pensions, wages; credits, rights and values achievable in medium and long term.

4-2 All those that are likely to have been used for the Commission of the criminal offence or that have been obtained with the product of this one. In this case the seizure will be extended to the convicted person's heritage that has been obtained as a result of the completion of the criminal offence he is investigated for, and the goods that were used to carry out such illicit activities.

4-3 No, because each one has a different origin and purpose. The seizure is intended to guarantee the payment of the civil liability that comes from the offence. The seizure of the convict's property can be done to assets that have not been obtained as a result of the crime he had been convicted of. Neither must they be instruments to the realization of the offence. They are only goods or rights whose only requirement is that they have to be the convicted person's property.

Instead, an asset can only be forfeited when it has been originated or has been an instrument for carrying out the illegal activity.

4-4 While preliminary investigation, goods obtained from the criminal offence or those that have been instruments for its commission will be seized or forfeited pending the sentence. The judicial order is only needed. The court proceeding is the same to the adoption of a preventive measure.

If it is given a guilty judgment the goods will be definitely forfeited.

When it was about a civil liability that the suspect has to confront, it will be done what civil procedure law lay down, which regulate the seizure of assets and property to

confront what shall be required to him. The judge order the forfeit through resolution and the Judicial Secretary runs it, as it has been answered in question 4.1.

4-5 There is not a procedure for agreeing on the seizure, however, when the judicial authority is aware of the commission of a criminal offence it can adopt, within the corresponding criminal proceedings, the injunction that agree the seizure, and appoint a depositary that keeps assets until final judgement.

If it is a guilty judgement all property used and obtained by the commission of the criminal offence will be permanently forfeited.

4-6 He has to adopt the decision, after considering the interests in conflict and the valuation of their proportionality and necessity.

Once the judge agree the seizure, it is carried out by the Judicial Secretary, being the one who performs subject's property research, fix assets to seize and fix the amount that must be seized if there were wages.

Question 5:

Has your country legislation in force to confiscate after due process the proceeds of crime?

Answer:

The Criminal Code expressly contains the confiscation of property in certain criminal conduct, as it has already been said.

When goods, media, instruments and profits that comes from drug trafficking have disappeared from the suspects' heritage, other suspects' assets can be seized, even from lawful origin.

Seized property can also be sold when the owner makes express abandonment of those, or when conservation could prove dangerous to public health or safety, and also when there could be a significant decrease in its value, even before pronounce sentence.

The proceeds from the sale will stay pending judicial resolution. Payment of expenses occurred due to the disposal may be inferred from the obtained sums

Finally, forfeiture property may also pay convict's civil liability and, if something remains, this will be awarded permanently to the State.

Question 6:

“Money makes the world go round”.

Has your country special legislation in force with regard to the electronic movements?

Answer:

In article 248 Spanish CP, number 2 and its three subparagraphs, cover unlawful conduct relating to those persons who gain inheritance illegally by using computer manipulation to the detriment of another. The manufacture, possession or the provision of a computer program used for these purposes is also covered here, even if this has not as yet been used, and also finally, the use of credit or debit cards, travellers cheques or the data on these to carry out these operations to the detriment of another

Question 7:

7.1. Should there be an international authority to handle organized crime besides for instance Interpol, Eurojust and Frontex.

7.2. Could your country be more active in that field?

7.3. Could you as Judge be more active in that field? Do you think that you have enough instruments and qualifications to handle cases of organized crime in Court?

Answer:

7-1 From the police point of view, it is thought that the creation of other instruments is not necessary because the police forces mentioned are sufficiently prepared to detect organised crime offences nowadays, regardless of whether they have to strengthen collaboration and coordination between them.

Nevertheless, it may be necessary to create an expert corps, dependent on the Administration of Justice that specialises in economic and, even computer matters, to specify unlawful conduct, whose target would be what the legislator has envisaged as a criminal offence.

7-2 While these crimes continue to be committed, a greater involvement of all countries will be required.

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7-3 As has already been stated, national judicial competences are clearly defined. However, the instruments needed to go further into the data as well as to provide a rapid response to them and the actions of the police who specialise in these crimes are not. These instruments would be necessary to create and specialize.

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