

Recent developments in EU anti-corruption strategy: the missing element of the return of corrupt assets to “victim countries”

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Abstract

Purpose – Recent developments in the EU's anti-corruption strategy have brought the EU closer to meeting the UNCAC's objectives, i.e. the Proposal for a Directive on combating corruption (2023) and the Proposal for a Directive on Asset Recovery and Confiscation (2022). This paper aims to discuss these developments from the perspective of the UNCAC, to identify missing elements in the EU's asset recovery mechanisms.

Design/methodology/approach – Critical approach towards EU anti-corruption policy (discussing the problems and solutions). Review of EU developments in asset recovery law.

Findings – There is a political will on the part of the EU to fight corruption through the rules enshrined in the UNCAC. However, improving EU law by introducing a new type of confiscation of unexplained wealth and criminalising illicit enrichment, without establishing convergent rules for the return of corrupt assets from EU territory to the countries of origin, cannot be seen as sufficient action to achieve the UNCAC's objectives. In modelling mechanisms of the return of assets, the EU should search for solutions to overcome the difficulties resulting from the ordre public clause remaining a significant factor conditioning mutual legal assistance.

Originality/value – This paper discusses the possible input of the EU, as a non-State Party to the UNCAC, to advance implementing the UNCAC solutions on asset recovery by establishing convergent rules for the return of corrupt assets from EU territory to countries of origin.

Keywords Asset recovery, Return of assets, Unexplained wealth, Illicit enrichment, Corruption, UNCAC

Paper type General review

1. Introduction

The EU's ambition is to develop a comprehensive anti-corruption strategy, one element of which is an improvement of the mechanisms of recovery of corrupt assets stored by Politically Exposed Persons (PEP) in EU territory. There is no question that to achieve this

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goal, the EU legal framework should correspond with the fundamental assumptions of the [United Nations Convention against Corruption \(2003\)](#), (hereinafter: the UNCAC or Convention), including the rules for asset recovery. The necessity of convergence of these two separate legal systems follows from the unique status of the UNCAC in the EU's legal order. The Convention binds the EU itself, as well as the EU Member States (MS). The Council concluded the UNCAC on behalf of the European Community on 25 September 2008. Recent EU developments in the area of asset recovery have made steps towards aligning EU law with the UNCAC: the Proposal for a Directive on combating corruption, presented by the European Commission on 3 May 2023 [\[1\]](#) and the Proposal for a Directive on asset recovery and confiscation, presented by the Commission on 25 May 2022 [\[2\]](#). Nonetheless, the proposed embedding in EU law of the concepts of unexplained wealth and illicit enrichment, without enabling the return of corrupt assets from EU territory to the country of origin under convergent rules, still puts the EU behind the UNCAC's approach to asset recovery. The return of assets remains an unresolved issue that the EU should seriously deal with, given the specificities of corruption as a global phenomenon. However, for the EU to meet the goals of the UNCAC is a demanding task, because there is an additional element that plays a crucial role in all asset recovery processes: trust. The question arises of what the EU should do to make its asset recovery mechanisms convergent with the UNCAC, while it is simultaneously experiencing a crisis of trust. The deficits in the protection of fundamental rights recognised by EU law have already hampered mutual trust in cross-border cooperation in criminal matters between the EU MS, as evidenced in cases recognised by the Court of Justice of the EU (CJEU), e.g. C-220/18 PPU, *ML*; C-216/18, *LM*; C-128/18, *Dorabantu*; Joined Cases C-354/20 PPU and C-412/20 PPU, *L and P*.

A far-reaching question has been posed in the European legal discourse of whether mutual recognition “is a viable general path for cooperation” inside and outside the EU ([Satzger, 2019](#)). [Satzger \(2019\)](#) pointed out that trust cannot be “ordered” and is a rather dynamic element in mutual recognition mechanisms, which still positions the “ordre public – proviso” as an important playmaker in this field (cf. [Sicurella, 2018](#)). If a deficit of trust has already provoked some turbulence in cross-border cooperation over criminal matters within the legal family of the EU MS, a similar deficit presents a much more challenging impediment to overcome in transnational cooperation, especially when involving developing countries, bearing in mind the level of guarantees of fundamental rights recognised by EU law. For the purposes of this article the term “transnational” when used in the context of asset recovery means processes involving non-EU countries, and the term “cross-border” means processes taking place within the EU. Considering that trust is a conditional factor for the effectiveness of asset recovery in all kinds of interstate cooperation, cross-border and transnational, the EU should seek solutions for the return of corrupt assets that can compensate for a deficit of trust when cooperating with developing countries to return the assets of their populations recovered from corruption offences.

This article argues that a lack of convergent rules for the return of corrupt assets from EU territory to the countries of origin is a missing element in the EU's anti-corruption strategy. In support of this thesis, the article discusses the approach to asset recovery adopted in the UNCAC in the context of recent EU developments aimed at embedding the concepts of “unexplained wealth” and “illicit enrichment” into EU law. The view put forward is that the EU should concentrate its efforts on seeking model solutions enabling the transnational return of assets. In this respect, the path to adopting solutions has already been paved by Switzerland and France. However, choosing the model best suited to the EU MS legal family requires a broader debate.

2. Transnational return of assets to country of origin as a general principle of asset recovery in the UNCAC

To understand how the EU could foster implementing the UNCAC's solutions on asset recovery, we must first look at the general principle of asset recovery in the Convention. This principle should be a key reference point when assessing EU developments aimed at meeting the Convention's objectives. Secondly, we must take into account that a lack of trust is identified as one of the main barriers to asset recovery (Stephenson *et al.*, 2011). Omitting the "trust factor" when considering the possible contribution of the EU towards implementing the UNCAC's approach to asset recovery, could lead to the EU relying excessively on developing legal provisions on mutual legal assistance under the framework of formal civil or criminal proceedings, the effectiveness of which may easily be reduced for reasons of *ordre public*. Bearing in mind the sensitive "trust factor" in cooperation between EU and non-EU States, one of the greatest difficulties for the EU is to create transnational procedures for the return of assets that reduce the risk of repeated unlawful re-use of those assets in the country of origin (cf. Ivory, 2014).

The issue of return of the proceeds of corruption offences belongs to the scope of application of the UNCAC (Article 3(1)). Detailed rules on the return of assets are specified in Article 57 of the Convention. Arnone and Borlini (2014) pointed out that including this issue in the Convention *ratione materiae* influences the interpretation of provisions in Chapter V of the Convention. This view is supported by Article 31(1) of the Vienna Convention on the Law of Treaties (1969), stating that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (Arnone and Borlini, 2014, p. 488). A novel aspect of the UNCAC consists of a requirement addressed to the States Parties, to return assets obtained through corruption to the victim country. The Foreword to the Convention emphasises that "it makes a major breakthrough by requiring Member States to return assets obtained through corruption to the country from which they were stolen. These provisions – the first of their kind – introduce a new fundamental principle, as well as a framework for stronger cooperation between States to prevent and detect corruption and to return the proceeds". This should be read together with Article 51 of the UNCAC stating that "The return of assets [...] is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard". Careful consideration of the assumptions of the UNCAC justifies the position that one of its main purposes is to ensure the return of assets from corruption offences to the country of origin in a manner that makes the beneficiaries of these assets the populations considered to be indirect victims of the corruption of public officials, their relatives or associates. Therefore, building asset recovery mechanisms in line with the Convention at the national and supranational level, which also applies to the EU, having the status of a non-State Party to the Convention, should concentrate on making such returns legally possible.

Corruption, as a specific phenomenon that transcends national borders and causes collective damage, needs specific national and supranational responses to restore justice (Powell *et al.*, 2020; Bismuth *et al.*, 2021). The Preamble to the UNCAC states that "[...] corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential". The question arises of whether, given the essence and purposes of the UNCAC, the EU has exploited its political and legal opportunities to achieve the highest possible level of implementation of the UNCAC in the field of asset recovery. Raising this question is made all the more legitimate when taking into account the EU's capabilities and ambition to be more than a regional player when defining the rules of the fight against corruption.

The challenge for the EU is to influence its MS to establish in their legal orders convergent rules enabling the transnational return of assets recovered from corruption offences by PEPs to the countries of origin. First of all, this can be done through political pressure exerted by the EU on the MS. Political will, on one side to return the corrupt assets and on the other side to receive those assets, is a necessary foundation for any transnational legal cooperation on this issue, giving the States the initial capital to work in common against difficulties faced during the asset recovery process. Secondly, this objective can be achieved both by the EU adopting well-tailored legal measures itself, as well as its MS, all being parties to the UNCAC. It should also be remembered that corruption and money laundering are areas of crime where the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions (Article 83(1) of the Treaty on the Functioning of the EU).

3. Recent developments in EU law regarding the concept of “unexplained wealth” and “illicit enrichment”

The Commission recently presented two Proposals for directives, important from the perspective of recovery of corrupt assets in the EU. First is the Proposal for a Directive on asset recovery and confiscation (2022), providing for a new type of confiscation in EU law, i.e. the confiscation of unexplained wealth linked to criminal activities. Second is the Proposal for a Directive on combating corruption (2023), embedding the concept of “illicit enrichment” within EU law.

3.1 Proposal for a directive on asset recovery and confiscation (2022)

The Proposal for a Directive on asset recovery and confiscation presents a broad approach towards the concept of “unexplained wealth”, evidenced by the wide spectrum of triggering offences committed under the framework of a criminal organisation and a lack of other restrictions as to the subject to whom this type of confiscation applies. An analysis of the impact assessment accompanying this Proposal leads to the conclusion that the purpose of including the concept of “unexplained wealth” in EU confiscation law was not directly targeted at fighting corruption involving PEPs, especially those from outside the EU. However, corruption has been mentioned among the triggering offences, as defined in the Convention on the fight against corruption involving officials of the European Communities or officials of MS of the European Union, drawn up on the basis of Article K.3(2)(c) of the Treaty on European Union (O.J. C 195, 25.6.1997, 1) and in Council Framework Decision 2003/568/JHA on combating corruption in the private sector (O.J. L 192, 31.7.2003, 54). Importantly, the catalogue of triggering offences covers money laundering, as defined in Directive (EU) 2018/1673 on combating money laundering by criminal law (O.J. L 284, 12.11.2018, 22), for which corruption offences of PEPs, including those from non-EU countries, might be predicate offences. These offences belong to the catalogue of triggering offences if they are punishable by deprivation of liberty of a maximum of at least four years (Article 2 in connection with Article 16 (3) of the Proposal). Confiscation of unexplained wealth in the Proposal is designed as supplemental to other types of confiscation, thus MS shall take the necessary measures to enable this type of confiscation when the other types, i.e. basic confiscation, confiscation from a third party, extended confiscation or non-conviction based confiscation (NCBC) are not possible (these types of confiscation are specified in Articles 12–15 of the Proposal).

The catalogue of triggering offences for this type of confiscation also includes many other offences, which might suggest that we are not dealing with a solely corruption-oriented tool, but instead a tool targeted at fighting serious harmonised offences in the areas broadly indicated by Article 2 of the Proposal. Corruption offences and related money

laundering may in principle fall within this scope, however, the main focus is not on combating these types of offences. It should be noted that varying types of “unexplained wealth order” (UWO) are in use in many jurisdictions, not only for anti-corruption purposes, but also in broader strategies to combat serious crime (Booz Allen Hamilton, 2012; Transparency International, 2015; Brun *et al.*, 2023).

The Proposal for a Directive on asset recovery links the confiscation of unexplained wealth to an “investigation into criminal offences”. The intersection of this non-penal legal tool with the criminal realm is also somehow indirectly reflected in the full name used for it in the Proposal: “confiscation of unexplained wealth linked to criminal activities”. In addition, ties with the criminal realm are included in the conditions of ordering this type of confiscation, specified in Article 16(1) of the Proposal, which must be fulfilled cumulatively. Firstly, the property should be frozen in the context of an investigation into criminal offences committed in the framework of a criminal organisation. Secondly, the criminal offence should be liable to give rise, directly or indirectly, to substantial economic benefit. Thirdly, the national court should be satisfied that the frozen property is derived from criminal offences committed in the framework of a criminal organisation. The evidential threshold for determining the link between previously frozen property (in the context of an investigation into criminal offences committed in the framework of a criminal organisation) and a criminal offence is civil in nature. The court’s assessment in this regards shall be based on all the circumstances of the case, including the specific facts and available evidence. A special indication for the court in this regards is any substantial disproportionality of the value of the frozen property against the lawful income of its owner (Article 16 (2) of the Proposal). As far as the procedural rights of the person affected by the confiscation of the unexplained wealth are concerned, the Proposal provides an obligation for MS to ensure the right of defence, including by awarding access to the file and the right to be heard on issues of law and fact. Importantly, respect for the right of defence should be in place prior to the stage of a court issuing such a confiscation order (Article 16(4) of the Proposal).

In this context, it is indisputable that EU confiscation policy to date has maintained a link (of varying strictness) between each type of confiscation of illegal property, even non-conviction-based ones, and proceedings in criminal matters [3]. Nevertheless, it is worth noting, that broad freedom has been left to MS, confirmed in the case law of the CJEU, to develop civil varieties of confiscation independent of criminal proceedings [4]. In this context, it is also worth recalling that a lack of non-conviction-based recovery procedures is indicated as one of the legal barriers to asset recovery by the Stollen Asset Recovery Initiative (Greenberg *et al.*, 2009) and the UNCAC Coalition [5].

The Camden Asset Recovery Inter-Agency Network (CARIN) attempted to distinguish between the different models of NCBC on the basis of analysis of various legal solutions available in EU law and EU MS. CARIN identified four models of NCBC and placed them within the civil-criminal division. Two of these models belong to the criminal realm. The first model is an “NCBC in criminal proceedings”. This model applies where confiscation based on a final conviction cannot be imposed because the commenced criminal proceedings may not be concluded because of the offender’s death, absconding, immunity, age or mental state (CARIN, 2015). The second model belonging to the criminal realm is “extended confiscation”. A link between the assets subject to confiscation or forfeiture and the offence for which the offender is being prosecuted is still preserved in this model, however, the link is significantly loosened compared to the first model. In this model, confiscation covers not only the assets related to the prosecution, but also other assets the defendant “owns” (CARIN, 2015).

In addition, CARIN recognised two models of NCBC belonging to the civil realm. The first is “civil confiscation or forfeiture”. In this model, action is taken against the assets obtained through unlawful conduct (*in rem*), not the person. There is an indirect link to a crime or more broadly to a criminal activity, however, this link is so distant that the model is not assigned to the criminal realm (CARIN, 2015). The second model belonging to the civil realm is “unexplained wealth”. In this model, the actual property that a person has acquired is compared to their declared income to find any disparity between the two. This model is mostly applied in the framework of civil proceedings, however, it is also possible in criminal proceedings. Importantly, in this model, it is not necessary to establish a direct or indirect link to a predicate offence (CARIN, 2015).

3.2 Proposal for a directive on combating corruption (2023)

The UNCAC provides for yet another possibility for depriving corruption offenders of the proceeds of crime: the criminalisation of “illicit enrichment” (Muzila *et al.*, 2012). However, establishment by State Parties of the offence of illicit enrichment in domestic laws is non-mandatory, as the UNCAC only makes a recommendation in this regard (Article 20 of the UNCAC).

From a theoretical point of view, the concept of illicit enrichment can also be associated with the concept of “unexplained wealth” if a broader perspective is assumed. In this approach, the term “illicit enrichment” covers the differing legal tools targeted at unexplained wealth, such as UWOs. For example, Dornbierer proposed a broad definition of an “act of illicit enrichment” as the “enjoyment of an amount of wealth that is not justified through reference to lawful income” (Dornbierer, 2021). Dornbierer takes the position that laws can be considered to be “illicit enrichment laws” if they fulfil two conditions. Firstly, if they empower a court (when satisfied that there was an act of illicit enrichment) to impose a criminal or civil sanction. Secondly, if they do not require establishing a separate or underlying criminal activity before imposing such sanctions (Dornbierer, 2021).

The second Proposal mentioned, i.e. the Proposal for a Directive on combating corruption aims to align EU anti-corruption law with the UNCAC, i.e. by introducing to EU law the concept of illicit enrichment as adopted in the Convention (Recital 7 of the Preamble and Article 13 of the Proposal). If this Proposal becomes a binding directive, MS will be obliged to take the necessary measures to ensure that the intentional acquisition, possession or use by a public official of property that that official knows is derived from the commission of any of the offences set out in Articles 7–12 and 14 of the Proposal (corruption and related offences), is punishable as a criminal offence. It should be emphasised that the term “public official”, as used in the description of corruption and related offences, means not only an EU official or a national official of an EU MS, but also a national official of a third country, as well as any other person assigned and exercising a public service function in an EU Member State or third country, for an international organisation, or an international court (Article 2 (3)(4)(5) of the Proposal). Significantly, the Proposal in question obliges MS to criminalise enrichment from corruption offences whether or not the public official was involved in the commission of that offence. For criminal liability, knowledge of the corrupt origin of property by the public official is sufficient.

However, concerns about whether this Proposal becomes a binding directive are justified when taking into account the lack of unanimous willingness by States to introduce the concept of criminalisation of illicit enrichment. The study “State of implementation of the United Nations Convention against Corruption”, prepared within the framework of the United Nations Office on Drugs and Crime (UNODC), states: “Illicit enrichment, a non-mandatory provision, has not been established as a criminal offence in the majority of State parties, although legislation is pending in

several cases. Countries from the Group of Latin American and Caribbean States seem the most willing to adopt legislation covering such an offence, while States parties from the Group of Western European and other States are most likely to reject it [...]"(UNODC, 2017).

It should also not be forgotten that the concept of illicit enrichment has already raised controversy at the stage of preparatory work on the UNCAC. During the stage of *travaux préparatoires*, the issue of illicit enrichment was included in the content of Article 25 (currently Article 20 of the UNCAC). One of the doubts raised concerned the constitutional and human rights issues resulting from, *inter alia*, the reversal of the burden of proof (cf. UNODC, 2010). During negotiations over the concept of illicit enrichment as proposed in the UNCAC, the following remark was noted: "The delegations of the Russian Federation, the member states of the European Union and others expressed their strong wish to delete this article" (UNODC, 2010). Though those provisions of the UNCAC concerning the criminalisation of illicit enrichment were initially proposed as mandatory via the use of the term "each State Party shall adopt", ultimately Article 20 of the UNCAC took the form of a non-mandatory recommendation that "each State Party shall consider adopting".

The EU, being a non-State Party to the UNCAC, is subjected to the self-assessment procedure concerning the implementation of the Convention [6]. This procedure was launched in 2021, but the first review cycle did not cover the implementation of the provisions on asset recovery contained in Chapter V of the Convention. However, the first review cycle did cover i.a. the implementation of Article 20 of the UNCAC on the criminalisation of illicit enrichment. The results of the assessment were presented by the Commission on 12 September 2022 [7]. As far as Article 20 of the UNCAC is concerned, it should be remembered that the Proposal for a Directive on combating corruption, involving the concept of illicit enrichment similar to that presented in the UNCAC, was presented by the Commission much later, on 3 May 2023 (Article 13 of this Proposal). From this perspective, the Commission's positive opinion of the implementation of the concept of illicit enrichment into EU law in 2022 was somewhat overstated. The main arguments in favour of the positive assessment presented on 12 September 2022 were based on the fact that EU law provides for different types of confiscations (third-party confiscation, NCBC, extended confiscation), which are also applicable to corruption offences (Directive 2014/42/EU).

The political will of the UN General Assembly to strengthen cooperation in the area of the return and disposal of proceeds from corruption offences was expressed in a Political Declaration, adopted on 2 June 2021 [8]. It is worth mentioning that the explanatory memorandum of the Commission's Proposal for a directive on combating corruption (2023) alludes to this Declaration and indicates an ambitious direction for the EU's anti-corruption actions: "In line with the commitments contained in the Political Declaration adopted at the 2021 UN General Assembly Special Session against Corruption, the European Union should, to the degree possible, go beyond the minimum and adopt additional measures for preventing and combating corruption". One can say that the EU even expressed a will to exceed the minimum requirements of the UNCAC and created an expectation that the EU will ultimately pave the way for its MS to establish fair mechanisms for the return of assets. These mechanisms should respect the level of protection of fundamental rights shared by the legal family of MS constituting the EU, while also being flexible enough to mitigate the use of the *ordre public* clause in difficult transnational asset recovery processes involving developing countries. Paradoxically, these developing countries are in most need of the return of corrupt assets, therefore at the EU policy level the *ordre public* clause should not be treated as a legal "brake", paralysing cooperation in the transnational return of assets, but as the clause exerting pressure on the EU MS to search for advanced legal solutions to

restore the *ordre public* in countries affected by corruption, through the use of assets returned to their populations.

4. Search for a model of transnational return of assets suited to the EU

Member States legal family

Improving the EU's legal framework solely by introducing a new type of confiscation of unexplained wealth and criminalising illicit enrichment cannot meet the goals of the UNCAC if simultaneous efforts are not made to develop convergent mechanisms of transnational return of corrupt assets from EU territory to victim countries. However, as the EU has a unique legal system, the situation is very demanding. At present, addressing the issue of the return of assets is also said to be one of the great challenges for global governance (Ivory, 2017). Action undertaken by the EU as a whole would avoid discrepancies between national mechanisms resulting from each MS adopting separate solutions on a case-by-case basis. Establishing convergent mechanisms for the return and disposal of such assets would also strengthen resistance to the proceeds of corruption being placed in EU territory.

The legal solutions enabling the return of assets adopted in France and Switzerland could serve as output models in elaborating a model suited to the whole family of EU MS. Nonetheless, to identify the pros and cons of possible legal solutions in this respect a wider scholarly debate is also needed.

In the French model, assets can be returned via official judicial proceedings (criminal or civil). However, such avenues in principle require action on the part of the requesting State. In addition, after the conclusion of such procedures, the assets recovered in the State where they are stored are often relocated to this State's coffers. The legal basis for redirecting the recovered assets to countries of origin was provided in French law by Programming Act 2021–1031 of 4 August 2021 on inclusive development and the fight against global inequalities (Loi n° 2021–1031 du 4 août 2021 de programmation relative au développement solidaire et à la lutte contre les inégalités mondiales) [9]. The assets must first be confiscated and then sold, so there is a need for a definitive conviction for one of the offences indicated in the statutory catalogue, i.a. money laundering and corruption offences. Then, the proceeds of the sale of the assets can be returned to the population of the foreign State (excepting the legal costs). The idea of the return is to direct the assets to the most local level possible, established by the court as the place of the commitment of the offence by a foreign public official. To this end, a special mechanism for the return of illicit assets was established and started to operate in 2022 (circular no. 6379/SG of 22 November 2022 signed by the Prime Minister, Circulaire n° 6379/SG du 22 novembre 2022 relative au mécanisme de restitution des biens mal acquis). According to Article 2(XI) of the above-mentioned Programming Act, the proceeds of the sale of confiscated assets give rise to opening special budgetary lines in the framework of the Public Development Assistance Mission managed by the Ministry for Europe and Foreign Affairs. Financing is carried out in accordance with the principles of transparency and accountability and involves civil society organisations. The terms of return of the assets within budgetary ring-fencing are flexible. They are defined by the Ministry of Foreign Affairs on a case-by-case basis, however, in a manner guaranteeing their contribution to improving the living conditions of the populations. For example, the funds can be used to finance various projects, initiatives of international and local organisations or agencies (UN, UNESCO, World Bank, NGOs), and the direct return of assets to foreign State coffers is also possible [10].

Swiss law provides advanced solutions for the transnational recovery of corrupt assets, designed to overcome problems associated with mutual legal assistance procedures. The

Federal Act on the Freezing and the Restitution of Illicit Assets Held by Foreign PEP of 18 December 2015 (Foreign Illicit Assets Act, FIAA), gives the basis for the freezing, confiscation and restitution of assets of foreign PEPs or their close associates, where those assets are deemed to have been acquired through acts of corruption, criminal mismanagement or other felonies [11]. The sequence of actions within this procedure differs from the French model, as the Federal Council may order the freezing of assets placed in Switzerland, for the purpose of potential future cooperation within the framework of mutual legal assistance proceedings with the country of origin, i.e. *ex ante* such cooperation (Article 3). Freezing of assets can take place under the following conditions: the government of the country of origin suffers a high level of corruption, its members have lost power, or a change in power appears inevitable; the assets are likely to be obtained from corruption, criminal mismanagement or other felonies; the safeguarding of Switzerland's interests requires the freezing of the assets. In addition, the Federal Council may freeze the assets of foreign PEPs for purposes of confiscation in the event that mutual legal assistance proceedings fail (Article 4). This freezing of assets is possible under the following conditions: the assets have been subjected to a provisional seizure order in the framework of international legal assistance in criminal matters launched at the request of the country of origin; this country is unable to satisfy the requirements for mutual legal assistance due to the collapse or the impairment of its judicial system (failure of state structures), and the safeguarding of Switzerland's interests requires the freezing of the assets. The Federal Council is also empowered to instruct the Federal Department of Finance (FDF) to launch legal action before the Federal Administrative Court for the confiscation of assets previously frozen by the Federal Council for the purpose of confiscation (Article 14).

The FIAA also provides for a legal basis for the restitution of assets aimed at improving the living conditions in the country of origin or strengthening the rule of law in countries of origin contributing to the fight against impunity (Article 17). The restitution of confiscated assets is carried out via the financing of programmes of public interest. In addition, the Federal Council is empowered to conclude agreements concerning restitution, which may cover such issues as the type of public interest programmes funded by the returned assets; the manner of the use of returned assets, the parties included in the process of restitution, as well as checking and monitoring of the use of the returned assets. However, if such an agreement is not concluded, the Federal Council is empowered to specify the procedure of restitution, for example, via international or national organisations, and provide for the supervision of the Federal Department of Foreign Affairs (FDFA). Importantly, the Federal Council is obliged to involve NGOs in the restitution procedure as far as possible (Article 18).

Bearing in mind the difficulties of mutual legal assistance procedures involving developing countries and the “trust factor”, which still plays an important role in cross-border cooperation in criminal matters between EU MS, there is justification to develop at the level of the EU a model of the return of corrupt assets involving both possibilities: the post-conviction return of assets as envisaged in the French Programming Act 2021–1031 on inclusive development and the fight against global inequalities, and freezing the assets *ex ante* mutual legal assistance, as envisaged in the Swiss FFIA, i.e. freezing of assets for purposes of future mutual legal assistance, as well as for purposes of confiscation in the event that mutual legal assistance proceedings fail. When assets are secured, early dialogue on the possible options for the return of assets is opened with the participation of various actors, such as the State authorities of the country of origin, as well as international, national and local organisations or NGOs. In the approach to asset recovery applied in the Swiss FIAA, securing assets lays the groundwork for future common work between the requesting and requested States under the framework of MLA procedures. Capturing of assets deemed to originate from corruption offences of foreign PEPs could facilitate their

future transnational return, serving as an incentive for the victim country to open existing procedures or even create new legal mechanisms for adequately requesting their return in a manner acceptable to the requested State, from the perspective of the protection of human rights and counterbalancing the risk of their repeated unlawful reuse.

Throughout the process of designing an EU model for the return of corrupt assets to the country of origin, the Global Forum on Asset Recovery (GFAR) Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases should also be taken into account [12]. According to these principles, mechanisms for disposing of and transferring assets should take into account: partnership, mutual interests, early dialogue, transparency and accountability, beneficiaries (the people harmed by corruption), strengthening anti-corruption and development, case-specific treatment, consideration of use of an agreement under Article 57(5) of the UNCAC, preclusion of benefit to offenders, inclusion of non-government stakeholders. Another point of reference should be the Civil Society Principles for Accountable Asset Return, which cover such issues as transparency and participation, integrity, accountability, victim restitution and other beneficiaries (the people of the country of origin) [13]. Nonetheless, to identify the pros and cons of embedding concrete legal solutions into the EU legal environment a wider scholarly debate is also needed.

5. Conclusions

If the EU aspires to be a global player on the battlefield against corruption, the establishment of convergent mechanisms for transnational return and disposal of assets derived from corruption offences of PEPs, from EU territory to countries of origin, especially to developing countries highly affected by corruption, is currently the key outstanding issue. The challenge is to create procedures that reduce the risk of repeated unlawful re-use of recovered corrupt assets in the country of origin. To this end, the EU should seek solutions that enable assets to be directed to the benefit of victim populations, and solutions to overcome the difficulties resulting from application of the *ordre public* clause in MLA procedures. Bearing in mind that a deficit of trust has already hampered cooperation in criminal matters within the EU, this clause should still be seen as a vital element of all kinds of interstate cooperation (cross-border and transnational). The solutions adopted in France and Switzerland can serve the EU as output models for developing mechanisms for the return of corrupt assets that the whole family of EU MS can follow without compromising human rights protections. These mechanisms should also correspond with the GFAR Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases and the Civil Society Principles for Accountable Asset Return. Taking steps in this direction will also benefit the EU itself, by increasing its resistance to being used for storing corrupt assets.

Notes

1. Commission, Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council, 3.5.2023, COM(2023) 234 final, 2023/0135(COD).
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