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PROBLEMS OF SECURING THE CIVIL CLAIM IN THE EUROPEAN CRIMINAL COOPERATION

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I. Introduction

One of the fundamental principles of the EU is free movement of persons: EU citizens should be able to move freely and easily between member states. This means the abolition of borders within the Union and the strengthening of controls at external borders. As the protective function of borders in the EU is eliminated, crime also gets a new, international dimension. This poses serious challenges to EU Member States, which need to find **the adequate instruments to fight against cross-border crime.** One of these is the deprivation of the proceeds of crime, which aims to achieve the following objectives:

- **prevention,**
- **reparation, and**
- **repression.**

- Deprivation of criminal proceeds has a **preventive effect** on those offenders who want to gain profit by committing a crime. A distinction is usually made between general and special prevention. Special prevention focuses on deterring individual criminals from committing other crimes, while general prevention serves to deter all members of society from future criminal behavior.

- Whether the deprivation criminal assets has a **repressive function,** is a question surrounded by controversy. According to German legal literature, for example, deprivation of property can either be strictly restricted to benefits from criminal activity or it can include a wider spectrum of revenues acquired in connection with the criminal deed, e.g. the criminal's investments. In the latter case, deprivation has a repressive function.

- Deprivation always has a **reparative character** as well, which is called differently from country to country such as restitution, compensation etc. The reparative function can be analyzed on several levels:

1. On the most abstract level, deprivation of criminal proceeds has a reparative function because it deprives the criminal from those benefits that could not have even become his property without committing a crime. Acting on behalf of the whole society, the state takes ownership of this illicit property. This function is manifest where deprivation of property is used in connection crimes without a victim (e.g. drug abuse) and the deprived property is added to the State's budget.

2. The reparative function is more visible when, even though there is no victim in the case, the deprived proceedings are not added to the central budget, but expended to the social sphere

most affected by the crime, e.g. it is spent to support therapeutic drug treatment, drug prevention programmes, environmental investments etc.

3. Turning to crimes with an actual victim, there are cases when the deprived proceedings do not originate from the victim (e.g. violent crimes), but still given to him as a means of compensation.

4. The reparative character is clearly shown in cases where there is a victim and the benefit of the crime was the property of the victim before the offence. The asset is then returned to victim[1]. In these cases the victim gets back his property. Reparation of financial damages is an important component of victim protection, which is nowadays a focal point of European criminal policy. In our study we are aiming to analyse the compensation of crime victims by the offender within the reparative function.

I.1. Victim protection in general

"*According to the Hungarian Presidency, the protection of crime victims should be strengthened in the EU because it's not only the law-abiding citizens that seize the opportunity to move freely, but criminals as well. All across the EU, we can become victims. Therefore we need common regulation in the field of victim protection, we need to eliminate the language barriers, we need to make criminal justice more accessible*." These words were said by the Hungarian deputy prime minister and minister of public administration and justice, Tibor Navracsics at the "Protecting victims in the EU: The Road Ahead" conference in March 2011. He also commented that one of the most important tasks of modern criminal policy is the **extenuation of harmful effects caused by crimes** and the **compensation of social, moral and material damage suffered by crime victims**.

The number of people – EU and non-EU citizens alike – travelling, living or studying in other EU countries who become victims of crimes in countries other than their own shows a steady increase.[2] Victims of cross-border crime may be treated differently just because they are not residents of the country where the crime was committed. These victims do not always speak the language of the country they are in, they also do not understand the host country's legal system and often return to their home countries before the criminal procedure could end. They have lack of information about the criminal procedure, the investigation, and their rights. All

[1] Hollán Miklós: Vagyonelkobzás, HVG-ORAC, 2008, 27-35. old.
[2] http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l33091_en.htm

EU countries ensure the rights of crime victims on the national level but the regulation differs from country to country so it is needed to be ruled on an EU level as well.

I.2. EU regulation

Protection of the rights of victims in the EU has been in the centre of interest since **1999**. In this year, at the European Council meeting in **Tampere**, it was concluded that minimum standards should be drawn up on the protection of the victims of crimes, in particular on crime victim's access to justice and on their right to compensation for damages, including legal costs. A decision was also made to set up national programmes to finance public and non-governmental measures for providing assistance and protection to victims.[3]

The first EU achievement in the field of victim's rights was **Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings** (hereafter: the FD on standing os victims) by the Council of the EU. This is a milestone in more than one way. It marks the first time when a so called „hardlaw instrument" concerning victims of crime was adopted at the international level.[4] The FD provides for the assistance of crime victims before, during and after criminal proceedings. Member States must guarantee that the dignity of victims is respected and that their rights are recognised throughout the proceedings.

Art. 9. (3) of the FD on the standing of victims states that Member States must ensure that decisions on the compensation of crime victims in criminal proceedings are taken within reasonable deadlines, and that measures are provided for encouraging offenders to compensate. Any recoverable property seized must be returned to the victims without undue delay, provided that they are not needed for the proceedings.

According to this FD, the Member States should regulate the compensation of crime victims. But does this instrument guarantee that victims of crime against property get back their property? Is this really the case in practice?

The next step in the evolution of the recognition of victim's rights was **Council Directive 2004/80/EC relating to compensation to crime victims** (hereafter: the Directive). Articles 1-2 of the Directive contain that Member States shall ensure that where a violent intentional crime has been committed the applicant shall have the right to submit an application for compensation, which will be paid by the competent authority of the Member State where the crime was committed. From our perspective, though, the limits of the Directive are evident:

[3] Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings
[4] http://ec.europa.eu/justice

firstly, only victims of violent intentional crimes are eligible to compensation, secondly, this compensation is to be paid by the state and not the offender.[5]

From the brief overview of EU instruments given above, it can be concluded that they all overlook a very important aspect of victim's rights, which is the right to property. The basic assumption that criminally acquired assets should be returned to their rightful owners is nowhere to be found in either of them. FD on standing of victims does contain a provision on the return of seized assets, but no mechanism is provided to ensure this.

I.3. Civil claim, confiscation and their relationship

Although the ultimate aim of the criminal procedure is not the financial compensation of victims, many jurisdictions maintain the possibility of obtaining reparation for victims within its confines. This is a fast and effective way of compensation, as the victim does not have to initiate a civil procedure in order to be awarded damages, but he can enforce his claim arising from the criminal deed in the criminal procedure. By announcing his claim while the criminal proceedings are still in progress, the victim is spared from the complexities and the costs of civil litigation.

This type of civil claim contains of three features which are:

1. a vindication of the victim enforced against the offender,
2. enforced in the criminal procedure,
3. on the basis of the victim's financial damage caused by the crime.

The interest of the victim to enforce his civil claim however, may come into conflict with the state's interest to deprive the offender of property for reasons other than reparation e.g. to **confiscate** property. The institution of confiscation can be described as a deprivation of property without adequate compensation by an individual decision of a judicial or administrative body. In case of confiscation, ownership of the property devolves to the state.

I.4.Hungarian regulation

For a better understanding of the relationship between the two institutions, let us briefly consider how a civil claim can be enforced during a criminal procedure in Hungary. Under Art. 54. (1) paragraph of the Code of Criminal Procedure, the victim may announce his civil

[5] Council Directive 2004/80/EC relating to compensation to crime victims, Art. 2. settles the responsibility for paying compensation: Compensation shall be paid by the competent authority of the Member State on whose territory the crime was committed.

claim during the criminal procedure and thus become a „private party". In order to secure the enforcement of the private party's claim, an interim order, a freezing order can be issued by the court to prevent the defendant to dispose of the property. The freezing order might also be issued to secure property which may be subject to later confiscation. If the claim for damages is awarded at the end of the criminal procedure, the decision can be immediately executed on the freezed property. This means that the stolen property is returned to the victim. If the asset was seized so it may be confiscated later, the ownership of the confiscated property will devolve to the state. The exact relationship between confiscation and the civil claim is settled – very much in the victim's favor - by Art. 77/B. (5) paragraph a) of the Hungarian Criminal Code which states that „property which is reserved to cover any civil claim awarded during the criminal procedure cannot be confiscated."

I.5. Cross-border crime against property

If one examines the current trends in European crime, the need for a fast mechanism to freeze illicit property with a view to its subsequent return to the victim becomes evident. Consider the phenomenon of „boiler room fraud" or „internet-purchases" for example. In both cases after receiving payments from the victim, the „boiler room" or the „sailer" vanishes, causing the unsuspecting investor or customer to loose his money. These activities are very often operated from overseas so there needs to be a regulation that ensures the security of transferred money in criminal procedures in order to give it back to the owner. But the questions are: How such victims can get back their money that was transferred –usually abroad - to the offender? What is the easiest and most effective way of doing it?

On The EU level neither the FD, nor the Directive provides regulation about the civil claim. In our presentation we focus on the current and possible future regulation of this special and important segment of victim's protection. Even though there are some council decisions attached to this field but the current regulation is still does not give a comprehensive, proper and detailed solution when it comes to claim for damages. Hereinafter we would like to illustrate the defficiency of regulation in use via case studies so the problem will be concrete and the understanding will be easier.

II. Case studies

II. 1. Case study 1.

II. 1. 1. Case 1.

Mr. X is a Hungarian citizen who's been dealing with gold as a family tradition for 30 years. Mr. Y contacted him by phone and told him that he wanted buy from him 24 kilogramms of gold in 1 kilogramm golden bars. In the phone they agreed in a price of 84.000 Euros, which would be paid at delivery. To conclude their business, the two met in Budapest at Mr. Y's house. When Mr. X showed the golden bars to him, Mr. Y took out a pistol from the desk, pointed it at Mr. X' and told him that to leave the golden bars and get out of the house. He also threatened him not to call the police otherwise he would kill him. When he arrived home, Mr. X made a denunciation and requested his civil claim to be enforced.

The investigation concluded that the Mr. Y runs a small, but well-organized crime organisation, which has international ties as well. One of the witnesses told the police that the golden bars are in Mr. Y's house in Slovakia.

How can Mr. X get his golden bars back? Which instruments of European criminal cooperation are available to him? Since we have information about the possible whereabouts of the golden bars, a home-search is needed to be conducted in Mr. Y's house. Once found, golden bars need to be transferred to Hungary, and finally they have to be given back to their owner.

First of all we will review the possible solutions offered by the current and future legal regulations.

II. 1. 2. Legal instruments of international cooperation in criminal matters

II. 1. 2. 1. Mutual legal assistance

The traditional way of international cooperation in criminal matters within the EU is **mutual legal assistance**, which is based on the **European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, Strasbourg** (henceforth: 1959 Convention). The Convention lays down the conditions under which mutual assistance is granted. It was complemened by a **Protocol in 1978** and another one in **2001**.

As between Member States of the European Union, rules on mutual assistance in criminal matters were developed by the **Convention Implementing the Schengen Agreement of 14**

June 1985 (hereafter: the Schengen Implementation Agreement).[6] The Agreement reduced the grounds to refuse the execution of a mutual assistance request and provided for a simplified procedure for the transmission of the requests, and established the direct contact between judicial authorities of the the Member States. Further improvements were made by the adoption of the **European Convention on Mutual Assistance in Criminal Matters of 29th May 2000** (hereafter: the 2000 Convention)[7], and its Protocol in 2001 October 16 set up by the Council Act.[8]

The 2000 Convention made the direct connection between the competent judicial authorities of Member States to be a general rule, and central authorities involved only in certain cases (such as transit of persons held in custody)[9]. It makes possible a faster process, but there are many questions – such as double incrimination – rising from the substance of the legal assisstance that can block or slow down the procedure.

II.1.2.2. Solving our case under the rules of mutual legal assisance

In accordance with the MLA instruments above, the Hungarian police authority may issue request for a home-search and seizure of the golden bars, which can be directly transferred to the Slovakian authority with territorial competence for executing it.[10] The requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State,[11] and has to execute the request as soon as possible, within the procedural deadlines or indicated deadlines indicated by the requesting State.[12] It is very important, that the requested State has the right to check whether the double incriminality requirement is met.[13]

Once the home-search and the seizure has been executed, the golden bars have to be transferred to the requesting State – ie. Hungary – which is also possible under the rules of 2000 Convention. Article 8 of the Convention provides that "*at the request of the requesting Member State and without prejudice to the rights of bona fide third parties, the requested*

[6] Official Journal L 239 , 22/09/2000 P. 0019 - 0062

[7] 2000/C 197/01
[8] 2001/C 326/01
[9] http://europa.eu/legislation_summaries/justice_freedom_security/judicial_cooperation_in_criminal_matters/l33108_en.htm
[10] 2000 Convention Art. 6 (1)
[11] 2000 Convention Art 4 (1)
[12] 2000 Convention Art 4 (2)
[13] 1959 Convention Art. 5. and Schengen Ipmlementation Agreement Art. 51

Member State may place articles obtained by criminal means at the disposal of the requesting State with a view to their return to their rightful owners."

Now that we have the golden bars returned to Hungary, they can be given back to the owner under national legal rules, if they are not needed anymore in the criminal procedure.

II . 1.2.3.The other way of European criminal cooperation – mutual recognition

According to the Article 82 (1) of the **Treaty on the Functioning of the European Union** judicial cooperation in criminal matters in the Union is to be based on the principle of mutual recognition of judgments and judicial decisions, which is, since the Tampere European Council of 1999, commonly referred to as a cornerstone of judicial cooperation in criminal matters within the Union.

Mutual recognition is a principle whereby a decision by the judicial authority of a MS is recognized, and if necessary, enforced in an other MS, without any further procession.[14] The principle is based on a high level of confidence trust between the Member States. It assumes that requesting authorities have already checked the legality, necessity and proportionality of the requested measures, so the executing authorities can execute it with trust, as if it were a national decision or request. The aim is to gain more and more ground for this principle, parallel with the weakening of double incrimination in regional EU-law development. As opposed to mutual legal assisstance, mutual recognition represents a quicker and more effective way of criminal cooperation.

II.1.2.4. Framework decisions based on the principle of mutual recognition

The Council of the European Union adopted a number of Framework decisions based on the principle of mutual recognition. The hereinafter mentioned are the important ones regarding our case.

The **2003/577/JHA Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence** (hereafter: the FD on FO) applies the principle to the freezing of evidence and property.

[14] Exchanging ideas on Eurpe 2008. Rethinking the European Union. UACES seminar Edinburgh, UK, 1-3 September 2008

In its use, a **freezing order** is a warrant which is meant to secure property that is evidence or could be subject to confiscation.[15] **Property** includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents evidencing title to or interest in such property, which the competent judicial authority in the issuing state considers: to be the proceeds of an offence referred to in Article 3, or equivalent to either the full value or part of the value of such proceeds, or constitutes the instrumentalities or the objects of such an offence. [16] **Evidence** means an object, document or data which could be produced as evidence in criminal proceedings.[17]

One of the advantages of this Framework decision over to the traditional system of mutual assistance is that acts which are listed in Art. 3. of the FD are not subject to verification of the double incriminality of the act, if they are punishable in the issuing state by a custodial sentence of a maximum period of at least three years.

The other important instrument is the **2006/783/JHA Framework Decision of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders** (hereafter: the FD on CO). The FD on CO defines confiscation as a final penalty or measure imposed by a court following proceedings in relation to a criminal offence resulting in the definitive deprivation of property.[18]

The **Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters** (hereafter: the FD on EEW). EEW may be used to obtain any objects, documents and data for use in proceedings in criminal matters for which it may be issued.

II.1.2.5. Applicability of FD on FO to our case

The FD on freezing orders can be used to retrieve the golden bars, and scope of this FD covers evidences on the first side and property which can be a subject of confiscation on the other side. It has to be emphasised that this instrument is applicable only because the physically extant golden bars are also evidence in the criminal proceeding.

Unfortunately, the FD on FO could be used only in theory. The problem is that it applies only to the seizure of evidence and doesn't mention whether authorities of the executing State are

[15] FD on FO Art. 2.
[16] FD on FO Art. 2
[17] FD on FO Art. 2.
[18] FD on FO Art. 2.

allowed to enforce the handover of the evidence. These rules could be used only in an ideal case where the suspect gives the evidence to the police authorities, without any further pressure. But there is little chance that the offender would give the object to the authorities so that it may be used as evidence against him.

It's easy to admit, that – if the the object is to be used as evidence is in the possession of the offender – there is little chance, that he would give it away voluntarily.

Still, if this would happen, a freezing order and a certificate could be issued by the Hungarian authority and transfered directly to the Slovakian police authority which is territorially competent to execute it[19]. As armed robbery is on the list of Article 3 (2) of fhe FD on FO, the request shall not be a subject to verification of the double incriminality, if it is punishable in the issuing state by a custodial sentence of a maximum period of at least three years. Since this happens to be the case in Hungary, the request would have to be recognized without any further formality. Although the FD on FO does not include a specific deadline, the freezing order would have been executed on the same priority as if it were issued by a Slovakian authority. [20]

Once the evidence is seized, the FD on FO has a two-step procedure for the transfer of evidence. The freezing order needs to be accompanied by a separate request for the transfer of the object to the issuing state, execute under the rules of mutual assistance in criminal matters.[21]

Unfortunately, because of the above mentioned reasons, this FD is not really applicable to our problem.

It can be concluded then, that in the absence of a mutual recognition instrument regulating the field, the house-search and the seizure could only be carried out under the above mentioned rules of 2000 Convention, based on the principle of mutual assistance.

II.1.2.6. Applicability of EEW

A brief mention is to be made on the applicability of the FD on the EEW to our case. In theory, a European Evidence Warrant could be issued to request the execution of the search, seizure and transmission of the stolen object, [22] but, unfortunately, the instrument has not been

[19] FD FO Art. 4 (1)
[20] FD FO Art. 5 (1)
[21] FD DO Art. 10 (1) a) and (2)
[22] FD EEW Art. 4. (1)

implemented yet in most of the Member States, although they should have done so by 19 January 2011.

II. 2. Case study 2.

II. 2. 1. Case 1.

Upon reading an advertisement on the internet, which offered golden bars as investment, Hungarian citizen Mr. W gave a call to Mr. Q, who told him, that through his Slovakian business connections he can acquire gold bars much cheaper than usual. Mr. W ordered 24 kilogramms of golden bars in 1 kilogramm pieces for a total amount of 80.000 Euros. According to their agreement, half of the money had to be transferred in advance, and the other half would be paid in cash at the delivery. Mr. W transferred from his house in Budapest 40.000 Euros via internet to the Slovakian account number given by Mr. Q. Mr. Q told him that as soon as the money arrives on the bank account, he would send the golden bars. After nothing happened for a week, Mr. W tried to call Mr. Q, but he didn't answer the call and had become unreachable.

Mr. W made a denunciation and requested his civil claim to be enforced.

The investigation disclosed that the account number provided by Mr. Q is the account of a Slovakian firm partially owned by Mr. Q.

We seek answer the same question posed in connection with our first case study. Can Mr. W get his money back and if he can, how? Again, we have te decide if it is mutual legal assistance or mutual recognition instruments that apply.

First of all, the amount has to be frozen before it disappears. We will see that the solution completely differs from the first case, as money is a replaceable property, so the goal is to secure not *that* money but *as much* money which was transferred by the victim.

II.2.1.1. Solution on grounds of mutual legal assistance

According to the 2000 Convention, a request is to be made for the money on the account is to be frozen to secure the claim of the victim. After the request had gone through the relativley slow procedure of recognition, and the money is frozen, and it has to stay so until a court awards the damages to the victim in a legally binding judgement. Hereinafter, an other procedure has to be launched on the recognition of the judgement in Slovakia. Once it is done, the Slovakian authorities will transfer the money to the Hungarian party, and the money will

be given back to the victim. The question is whether this long and complicated procedure can be replaced by one of the instruments of the mutual recognition.

II.2.1.2. Solutions on grounds on mutual recognition

Theoretically, as a proceed of the crime, the amount on the bank account could be confiscated as well, so that a freezing order could be issued, but this method would lead us into a one-way road. Once the amount is frozen to be secured for *confiscation*, if the court of the issuing state adjudges the *civil claim* of the victim, there will not be a legal ground for the transfer the money to the executing state. There will be the frozen-to-be-confiscated amount on the one side, and there would be a civil claim to be enforced on the other. Authorities of the issuing state won't be allowed to transmit the money *to be paid back to the victim*, while it has been frozen to *be confiscated*.[23] These are two totally different legal instruments, which should not be confused.

Focusing only on the issue of deprivation of the money freezing order needs to be issued under the rules of FD on FO. [24] As the amount of money on bank account is not an evidence, but can be subject to confiscation, this is the only ground on which the request can be issued – although in case our aim is not to confiscate the money, but to restitute it to its rightful owner. According to Hungarian legal rules, confiscation can only be ordered by the court in its judgement on the case. Until a judgement has not been passed, the amount has to stay frozen, therefore the transmission of the freezing order shall contain an additional instruction in the certificate that the money shall temporarily remain in the executing State. [25] After the final judgement – which contains a confiscation order – becomes legally binding, an other request is to be made under the rules of Art. 10. (1) b) of the FD on FO in favour of the enforcement of the confiscation order, which is recognizable under the rules of the FD on CO based on the principle of mutual recognition.

Once the money has been confiscated, Art. 16. of the FD on CO is to be followed, which disposes of the allocation of the money. If the confiscated amount is below or equivalent to 10.000,- Euros, it shall accure to the executing State,[26] while above this sum, half of it shall be transferred by the executing State to the issuing State. [27] On one hand, these rules are fairly reasonable, because the aim of confiscation, in general, is neither to make money for the state,

[23] The above mentioned problem appears if the freezing order is to be issued according to e.g. Hungarian rules.
[24] FD on FO Art. 4.
[25] FD on FO Art. 10. (1) c)
[26] FD on CO Art. 16. (1) a)
[27] FD on CO Art. 16. (1) b)

nor to compensate the victim, but to prevent crime by depriving its proceeds from the offender. On the other hand, these rules result that even if a state's national legal rules make it possible to compensate the victim from confiscated money, authorities will only have limited means to do so.

To sum it up, solutions offered by current instruments of mutual recognition are not satisfactory because of the following:

- a freezing order cannot be issued to secure property to which the victim lays claim,
- although a freezing order might be issued to freeze money which is subject to confiscation, confiscated money may not be used to compensate the victim,
- even if it could be used for compensation, the issuing state would not be given the whole amount back.

As the FD on freezing orders refers to evidence and to subject of confiscation, it concentrates only on the interest of the state to take away the proceeds of crime and doesn't take in account that the reason of deprivation of property is not only to punish but to restitute.

The problem roots in that the amount to be confiscated as the proceed of the crime, and the coverage of civil claim – which originates from the damage caused by the offence – is the same. Therefore the claim of the state and the claim of the victim concur, and in European regulation is not declared, that the latter would have a higher priority.

As mentioned above, amount on bank account is not an evidence, **EEW** could not be used in this case.

II.2.1. 3. European Investigation Order

It's easy to admit, that such fragmented regime doesn't serve the quickness of the process, and endangers the interests of the investigation as well. In the Stockholm Programme of 2009 the Concil decided to set up a comprehensive, single system for obtaining evidence based on the principle of mutual recognition. On this basics, the **Draft Directive of the European Parliament and of the Council regarding the European Investigation Order in criminal matters** (hereafter: DD on EEW) it is aimed to cover almost all types if investigation measures and create a single instrument instead of the fragmented regime nowadays with combining the efficiency of mutual recognition with the flexibility of mutual assistance.

It would also bring a fundamental change in point of view as it would focus on the investigation measures instead of the evidence.

Focusing on the problem of securing the stolen property EIO would bring a definitely positive change in the entire procedure as it would cover all the needed investigative measures as home search, seizure, and transmission and freezing of property. It also would allow the presence of the competent authority of the issuing state to assist[28], so that– evidence can be immediately transmissed to the issuing state[29]. However, it doesn't say a word about civil claim.

III. Conclusions and possible solutions

III.1. Conclusions

The well-known idiom **„crime doesn't pay"** is frequently used to express that crime, ultimately, does not benefit a person. It can also carry the meaning that criminals should not enjoy the fruits of their deeds. To help make sure of this, states use the tool of confiscation to deprive assets obtained as a result of criminal conduct. However, the same assets were taken from a victim, who wishes to be compensated for his loss. This gives rise to conflict between the state's and the victim's interest which needs to be solved somehow. Priority must be given to either of them. But should the state's claim – under any circumstance – enjoy precedence over the victim's? Should crime ever benefit the state to the prejudice of the victims?

We acknowledge the fact that there are **substantial differences** between the EU Member States' regulations with regards to the subsequent treatment or distribution of confiscated assets. In some countries, the property acquired by the state by means of confiscation may be used to compensate crime victims.

But this is far from being the general rule among Member States. The notion of confiscated property devolving to the state is as old as the Roman Law. The very word **„confiscation"** means **„to seize for the public treasury"** in Latin. This heritage is still carried on in many European jurisdictions, including Hungary. In these countries, ownership of confiscated property devolves to the state and there are no specific rules regulating how the state shall dispose of it. It's in countries like these that the issue of conflicting interests appears in the sharpest form.[30]

[28] DD on EEW Art.. 8.
[29] DD on EEW Art. 12.
[30] It must be noted here, that the Art. 77/B. (5) a) of Hungarian Criminal Code settles the matter very much in favour of the victim *„Property which is reserved to cover any civil claim awarded during the criminal procedure cannot be confiscated."* But this may not be the case in other EU countries.

If we accept the disparity between EU jurisdictions described above, we must pose the question why the EU lawmaker ignored it when the mutual recognition regime regulating the seizure of criminal proceeds was created? Was it intentional or merely an oversight?

From the beginning of our study, we've been trying to prove that existing EU instruments regulating the seizure of illicit proceeds do no take into consideration that victims of crime against property have the right to have their property returned to them before a state could confiscate it. This is evident from the – intentional or unintentional – lack of attention mutual recognition instruments give to this aspect of seizure and freezing property in criminal procedures.

Under present conditions, issuing a freezing order to secure the criminal asset actually precludes the victim from taking advantage of the faster and easier route to compensation in the criminal courts. Consider the situation in our second case study: the ground for requesting the execution of such an order – since money is not evidence – could only be Article 3 paragraph 1 b) ie. to secure subsequent confiscation of property. The request would have to be accompanied by a request of confiscation of the asset. Assuming that Slovakia, pursuant to the FD on CO, enforces the confiscation order, Article 16 of the FD on CO would have to be taken into account. Hungary, therefore, would acquire only half of the money stolen from the victim, which, according to the Hungarian Criminal Code, would devolve to the state. Due to a rule in Hungarian law, namely Section 120 paragraph (2) of the Civil Code of Hungary, the state, if it acquires ownership pursuant to a court decision or other official resolution without indemnification, is liable for the obligations of the ex-owner existing at the time of acquisition of ownership to a bona fide person to the extent of the value of the property. Thus, the victim would not be completely barred from getting some of his assets back, but only a friction of the original amount would be restituted to him.

In our case studies, we have tried to demonstrate that the form of the stolen property determines its subsequent fate. In the case of the gold bar, a tangible object, European criminal cooperation instruments allow for its quick recovery. Incorporeal property, such as money, however, 1) can only be frozen with a view to future confiscation and 2) can only be recovered through means of mutual legal assistance. This discrimination between the gold bar and the money can hardly be justified, since – from a legal viewpont - both are essentially the same: property of the victim.

All of this goes against the declared policy of the European Union with respect to protection and compensation of crime victims. Changing it must therefore be a priority.

III. 2. Possible solutions

III.2.1. The European Investigation Order

Looking for possible solutions we should first consider the Proposed Directive for European Investigation Order which brings much promise for cooperation in criminal matters. By eliminating the fragmentary nature of the current regulation, this instrument aims to facilitate the gathering and transmission of evidence in criminal matters between EU Member States. Not yet adopted by the member states, the Directive would replace the corresponding provisions 1959 Convention and its two protocols, as well as the 2000 Convention and its protocol, and the relevant provisions of the Schengen Implementation Agreement, as between participating EU Member States. The EIO would also subsitute for the corresponding provisions of the FD on FO.

The usefulness of this instrument to treat some of the problems outlined in this paper is beyond doubt. Under its rules, seizure and subsequent return of the golden bar discussed in our first case study could be accomplished by a single EIO transmitted to Slovakian authorities, which would be obliged to comply within a general deadline of 60 days and – altough in case of theft this is hardly relevant – without checking if the double incriminality requirement is met.

With respect to our second case study, however, the issue would persist. Article 29 of the DD on EIO ordains that the Directive substitutes for the relevant provisions on the FD on FO in relation to „freezing of items of evidence". As has been noted before, money on a bank account is not 'evidence', the DD on EIO would therefore not apply to freezing it. The only available instrument that could be applied would still be FD on FO which – as has been pointed out several times now – would not allow freezing for the purpose of future restitution to the victim.

To summarize, the EIO – if adopted – will be a step towards speeding up recovery of criminal assets but only as far as they can be considered 'evidence'. It will not help the restitution of incorporeal property however.

III.2.2. The extension of the mutual recognition principle

Having already considered both the benefits and shortcomings of the future EIO and having concluded that it does not address all the issues mentioned before, we must look for another solution. The most straightforward and satisfactory way would be to bring victim's claims under the principle of mutual recognition.

Technically, this could be done by a simple addition to the FD on FO. Article 3 paragraph 1. of the FD, which lists the purposes for which a freezing order can be issued, should be modified to add that the FD can also be applied to freezing orders issued for securing property in favor of the victim's claims.

Returning to our second case study once again, this modification would enable the Hungarian authorities to ask for the freezing of the bank account. The money would then remain frozen until the Hungarian court decided to award damages to the victim. After recognizing the judgement of the Hungarian court, the Slovakian authorities would lift the freeze on the account and retransfer the money to the victim.

By guaranteeing the victim's right to recover his property even if it was taken to another EU Member State, this modification would be major improvement over the current regulation. It would also help to achieve the EU's goals in the field of victim protection and compensation.

An even more progressive approach would be to merge the FD of FO and the European Investigation Order. There's little reason to maintain the present structure with two separate instruments regulating the area. Elimination of the fragmentary nature of instruments relating to pre-trial investigative measures has been of the the express aims of the DD on EIO. The Eurojust opinion on the proposal[31] mentions that the exclusion of the freezing of assets from the scope of the EIO would result that two separate forms under two separate legal regimes would have to be used to 1) acquire bank information (covered by the Directive on EIO) then 2) freeze money on that bank account (applying the FD on freezing orders). The opinion argues that such a complicated approach might have the advantage of allowing the issuing authority to gather the necessary information before issuing a freezing order. In our opinion, however, this two-step mechanism would simply be too time consuming to have any practical value. It would also have the disadvantage of making the regime on investigative measures too complex and the relationship between its instruments unclear. Thus, we argue that the EIO should truly be a „stand-alone" instrument, covering all investigative measures, including freezing orders with an option to freeze property in favor of the victim's claims as well.

We hope that with our study we have managed to bring some attention to a somewhat neglected field of victim's rights. In our opinion, the right of victims to have their property returned to them is just as important as any other right guaranteed to them in EU instruments. Giving it more emphasis would be an important step towards the establishment of the area of freedom, security and justice.

[31] Eurojust opinion on the Proposal for a Directive on the European Investigation Order (EIO), The Hague, 2 March 2011.

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