

STEP-BY-STEP GUIDE FOR ASSET RECOVERY

FROM G20 COUNTRIES

SPAIN

I. INTRODUCTION

LEGAL FRAMEWORK

In our legal system, the regulation of confiscation is primarily contained in Article 127 of the Criminal Code, which allows the Judges and Courts to order the confiscation of the effects of crime, goods, means or tools with which it has been prepared or executed, as well as the proceeds of crime or misdemeanour, regardless the transformations they may have undergone. Under the Organic Law 5/2010 of 22nd June, a reform of this provision was carried out, in order to transpose the European Union (EU) Council Framework Decision 2005/212/JHA, of 24th February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.

On the other hand, the destruction and early realization of assets seized in the criminal proceedings are regulated under Articles 367 bis et seq. of the Code of Criminal Procedure. These provisions allow the early realization of effects of lawful trade in certain cases, through their handing over to non-profit entities or public administrations, by means of a specialized person or entity, or public auction. In the field of international legal cooperation, when the good in question is confiscated, in execution of an agreement adopted by a foreign judicial authority, according to Law 18/2006 on the execution in the European Union of orders freezing property or evidence in criminal proceedings (*Ley 18/2006, de 5 de junio, para la eficacia en la Unión Europea de las resoluciones de embargo y de aseguramiento de pruebas en procedimientos penales*), its implementation will not be carried out without previously obtaining the approval of the foreign judicial authority.

Both the Criminal Code and the Code of Criminal Procedure are currently under review with the aim of updating the rules in matters of confiscation and seized property management. On the one hand, a new revision of the Criminal Code is being prepared which will modify Articles 127 et seq. to introduce improvements in the area of the judicial seizure. On the other, the Code of Criminal Procedure will also be amended in order to regulate the advance sale of legal effects and, in general, the management and recovery of the seized assets. As a result, a special office will be set up, which will be in charge of carrying out the necessary actions to manage, in the most economically efficient way, the retention, preparation or use of the seized goods. These legislative reforms introduce important modifications aiming at providing legal instruments that could be more effective in the recovery of assets from criminal activities, and in their economic management (money laundering and receiving stolen goods, trafficking in human beings, prostitution, exploitation and child abuse, counterfeiting, corruption in the private sector, computer-related crime); and regulate the confiscation without conviction for those cases in which the prosecution of the defendant is not possible during a very long time period (usually because he/she is in absence) and there is a clear danger that the facts from which those goods or effects come could expire.

Special attention deserves international legal cooperation in this field. The foreseen reform will include a final Provision aimed at regulating the execution of confiscation decisions pronounced by

foreign authorities, in those cases where there is no Convention or collaboration Agreement between Spain and the requesting State.

SPANISH ASSET RECOVERY TOOLS AND MAIN DATABASES

Spain is one of the most active and most requested States in Europe concerning the identification and tracing on asset recovery, and has two designated Asset Recovery Offices (ARO) as from March 19, 2009. In order to implement EU Council Decision 2007/845/JHA, of 6 December 2007, the Center of Intelligence for Organized Crime (*Centro de Inteligencia contra el Crimen Organizado*, CICO) and the Special Anti-drug Prosecution Office (*Fiscalía Especial Antidroga*) were designated as the Spanish contact points. The CICO (Ministry of Interior) has an administrative character, while the Special Anti-drug Prosecution Office has a judicial nature. There are two asset tracing offices to support the CICO:

- Asset Tracing Office of the National Police Force (*Oficina de Localización de Activos*, OLA) is an operative group which belongs to the first section of the Money Laundering Squad, within the Central Economic Crime Unit of the Spanish National Police Force.
- Technical Unit of Judicial Police of the Civil Guard (*Unidad Técnica de Policía Judicial*, UTPJ).

CICO acts as an intermediary and redistributes the information requests between these two offices, which are the ones in charge of identifying and tracing the assets. After obtaining this information the reply is sent to the CICO, which finally sends it to the requesting State. Currently there is no Asset Management Office (AMO) in Spain so that prosecutors are in charge of this. In the future the new ARO will have the competences for being an AMO as well. The FIU (*Servicio Ejecutivo de la Comisión de Prevención de Blanqueo de Capitales e Infracciones Monetarias*, SEPBLAC) is another administrative institution which depends on the Ministry of Economy and Competitiveness.

CICO uses SIENA in order to receive/send the information requests, while the Special Anti-drug Prosecution Office uses the e-mail. CICO counts on the support of OLA and UTPJ to access the following databases, which can be accessed by the Special Anti-drug Prosecution Office too:

- Notarial Unified Index Database (*Indice Único Informatizado Notarial*): on-line request of summaries of notary acts and protocols.
- Central Land Register (*Registro Central de la Propiedad*): requests are made on-line, and the answer is received within a very short period of time.
- Central Business Register (*Registro Mercantil Central*): works as explained above.
- Other databases: Vehicles register (*Registro de Vehículos*) and Ships register (*Registro de Buques*).

II. HOW TO SEEK RESTRAINT, SEIZURE AND FORFEITURE/CONFISCATION FROM SPAIN

In order to seek the restraint, seizure and forfeiture/confiscation of criminal proceeds from Spain, the following steps should be followed:

1. IDENTIFICATION OF THE ASSET

In order to recover the proceeds of corruption held within Spain the request can be formal through MLA or informal but a motivation of the case is always needed.

It will be necessary to facilitate detailed information about suspects, legal entities and assets to be identified and located. In the case of suspects, passport number, address and date of birth is very relevant information. In the case of legal entities, accurate name and when possible the tax

identification number and/or legal address. In the case of other assets as many information as possible is relevant.

In order to assist identify assets in Spain, the following mechanisms are available:

- Mutual Legal Assistance (MLA) Request. Steps are outlined in the G20 Country Guide to MLA: It is recommended that the requesting authority in your country contact the Spanish Central Authority in advance of making a request for MLA.
In drafting the request: identify the treaty, convention or other avenue of cooperation being referred to in seeking the assistance from Spain; indicate which authority in your country is conducting the investigation and/or prosecution; provide a detailed outline of the case under investigation or prosecution, including a summary of the evidence that supports the investigation/prosecution; identify and set out the verbatim text of all relevant legal provisions under investigation and/or prosecution, including applicable penalties, outline exactly what you are seeking to obtain from Spain and any particular requirements that must be met. In addition, in case of seizure, include a copy of the order issued by the judicial authority, the identification of the location to be searched if possible and any specific procedural indication that should be taken into account by the executing authority when no prohibited by Spanish domestic law.
Spain requires incoming requests for MLA to be provided, in writing, and duly signed by the judicial authority in the requesting country's official language, and accompanied by a Spanish translation of the request and all documents.
- Use of blind discovery provisions (compulsory notice/orders which are designed to locate assets based only on a suspected offender or related entity) to locate bank accounts, casino accounts etc. These data should be requested through MLA, to the Public Prosecution or to the Judicial Authority. SEPBLAC has full access to all type of banking or financial information.
- Access to government held property ownership records including real property, motor vehicles, vessels and aircraft. It is possible that the Police provide this information to the judicial authority, the Public Prosecution and Law Enforcement Agents (LEA's). Being public registers, the information can also be consulted by any person having a legitimate interest.
- Access to public corporate records of any registered company (Business Register), showing directors and shareholders at the time of the incorporation or a capital increase. As public information, judicial authority, the Public Prosecution and LEA's have full access.
- Access to confidential Notarial Unified Index Database, showing directors, shareholders and beneficial owners (if any) of Private limited liability companies (*Sociedades de Responsabilidad Limitada, SLs*). Judicial Authorities, the Public Prosecution and LEA's have full access.
- Access to confidential book-entry securities databases (dematerialised securities) conducted by financial institutions, showing the shareholders of Public limited liability companies (*Sociedades Anónimas, SAs*). Judicial Authorities, the Public Prosecution and LEA's have full access.

- Access to taxation records for personal income tax, business/company tax. These data should be requested through MLA, to the Public Prosecution or to the Judicial Authority.
- Use of informal investigative networks such as the Europol based Camden Asset Recovery Interagency Network (CARIN); Global Focus Point, regional CARIN groups.
- Other types of investigative assistance available: It is possible to use the information contained in Police intelligence Sources, police records and others, as long as requested by the competent authority (Judges and Magistrates, Public Prosecution and LEA's).

2. CONFISCATION OF PROPERTY RELATING TO FOREIGN OFFENCES

When assets have been identified, Spain offers the following means of assistance to recover the assets:

To restrain/ freeze/ seize assets located in your country based on a **foreign arrest or charge**. It is possible through MLA or a specific procedure in the case of EU Member States, which have transposed Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence (transposed in Spain through Law 18/2006).

To restrain/ freeze/ seize assets based on a **suspicion/belief** that a person has committed a **foreign serious offence** and holds assets in your country. It is possible through MLA or an specific procedure in the case of EU Member States which have transposed Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

To restrain assets through the enforcement of **foreign orders and judgements**. Specify what types of orders you can enforce (e.g., pecuniary, substitute value, non-conviction based, etc.) and at what stages (final, non-appealable, etc.). All types of orders are possible, always in accordance with the Spanish legislation and in the course of a criminal investigation. There are limitations in not conviction based processes because generally they are used in the course of a civil procedure.

To restrain assets where there has been **no conviction** ('non-conviction based asset forfeiture'). Currently, article 127.4 of the Criminal Code regulates cases of non-conviction based asset forfeiture ("The Judge or Court shall be able to agree to the confiscation foreseen in the aforementioned paragraphs of this article even though no conviction is imposed on an individual exempt from criminal liability or in case this liability would be extinguished; in this last case, whenever that financial circumstances are proved to be illicit"). This regulation is subject to review; a new article 127 ter, will rule some cases for confiscation without conviction: death, illness that prevents prosecution and judgment by default, when there is a risk of prescription of actions.

To confiscate assets through the enforcement of **foreign orders and judgements** for a person **convicted of a foreign offence** including statutory forfeiture, pecuniary penalty orders and substituted asset orders. It is possible through MLA or an specific procedure in the case of EU Member States, which have transposed Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders; transposed in Spain through Law 4/2010 on the execution in the European Union of confiscation orders, *Ley*

4/2010, de 10 de marzo, para la ejecución en la Unión Europea de resoluciones judiciales de decomiso).

To confiscate assets through the enforcement of **foreign orders and judgements** for a person **not convicted of a foreign offence** including pecuniary penalty orders and substituted asset orders, as explained relevant provisions in the Criminal Code are being revised.

To confiscate the proceeds and/or instrumentalities of a foreign offence through the enforcement of **foreign orders and judgements**. It is only possible after a criminal conviction.

3. DISPOSAL/RETURN OF ASSETS

In order to return forfeited assets with a foreign State, the following requirements must be met

In most cases, international legal cooperation instruments provide for the way to return the assets to the State requesting its seizure and its forfeiture. Sometimes, a new rogatory letter is necessary; others, the delivery is implicit.

Some conventions restrict the possibility to return the seized assets when related to other criminal proceedings followed in Spain or when these are goods of public interest integrating the National Historic Heritage. Since Spain does not have an international legal cooperation law on criminal matters, relevant provisions under the international legal assistance treaty are therefore applied.

Spain abides by those EU Framework Decisions transposed in our national legislation and pursuant to the law's own terms. For instance, in case of the freezing of assets and evidence, Law 18/2006 sets forth the following cases for the termination of the enforcement/suspension of the execution of this European order:

- When its execution might damage an ongoing criminal investigation in Spain, until such time as it deems reasonable.
- When a previous measure has been adopted relating to assets or evidence, in the context of judicial or administrative proceedings till the lifting of the measure, whenever such measure takes preference over further decisions on the confiscation of proceeds and instruments issued on criminal matters according to national law.

There are no general rules on the system for the "distribution" of cash; it only falls within the scope of the EU Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation which establishes general rules (a minimum for the requested country and to share the 50%) but also allows ad hoc agreements. Procedures available for the return of confiscated assets to victims of an underlying corruption offense follows the same rules mentioned in the above paragraph.

It is possible to use bilateral or multilateral agreements when available and it is also possible an ad hoc agreement.

Draft Organic Law on the reform of the Criminal Code foresees a general regime: Spain shall abide by the agreement between States, or in its absence, by the distribution of the 50 per cent, once the costs deduced in all cases. If the amount is lower than 10,000 € the confiscated sum shall belong to Spain.

III. ASSET RECOVERY AGENCY/ AGENCIES – CONTACT INFORMATION

StAR (Stolen Asset Recovery Initiative) focal point:

Asset Tracing Office (OLA) Anti Corruption Squad. Police Service for the Prevention of Money Laundering. Financial and Economic Crime Unit (UDEF) Criminal Police General Department. National Police Force.

CARIN contact point:

Anti Corruption Squad. Police Service for the Prevention of Money Laundering. Financial and Economic Crime Unit (UDEF) Criminal Police General Department. National Police Force.

Special Anti-drug Prosecution Office. Public Prosecution Service.

ARO contact point (EU):

Centre of Intelligence for Organized Crime (CICO) Secretariat of State for Security. Ministry of Interior.

Special Anti-drug Prosecution Office. Public Prosecution Service.

ANNEX

Main conventions ratified by Spain that enable seizure or confiscation:

- Convention drawn up on the basis of Article K.3 (2) (c) of the European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, done in Brussels on the 26 of May of 1997.
- EU Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, Brussels, 29 May 2000.
- European Convention on Mutual Assistance in Criminal Matters, done at Strasbourg on 29 April 1959.
- European Convention on Money Laundering, Seizure and Confiscation of the Proceeds of Crime, 8 November 1990.
- Convention on Money Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, Warsaw, 16 May 2005.
- United Nations Convention against Illicit Traffic on Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988.
- OECD Convention on Combating Bribery of Foreign Public Officials, Paris, 17 December 1997.
- UN International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999.
- United Nations Convention against Transnational Organized Crime, done in New York, the 15 November 2000 and signed in Palermo, 13 December 2000.
- United Nations Convention against Corruption, done in New York, 31 October 2003.