

CONFISCATION: HURDLES AND BEST PRACTICES

Tallinn, Estonia
March 30, 2023

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I. INTRODUCTION

Our final topic today is confiscation

- That is, the confiscation of assets that were derived from or used to commit a criminal offense
- I spent a lot of time confiscating assets from criminals in my time as a federal prosecutor in the United States, and it is a subject I love to talk about
- So, thank you for inviting me to do so.

I am going to break this into four parts:

1. Why do we do this? What is the law enforcement purpose of confiscating assets?
2. What can we confiscate? The law says that you can confiscate the proceeds of a crime, and the prop that was used to commit the crime. But what do those terms mean?
3. How do you do it? Does confiscation require a criminal conviction? If so, when and how is it done?

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4. Who does it? What are the best practices when it comes to locating assets and making sure than they are confiscated, and whose job is it to do it – the policeman, the prosecutor, the court?

So, Why, What, How, and Who.

Now, that sounds like a lot to do in just one hour, and it is

- But we are going to have a parallel program tomorrow, discussing the prosecution of money laundering and the confiscation of assets under Estonian law in detail
- So, this will be an Overview to the topic of confiscation, with many of the details of how it works in Estonia to be covered tomorrow for those who are able to attend the parallel session

Couple of preliminary points before we get started:

- When I was a federal prosecutor my focus was on money laundering and asset forfeiture – what you call confiscation
- I will try to use the term “confiscation” today, but inevitably I will call it forfeiture some of the time
- After 30 years, it’s hard to break the habit
- I understand that in some countries, forfeiture and confiscation mean different things, but in the U.S. they are the same
- So, please don’t think I’m trying to make a distinction between forfeiture and confiscation if I use one term sometimes and then the other
- I intend for them to mean the same thing

Also, I will make reference from time to time to the law in other countries

- I understand that we are here to talk about the law in Estonia, not the law somewhere else
- I have read the Estonia statutes:

- The Money Laundering and Terrorist Financing Prevention Act
 - The Penal Code, and
 - The Code of Criminal Procedure
- And tried to learn what you can and cannot do in Estonia
 - That is our focus
 - But comparing the law in different jurisdictions can be a helpful way of explaining concepts, and of pointing out the strengths and weaknesses of the law that we are talking about
 - As you will hear, for example, there are things that you can do in Estonia with respect to the confiscation of assets that we cannot do in the United States, and other things that we can do in the United States that you cannot do in Estonia
 - My point is that if I make reference to confiscation law in some other country it is not because I've forgotten that we're here to talk about the law in Estonia or because I think the law in some other place is better
 - But because comparisons with, and examples from, other countries can help us better understand what you can and cannot do in Estonia.

II. WHY DO FORFEITURE

OK, why confiscate property?

- Why should we invest the time and resources to include the financial aspects of the crime in the criminal investigation?
- And why should we make the effort to obtain a confiscation order if the defendant is convicted?
- And why is this the first of the many topics we need to cover?

We are here to talk about hurdles, about the obstacles to asset confiscation

- There are many hurdles:
- There are legal hurdles: does the legislation or the judicial interpretations of it give the Government sufficient authority
- There are factual hurdles: can we gather the evidence we need to establish the connection between the property and the offense
- And there are practical hurdles: how to manage the assets and keep them from depreciating while the case is pending

But the #1 obstacle to making effective use of the asset confiscation laws – in Estonia and in every other country in the world -- is law enforcement culture

- It is the sense among prosecutors that confiscating assets adds an unnecessary complication to their work and is not worth the trouble
- That it's simpler just to convict the defendant and move on to the next case
- That it's easier to get a guilty plea if you just let the defendant keep his property

And the same is true among law enforcement agents

- Most are more than willing to take the low hanging fruit
- The cash the defendant has in his pocket when he is arrested
- But otherwise they want to move on and arrest the next guy and not worry about finding where the defendant hid his money

Approaching a criminal case that way is a mistake

- for all of the following reasons, confiscation should be a part of any case in which a defendant obtained or laundered a significant amount of money

1. Punish the wrongdoer

- Putting the defendant in jail is a form of punishment, but so is taking away the fruits of the crime;
- If the defendant committed the crime so that he could buy an expensive car, forfeiting the car is a form of punishment

But the point of forfeiture is not just to force the defendant to disgorge the fruits of his crime

- It's to punish him for committing the crime
- He may no longer have the proceeds of his crime
- He may have spent it all on wine, women and song, so that there is nothing left to disgorge
- But we don't want to reward criminals for spending their money before we have the chance to take it away
- Because confiscation is a form of punishment, the punishment has to apply whether the criminal still has the proceeds of his crime or not
- Which is why in most countries, including Estonia, a criminal who is convicted of a crime is liable to forfeit an amount of money equal to the proceeds of his crime.
- What is called a value-based judgment
 - *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (forfeiture is mandatory even if the defendant lacks the present ability to satisfy the judgment; "To conclude otherwise would enable wrongdoers to avoid forfeiture merely by spending their illegitimate gains prior to sentencing");
 - *United States v. Newman*, 659 F.3d 1235, 1242-43 (9th Cir. 2011) (forcing defendants to disgorge their ill-gotten gains, "even those already spent," ensures that defendants do not benefit from their crimes);

- Obtaining that value-based judgment is critical to ensuring that confiscation serves its punitive purpose

2. Deter other wrongdoers

- the point of committing the crime was to make money
- if the defendant does not get to keep the money, there is less incentive for the next person to commit the same offense
- conversely, if defendants were able to keep the proceeds of their crimes, even if they are found guilty, others might think it is worth the risk of conviction
- that would be the opposite of deterrence; it would be an incentive
 - *United States v. Martin*, 662 F.3d 301, 309 (4th Cir. 2011) (Criminal forfeiture is part of the defendant's sentence; its purpose is "to deprive criminals of the fruits of their illegal acts and deter future crimes");

3. Incapacitation: Take away the tools of the trade and the economic resources

- Confiscation is not limited to proceeds
- It reaches the property used to commit a criminal offense
- we don't want drug dealers to keep the airplane so they can use it again,
- the same is true for letting the child pornographer keep the computer and cameras that he used
- or letting the money launderer keep the business through which he laundered his money

4. Disrupt the organization

- if confiscation can incapacitate an individual criminal, it can incapacitate a criminal organization
- there is a temptation in drug cases to make easy arrests of street level dealers

- but to have a real, lasting impact on the organization, you have to go after the money
- money is the glue that holds organized criminal enterprises together; they have to recycle the money to keep the scheme going
- it is harder for a drug organization to replace the money than to replace the drugs
- taking the money does more to interrupt the cycle than any number of arrests of low level street dealers
- the same is true for persons engaged in wildlife trafficking; seizing the money flowing from Asian markets back to the poaching enterprises is more effective than arresting the guy with the truck and the gun in Africa
- figuring out how terrorism is financed, and taking away the money before it can be used, is a critical part of the anti-terrorism effort
- and seizing money destined for sanctioned countries like N. Korea and Iran disrupts their ability to evade those sanctions

5. Get money back to the victim

- forfeiture is a more effective way of recovering money for victims than ordering the defendant to pay restitution
 - *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014) (“The Government’s ability to collect on a [forfeiture] judgment often far surpasses that of an untutored or impecunious victim of crime . . . Realistically, a victim’s hope of getting paid may rest on the Government’s superior ability to collect and liquidate a defendant’s assets” under the forfeiture laws);
 - *United States v. Bennett*, 986 F.3d 389 (4th Cir. 2021) (following *Blackman* and rejecting defendant’s argument that the forfeiture order impinges on her ability to provide restitution to her victims; to the contrary, the forfeiture order is likely the only vehicle by which the Government will recover assets to be used to satisfy the restitution order);

6. Protect the community / Public policy / Rule of Law

Confiscation also serves a role in protecting the community, advancing public policy, and preserving respect for the rule of law

- For example, confiscating a criminal's assets demonstrates to the public that everyone is treated the same; that a wealthy criminal does not get to own the largest business in town, or live in the biggest house, or drive the most expensive car if he acquired that property with the proceeds of his crime
- It shows that the system of justice is fair and that law enforcement is effectual;
- It also ensures that the playing field is level, so that people trying to run businesses honestly don't have to compete with capital from illegal sources
- we also don't want criminal organizations (foreign or domestic) that have acquired great wealth use it to control markets or institutions
- allowing wealthy criminals to buy up all the expensive waterfront property or penthouses in a city can skew the market, putting the property out of the reach of local residents
- We don't want to let corrupt leaders of developing countries use our financial system to loot their treasuries and safeguard a nest egg to use when they have to go into exile
- Finally, forfeiting the assets of sanctioned Russian oligarchs who have tried to evade the sanctions by moving or disguising the ownership of their assets is one of the ways that countries right now are carrying out the public policy of supporting Ukraine in response to the Russian invasion

7. Recycle the money

- forfeited funds can be shared with law enforcement and used to fund law enforcement programs.
- and some forfeited property can be put into official use or handed over to community organizations

- this is the controversial feature of forfeiture

III. WHAT CAN YOU FORFEIT?

Estonia has a very robust asset confiscation law

- Unlike the law in some countries where the confiscation statute applies only to a subcategory of crimes, the confiscation statutes in Estonia apply to virtually any crime committed in Estonia
- moreover, the statutes authorize the confiscation of both the proceeds of crime and the property used to commit the crime.
- Specifically, Section 83¹ of the Penal Code authorizes the confiscation of the “assets acquired through an offence” – what I am calling the proceeds of the crime
- And Section 83 authorizes the confiscation of objects “used or intended to be used to commit” a crime – which should be interpreted broadly as I will explain

What are “proceeds”?

What constitutes proceeds in most cases is fairly obvious

- it’s whatever the defendant acquired as a result of the offense, or stated differently, what he would not have “but for” having committed the offense

If a person sold drugs, the money that he received is the proceeds

- If he robbed a bank, the money that he stole is the proceeds
- If he took a bribe, the bribe money is the proceeds
- If he *paid* a bribe, whatever he got in return would be the proceeds
 - *E.g.*, if a contractor obtains a contract by paying a bribe or kickback, the contract itself would be the proceeds of the crime

Appreciation and other traceable property

The scope of the term “proceeds” can actually be quite broad:

- proceeds include any property traceable to the proceeds,
- In fact, Section 83¹(1¹) specifically provides that the assets subject to confiscation include both the directly acquired assets and anything acquired with those assets
- if the person who sold drugs or robbed a bank used the money to buy a car, the car can be confiscated as property traceable to, or derived from, the crime
- it can be confiscated as “proceeds”
- and that is true regardless of how much time has passed or how many times the property has changed form
- if a defendant uses the proceeds of his crime to buy a car, uses the car as collateral for a loan, and uses the loan proceeds to buy a boat, the boat is traceable to the crime and is subject to confiscation
- or if he uses criminal proceeds to gamble at the casino and hits the jackpot, the gambling winnings are traceable to the crime and subject to confiscation
 - *United States v. Tolliver*, 949 F.3d 244 (6th Cir. 2020) (commission that a third-party money launderer is paid is forfeitable as property involved in money laundering, and when the defendant uses that money to gamble, his winnings are forfeitable as property traceable to such property);

Traceable property also includes appreciation and income derived from the property

- a person who buys a lottery ticket for one dollar and wins a million dollars forfeits the entire million, because the ticket appreciated in value
 - *United States v. Betancourt*, 422 F.3d 240, 251 (5th Cir. 2005) (if defendant buys a lottery ticket with drug proceeds, the lottery winnings are traceable to the offense even though the value of the ticket appreciated enormously when it turned out to contain the winning number);
- Or if he invests his money in a beach house and rents it out, the rental income would be proceeds

I mentioned that proceeds includes whatever the defendant would not have “but for” having committed the offense

— Under the “but for” test, an entire business, and all of its revenue and assets, are subject to forfeiture if the business would not exist but for the investment of criminal proceeds to start the business or to keep it going.

- *United States v. Warshak*, 631 F.3d 266, 329-330 (6th Cir. 2010) (all proceeds of defendant’s business are forfeitable because the business was “permeated with fraud;” but even if a part of the business was legitimate, the proceeds of that part are nevertheless forfeitable if the legitimate side of the business would not exist but for the “fraudulent beginnings” of the entire operation);
- *United States v. Smith*, 749 F.3d 465, 488-89 (6th Cir. 2014) (following *Warshak*; if business is so pervaded by fraud that its revenue stream would not have existed but for the fraud, any asset derived from that revenue stream is forfeitable as proceeds);

Net v. Gross

While your law doesn’t address this specifically, and some judges may see it differently, there should be no deduction for the cost of committing the crime

- *United States v. Prasad*, 18 F.4th 313 (9th Cir. 2021) (“proceeds” means gross receipts, not net profits; a contrary interpretation would be inconsistent with the purpose of forfeiture, which is punishment and deterrence; a forfeiture that simply divests a defendant of his profits would have “little deterrent value” and would “hinder [the statute’s] punitive purpose”); *id.* (limiting forfeiture to profits would allow defendants to defeat forfeiture by reinvesting proceeds in the criminal enterprise before conviction rather than pocketing the profits);
- *United States v. Peters*, 732 F.3d 93, 101 (2nd Cir. 2013) (the purpose of forfeiture is punishment; forfeiting defendant’s profits is not punishment because it merely returns him to the economic position he occupied before he committed the offense; therefore, defendant must forfeit the gross receipts);

— The drug dealer does not get to deduct the cost of the drugs

- *United States v. McHan*, 101 F.3d 1027, 1041-42 (4th Cir. 1996) (gross proceeds forfeitable in drug case);

— A person who embezzles money from his employer, or mismanages someone’s investment plan, or steals money from a Government program does not get to deduct his costs

- *United States v. Bodouva*, 853 F.3d 76 (2nd Cir. 2017) (forfeiting gross proceeds of embezzlement);
- *United States v. Uddin*, 551 F.3d 176, 181 (2d Cir. 2009) (affirming forfeiture of gross proceeds under § 981(a)(2)(A) in a criminal forfeiture cases involving food

stamp fraud; defendant must forfeit the amount he received from the Government for the food stamps without credit for the amount he had to pay for them);

- The person who obtains business by paying a bribe or kickback does not get to deduct the amount of the bribe or kickback

This may seem obvious, but there is some question as to whether the person who obtains a contract by fraud or bribery, but who performs the work, gets to deduct the cost of that work or of the goods he provides

- *Compare United States v. Percoco*, 13 F.4th 180 (2nd Cir. 2021) (if the defendant would not have obtained a job but for its being part of a bribery scheme, he must forfeit the gross proceeds obtained from the job without any deduction for the value of the services actually rendered);
- *With United States v. Martin*, 2014 WL 221956, *5 (D. Idaho Jan. 21, 2014) (contractor who obtains a Government contract by falsely claiming eligibility for a program for disadvantaged businesses must forfeit the net profits, not the gross proceeds, of the fraudulently-obtained contracts);

- This is something you may want to address through legislation

Commingled property

It is quite common for criminals to combine, mix, or commingle their criminal proceeds with other money from other sources

- For example, the defendant might obtain €200,000 in a fraud scheme, combine it with €300,000 in other money, and use the combined €500,000 to buy a house
- How the law treats such commingled property differs from one country to another
- In the United States, if we are proceeding under a statute that authorizes the forfeiture of the proceeds of the offense, we would only be entitled to recover the portion traceable to the crime.
- So, in the case of the €500,000 invested in the house, we would only be entitled to the 2/5ths that was traceable to the fraud scheme
- If we wanted to recover the entire €500,000 or the entire house, we'd have to prove that combining the money was a money laundering offense, and that the entire amount was subject to forfeiture as property "involved in" money laundering

The law in Estonia appears to be the same as it is in the United States

- Under Section 83^{1(1²)} if the defendant invests €200,000 in a house worth €500,000, the state is entitled only to the € 200,000 in proceeds
- It would have to get a judgment for that amount and force the sale of the house if the defendant refused to pay
- Whether you can work around this problem by using the money laundering laws as we do in the U.S. I'll come back to in a minute
- But first ...

2. Instrumentalities

Section 83 says that the court may confiscate an object that was used or intended to be used to commit a criminal offense.

- This is a very typical provision that appears in most confiscation statutes around the world
- The property subject to confiscation under such a provision is usually called an instrumentality of the offense, though I prefer the somewhat broader term “property used to facilitate the commission” of the offense

Such property is anything that makes the crime easier to commit or harder to detect

- *United States v. Schifferli*, 895 F.2d 987, 990-91 (4th Cir. 1990) (dentist’s office “provided an air of legitimacy and protection from outside scrutiny,” and thus made the crime of writing false prescriptions less difficult to commit and “more or less free from obstruction or hindrance”);
- *United States v. Huber*, 404 F.3d 1047 (8th Cir. 2005) (facilitating property is anything that “makes the prohibited conduct less difficult or more or less free from hindrance”);

In cases stretching back over decades, courts have upheld the forfeiture of real property, vehicles, and other personal assets as facilitating property

- Sometimes, that the property was used to commit the offense is obvious, like the gun used to commit an armed robbery
- But there are many more subtle situations

— For example:

- *United States v. Rivera*, 884 F.2d 544, 546 (11th Cir. 1989) (defining facilitating property broadly to include cows and horses used to make a heroin operation appear to be a working ranch);
- *United States v. Diaz*, 413 Fed. Appx. 704, 708 (5th Cir. 2011) (real property where owner allowed drug dealers to park their tractor-trailers while waiting to transport drugs and money across the border forfeited as facilitating property);
- *United States v. Ortiz-Cintrón*, 461 F.3d 78, 80 (1st Cir. 2006) (residences where defendants packaged drugs and stored drug money, and where telephone calls were made, was forfeitable as facilitating property);
- *United States v. Singh*, 390 F.3d 168, 190 (2d Cir. 2004) (a medical license is forfeitable as facilitating property under section 853(a)(2) if the doctor uses the license to distribute controlled substances in violation of the Controlled Substances Act; under section 853(b), property includes “rights, privileges, interests, claims, and securities”);

— in fact, an entire business and/or all of its assets could be forfeited as facilitating property

- *United States v. \$7708.78 in U.S. Currency*, 2011 WL 3489835, *3 (S.D. Miss. Aug. 9, 2011) (facilitating property is anything that makes the crime “less difficult or more or less free from obstruction or hindrance;” a pharmacy used as a cover for the illegal distribution of drugs is forfeitable as facilitating property, and hence so are all of its assets; including funds in its bank accounts that include money traceable to legitimate sales);
- *United States v. Segal*, 432 F.3d 767, 779 (7th Cir. 2005) (if a business is forfeited, then so are all of its assets, including any subsidiary business that is wholly owned by the forfeited business; that there is no independent basis for the forfeiture of the subsidiary does not matter);

Confiscation in Money Laundering Cases

In Estonia, you have a separate provision authorizing the forfeiture of any “property which was the direct object of the commission” of a money laundering offense: Penal Code § 394(5)

— So, if the defendant is convicted of money laundering, and the prosecutor wants to confiscate more than the criminal proceeds that were being laundered, he could ask the court to find, in terms of § 394(5), that all of

the commingled property was the “direct object” of the money laundering offense

Take my example of the €500,000 in mixed funds that a defendant used to buy a house

- If only a portion of the house is considered the proceeds of the underlying fraud, the court cannot order the confiscation of the entire house under the proceeds theory
- But the prosecutor could charge the defendant with money laundering and ask the court to find that the entire house is subject to confiscation because the purchase of the house with the commingled funds was the “object” of the money laundering offense.
- That is exactly what we would do in the United States under a statute that allows the confiscation of any property involved in a money laundering offense
- and there are many examples of it in our case law
 - *United States v. Kivanc*, 714 F.3d 782, 794-95 (4th Cir. 2013) (residence in which fraud proceeds were invested is subject to forfeiture in its entirety as property involved in a money laundering offense, even though legitimate funds were also invested in the property);
 - *United States v. Coffman*, 859 F. Supp. 2d 871, 881 (E.D. Ky. 2012) (where half of the \$900,000 down payment on a yacht was fraud proceeds, the yacht was forfeitable in its entirety as the subject of a money laundering offense);
 - *United States v. Beltramea*, 160 F. Supp.3d 1119, 1128 (N.D. Iowa 2016) (defendant’s use of fraud proceeds to pay for improvements to real property was a money laundering offense, making the property forfeitable in its entirety as the “object” of the offense), aff’d, 849 F.3d 753 (8th Cir. 2017);

Alternatively, the prosecutor could ask the court to find that that the commingled €300,000 made it easier to launder the €200,000 in fraud proceeds, the same way that Rivera’s cows and horses made it easier his to conceal his heroin operation

- By hiding the dirty money in an account with clean money he made it appear to be legitimate, or made it less likely that it would be detected

- *United States v. Aguasvivas-Castillo*, 668 F.3d 7, 17 (1st Cir. 2012) (retailer who commingled \$4.4 million in food stamp fraud proceeds with legitimate funds “to shield the fraud” ordered to forfeit \$20 million);

— In that case, the clean money could be confiscated along with the tainted money under § 83 as property used to commit the money laundering offense

The same logic would apply if the defendant laundered his money by running it through his legitimate business, e.g. by making it appear that the money was from selling food at his restaurant instead of from selling child pornography

— In that case the entire business could be confiscated under § 83 as property used to commit the money laundering offense

IV. CONFISCATION PROCEDURE

OK. We have talked about why we confiscate property and what types of property can be confiscated

— now we need to talk about how it is done

Typically, there are three ways of recovering property through confiscation

1. administratively
2. criminally – that is, as part of a criminal prosecution
3. in a non-conviction-based action against the property

Estonia has a limited version of the first, a robust version of the second, and no version of the third

Administrative confiscation

Administrative confiscation is just a fancy way of describing an action whereby the state takes title to property by default when no one claims it

— this is very common in the United States

— a law enforcement agency – the FBI, the DEA, the IRS – seizes property (usually with a warrant) based on cause to believe it was derived from or used to commit a crime

- the Government sends notice to the property owner of his right to claim his property and contest its forfeiture
- if no one files a claim, the property is forfeited by default
- in the United States, this is what happens approximately 80 percent of the time
- and it can happen in virtually any case involving personal property having a value of under \$500,000 involved in a federal crime

In Estonia, you have a much more limited version of administrative confiscation

- Section 57 of the MLTFPA provides that in cases involving money laundering or terrorist financing, the FIU may freeze a bank account or other property for a period of time
- If the property owner comes forward and proves to the FIU that the property has no link to money laundering or terrorist financing, the property must be released
- Otherwise, the FIU has 90 days to refer the case to a law enforcement agency to open a money laundering case and obtain a seizure order
- But if the property owner remains unidentified and a year goes by, the FIU may ask the administrative court “for permission to transfer the property to state ownership”
- In that way, the property becomes the property of the State without the filing of a criminal case and without obtaining a criminal conviction

So what we can say is that Estonia does have an administrative confiscation provision but one that applies only in money laundering and terrorist financing cases

Criminal Confiscation

The second way of confiscating criminally-tainted property is by means of a criminal prosecution

- This is where the provisions in Sections 83-85 of the Penal Code that we discussed earlier come into play
- If the defendant is convicted of an offense, Section 83¹ says that the court *must* order confiscation of the proceeds of the offense
- And Section 83 says that the court *may* order the confiscation of the property used to commit the offense
- In other words, as in most other countries, the confiscation is part of the convicted defendant's sentence

The only thing that is somewhat unusual is that the confiscation of the proceeds is mandatory, while the confiscation of the property used to commit the offense is discretionary

- Actually, to be clear, even the confiscation of the proceeds is not truly mandatory, given that Section 83¹(3) provides that the court “may decide not to confiscate . . . property acquired through an offense” if the confiscation would be “unreasonably burdensome” – what some might consider a gigantic loophole in the law

How the court is to exercise its discretion in a case involving instrumentalities, and when it would consider the confiscation of proceeds to be “unreasonably burdensome,” is not clear

- But I don't want to get into the details of obtaining a confiscation order now
- Chapter 16 of the Code of Criminal Procedure sets forth the procedure for handling criminal confiscation applications in detail
- So we'll leave that for tomorrow

Property of equivalent value

But there are two key provisions of the Penal Code that we should talk about now, however

- The first has to do with confiscating property of equivalent value

- And the second involves what is called “extended confiscation”

Section 84 says that if the proceeds or the property used to commit the offense have been “transferred, consumed, or the confiscation thereof is impossible or unreasonable for another reason” ---

- The court may order the “payment of an amount which corresponds to the value of the assets subject to confiscation”

So, if the defendant has spent his criminal proceeds on wine, women and song

- Or he has placed the money in a foreign bank account where it cannot be recovered
- Or if it simply cannot be determined what happened to the criminal proceeds or to the property used to commit the offense
- The court may order the defendant to pay a sum of money equal to the value of the missing property

This is what I was referring to earlier when I said that for confiscation to have its intended punitive effect, the court must be able to enter a value-based judgment, even if the defendant no longer has the property directly derived from the offense

- It is a critical component of any criminal confiscation provision and is something that the FATF looks for when doing its evaluations
- The only thing that I did not see in this provision was any provision for how the state could go about enforcing the value-based judgment
- In the United States, for example, the corresponding provision in the forfeiture law says that to enforce or satisfy a value-based judgment, the court may order the forfeiture of other property of the defendant up to the amount of the value-based judgment
- What we call the forfeiture of a substitute asset

So, for example, if the court orders the confiscation of € 1 million as the proceeds of a fraud scheme, but the defendant has spent the € 1 million

- The court could order the confiscation of the villa the defendant inherited from his grandfather to satisfy the judgment.
 - *United States v. George*, 2010 WL 1740814, *3 (E.D. Va. Apr. 26, 2010) (defendant ordered to forfeit annuity payments she was entitled to receive for the next ten years as substitute asset in partial satisfaction of money judgment);

There is nothing about that in § 84,

- but because § 142 of CCP authorized the attachment of “substitutional property” to preserve it for confiscation,
- I assume that courts in Estonia can order the confiscation of substitute property just as courts in the U.S. may do

Extended confiscation

The other key provision is the provision in Section 83² authorizing extended confiscation

- That is, if the defendant is convicted of a criminal offense, the court may order the confiscation of other property of the defendant
- that is, property not necessarily derived from the particular crime for which the defendant has been convicted --
- if the court finds that the nature of the defendant’s offense and his lack of a legitimate source of income sufficient to explain his lifestyle “gives reason to presume” that the defendant has acquired his wealth through criminal activity
- this is a very powerful provision that may be used to deprive a defendant of the proceeds of a life of crime based solely on his conviction for a single offense

Other countries have a similar provision, so the extended confiscation provision in the Estonian statute is by no means unique

- but there are other countries that limit criminal confiscation to the proceeds or, or the property used to commit, the particular offense for which the defendant has been convicted

- For example, if the defendant is convicted of robbing a bank on Monday, and taking 10,000 euros, the confiscation order will be limited to the 10,000 euros that he stole on that occasion
- even if he stole another 10,000 euros from another bank on Tuesday unless he was also convicted of that offense

That is the rule, for example, in the United States

- if we want to recover the money the defendant derived from other crimes, we have to either charge him with a conspiracy encompassing all of his criminal conduct
- or bring a separate case

Extended confiscation, therefore, is one of the instances I was thinking of earlier when I said that there are aspects of the confiscation law in Estonia that go beyond what the corresponding law in the United States would allow

- and what therefore makes it particularly effective

Limitations of criminal confiscation

This has been just a brief overview of the criminal confiscation statute

- To summarize, it applies not just to a small sub-category of crimes that may be committed in Estonia, but to virtually every serious criminal offense
- it authorizes the confiscation of both proceeds and property used to commit the offense,
- and it contains the equivalent value and extended confiscation provisions, necessary to make it effective
- it has what may be considered a few ambiguities and omissions,
- but overall, it has the potential to be an effective part of the criminal justice system if it is applied, as it should be, in any criminal case involving money or property

Even so, criminal confiscation has some inherent limitations

- When I say inherent limitations, I mean limitations not unique to the Estonian statute, but limitations that apply to criminal confiscation as a concept
- The first is that criminal confiscation necessarily requires a criminal conviction

Obtaining a criminal conviction is not always possible

- What if you find the proceeds of a crime but the defendant is dead, or is a fugitive, or is too ill to stand trial
- What if the property that you want to confiscate is the proceeds of a foreign crime that you could not prosecute in Estonia even if you had custody of the person who committed it
- What if someone laundered the proceeds of a foreign crime in Estonia -- and so committed a domestic money laundering offense – but did so from another country and can't be extradited
- Or what if you have all the evidence needed to prove a criminal offense but just don't know who did it

In all of those cases, the property may be right here in Estonia, and you can prove that it was derived from or involved in a crime, but you can't bring a criminal case

- And if you can't bring a criminal case, you can't obtain a criminal confiscation judgment.
- § 57 – the administrative provision – fills some of those gaps but not all of them

Rights of third parties

The other limitation inherent in criminal confiscation cases concerns the rights of third parties

Sections 83, 83¹, and 83² expressly limit criminal confiscation to property *that belongs to the defendant* at the time the judgment is entered

- But what if the defendant used someone else's property to commit the crime
- Or what if he transferred the proceeds of his crime or the property he used to commit to a third party to avoid confiscation?

Section 40² of the CCP appears to allow third parties to participate in the criminal case to defend their property

- Some might consider this an unwarranted distraction in the criminal case
- But others would say that it would violate the due process rights of a third party to confiscate his property in a proceeding in which he was not allowed to take part
- As we'll discuss tomorrow, there are a several ways to deal with this problem, including the use of non-conviction-based forfeiture procedures

Non-Conviction-Based Confiscation

That brings us to the third method of confiscating property

- it is called non-conviction-based or NCB forfeiture
- and as the name implies, it applies when there is no criminal case at all (for any of the reasons I mentioned)
- or when the defendant in a criminal case used a third party's property to commit the offense and you don't want the third party intervening in the criminal case to defend his property rights

NCB forfeiture is well-known in many countries, not only in the common law countries (such as the United States and Canada) but in others as well

- Latvia, for example, has an NCB forfeiture provision in its law, as do other countries in Europe such as Germany, Italy and Malta
- but you do not have NCB forfeiture in Estonia

So, in the last part of the parallel program tomorrow, we will be discussing what NCB forfeiture is, how it works, when you would need it, and why Estonia might want to enact an NCB forfeiture statute

V. BEST PRACTICES

For now, however, in the time remaining, I want to talk about what needs to be done to be successful in confiscating property in a criminal case, and whose job it is to do it

Making the financial aspects part of the criminal investigation

- It is critically important not to wait until the defendant is convicted and is being sentenced to think about confiscation
- To the contrary, a financial investigation aimed at locating proceeds of the crime and other assets of the defendant must be part of the criminal investigation from the beginning

There are several reasons why this is important:

1. The financial investigation may aid in proving the crime
 - For example, showing that a public official has more assets than can be explained by his public salary can aid in proving that he is corrupt
 - And following the money can aid in identifying other parties to the crime and their relationship to each other
2. Failure to include a financial investigation can lead to missing the opportunity to bring a money laundering case as part of the prosecution
 - As we will discuss tomorrow, there are all kinds of reasons why a prosecutor may want to charge money laundering as part of any criminal case involving property
 - But if you don't follow the money, you'll likely miss the evidence of money laundering and third parties who may be involved only in the money laundering part of the criminal scheme

3. If you wait until the end of the case to try to locate the defendant's assets, you will likely find that they have disappeared

- Criminals are unlikely to politely hold on to their assets, keeping them in a place where they're handy for you to seize, until they are convicted of a crime and the court is ready to make a confiscation order
- If you want to get a confiscation order that isn't an empty judgment, you need to freeze or seize the property to preserve it pending trial
- And in order to be able to do that, you need to do the financial investigation at the beginning of the case, not the end
- Otherwise, it will be too late

Investigative Tools

The most important parts of a financial investigation are the interviews with cooperating witnesses

- That is, with persons who were part of the criminal enterprise and who know how and where the defendant kept or laundered his money --
- and obtaining bank records and other documents

This may involve serving compulsory process on financial institutions and anyone else to produce records that may help in identifying and tracing the proceeds of crime

- It may also involve obtaining electronic records, such as emails and text messages, that may help in the investigation, as well as executing search warrants and conducting surveillance
- All of these steps are authorized by provisions in the Code of Criminal Procedure:
 - interrogation of witnesses (CCP § 68, 69.2);
 - production of documents (CCP § 32)
 - Inspection of documents (CCP § 86);

- Searches (CCP §§ 91, 91.1)
- Surveillance (CCP §§ 126.2 and 126.3)

So, as part of any criminal investigation, the investigators will want to use these tools to determine if the defendant, in addition to committing the predicate offense, has engaged in money laundering

- And to identify and locate the proceeds of the offense.

Freezing and seizing assets

In a criminal case, no confiscation order may be made until the defendant is convicted

- So, it is critical that any property identified as subject to confiscation during the investigation be frozen or seized to preserve it pending trial and conviction

Freezing an asset means leaving it in the possession of its custodian subject to an order prohibiting its transfer, conversion, disposition or movement

- For example, the Prosecutor could decide to freeze an investment account rather than liquidate it and take possession of the proceeds

Seizure, on the other hand, means to take physical possession or control of the asset

- Generally, you would want to seize assets that were in the possession of the defendant
- And you might want to seize assets that are easily moved – like funds in a bank account – even if they are in the possession of a third party, such as bank – if you want to be certain that they do not disappear
- The provisions authorizing provisional measures enabling the preservation of property subject to confiscation are in CCP § 142

Structural issues

Now, whose job is it to do all of this, and how might you structure your asset recovery resources to allow them to do their job effectively?

It will be the rare case where the crime was committed to make money that does not have the potential to include a money laundering charge, and to recover at least the proceeds in a confiscation order

So, I say again, looking at the financial aspects of the crime should be a routine part of every criminal investigation from the beginning

- Except in the most complex cases, you don't need to set up a specialized financial investigations unit to do this
- The law enforcement officers who investigate fraud, corruption or drug trafficking can and should be following the money as they pursue their investigation
- And the prosecutor should be considering whether to include a money laundering charge and what assets should be confiscated as soon as he or she becomes involved in the case

Where some additional expertise is needed, look to the FIU

- § 54 of the MLTFPA specifically directs the FIU to cooperate with all investigative bodies and to provide training to “investigative bodies, prosecutors and judges in [money laundering] matters;
- For example, it is the FIU that arranged for my coming to assist in the training that is scheduled for tomorrow
- There is a great deal of expertise in the FIU on financial matters that can lead to the confiscation of assets, fulfilling all of the purposes of confiscation that we discussed at the beginning of this presentation
- You should use it

Under this model, it is everyone's job to look for assets and to include their confiscation in a criminal case

- There is nothing wrong with this model, and it will work some of the time
- But the problem is that when you say that something is everyone's job, it quickly becomes no one's job
- If no one is saying, "did you remember to include confiscation of assets in your investigation and prosecution?", it doesn't get done

Moreover, there are times when the prosecutor needs to rely on the expertise of a confiscation expert

- you will find, if you get involved in the more complex cases, that issues will arise that fall outside of the common experience of the typical criminal prosecutor
- Issues having to do with property rights, intangible assets, trusts and other third parties, marital property rights, virtual currency, ongoing businesses and other complex assets, and assets that depreciate or require maintenance.
- And the complexity and need for specialization will only increase if you decide to enact NCB forfeiture legislation
- For that reason, you may consider created a specialized unit of dedicated prosecutors who develop expertise in specifically in the identification, preservation, confiscation, and disposal of assets

In the United States, we have 93 regional federal prosecutors' offices, and each one has one or more asset forfeiture specialists

- And there is a large asset forfeiture unit in the headquarters of the Department of Justice in Washington, DC as well, which is where I served as Deputy Chief for many years
- When the Public Prosecutor in South Africa set up their asset recovery regime 20+ years ago, the first thing they did was to establish a centralized unit
- And when I was in Latvia a year ago, I participated in the training of the judges who had just been selected to serve on the new specialized court handling NCB forfeiture cases.

- So this is something that you may want to consider

If you decided to set up such a unit what would it do?

Center of excellence and expertise

First, it could be a center of excellence and expertise within the Public Prosecutor's office

- that is, the place where all of the other prosecutors would be able to go if they had a question or the need of some guidance on a matter related to money laundering or confiscation
- When I was Head of the specialized unit in Baltimore, I would take 5 or 6 calls a day – sometimes 100 in a single month – from prosecutors in my office and throughout the United States, asking for help with issues that arose in their money laundering and forfeiture cases

Some of the most complex money laundering questions would concern property that was derived from a foreign crime

- For example, a prosecutor might come to me and say, we have a case where a lot of money is coming into our city from Russia and it seems clear from the circumstances that its dirty money, but what do I have to prove to show that it is the proceeds of a foreign crime?
- Do I have to know what country the money came from? Do I have to know what criminal offense was committed in that country? Do I have to prove the elements of that offense in my trial?

The point is that while much of the time adding a money laundering charge to a criminal case will be simple – the defendant sold drugs and then he spent the money to buy a car – there will be other times when charging money laundering will raise a complicated issue

- And the experts in your money laundering section will have the expertise and institutional knowledge to advise his colleague as to how that issue may be resolved.

The same will be true with respect to asset confiscation

- Inevitably, confiscation cases involve issues of property law and the rights of third parties
- For example, a prosecutor might say, I have a case where the defendant used his house as the center of a drug-trafficking scheme, but his wife owns half the house, or his bank has a mortgage on it, or the plumber wasn't paid for his work and has a mechanics lien
- And the defendant has pledged to leave the house to his children in his will when he dies
- Do any of these people have the right to object to the confiscation? If so, how do I advise the court what to do?

These questions and many, many others, will arise every day

- So, if a question of this nature should arise, or if someone had a question about the meaning of a particular statute, or needed a form to go by, they need someone to go to

Other areas of expertise will involve requesting mutual legal assistance (and responding to such requests from other countries)

- Everyone in the office will not have the same degree of expertise and experience needed to identify the person in another country who can provide the legal assistance and thus is the person to whom the request should be directed
- But someone, or some group, needs to develop that expertise and that list of international contacts

Training

There will also need to be a process for providing training to new hires – both within the freezing and confiscation unit and in the Public Prosecutor's Office as a whole – on a continuing basis so that knowledge and experience are handed down as turnover takes place and new people come on board

- And in that vein, someone will need to be responsible for creating and maintaining a file of forms and legal briefs that address recurring issues so that everyone does not have to "reinvent the wheel" every time an issue arises in a money laundering or confiscation case

The point is that the prosecutors who are handling fraud cases, or human trafficking cases, or drug cases should continue to handle those cases

- And they should routinely consider added money laundering charges and requests for confiscation orders
- But when they have a question about which money laundering statute to charge or which section of the law authorizes the service of a request for financial records, they know where to go

Complex cases

Now, the other role of the specialized unit is to handle those cases that are so complicated that they need to be handled in a different way

- I'm thinking of international money laundering cases,
- cases involving shell companies formed in off-shore jurisdictions
- cases involving extraterritorial jurisdiction or requests for mutual legal assistance from a foreign country
- these are the kinds of cases that the specialized unit should handle from the beginning and in their entirety
- they may constitute only a small fraction of all the cases in the office, but they merit special attention because of their scope and complexity

Example

What would be an example of a case that might be handled by a specialized unit?

- Suppose, for example, that the owners of a major bank in Estonia decided to steal million of dollars from their bank, and thus defraud their creditors and investors
- And suppose they did this through an elaborate and complex false lending scheme
- And suppose that the fraud and the subsequent laundering of the proceeds involved shell companies formed in secrecy jurisdictions like the British

Virgin Islands that had bank accounts in other Eastern European countries like Latvia and Moldova

- And that the Latvian and Moldovan bank records – if they could be obtained – would show that the defendants laundered the embezzled and stolen money by conducting convoluted transactions through the banks in those countries
- And were using the money to pay bribes, invest in other businesses, and live a lavish lifestyle

Those are the facts of real cases, and they are complicated, time-consuming, and important to maintaining the integrity of your economic system

How would such a case be investigated?

The investigation of a case of this nature has to be handled differently from the investigation of the routine case

- In such a case, the prosecutor cannot be passive, waiting for someone else to complete the investigation and bring it to him on a silver platter
- To the contrary, the prosecutor must work collaboratively with the investigators from the beginning
- Making sure that everyone knows the elements of the crime – including the elements of money laundering – and knows what they must prove, and what evidence is needed to prove it
- And the prosecutor needs to be directing the investigation, suggesting what witnesses to interview, what documents to request, and how they should be analyzed, as the case goes along
- And he needs to be making requests for legal assistance from other countries

You might, in particularly large case, want to set up what we call a task force where the prosecutor and the investigators are co-located and work together, bringing to bear their different areas of expertise

Asset Management Issues

Finally, any discussion of best practices must involve the management of seized, restrained and confiscated assets

- Who will be responsible for taking custody of property that is seized during the course of an investigation?
- If vehicles are seized, where will they be stored?
- If animals are seized, how will they be cared for
- If money is seized, will it be deposited in an interest-bearing account?
- If securities that fluctuate in value with the market are seized, or if the property is perishable or liable to deteriorate, should it be liquidated?
- If the property is expensive to maintain or is depreciating in value, you may need to ask for permission to conduct an interlocutory sale
- If so, who should conduct the sale, who should be eligible to buy, and what is the process for obtaining judicial approval for the sale if the defendant objects?

Or suppose the property involved in the offense and subject to confiscation is an on-going business

- If instead of shutting the business down and putting the employees out of work while the case is pending, you decide to let the business stay open subject to a freeze order, who will monitor the business, or who will run it in place of the defendant?

Finally, there will be cases that involve victims

- If, at the conclusion of a criminal case, the court orders the confiscation of property taken from victims in a fraud scheme, what is the procedure for dividing the money among the victims?
- Who will determine who is a genuine victim and who is not?
- If there is not enough money to make everyone whole, who will decide how it will be distributed? What will the formula be?

These and tens of other questions will arise once you start having success in processing cases

- You need to be thinking about the answers to those questions now.

Conclusion

We have covered a great deal of material

- I hope that it has been helpful to you,
- And I look forward to seeing those who are able to attend the parallel session on money laundering and confiscation tomorrow.