

Proceeds of Corporate Criminality

UNCAC

Article 23.

Laundering of proceeds of crime

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
 - (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;
 - (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;
- (b) Subject to the basic concepts of its legal system: (i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime; (ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.
2. For purposes of implementing or applying paragraph 1 of this article:
 - (a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;
 - (b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;
 - (c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there; (d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations; (e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

UNCAC

Pasal 23 Pencucian hasil kejahatan

1. Negara Pihak wajib mengambil, sesuai dengan prinsip-prinsip dasar hukum nasionalnya, tindakantindakan legislatif dan lainnya yang perlu untuk menetapkan sebagai kejahatan, jika dilakukan dengan sengaja:

(a)(i) Konversi atau transfer kekayaan, padahal mengetahui bahwa kekayaan tersebut adalah hasil kejahatan, dengan maksud menyembunyikan atau menyamarkan asal-usul tidak sah kekayaan itu atau membantu orang yang terlibat dalam pelaksanaan kejahatan asal untuk menghindari 30 or her action; konsekuensi hukum perbuatannya. (

(ii) Penyembunyian atau penyamaran sifat sebenarnya, sumber, lokasi, pelepasan, pergerakan atau pemilikan atau hak yang berkenaan dengan kekayaan, padahal mengetahui bahwa kekayaan itu adalah hasil kejahatan; (

(i) Perolehan, pemilikan atau penggunaan kekayaan, padahal mengetahui, pada waktu menerimanya, bahwa kekayaan itu adalah hasil kejahatan;

(ii) Partisipasi dalam, hubungan dengan atau persekongkolan untuk melakukan, percobaan untuk melakukan dan membantu, memfasilitasi dan menganjurkan pelaksanaan kejahatan menurut pasal ini;

2. Untuk melaksanakan atau menerapkan ketentuan ayat

1: (a) Negara Pihak wajib berusaha menerapkan ketentuan ayat 1 dalam arti seluas-luasnya kejahatan asal;

(b) Negara Pihak wajib memasukkan sebagai kejahatan asal sekurang-kurangnya suatu rangkaian komprehensif kejahatan menurut Konvensi ini;

(c) Untuk maksud sub-ayat (b) di atas, kejahatan asal meliputi kejahatan yang dilakukan di dalam dan di luar yurisdiksi Negara Pihak yang bersangkutan. Namun, kejahatan yang dilakukan di luar yurisdiksi Negara Pihak merupakan kejahatan asal hanya jika perbuatan yang bersangkutan merupakan kejahatan menurut

hukum nasional Negara tempat perbuatan dilakukan dan merupakan kejahatan menurut hukum nasional Negara Pihak yang melaksanakan atau menerapkan pasal ini seandainya perbuatan tersebut dilakukan di Negara Pihak itu.

(d) Negara Pihak wajib menyerahkan salinan undang-undang yang menerapkan pasal ini dan perubahan undang-undang itu atau keterangan mengenai hal itu kepada Sekretaris Jenderal Perserikatan Bangsa-Bangsa;

(e) Jika diwajibkan oleh prinsip-prinsip dasar hukum nasional suatu Negara Pihak, dapat ditentukan bahwa kejahatan sebagaimana dimaksud pada ayat 1 tidak berlaku bagi orang yang melakukan kejahatan asal.

Article 31. Freezing, seizure and confiscation

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:
 - (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
 - (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.
2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.
3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.
4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.
5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.
6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.
7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.
8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.
9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.
10. Nothing contained in this article shall affect the principle that the measures to which it refers shall be defined and implemented in accordance with and subject to the provisions of the domestic law of a State Party.

UNCAC art 31

Pasal 31 Pembekuan, penyitaan dan perampasan 1. Negara Pihak wajib mengambil, sepanjang dimungkinkan dalam sistem hukum nasionalnya, tindakan yang perlu untuk 36 enable confiscation of: memungkinkan perampasan: (a) Hasil kejahatan yang berasal dari kejahatan menurut Konvensi ini atau kekayaan yang nilainya setara dengan hasil kejahatan itu (b) Kekayaan, peralatan atau sarana lain yang digunakan atau dimaksudkan untuk digunakan untuk kejahatan menurut Konvensi ini.

2. Negara Pihak wajib mengambil tindakan-tindakan yang perlu untuk mengidentifikasi, melacak, membekukan atau menyita setiap barang sebagaimana dimaksud pada ayat 1 untuk tujuan perampasan.

3. Negara Pihak wajib mengambil, sesuai dengan hukum nasionalnya, tindakan-tindakan legislatif dan lainnya yang perlu untuk mengatur pengadministrasian oleh pejabat yang berwenang atas kekayaan yang dibekukan, disita atau dirampas sebagaimana dimaksud pada ayat 1 dan ayat 2.

4. Jika hasil kejahatan telah diubah atau dikonversi, sebagiannya atau seluruhnya, ke dalam kekayaan lain, maka sebagai gantinya, kekayaan tersebut wajib dikenakan tindakan-tindakan sebagaimana dimaksud dalam pasal ini.

5. Jika hasil kejahatan telah bercampur dengan kekayaan yang diperoleh dari sumber-sumber yang sah, maka dengan tidak mengurangi kewenangan yang berkaitan dengan pembekuan atau penyitaan, kekayaan tersebut wajib dikenakan perampasan sampai nilai perkiraan dari hasil kejahatan yang dicampur tersebut.

6. Pendapatan atau manfaat lain yang berasal dari hasil kejahatan, dari kekayaan yang berasal dari perubahan atau konversi hasil kejahatan atau dari kekayaan yang telah bercampur dengan hasil. kejahatan, wajib juga dikenakan tindakan-tindakan sebagaimana dimaksud dalam pasal ini, dengan cara dan lingkup yang sama seperti hasil kejahatan.

7. Untuk melaksanakan pasal ini dan pasal 55 Konvensi ini, Negara Pihak wajib memberikan kewenangan kepada pengadilan atau badan berwenangnya yang lain untuk memerintahkan agar dokumen bank, keuangan atau perusahaan diberikan atau disita. Negara Pihak tidak boleh menolak melaksanakan ketentuan pasal ini dengan alasan kerahasiaan bank.

8. Negara Pihak dapat mempertimbangkan kemungkinan untuk mewajibkan pelaku untuk menunjukkan kesyahan asal-usul dari apa yang diduga sebagai hasil kejahatan atau kekayaan lain yang dikenakan perampasan, sepanjang kewajiban tersebut sesuai dengan prinsip-prinsip dasar hukum nasionalnya dan dengan proses pengadilan dan proses lainnya.

9. Ketentuan pasal ini tidak boleh merugikan hak pihak ketiga yang beritikad baik.

10. Ketentuan pasal ini tidak mempengaruhi prinsip bahwa tindakan-tindakan sebagaimana dimaksud dalam pasal ini diartikan dan dilaksanakan sesuai dengan dan tunduk pada ketentuan-ketentuan hukum nasional Negara Pihak.

Measures available in UK

- Confiscation orders (after conviction)
- Civil recovery (non conviction-based: *in rem* action against anyone, including company, holding the property)
- Taxation of proceeds of crime (usually as income, by corporation tax: tax penalties available)
- Unexplained Wealth Orders leading to civil recovery orders (Criminal Finances Act 2007)
(legislation is Proceeds of Crime Act 2002 as amended)

Confiscation

Only after conviction

(Civil) burden on prosecution unless lifestyle provisions apply

Originally applied only to drugs offences, then organised crime, then serious crime, then far more widely (tax, immigration, &c &c)

Outcome an order for (in essence) a debt, quantified by reference to proceeds, not profit, up to a sum limited so as not to compel bankruptcy.

Possibility of 'lifting the veil' in corporate cases.

Some Issues

- Objective? *Status quo ante* or what?
- Amount?
- Deductions?

Waya

Late in 2003, Waya contracted to buy a flat for £775,000. £310,000 came from his own resources. The balance of £465,000 was provided by way of a mortgage, which he obtained by making false statements about his employment and earnings. At the time of the events giving rise to the prosecution it was very easy to get mortgages of this sort. In April 2005, the mortgage was redeemed by way of a second loan (honestly obtained) in the sum of £838,943. In 2007 the Appellant was convicted of obtaining a money transfer by deception in relation to the false statements he made to the initial mortgage lender.

Was the benefit:

1. £1,540,000 (£1.85M - £310K), if the original loan and all the appreciation in the value of the flat was “benefit” for this purpose;
2. £1.11M. This is what the CA had held. It took the proportion of the initial value of the property provided by the mortgage lender as a result of the false statements set the order at that proportion of the flat’s market value at the time of the confiscation proceedings (i.e. $£1.85M \times [£465K/£775K]$)
3. £392,400, 60% of the appreciation in the flat’s value, with an adjustment for the repayments that had been made (i.e. $[£1.85M - £775K] \times [£465K/£775K]$)
4. £987,400, which is the difference between the flat’s value and the second mortgage at the time the confiscation order was made

UK Sup Ct held (3-2)

European Convention on Human Rights 1950
Protocol 1 art.1 required that the deprivation of property as a penalty had to be proportionate to the legitimate aim, which was to remove from criminals the pecuniary proceeds of their crime, the deterrent effect being secondary. A judge had to refuse to make a disproportionate confiscation order but this was not a reincarnation of a general judicial discretion.

R v Harvey (CA) [2013] EWCA Crim 1104

The defendant owned a plant hire and contracting company, which had regularly acquired and sold stolen plant. The value of these items when stolen had been £315K, but when recovered it was £160K. The judge assessed the revenue derived from the stolen plant as 38 per cent of the company's total revenue, £1,960K. Harvey argued that from this sum should have been deducted the VAT on the sums gained by using the plant, which had been passed on to HMRC. The Court of Appeal refused to permit such a deduction. The Supreme Court did.

Civil Recovery

Civil recovery (non conviction-based: *in rem* action against anyone, including company, holding the property, except a bone fide purchaser)

Proprietary action, civil standard of proof

Originally where criminal prosecution failed or could not succeed, now used more widely.

Tax jurisdiction

Capone &c

(Profits of unlawful activity subject to tax in UK)

Raise assessment (including penalties where appropriate)

Burden of proof on taxpayer to negative assessment

Unexplained Wealth Orders

Unanswered (or insufficiently answered) UWO is evidence that may be used in support of civil recovery action.

In principle ...

1. Proceeds of crimes by corporations = Proceeds of any other crime.
2. Proceeds of corruption = Proceeds of any other crime (but how to quantify?)

But ... the corporate sphere

Company A publishes false accounts, in consequence of which its share price is artificially inflated.

As a result its takeover bid for Company B, in cash + shares in Company A, is more attractive, and is accepted.

A takes over B. (Guinness/Distillers 1980s)

Article 34.

Consequences of acts of corruption With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

Pasal 34

Akibat tindakan korupsi

Dengan memperhatikan hak-hak pihak ketiga yang diperoleh dengan itikat baik, Negara Pihak wajib mengambil tindakan, sesuai dengan prinsip-prinsip dasar hukum nasionalnya, untuk mengatasi akibat-akibat korupsi. Dalam kaitan ini, Negara Pihak dapat mempertimbangkan korupsi sebagai faktor yang relevan dalam proses hukum untuk membatalkan atau meniadakan kontrak, mencabut konsesi atau instrumen lain yang sama atau mengambil tindakan pemulihan lain.

Article 35.

Compensation for damage Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

Pasal 35

Kompensasi kerugian

Negara Pihak wajib mengambil tindakan yang perlu, sesuai dengan prinsip-prinsip hukum nasionalnya, untuk menjamin agar badan atau orang yang menderita kerugian sebagai akibat dari perbuatan korupsi mempunyai hak untuk mengajukan tuntutan hukum terhadap mereka yang bertanggung jawab atas kerugian itu untuk memperoleh kompensasi.