СРАВНИТЕЛЬНОЕ ПРАВО

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Confiscation and other procedures for deprivation of illegally acquired (criminal) proceeds under the laws of Russia and foreign jurisdictions

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The article focuses on the problems of effective combating profit-driven crimes and the implementation of the "crime does not pay" principle in the Russian legislation. The author analyzes the existing civil and criminal mechanisms for the return of assets in Russia, as well as the issues of a special unexplained wealth procedure. The paper reveals the deficiencies of each instrument that result in practical challenges, faced by law enforcement agencies, the judiciary and victims, while restoring the situation that existed prior to commission of a crime. In the search for possible solutions to the problems, legal acts of the European Union, international conventions and the legislation of the certain jurisdictions (Germany and the United States) were reviewed in order to explore the alternative procedures for reducing the "profitability" of economically-motivated crimes and compensating victims. In particular, the article considers non-conviction-based confiscation models, their expansion and application conditions, maintaining balance between confiscation of assets and the interests of victims, as well as certain aspects of post-conviction assets tracing and confiscation. In conclusion, the author introduces the concept of modernizing the confiscation system in the Russian Federation, differentiating between evidentiary standards used to determine a person's guilt and to confiscate illegally acquired assets, with reference to foreign experience in using confiscated property to compensate for damage caused by a crime; proposes supplements to the criminal procedure law providing for the application of extended and independent confiscation; identifies possible outlines of the institution to sever "criminal case against assets" from "criminal case against a person" when the latter is referred to the court (in respect of the highly profitable crimes).

Keywords: confiscation, forfeiture, restitution, asset recovery, corruption, drug trafficking, organized crime, victim.

1. Introduction

As decades ago, the international community continues to seek ways to curb acquisitive crime[1], which, despite the efforts of states, successfully adapts to almost any new obstacles and requires constant refinement of approaches. Such challenges are being addressed not only at the interstate level, but also at the national level.

Specifically, the Russian Federation has adopted another National Anti-Corruption Plan, now for the period 2021–2024[2], which contains a separate set of measures implying the improvement of both criminal and criminal procedure measures. In particular, para. 17 (e) of the plan provides for the analysis of the practice of compensation for damage caused by corruption crimes and the development of proposals on the procedure for the allocation of search and seizure of criminal proceeds to a separate proceeding from the main criminal case, including when the main case is referred to court and when it is suspended or terminated on non-exculpatory grounds.

In addition to corruption, the recovery of the proceeds of organised and other profit-driven crimes, including conventional crimes such as drug trafficking[3], remains a pressing issue.

Some gaps in domestic legislation and law enforcement were identified by the Financial Action Task Force (FATF) assessors in their report within the fourth round of mutual evaluations[4]. The shortcomings include a closed list of offences to the proceeds of which confiscation may be applied (para. "a" of part 1 of Art. 104.1 of the Criminal Code of the Russian Federation (hereinafter — the CC RF)), as well as a hands-off approach to using confiscation as a basis for mutual legal assistance in the recovery of assets from foreign jurisdictions.

Against the background of the obvious need for law enforcement agencies to rethink and modernise existing legal mechanisms, it is regrettable that research community has not paid sufficient practical attention to the problems of effectiveness in combating acquisitive crime and improving the rules aimed at depriving criminals of access to criminal proceeds and restoring victims' property rights.

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[1] See, e. g.: Notes by Secretariat of the Open-ended Intergovernmental Working Group on Asset Recovery of the Conference of the States Parties to the United Nations Convention against Corruption CAC/COSP/WG.2/2019/5, CAC/COSP/WG.2/2020/3, CAC/COSP/WG.2/2021/2 and others. Accessed November 6, 2024. https://www.unodc.org/unodc/en/corruption/WG-AssetRecovery/working-group-on-asset-recovery.html.

[2] Decree of the President of the Russian Federation No. 478 "On the National Anti-Corruption Plan for 2021–2024" dated August 16, 2021. Hereinafter all the Russian laws, international treaties and judicial acts are cited from the legal reference system "ConsultantPlus", unless otherwise noted. Accessed November 6, 2024. http://www.consultant.ru.

[3] Suffice it to mention that in criminal cases of drug trafficking confiscation is applied in only 2 % of convictions, and this figure also includes the crime instrumentalities, i. e. the actual number of criminal proceeds confiscation is even lower than the statistics show (see: report on the number of persons prosecuted and types of criminal sanctions, form No. 10.1, sections 1 and 32, row 78. Accessed November 8, 2024. https://vk.com/doc18489852_682697046?hash=9jsch1arbWuZWzJzRNrPKXnE9ptRt2NItl9xMdLSIPo&dl=FxpaWuBqNOl8XfXxYX1p5ZhJ0AEKgwuPCzZ6OBBZFew).

[4] Anti-money laundering and counter-terrorist financing measures. Russian Federation. Mutual Evaluation Report 2019. Accessed November 6, 2024. https://www.fedsfm.ru/content/files/documents/2020/ово%20рф%20rus.pdf?ysclid=ldabbdzs6y246104987.

Meanwhile, it should be noted that procedures for deprivation of illegally acquired (criminal) assets[5] are not the Achilles' heel of the domestic law enforcement alone. Issues of reforming and streamlining confiscation and restitution mechanisms remain a challenge both at the level of individual states and their unions[6].

2. Basic research

2.1. Asset recovery mechanisms in the Russian Federation[7]

2.1.1. Remedies under civil law

At present, the deprivation of criminal profits in Russia is mainly achieved through civil law means: by claiming damages in criminal (Art. 44 of the Criminal Procedure Code of the Russian Federation (hereinafter — the CPC RF)) or civil proceedings, and, in some cases, by claiming restitution based on the rules on the invalidity of transactions (part 2 of Art. 168 in conjunction with Art. 10, Art. 169 and part 1 of Art. 170 of the Civil Code of the Russian Federation)[8], that is when the offender (civil defendant) is given back property against which the judgement for damages can be enforced.

The ideal situation would be for all criminally acquired property to be legally registered as belonging to the offender, but such a modus operandi is not typical of highly profitable crime. This conclusion is supported by the results of a survey of 159 experienced investigators and prosecutors working in the central and regional offices of their agencies. In response to the question "Do you agree that a high profit from criminal activity leads criminals to take more measures to conceal their criminal activities than in cases where the profit from crime is not high?" 78 % (124) of respondents answered in the affirmative.

Consequently, a claim for damages may not (and often does not) result in actual compensation for damages, as the defendant does not have formal legal title to foreclose, and using restitution, where assets are nominally registered in the name of third parties, requires considerable time and effort or is not possible at all (if the parties to the transaction are not the criminal (as the alienator) and an associated nominee (the recipient), but, for example, an independent bona fide person (as the seller) and a nominee (as the purchaser) paying with criminal money).

The shortcomings of civil law remedies could also be pointed out in the context of the transfer of assets abroad, as evidenced by the lack of established practice of their

[5] Hereinafter the terms "assets", "property" and "income" are used as synonyms.

[6] For example, Report from the Commission to the European Parliament and the Council. Asset recovery and confiscation: ensuring that crime does not pay. Brussels, 02.06.2020. COM/2020/2017final. Accessed November 6, 2024. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0217; Confiscation of the proceeds of crime after conviction: a final report. Law Commission No. 410. Accessed November 6, 2024. https://www.lawcom.gov.uk/project/confiscation-under-part-2-of-the-proceeds-of-crime-act-2002.

[7] The category "asset recovery" is used as a generic term for any confiscation mechanisms for criminal or illegally obtained proceeds, as well as for procedures designed to compensate victims.

[8] Rulings of the Plenum of the Supreme Court of the Russian Federation No. 23 "On Judicial Practice of Consideration of Civil Claims in Criminal Cases" dated October 13, 2020 (para. 12); No. 25 "On Application of Certain Provisions of Section I of Part One of the Civil Code of the Russian Federation by courts" dated June 26, 2015 (para. 7–8, 85–86); Ruling of the Presidium of the Supreme Court of the Russian Federation No. 44G-13/2018 dated June 27, 2018 in the case No. 2-1114/2017.

return (Kapinus 2021, 428–443), given the significant financial flows to foreign jurisdictions[9]. In our view, one of the main obstacles to the return of assets from abroad by civil law means, apart from political disagreements, is the lack of existing universal international treaties on mutual recognition and enforcement of state court judgments in civil matters[10] and an insignificant number of bilateral agreements of this type with capital recipient states[11].

Even if the practice of mutual recognition and enforcement of judgements awarding damages become widespread, it appears that civil law mechanisms will not be effective enough to recover assets registered in the name of third parties who were not involved as defendants or as (co-)defendants in a civil claim brought in a criminal case. In such cases, the injured party would be forced to first seek the invalidity of the fictitious ownership before seeking recognition and enforcement of a judgment for damages, which, depending on the category of the property and its owner, may fall within the exclusive jurisdiction of the foreign courts (e. g. in the Russian Federation such would be claims for rights to immovable property) or may not fit within the existing civil law rules.

Attempts to "enforce" judgements determining the fate of property seized abroad (i. e. "to transfer to the victim property belonging to the convicted person and previously seized as compensation for the damage caused"[12]) are currently ineffective in practice.

For example, in one such case, the Prosecutor General's Office of the Russian Federation requested the competent authorities of the Principality of Monaco to transfer to the account of the Federal Bailiff Service more than $ 1 million of previously seized funds held in a bank as compensation for pecuniary damage to the victim.

The Public Prosecution Department of the Principality of Monaco, having accepted the request, referred it to the court to obtain an order for its execution. However, the court refused to issue such an order on the grounds that "Monegasque law does not authorise the criminal jurisdiction that has ordered the confiscation of funds to transfer possession of the seized and confiscated assets to a civil claimant". The court of appeal upheld the ruling of the trial court (Kapinus 2021, 429–430). As can be seen, the procedure introduced by the Russian courts for the enforcement of a judgment granting a claim for damages has not been understood and recognised by the competent authorities of the Principality of Monaco.

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[9] "Director of Rosfinmonitoring told senators about the implementation of the concept of developing a national system to combat money laundering". *Rosfinmonitoring.* 2019. Accessed November 6, 2024. https://www.fedsfm.ru/releases/4270?ysclid=ldbkc1j9he457426581.

[10] The Convention on the Recognition and Enforcement of Foreign Judgements in Civil or Commercial Matters of July 2, 2019 has not entered into force; the Russian Federation signed it on November 17, 2021, but has not ratified it so far. As of January 22, 2023, consent to be bound by the convention has been expressed by the European Union on behalf of its member states and by Ukraine (for them the convention enters into force on November 1, 2023). Accessed November 6, 2024. https://www.hcch.net/en/instruments/conventions/status-table/?cid=137.

[11] At present, bilateral treaties of the Russian Federation containing provisions on the reciprocal recognition and enforcement of judgments in civil matters are in force in relations with about 40 countries (Albania, Algeria, Argentina, Armenia, Azerbaijan, Belarus, Bulgaria, China, Cyprus, Czech Republic, Cuba, Cyprus, Egypt, Estonia, Finland, Greece, Hungary, India, Iran, Iraq, Italy, Kyrgyzstan, Democratic People's Republic of Korea, Latvia, Lithuania, Macedonia, Moldova, Mongolia, Poland, Romania, Slovakia, Slovenia, Spain, Tajikistan, Tunisia, Uzbekistan, Vietnam, Yemen).

[12] The wording is based on the judgements available to the author due to her professional engagement.

Another example[13]. In one of the criminal cases of embezzlement and money laundering investigated by the Investigative Committee of the Russian Federation, funds held in a Singapore bank account were seized. Under Singapore law, the only possible basis for returning the funds to the Russian budget was confiscation. In order to arrive at a resolution that would meet the requirements of Singapore law, the judgment and subsequent judicial acts were repeatedly reviewed. Eventually, it was decided to satisfy the claim for damages, to confiscate the funds deposited in a Singapore bank and to "convert the confiscated funds into compensation for the damage caused to the victim". It was only after this change of wording that the Russian judicial act was registered by the Singapore judicial authorities as a foreign confiscation order.

From a legal perspective, the domestic court made a decision that does not seem to be provided for in the procedural law, whereas the use of confiscated funds to compensate for damages is a common practice in foreign states.

The norm permitting such a procedure may be considered to be part 2 of Art. 104.3 of the CC RF. In the author's opinion, this provision does not meet the criterion of the quality of law, including in view of the fact that its interpretation does not allow to determine without hestitation whether it is addressed to bailiffs or, conversely, to judges, who are required to assess, when passing a judgment, the sufficiency of property for both compensation of victims and confiscation and to determine how the judgment is to be executed, which is not possible in a context where a civil claim is not resolved at the same time as a final procedural decision is adopted[14].

If Art. 104.3 of the CC RF requires that confiscation be applied only after compensation for damages, why are crimes involving damages excluded from Art. 104.1 of the CC RF? Or has the author of the law sought to cover by this norm only criminal cases on several crimes, when some of them give rise to a civil claim, and the other — not, combined in one proceeding? Does the legislator intend that part 1 of Art. 104.3 of the CC RF (which uses the wording "first of all, the question of compensation for damages caused to the legal owner shall be resolved") should apply to cases of civil reparation in accordance with the procedure of Art. 44 of the CPC RF or only to criminal procedural restitution (part 3 (4) of Art. 81 of the CPC RF)?

Irrespective of the answers to these questions, it is of significant importance that Art. 104.3 of the CC RF states verbatim that "when deciding on the confiscation of property… the issue of compensation for damages… shall be resolved first…". With such a construction of the norm, it seems that the judge, when passing the sentence, should decide whether the property found in the defendant's possession is sufficient to satisfy both the civil claims and the confiscation at the same time; if not, the court shall satisfy the claim for compensation for damages, and confiscation shall be applied on a residual basis. In other words, it is proposed that the damage be compensated not from the confiscated property (i. e. the property to which confiscation was applied), but from the property that would have been subject to confiscation if the claims for damages had not been brought and satisfied.

The difference between the approach chosen by the authors of Art. 104.3 of the CC RF and the approach used abroad becomes clearer when getting familiarised with specific norms of foreign legislation (for further details, see: section 2.2.2).

[13] Based on the author's participation in meetings of the Inter-Agency Commission on Combating Money Laundering, Terrorist Financing and Proliferation Financing.

[14] For other arguments on the issue, see: (Skoblikov 2018).

It appears that the civil legal remedies, which are given priority in the issue of depriving criminals of illegally acquired assets and compensating victims in Russia, contain gaps in terms of the desired outcome of legal regulation. As will be shown below, these gaps are not sufficiently filled by the development of criminal and criminal procedural law instruments.

2.1.2. Unexplained wealth orders

But before proceeding to the analysis of legal provisions on the criminal confiscation, we suggest to briefly review the institution of the so-called "civil confiscation" under Art. 17 of the Federal Law "On Monitoring Consistency of Expenses of Individuals Holding Public Positions and of Other Individuals to Their Income" dated December 3, 2012 (hereinafter — Federal Law No. 230-FZ).

The mentioned law provides that certain categories of assets possessed by persons occupying or holding one of the positions referred to in para. 1 of part 1 of Art. 2 of Federal Law No. 230-FZ (hereinafter — public officials) may be subject to confiscation in civil proceedings initiated by prosecutors, when a public official (or his or her spouse or minor child) spends a sum greater than the official's declared income over the most recent three years and no information justifying such expenditures (that the assets are legitimately acquired) is submitted (part 1 of Art. 4 and Art. 17 of Federal Law No. 230-FZ). As can be seen, in order to streamline the process of proving the illegality of the origin of the property in question, the legislator introduced a kind of rebuttable presumption, the use of which is a trend in the transformation of confiscation procedures worldwide (for more details, see: section 2.2.1).

Despite the apparently progressive nature of this mechanism, it is not without a number of drawbacks.

Firstly, apart from the general limitation of the scope of application (anti-corruption), the established procedure applies only to the persons listed in para. 1 of part 1 of Art. 2 of Federal Law No. 230-FZ, while the subjects of corruption offences may include other categories of persons not specified in this law and not included in special lists drawn up at the discretion of individual agencies and organisations (e. g. para. 1 (m) of part 1 of Art. 2 of Federal Law No. 230-FZ). These are positions set up to carry out tasks assigned to federal state bodies. As a rule, only the head of the organisation, his/her deputies and the chief accountant are included in the above list[15].

Secondly, confiscation under Art. 17 of Federal Law No. 230-FZ is carried out through civil proceedings upon a prosecutor's motion, which is submitted to the court following examination of materials on the discrepancy between the expenses of a public official and his or her income. Meanwhile, the most significant materials (in terms of the volume and value of property subsequently confiscated) come from investigative bodies, whose tasks do not include identification of assets for purposes of such civil confiscation (Art. 73, 115 and 160.1 of the CPC RF). This contradiction suggests that the search for and seizure of property of unexplained (unclear) origin can be most effectively carried out by operational-search and investigative means as part of the investigation of a criminal case, which is at present legally determinated by other objectives though[16].

[15] See, e. g.: Order of the Ministry of Energy of Russia No. 837 dated November 12, 2014.

[16] In general, the law enforcement system is primarily focused on bringing a person to criminal re-

Thirdly, the procedure for civil confiscation is not synchronised with the criminal proceedings against the persons concerned; in particular, there is no legal regulation of the relationship between the confiscation procedure under Art. 17 of Federal Law No. 230-FZ and compensation for damages in criminal proceedings (use of confiscated property for the purpose of compensation for damages). As a result, confiscation under Art. 17 of Federal Law No. 230-FZ, when it has taken place prior the adjudication of the civil claim brought in the criminal case, may leave compensation for damages unsecured (usually, in embezzlement cases).

2.1.3. Confiscation under Chapter 15.1 of the Criminal Code of the Russian Federation

The institution of confiscation of criminal proceeds on the basis of a conviction[17] is regulated by Chapter 15.1 of the CC RF, which entered into force in 2006 and currently provides for only two confiscation regimes:

— special or object-based confiscation (Art. 104.1 of the CC RF), which allows for the confiscation of property if it is found to be linked to a specific crime or if it is found that the proceeds of crime have been converted into property to be confiscated;

— confiscation of equivalent value (Art. 104.2 of the CC RF).

However, this institution in the Russian Federation, in our view, is rather fragmented, in particular, both types of conviction-based confiscation can only be applied to a limited list of crimes. It does not include many proceeds-generating crimes, such as those under Art. 159–159.6 (fraud), 160 (embezzlement), 172 (illegal banking), 256 (illegal production (fishing) of aquatic biological resources), 258 (illegal hunting), 198–199 (tax crimes) of the CC RF.

The legitimate question is: on what principle did the legislator choose the crimes for which confiscation is applicable? And if the legislator' selectivity with regard to the crime under Art. 172 of the CC RF, which involves deriving financial gain but does not involve causing damage (i. e. when there is no victim in the criminal case), could be explained by negligence, then there must be other considerations underlying the exclusion of other offences from the confiscatory crimes list.

It appears that in refusing to recognise conventional[18] offences as confiscatory in Russian law, the lawmakers were guided by the protection of the rights of the victims (civil plaintiffs) and (or) the preservation of the relevant property to ensure compensation for the damage caused by the crime. And if the existence of the victim (civil plaintiff) is not in doubt in the case of crimes under Art. 159–160, 198–199 of the CC RF, it is less obvious in the case of environmental crimes, also due to the specificity of the subject and object of

sponsibility (Art. 6 of the CPC RF). The basis of this approach is the desire to isolate criminal actors from society, while the flaw is that convicted criminals are replaced by new ones who retain the criminal funds of their predecessors. This is particularly the case for organised forms of criminal activity.

[17] The confiscation of money, valuables and other property used or intended for the financing of terrorism, extremist activities, an illegal armed formation or criminal organization, as well as of instrumentalities, equipment or other means of commission an offence (para. "c" and "d" of part 1 of Art. 104.1 of the CC RF) is not covered by this article.

[18] Conventional offences are those listed in UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (Art. 5 and 3 (1)), UN Convention against Transnational Organized Crime 2000 (Art. 12 and 2 (1)), UN Convention against Corruption 2003 (Art. 31 and 15–25), Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005 (Art. 3 and appendix).

the crime, as well as the use of special rates and methods of calculating the damage caused to wildlife. Perhaps, the idea of ensuring compensation for damages has also covered the non-inclusion of Art. 172 of the CC RF in para. "a" of part 1 of Art. 104.1 of the CC RF, the wording of which allows that the act criminalised by it may cause damage to citizens, organisations and the state, although in practice such an offence is associated only with the extraction of profits (Gladkikh 2021, 43). It seems that the drafters did not take into account the fact that compensation for damages is more than a one-act model action in which the property of the defendant is transferred to the victim (civil plaintiff).

Although the argument that "stolen property should be returned to the victim and not confiscated" (Iani 2006, 32) (para. 4 of part 3 of Art. 81 of the CPC RF) is not devoid of truth, in practice it is applicable to a limited number of cases, namely, when the stolen object has been preserved in kind and it is possible to individualise and identify it. It is unlikely that the rule of criminal procedure restitution to the victim of a stolen phone could be equally applied to the return of funds stolen from the budget, converted into other property and initially lacking identifying features.

The limited list of offences for which confiscation applies, coupled with the high standard of proof inherent in special confiscation rules, has meant that there has been little practice in its application: each year it is imposed on about 3000 convicted offenders (confiscated instrumentalities and means of commission of a crime are also included in this figure). At the same time, the courts satisfy more than 80 000 civil claims for damages in criminal proceedings alone[19].

Despite the great potential of the institute of confiscation, the available domestic research on the subject is mainly focused on historical aspects as well as theoretical issues of the nature of the institute itself, the expediency of restoring confiscation as an additional form of punishment or maintaining it as another criminal law measure in line with the idea of criminal repression economy[20].

In modern foreign studies, the implementation of the maxim *nullus commodum capere potest de injuria sua propria* ("no one can benefit from his own wrong") is viewed through the prism of confiscatory measures, which have several main purposes (Boucht 2017, 10; Mujanović, Datzer 2020, 11–12; Brun et al. 2020, 211): 1) preventive (a potential offender will refrain from committing a crime if the potential benefit of his criminal behaviour outweighs the risk and inconvenience that such behaviour may entail); 2) restorative (restoring the situation that existed before the crime was committed, i. e. restoring equality in the distribution of wealth in society, depriving criminals of the means to commit future crimes, and eliminating the possibility of their influence on the legitimate economy); 3) compensatory (using of confiscated proceeds to compensate victims).

It seems unfair that there has been no active interest among researchers from Russia in alternative trends in the development of this institution, namely the implementation of new confiscation models and mechanisms by foreign legislators[21]. In this respect, an attempt has been made to highlight current practices in other countries.

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[19] Report on the work of the courts of general jurisdiction regarding consideration of criminal cases at first instance, form No. 1, section 3, row 34; section 7. Accessed November 6, 2024. https://vk.com/doc18489852_682697046?hash=9jsch1arbWuZWzJzRNrPKXnE9ptRt2NItl9xMdLSIPo&dl=FxpaWuBqNOl8XfXxYX1p5ZhJ0AEKgwuPCzZ6OBBZFew.

[20] For an overview of the relevant studies, see: (Bavsun, Nikolayev, Samoylova 2019, 6, 58–63).

[21] Some of the few domestic studies over the past decade that are focused, including in part, on the legal regulation of new mechanisms for confiscation of ill-gotten gains in foreign countries are, e. g. (Lafitskiy 2014; Klyuchnikov 2017; Kayumova 2018; Belyaeva 2020).

2.2. Overview of asset recovery mechanisms: The experience of foreign jurisdictions

2.2.1. Models of confiscation of illegally gained (criminal) proceeds in the law of the European Union and foreign states

In addition to special and equivalent confiscation, foreign jurisdictions use the following non-conviction based confiscation procedures to enforce the "crime does not pay" principle[22] (example of the European Union countries).

Firstly, extended confiscation, which consists of the deprivation of property belonging to a person convicted of a crime which is liable to give rise to economic benefit where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as, for example, that the value of the property is disproportionate to the lawful income of the convicted person, concludes that the property in question is derived from criminal activity (Art. 5 of Directive 2014/42/EU) (implemented in all European Union (hereinafter — the EU) Member States, except Ireland and Greece)[23].

The point of extended confiscation is to tip the scales in favour of the state. The reason for this "forced" alignment is that there is a significant imbalance of evidence in criminal cases involving high-profit crimes: defendants are often in a stronger position to prove their innocence and legal origin of the property in question than the state is to prove guilt and the criminal origin of the assets.

The undoubted advantage of this regime in lowering the standard of proof (shifting the burden of proof to the defence when the prosecution presents prima facie evidence (i. e. evidence that is sufficient in the absence of rebuttal)) as compared to special confiscation, its proven effectiveness and prevalence[24] are likely to lead to its inclusion in the new version of FATF Recommendation 4 as a universally binding standard[25] to be implemented to the extent that is consistent with fundamental principles of domestic law[26].

Secondly, classic non-conviction based confiscation (independent confiscation or confiscation in absentia), which applies in cases where the offender cannot be brought before the court or convicted (due to illness or absconding), where criminal proceedings have been initiated regarding a crime which is liable to give rise to economic benefit and

[22] The mandatory minimum of rules to be incorporated into the national laws of European Union member States is set out in Directive 2014/42/EU of the European Parliament and of the Council of April 3, 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (hereinafter — Directive 2014/42/EU). Accessed November 6, 2024. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0042.

[23] Commission staff working document. Analysis of non-conviction based confiscation measures in the European Union. Brussels, 12.04.2019. SWD(2019) 1050 final. Accessed November 6, 2024. https://db.eurocrim.org/db/en/doc/3205.pdf.

[24] See, e. g.: Revision of the EU rules on asset recovery and confiscation. 2023. Accessed November 6, 2024. https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739373/EPRS_BRI(2023)739373_EN. pdf; "Confiscation of instrumentalities and proceeds of corruption crimes in Eastern Europe and Central Asia". *OECD.* 2018. Accessed November 6, 2024. https://www.oecd.org/corruption/acn/OECD-Confiscation-of-Proceeds-of-Corruption-Crimes-ENG.pdf.

[25] Resolution 1617 of the UN Security Council (adopted by the UN Security Council at its 5244 meeting on July 29, 2005 in New York).

[26] A revised version of Recommendations 4 and 38 is expected to be adopted in October 2023. See: Outcomes FATF Plenary 21–23 June 2023. Accessed November 6, 2024. https://www.fatf-gafi.org/en/publications/Fatfgeneral/outcomes-fatf-plenary-june-2023.html.

such proceedings could have led to a conviction if the suspected or accused person had been able to stand trial (Art. 4 of Directive 2014/42/EU) (primarily relied on in 25 EU Member States, except the United Kingdom, Ireland and Bulgaria)[27]. A similar norm is also already part of the current FATF standards (Recommendation 38), which state that "with regard to requests for cooperation made on the basis of non-conviction based confiscation proceedings, countries… should be able to act on the basis of all such requests, at a minimum in circumstances when a perpetrator is unavailable by reason of death, flight, absence or the perpetrator is unknown".

Alongside with these confiscation models, more than ten EU Member States have some forms of in rem confiscation, where property rather than a person is "prosecuted", and unexplained wealth orders, where a disparity is identified between person's declared income and the assets he actually holds. These models are most commonly used in the United Kingdom, Ireland and Bulgaria.

The development of non-conviction based confiscation in foreign (European) countries makes it possible to balance the complexity of investigating profit-driven crime. It applies where there has been no conviction (independent or in absentia confiscation) or, where there has been a conviction, — to property which is not the proceeds of the specific offence for which the person has been convicted but which has a criminal origin (derived from other criminal conduct) established by prima facie evidence and rebuttable presumptions (extended confiscation). It is important to note the confiscation procedure itself may be governed by both criminal and civil procedure law (e. g. in the United Kingdom, Ireland and Bulgaria).

From the point of view of consistency and regulatory coherence, the confiscation within criminal proceedings appears to be the preferred solution, especially in cases where the property is located abroad, since even within the European Union the obligations of Member States to recognise and enforce decisions to seize and confiscate proceeds of crime apply only to proceedings in criminal matters[28].

Returning to the issue of regulating confiscation regimes, it stands to mention that Art. 6 of Directive 2014/42/EU separately envisages the criteria for applying third party confiscation. Such procedure consists in confiscation of proceeds or other property of corresponding value, which, directly or indirectly, were transferred to third parties by an accused person or a suspect, or which were acquired by third parties from a suspected or accused person, who at least knew or ought to have known (presumption of knowledge) that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer (or acquisition) was carried out free of charge or in exchange for an amount significantly lower than the market value.

Although Russian legislation does not limit the use of confiscation from third parties, the conditions for its application are unclear to law enforcement agencies, which, among

[27] This mechanism is also provided for in para. 1 (c) of Art. 54 of the United Nations Convention against corruption of October 31, 2003). Accessed November 6, 2024. https://www.un.org/ru/documents/decl_conv/conventions/corruption.shtml.

[28] Regulation (EU) 2018/1805 of the European Parliament and of the Council of November 14, 2018 on the mutual recognition of freezing orders and confiscation orders (hereinafter — Regulation (EU) 2018/1805), which has entered into force on December 19, 2020, covers all decisions to seize and confiscate assets (whether conviction-based or not), but only where they are issued within the framework of proceedings in criminal matters, not civil or administrative ones. Accessed November 6, 2024. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32018R1805.

other things, restrains the spread of the respective practice and contributes to the "profitability" of crime. The lack of precise, understandable and predictable rules on the subject makes confiscation, in a sense, "a privilege only for those who have not known how to commit crimes, in whom the criminal will has not become so strong as to allow them to think in advance and prepare a convenient setting for their cause"[29].

Alongside with the above confiscation models, it is mandatory for EU Member States to put in place procedures to enable the identification and tracing of assets subject to confiscation even after a final conviction (Art. 9 of Directive 2014/42/EU).

In this context, the transposition of Directive 2014/42/EU into the specific legal provisions of the EU Member States is of particular interest.

For example, in 2017, the Federal Republic of Germany (hereinafter — Germany) undertook a fundamental reform of its asset recovery legislation the aim of which was not only to simplify the law, but also to "close gaps in confiscation" by, among other things, "expanding the extended confiscation"[30]: it adopted the Criminal Law Confiscation Reform Act[31], which implements all the confiscation regimes provided for in Directive 2014/42/EU and adjusts the provisions on certain aspects relating to evidence and proof, in particular[32].

Firstly, the list of crimes for which extended confiscation may be imposed has been removed from the previous extended confiscation rules. It now applies to all offences and requires only the judge to be convinced of property's unlawful origin (section 73a "Extended confiscation of proceeds of crime from offenders and participants" of the German Criminal Code (hereinafter — the German CC)[33]). "As always, no excessive demands should be placed on the formation of convictions"[34] and "exculpatory statements made by the accused are not to be accepted as irrefutable merely because there is no direct evidence to the contrary"[35]. If, after exhausting all procedural means, the court is unable to determine with certainty whether the proceeds of an offence originate from an accused offence or from another offence — which, however, cannot be substantiated — but it is certain that one or the other is the case, extended confiscation is to be ordered[36]. Moreover, the case law confirmed by the Federal Court of Justice[37] further expands the scope of confiscation and allows for the application of extended confiscation, as well as object- and value-based confiscation, in cases where the proceeds are

[29] From A. Koni's reasoning on the prosecution of criminals in the context of a lack of direct evidence (for more details, see: (Vinberg, Rakhunov 1947)). In author's opinion, his assessments can also be extended to confiscation procedures. The latter, in the case of profit-driven crime, are even more aimed at restoring social justice and preventing new crimes than punishment.

[30] Entwurf eines Gesetzes zur Reform der strafrechtlichen Vermögensabschöpfung. BT-Drucks. 18/9525, 2, 57. Accessed November 6, 2024. https://dserver.bundestag.de/btd/18/095/1809525.pdf.

[31] Gesetz zur Reform der strafrechtlichen Vermögensabschöpfung vom 13.04.2017. Accessed November 6, 2024. https://dejure.org/BGBl/2017/BGBl._I_S._872.

[32] For a more detailed overview of the reform, see: (Burchard 2019; Meißner 2017).

[33] Strafgesetzbuch. 1871. Accessed November 6, 2024. https://www.gesetze-im-internet.de/stgb/index.html.

[34] See, e. g.: BGH, 22.11.1994 — 4 StR 516/94, 9. Accessed November 6, 2024. https://www.hrr-strafrecht.de/hrr/4/94/4-516-94.php.

[35] See, e. g.: BGH, 14.10.2020 — 5 StR 165/20, 7. Accessed November 6, 2024. https://www.hrr-strafrecht.de/hrr/5/20/5-165-20.php.

[36] See, e. g.: BGH, 31.08.2022 — 4 StR 108/22, 4. Accessed November 6, 2024. https://www.hrr-strafrecht.de/hrr/4/22/4-108-22.php.

[37] BGH, 22.03.2023 — 1 StR 335/22. Accessed November 6, 2024. https://openjur.de/u/2473145.html.

derived from one of the offences listed in section 6 (5) of the German CC (including illegal sale of drugs, subsidy fraud, human trafficking, etc.) committed not only in the national territory but also abroad.

Secondly, it has been stipulated that confiscation of property from third parties is possible in both special and extended confiscation cases; the conditions for its application extend and clarify those laid down in Directive 2014/42/EU (section 73b "Confiscation of proceeds of crime from other persons" of the German CC).

Thirdly, a rule has been adopted that property constituting criminal proceeds or its equivalent can be confiscated in all cases where it is not possible to prosecute or convict a specific person for a crime (without specifying such cases) (section 76a (1), (2), (3) "Independent confiscation" of the German CC).

Fourthly, a separate regime has been introduced for confiscating assets seized on suspicion that one of the offences referred to in section 76a (4) of the German CC (e. g. drug trafficking, tax offences, participation in a criminal organisation, money laundering, etc.) has been committed. This model of confiscation combines features of two others: a) extended confiscation (in terms of establishing a list of confiscable objects that are not the proceeds of a specific crime, but have other criminal origin) and b) independent confiscation (in terms of its application in cases where it is not possible to prosecute or convict a specific person). Suspicion of a crime, rather than conviction, is required for the imposition of extended independent confiscation.

In Germany, in order to establish an initial suspicion of a crime, including criminal money laundering, it is sufficient that, according to criminalistic experience (nach kriminalistischer Erfahrung), the offence appears possible on the basis of factual indications[38]. "In practice, therefore, criminal proceedings on suspicion of money laundering are initiated without hesitation when, for example, law enforcement authorities become aware of cash that appears to them to be "suspicious". A small four-figure sum can be enough if the person does not provide a plausible explanation for possessing of the money"[39].

At the request of the prosecuting authorities, such property may be confiscated by the court, applying a special standard of proof. For example, in one such case, a person was transporting € 800 000 in cash from Germany to Turkey, which he duly declared, presented an invoice for a similar amount from a Turkish company and other documents indicating that the money was allegedly payment for the delivery of gold from Turkey. However, the court of appeal did not find this picture convincing, noting in its judgment[40] that "in the age of electronic payment transactions… cash payments — especially in this amount — are already highly suspicious per se and literally bear the stamp of cover-up and concealment of the origin of this money literally on their foreheads". It is questionable why a money courier was hired when a bank transfer would have been faster and safer. The denomination of the cash was also unusual and could not be explained by the person concerned, nor could the relationship between the courier and the client. Besides, the

[38] BVerfG, 08.03.2004 — 2 BvR 27/04, 21. Accessed November 6, 2024. https://www.hrr-strafrecht.de/hrr/bverfg/04/2-bvr-27-04.php; BVerfG, 03.03.2021 — 2 BvR 1746-18, 18. Accessed November 6, 2024. https://www.bverfg.de/e/rk20210303_2bvr174618.html.

[39] Pascal, Johann. 2023. "Selbständige Einziehung § 76a StGB; Beschluss des Landgericht Hamburg vom 07.03.2019, 614 Qs 21/18. 2023". Accessed November 6, 2024. https://www.anwalt.de/rechtstipps/selbstaendige-einziehung-76a-stgb-beschluss-des-landgericht-hamburg-vom-732019-614-qs-2118_156248.html.

[40] LG Hamburg 14. Große Strafkammer, 07.03.2019 — 614 Qs 21/18. Accessed November 6, 2024. https://www.landesrecht-hamburg.de/bsha/document/NJRE001384137.

paying firm was a "shell company" and it was "completely unrealistic" for it to collect such amounts "in such small denominations" in order to service a claim for € 800 000. These considerations were also supported by the fact that the courier had initially refused to say from whom he had received the money.

It appears that extended independent confiscation provides a fair means of neutralising the criminal profits of organised crime where there is little or no judicial prospect of a criminal investigation and prosecution of a particular individual, but the criminal origin of the funds is clear. This procedure makes it possible to confiscate money transferred by money mules as well as slush funds (collective funds) discovered in the course of investigations. It is also important to note that this confiscation procedure is applicable not only to cash but also to real estate[41].

The standard of proof for cases of extended independent confiscation is set out in section 437 of the German Code of Criminal Procedure (hereinafter — the German CPC))[42]. The court may base its conviction that the object was derived from an unlawful act on the gross imbalance between the value of the object and the legitimate income of the person concerned, as well as take into account when reaching its decision: a) the outcome of the investigation into the crime that give rise to the proceedings, b) the circumstances under which the object was found and secured, and c) the person concerned's other personal and economic circumstances.

In line with the jurisprudence, this standard is not only applicable in cases of independent extended confiscation, but "in accordance with the will of the legislator" should be extended to cases of ordinary extended confiscation[43], for which the standard of proof is not separately specified in the law.

Fifthly, the judgement no longer depends on whether the person has assets to be confiscated, the judgement is based solely on the amount of the original proceeds of crime (previously on the amount of assets seized during the investigation). The decision on the disposal of the proceeds of crime from a person's possession has been entirely shifted to the enforcement stage (section 459g of the German CPC). As a result, those assets that are found in a person's possession post-trial (i. e. after a confiscation order has been issued) can be easily returned to the state at a later date, namely after the merits of the case have been considered. To this end, para. 459g (3) of the German CPC allows, inter alia, for search and provisional measures to be taken in respect of assets identified during the enforcement phase. Only section 76b of the German CC sets a time limit for rendering and the enforcement of a confiscation order, separating the possibility of confiscation from the limitation period for criminal prosecution and providing for an independent statute of limitations for extended and in absentia confiscation proceedings of 30 years. Consequently, the expiration of the criminal limitation period does not preclude confiscation.

Experts believe that the reform has led to a more intensive use of confiscation. For example, in the year following the reform (2018) in Schleswig-Holstein, the regional courts ordered confiscation of assets worth € 18 million, of which € 14.5 million was recovered

[41] KG Berlin 4. Strafsenat, 30.09.2020 — 4 Ws 46/20. Accessed November 6, 2024. https://gesetze.berlin.de/bsbe/document/NJRE001438713.

[42] Strafprozeßordnung. 1877. Accessed November 6, 2024. https://www.gesetze-im-internet.de/stpo/index.html.

[43] BGH, 14.10.2020 — 5 StR 165/20, 8. Accessed November 6, 2024. https://www.hrr-strafrecht.de/hrr/5/20/5-165-20.php.

for victims and € 3.4 million for the state, while in 2017 the amount of confiscated assets was almost eight times lower (€ 2.26 million). Similar changes have occurred in other Länder as well (Kaufmann 2019). The positive effect of the reform was tangible, even though confiscation measures in Germany prior to the reform were not limited to conviction-based (special) confiscation. In particular, extended confiscation has existed since 1992 (former section 73d of the German CC), albeit in a reduced form (for a number of offences)[44]. However, it is worth mentioning that in Germany, as in any other country, the amount of confiscated property is heavily influenced by individual major investigations.

In this context, it would not be out of place to put a few words about the understanding of the nature of confiscation by the German courts.

In 2021, the Federal Constitutional Court, when assessing the constitutionality of the retroactive application of the law transposing Directive 2014/42/EU, ruled that confiscation is not an additional punishment (Nebenstrafe) subject to the principle of individual culpability, but a measure sui generis with restitution-like character[45]. In other words, the legislator sought to make the return of property of criminally acquired assets an independent legal consequence alongside the punishment itself. The purpose of confiscation is not to create a hardship, but to remove an advantage which, if retained, might induce the offender to commit further offences. Among other things, the court noted the proximity of confiscation to the civil concept of unjust enrichment due to its quasi-conditional nature[46], although the decision on confiscation of any kind is delegated to the criminal justice system. "In effect, the German legislator tasked criminal justice actors to administer measures (supposedly) akin to private law under the roof of the administration of criminal justice by means of a peculiar melange of civil and criminal procedure" (Burchard 2019, 215), which in fact is nothing out of the ordinary[47]. There are numerous examples of jurisdictions where criminal courts have the ability to make non-punitive decisions, such as civil claims by victims for damages caused by the crime[48], and Russia is no exception.

2.2.2. Interplay between confiscation of illegally gained (criminal) proceeds and compensation for damages caused by crime

Another important aspect of the German law reform, which is also relevant for the Russian Federation, is the protection of victims' rights when deciding on confiscation.

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[44] Bundesverfassungsgericht. 2004. "Erweiterter Verfall mit dem Grundgesetz vereinbar". Accessed November 6, 2024. https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2004/bvg04-046.html#:~:text=Durch%20das%20Gesetz%20zur%20Bekämpfung,StGB%20über%20den%20einfachen%20Verfall.

[45] "Confiscation of criminal proceeds in cases where the underlying criminal acts were already statute-barred before the Reform Act entered into force is compatible with the Basic Law". *Bundesverfassungsgericht*. 2021. Accessed November 6, 2024. https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-020.html.

[46] BVerfG, 10.02.2021 — 2 BvL 8/19, 59-64. Accessed November 6, 2024. http://www.bverfg.de/e/ls20210210_2bvl000819.html.

[47] For more details, see: CAC/COSP/2021/15. Accessed November 6, 2024. https://undocs.org/Home/Mobile?FinalSymbol=CAC%2FCOSP%2F2021%2F15&Language=E&DeviceType=Desktop&LangRequested=False.

[48] Balsamo v. Italy, applications No. 20319/17 и 21414/17, October 8, 2019, § 63.

Under the prior model of victim compensation in the form of "assistance in recovery" (Rückgewinnungshilfe), the civil claims of victims arising from the commission of a crime took precedence, so that criminal confiscation could not be imposed in cases where the victims were entitled to compensation. The reform has completely re-regulated this issue (Meißner 2017, 237).

The former central provision — section 73 (1) and (2) of the German CC — has been revoked. Under the new rules, a court decision on confiscation must be taken even if the victim has a claim. Now the victim can obtain damages pursuant to sections 459g–459k of the German CPC in the course of enforcement proceedings (by filing an application with the public prosecutor (as enforcement authority) within six months after the confiscation order has become final) or under section 111i of the German CPC in insolvency proceedings. The way chosen depends on whether the value of the seized assets covers all claims for damages.

The mentioned Regulation (EU) 2018/1805 (Art. 30), the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Art. 25)[49] and the United Nations Convention against Transnational Organised Crime (Art. 14) also provide guidance on compensation and restitution to victims from confiscated property. The rule on compensation to victims from confiscated assets is also contained in the Proceeds of Crime Act (section 13 (5) and (6) of part 2)[50] of the United Kingdom and in the legislation of other states.

For example, the Crime Victims' Rights Act of 2004 (18 U.S.C.§ 3771)[51] adopted by the United States of America (hereinafter — the U.S.) has been assessed by practitioners to have led to an offensive use of forfeiture[52] legislation as a means of providing victims with compensation for damages, as "forfeiture is a far more powerful tool for locating, restraining, and collecting criminal proceeds (ensuring that they will be available to compensate victims) than restitution" (Levin, Ramachandran 2013, 11). On the one hand, this trend can be explained by the peculiarities of the U. S. restitution regime, which does not contain provisions allowing for the seizure of assets to secure victims' interests, and on the other hand, by the relation-back doctrine, which prevents criminals from escaping forfeiture by transferring assets to nominal holders.

On the face of it, the concurrent application of forfeiture and restitution may result in a double "punishment" for the same crime. In many cases, especially those involving fraud, they are also identical in amounts (Levin, Ramachandran 2013, 11). However, both criminal (21 U.S.C. § 853(i)) and civil (18 U.S.C. § 981 (e)) forfeiture laws provide that forfeited assets are to be used to restore the property rights of victims if they were violated by the crime.

The distribution of forfeited assets to compensate victims is carried out through one of the alternative procedures (if the funds are insufficient to satisfy both forfeiture and restitution orders at the same time): 1) by petitions for mitigation or relief from confisca-

[49] Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. 2005. Accessed November 6, 2024. https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=198.

[50] Proceeds of Crime Act 2002. Accessed November 6, 2024. https://www.legislation.gov.uk/ukpga/2002/29/section/13.

[51] Crime Victims' Rights Act of 2004, 18 U.S.C.§ 3771. Accessed November 6, 2024. https://www.law.cornell.edu/uscode/text/18/3771.

[52] Confiscation is known as forfeiture in the U.S.

tion (remission), or 2) by using forfeited assets to satisfy an outstanding order of criminal restitution (restoration)[53].

Restoration occurs only after an order of restitution and an order of forfeiture have been issued. Under this mechanism, within 30 days of entry of the restitution order, the U.S. Attorney's Office forwards a request to the Asset Forfeiture and Money Laundering Section of the Criminal Division of the U.S. Department of Justice, to use the forfeited funds to pay restitution to the victim of a crime. Once the request is approved, the net proceeds of the forfeiture are transferred directly to the Clerk of the Court for distribution in accordance with the restitution order.

It appears that in the jurisdictions reviewed, confiscation (forfeiture) is not a barrier to restitution (compensation for damages), but rather a facilitating mechanism that helps to ease the burden on the aggrieved party to obtain actual enforcement of judgments in the satisfied civil claims.

3. Conclusions

The analysis of foreign legal trends in the establishment of mechanisms to reduce the profitability of crime allows us to identify several scenarios to which the law enforcement and criminal justice system adapts as a result of their implementation. These include situations where: 1) it is not feasible to pinpoint the origin of the property from a specific crime under investigation, 2) it is impossible to hold a specific person criminally liable, and where 3) the property is transferred to formal (nominal) owners.

As it is shown in the first part of the article, unfortunately, the system of legal remedies in Russia (civil and criminal) does not allow solving similar problems efficiently enough, and the chosen algorithm of prioritising the rights of victims works, as a rule, only in an ideal situation — when the offender (defendant) possesses sufficient property to compensate for damages (and even better — when he possesses the stolen property in its original form). In cases where the defendant's property has been transferred to third parties (nominal holders), as well as in situations requiring recognition and enforcement of a judgment abroad, the current procedure is not so favourable to victims. It is important to note that the introduction of new confiscation models is not, as one might assume, a matter of implementing standards imposed from above (by international or supranational organisations, which, in fact, develop standards collegially and therefore take into account the differences in legal systems), but, in our view, it is a matter of adapting the law and the state's response to the changing social environment, a matter of "filling the gaps". In this sense, confiscation is a more effective deterrent to high-profit crime than traditional criminal sanctions such as imprisonment, because it hits criminals where it hurts most. The lack of a symmetric response by the state to the challenges of crime and the scarcity of legal mechanisms that fit the times can pose a threat to national security and have a negative impact on public welfare and the development of fair competition.

In this regard, and taking into account the results of the research, it is possible to schematically identify a number of directions for improving the Russian legislation on confiscation.

[53] Department of Justice. Returning Forfeited Assets to Crime Victims: An Overview of Remission and Restoration. Asset Forfeiture Program. Accessed November 6, 2024. https://www.justice.gov/usao-ks/file/629026/download.

Firstly, to consider the introduction of extended confiscation. It is suggested that the relevant standards (which appear to be contained in Chapter 15.1 of the CC RF) should provide that:

— property other than that specified in Art. 104.1 of the CC RF shall be subject to confiscation in cases where a person is convicted of any of the crimes listed in the draft article and the court is satisfied that it is of other criminal origin;

— a list of the crimes for which conviction shall entail extended confiscation[54];

— conditions for application of confiscation: 1) if the value of the property owned by the convicted person within three years (or any other period) prior to the commission of the crime and thereafter prior to the conviction, is disproportionate to his or her legitimate income; 2) including if the property is transferred to another person (an individual or an organisation) who is a close relative (kinship) of the convicted person or is related to him or her by property, corporate or other close ties[55]; 3) if the specified persons are unable to confirm the lawful origin of such property.

Secondly, to supplement criminal procedure legislation with provisions on independent confiscation, i. e. confiscation under Art. 104.1, 104.2 of the CC RF (including from third parties), where:

— the criminal case or criminal prosecution is terminated due to expiry of the statute of limitations or death of the accused (para. 3 and 4 of part 1 of Art. 24 of the CPC RF) or due to an amnesty (para. 3 of part 1 of Art. 27 of the CPC RF);

— the accused has absconded or there are other reasons preventing him or her from standing trial for more than one year[56];

— the person to be charged has not been identified within a year after the initiation of criminal proceedings.

In other words, if it is found that it is impossible to hold a particular person criminally liable, i. e. in the above-mentioned cases of termination of criminal proceedings (prosecution) or suspension of preliminary investigation, property that is the direct proceeds of the offence or its equivalent may be confiscated, i. e. confiscation is applied in cases where the event of the crime (objective side of the crime, actus reus) has been established, but there is no subject (no person).

It is important to recall that the application of confiscation in absentia is currently only possible where a criminal proceeding (prosecution) has been terminated by the court (not by the investigating officer) on non-exculpatory grounds (i. e. the criminal case has been completed and referred to the court for consideration on the merits, but the grounds for termination arose during the trial)[57].

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[54] The list of such offences could be either open-ended or, as part of the risk-based approach, limited, for example, to groups of crimes that pose the greatest threat to the national AML/CFT system (see: "National Money Laundering Risk Assessment. Public Report". *Rosfinmonitoring.* 2022, 12–17. Accessed November 6, 2024. https://fedsfm.ru/content/files/отчеты%20нор/нор-од-2022-6.pdf).

[55] The chosen wording is largely based on the definition of personal interest given in Art. 10 "Conflict of interest" of Federal Law No. 273-FZ "On Countering Corruption" dated December 25, 2008. In the author's opinion, partial borrowing of terminology already used in the current legislation will both contribute to the unification of legal norms and simplify law enforcement.

[56] The purpose of setting a time limit is intended to increase safeguards to protect the rights of persons concerned.

[57] Ruling of the Plenum of the Supreme Court of the Russian Federation No. 17 "On Certain Issues Related to the Application of Confiscation in Criminal Proceedings" dated June 14, 2018 (para. 13).

Thirdly, to consider the introduction of extended independent confiscation for specific offences. This could include crimes that pose the greatest threat to the national AML/CFT system[58].

Given the legal difficulties in prosecuting money laundering (Shatailyuk 2021), the possibility of confiscating the economic benefits derived from such crimes could be a viable alternative to criminal prosecution.

The experience of the German legislator (section 437 of the German CPC) seems to have been successful in establishing the rules of evidence for this category of matters.

Fourthly, to eliminate the fragmentation of object-based confiscation by extending para. "a" of part 1 of Art. 104.1 of the CC RF to all offences involving the proceeds of crime and not just a limited list thereof.

Fifthly, to improve the quality of law in terms of specifying the conditions for the application of third-party confiscation. This objective could be achieved by supplementing Chapter 15.1 of the CC RF with the norm that Art. 104.1, 104.2 of the CC RF, the articles on extended and independent confiscation, also apply to property owned by non-bona fide third party which includes: a) property under the effective control[59] of any person specified in Art. 33 of the CC RF and owned by a close relative (kinship) of the indicated person or is related to him or her by property, corporate or other close ties; b) property that was gifted or transferred to the third party (a person other than specified in Art. 33 of the CC RF) for an amount significantly outside of market value.

Sixthly, in view of the suggested extension of the grounds for confiscation (and the extension of confiscation measures to crimes with victims), to lay down the possibility and rules for using confiscated property (proceeds from its sale) to compensate victims, and, in this regard, to repeal Art. 104.3 of the CC RF in its current wording.

Seventhly, to establish an independent (longer) limitation period within which the confiscation can be applied (e. g., within 20 years of the completion of the criminal activity), as opposed to the statute of limitations for criminal prosecution.

Eighthly, the introduction also noted an action included in the National Anti-Corruption Plan for 2021–2024 to develop a procedure to continue investigation against the assets belonging to a person after the criminal case against his or her has been referred to a court.

To this end, consideration could be given to supplementing the CPC RF with Art. 154.1, which will specify the procedure and grounds to sever a criminal case where there are sufficient grounds to believe that property subject to confiscation (property from which damages may be recovered) exists and where the alleged criminal proceeds exceed a certain threshold defined by law (e. g., the threshold of large scale money laundering under Art. 174 and 174.1 of the CC RF — ₽ 6 million)[60] but the relevant assets have not been identified by the time the preliminary investigation is completed.

Do these circumstances indicate the elements of money laundering, the investigation of which could be such an "investigation against assets"? In our view, there is no unam-

[58] See: "National Money Laundering Risk Assessment. Public Report". *Rosfinmonitoring*. 2022, 12–17.

[59] Effective control means the right to give binding instructions on the use and disposal of property, as well as the ability to otherwise determine its fate, including entering into transactions with it and determining their terms.

[60] The introduction of a threshold would optimise the work of law enforcement agencies in terms of cost-effectiveness (benefit-cost analysis). For more details, see: (Cohen 2000).

biguous answer, as the category of "indications of the elements of a crime" is itself quite evaluative.

This is in line with the results of a survey of 159 investigators and prosecutors, who were asked: "In your opinion, if a person has committed an offence involving proceeds (anything from fraud and bribery to drug trafficking and organising prostitution), is the absence of property in his/her formal ownership sufficient to initiate a criminal case for money laundering? Even if the proceeds (money or other property) have not been found at the end of the preliminary investigation into the predicate offence?" Those surveyed were split as follows:

— 35,2 % (56): "No, the described circumstances alone are not sufficient to initiate a criminal case under Art. 174, 174.1 of the CC RF";

— 23,3 % (37): "Yes, under the circumstances described, a criminal case may be initiated under Art. 174, 174.1 of the CC RF";

— 17 % (27): "Yes, under the circumstances described, a criminal case should be initiated under Art. 174, 174.1 of the CC RF";

— 12,6 % (20): "Difficult to answer";

— 7,5 % (12): "Yes, under the circumstances described, a criminal case may be initiated under Art. 174, 174.1 of the CC RF, if the expected proceeds (damage caused) exceed a certain significant threshold";

— 4,4 % (7): "Yes, under the circumstances described, a criminal case should be initiated under Art. 174, 174.1 of the CC RF, if the expected proceeds (damage caused) exceed a certain significant threshold".

As can be seen, the largest and yet relatively equal number of respondents hold views that are diametrically opposed to each other.

In this respect, we suggest that the above circumstances be considered as indicating money laundering de jure, even if de facto a particular investigator (prosecutor, head of the investigative body or procedural control officer) could assess them differently.

Consequently, in the situation under consideration, the severance of a criminal case into a separate proceeding shall be accompanied by the initiation of a criminal case under Art. 174, 174.1 of the CC RF, reflected in the same decision (part 3 of Art. 154 of the CPC RF), if the relevant decision (the decision to initiate a criminal case under Art. 174, 174.1 of the CC RF) is not contained in the severed case file.

Investigation of such a criminal case may result in: 1) prosecution and conviction of certain persons under Art. 174, 174.1 of the CC RF with confiscation of the identified property; 2) termination of the criminal case (criminal prosecution) under Art. 174, 174.1 of the CC RF with confiscation of the identified property or without confiscation, if the property is not identified and (or) the statute of limitations for confiscation has expired.

The introduction of such a rule would make it possible to separate, where appropriate, the procedures for criminal prosecution of individuals and for restoring the property rights of the state and private persons (para. 17(e) of the National Anti-Corruption Plan for 2021–2024), which would not only reduce the term of investigation of the main criminal case, but also significantly mitigate, if not eliminate, the risks of preliminary investigation agencies avoiding to "follow the money", motivated by a desire to shorten the length of investigation and increase the number of criminal cases referred to the court and prosecutor.

It seems that such a procedural mechanism could serve as an analogue to foreign procedures for the detection, tracing and confiscation of assets after a final conviction for a crime. In Germany, for example, the power to enforce decisions rendered in criminal proceedings is vested in the prosecutor's office[61], which is also the authority that conducts the preliminary investigation, either directly or by coordinating the police (section 160 of the German CPC). In other words, the same authority is responsible for the entire course of a criminal case — from the initiation of the investigation to the actual enforcement of final judgements. Such an organisational arrangement is likely to solve the problem of detachment of investigative and enforcement bodies from each other and to avoid undue shifting of responsibility.

Who should be empowered to conduct the investigations proposed by Art. 154.1 of the CPC RF (investigators, prosecutors, bailiffs or officers of a new separate agency) is a decision that requires consideration of both political and financial factors. Despite the narrower subject matter of this article, we believe it is possible to express the opinion that it would be most expedient to retain the competence to conduct the relevant investigations with the same investigative body that investigated the criminal case from which the case was severed in accordance with Art. 154.1 of the CPC RF. In our view, such a solution would not require a significant institutional restructuring and redistribution of powers between agencies, which usually entails budgetary and staffing difficulties.

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