The Fight Against Corruption and Money Laundering: The Office of the Asset Recovery and Management[1]

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The art.367 septies, was added to the Criminal Procedure Law (LECrim in Spanish) through Final Disposition 1º number three of the Organic Law 5/2010, of 22 June, which modified the Organic Law 10/1995, of 23 November of the Criminal Code. Thus, for the first time, the creation of an Office dedicated to Asset Recovery (OAR).

Although considered necessary, this legislative amendment was never implemented in practice and its functions were assumed in part by the Center for Intelligence against Terrorism and Organized Crime (CITOC) and the National Plan on Drugs (Act 17/2003 of 29 May). Furthermore, since it was designed solely to carry out asset tracing tasks and not to manage them, the judicial bodies lacked the necessary assistance to be able to administer and perform the effects seized and confiscated. As a result, they were faced with the task of managing assets that had previously been seized and confiscated for which they lacked the necessary material and human resources.

However, the need to comply with Directive 2014/42/EU of the Parliament and Council of 3 April 2014 on the freezing and confiscation of instrumentalities and the proceeds of crime in the European Union and, as a result, to improve the effectiveness of the system of asset recovery and management, led to the amendment of Organic Law 1/2015 of 30 March, which amended Organic Law 10/1995, by means of the fifth Additional Provision of the LECrim (introduced by Law 41/2015, of 5 October, amending the Criminal Procedure Act to speed up criminal justice and strengthen procedural guarantees) the content of art.367 septies of the LECrim, in the sense of completing its initial function of locating and recovering assets with that of administering and managing them, made clear by renaming the initial OAR (Office of Asset Recovery) into the current OARM: Office of Asset Recovery and Management.

Keywords: corruption, money laundering, assets, OAR, OARM

INTRODUCTION

Criminal phenomena of an international nature have led to the need to combat organized crime through the further transformation of our legal system. This requires the adoption of a set of measures aimed at creating a specialized organizational structure not only in the area of confiscation (both in its substantive and procedural regulation), but also in the recovery and management of assets derived from the commission of illicit activities. This is what RODRÍGUEZ GARCÍA[2] calls an *institutional brick*, i.e. a legal reality in which a central administrative body for judicial assistance, such as the Office of Asset Recovery and

Management (hereinafter OARM), responds to the need to recover and manage each and every one of the different judicial effects that are intervened by the judicial bodies, with the aim of being able to assist the rest of the judicial bodies in concentrating all their efforts, materialized in the form of human and material resources, in the development of the appropriate criminal investigation.

In addition to the imposition of the penalty for the commission of the relevant criminal offence, the deprivation of the proceeds of its commission is also important. The aim is to ensure that the profits generated by the commission of criminal activities cannot be used or exploited by the perpetrator, thus trying to avoid that the commission of the punishable act results in a profit for the offender. The main success associated with this change of direction in criminal policy is the possibility of converting the punishable act committed by the offender into a benefit not for the offender but for the victims themselves and, at the same time, for society as a whole[3].

All this is possible through the content of Chapter V "*Mechanisms for the rendering of accounts*" of Royal Decree 948/2015, of 23 October, which regulates the Office for the Recovery and Management of Assets. And more specifically, through the content of its arts. 17 and 18, which emphasize the need and express desire of the Spanish legislator for the actions of the OARM to be transparent, giving citizens maximum publicity about the results of its activities and the use made of the funds collected.

REGULATORY BACKGROUND

The OARM constitutes the more than evident result of the need within the international and state normative environment for the creation of an institutional structure equipped with the necessary human and material resources to be able to implement an effective system capable of managing the assets of criminal origin previously seized and confiscated.

The OARM therefore arises within the framework of the fight against criminal organizations under the principle that the crime does not benefit the offender and with the primary objective, as indicated by JIMÉNEZ-VILLAREJO FERNÁNDEZ[4], of responding to the demands or needs to articulate an instrumental body, centralized and specialized that has judicial police functions and that in proceedings and investigations related to organized crime, assists the Prosecutor's Offices and judicial bodies in locating assets (in a first phase), as well as in the administration and management of assets previously seized during the course of those same judicial proceedings related to the commission of illegal activities within a criminal organization (in a second phase); as well as in the final execution of the same.

At the Community level (European Union), the origin of the OARM is to be found in Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between asset recovery offices of the Member States in the field of tracing and identification of crime-related proceeds or other property. This standard was preceded by the CARIN NETWORK (Camden Assets Recovery Inter-Agency Network) formed in 2004 by law enforcement and judicial experts in the field of confiscation and recovery of assets from different countries in Europe: Austria, Belgium, Germany, Ireland, the Netherlands and the United Kingdom[5].

With regard to the national sphere, we must point out that the incorporation into our legal system of the regulations relating to the destruction and early realization of judicial effects took place through the approval of Law 18/2006, of 5 June, for the effectiveness in the European Union of the resolutions on seizure and securing of evidence in criminal proceedings -(with this law the Council Framework Decision 2003/577/JHA, of 22 July 2003 was also incorporated into our legal system, on the execution in the European Union of orders for the preventive seizure of property and the securing of evidence), later repealed by Law 23/2014, of 20 November, on the mutual recognition of criminal decisions in the European Union- and of document CRIMORG 42, 7811/2009, in which the Counsellor for Home Affairs of the Permanent Representation of Spain to the European Union communicated to the Secretary General of the Council of the European Union the designation of two Offices for the Recovery of Assets: The Center for Intelligence against Terrorism and Organized Crime -(CITOC) as the Office for Police Asset Recovery-, and the Special Anti-Drugs Prosecutor's Office (as the Office for Judicial Asset Recovery). At present, while CITOC remains the point of contact, OARM does so through the exercise of certain information functions regarding

the identification and search for assets, thus replacing the Special Anti-Drug Prosecutor's Office as the judicial point of contact.

Subsequently, Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the seizure and confiscation of instrumentalities and the proceeds of crime within the European Union went a step further by taking up through the content of its art.10 not only the issue of asset tracking and recovery, but also the essential function relating to the proper administration of property that has been seized and confiscated in order to prevent the loss of its economic value.

All these precedents lead us to the current situation of the OARM, which is regulated through the provisions of art.367 septies LECrim (in the wording given by the Organic Law 1/2015, of 30 March, which modifies the Organic Law 10/1995, of 23 November of the Criminal Code), which in turn must be completed with the provisions of the fifth Additional Provision of the LECrim (introduced by Law 41/2015, 5 October, of amendment of the Criminal Procedure Act to speed up criminal justice and strengthen procedural guarantees) and with the implementing regulation contained in Royal Decree 948/2015 of 23 October, which regulates the Office of Asset Recovery and Management[6].

As we pointed out, the definitive constitution of the OARM took place through the development of Royal Decree 948/2015 of 23 October, which regulates the Office of Asset Recovery and Management, whose main objective is to provide the competent judicial authorities with an effective system to locate and manage assets of criminal origin with the support of the institutional structure and the financial and human resources necessary to do so, thus facilitating the work of seizing and confiscating property within the framework of criminal proceedings. In this way, due prominence is given to asset investigation and confiscation in the fight against the economic side of crime carried out by criminal organizations and networks, thus achieving their financial strangulation[7].

NATURE, ORGANIZATIONAL STRUCTURE, FUNCTIONS, PURPOSES AND MANAGEMENT OF RESOURCES

Nature of the OARM

The administrative nature of the OARM is accredited in accordance with the definition given by the legislator themselves, who, by means of the first section of the Sixth Additional Provision of the Law of Criminal Procedure, conceives the OARM as "*the administrative body to which the functions of locating, recovering, conserving, administering and carrying out effects arising from criminal activities in the terms provided for in criminal and procedural legislation correspond*". This idea is supported by the content of art.1 of Royal Decree 948/2015, of 23 October, which regulates the OARM, establishing that the latter "*is configured as an organ of the General State Administration and auxiliary to the Administration of Justice*", and the position of the General Council of the Judiciary, which advocates that the OARM should depend organically on the Ministry of Justice but functionally act under the judicial authority for the sake of greater rationality and efficiency.

Organizational Structure and Functions of the OARM

The commitment to the creation of the OARM not as an entity of a public nature but as a central state administrative body with powers at the national level, coupled with the regulatory revolution since its creation (LO 5/2010 of 22 June, amending the Organic Law 10/1995 of 23 November on the Criminal Code) and until its implementation through the Order JUS/188/2016, has led to an expansion of its functions: to the initial one of locating and recovering assets from criminal activities was added that of the conservation, administration and realization of the seized, embargoed and confiscated property, respectively.

All these main functions are concentrated in a single administrative body of a state and centralized nature as is the OARM -which is given the rank of General Directorate and is attached to the Ministry of Justice with the Secretary of State for Justice (art.4 Royal Decree 948/2015)-. As a result, in order to achieve a more efficient, coordinated and unitary operation of the same, its structure is made up of two general sub-directorates (the general sub-directorate of location and recovery of goods, and the general sub-directorate

of conservation, administration and realization of goods) in charge of assuming in a differentiated way the competences mentioned above: location, recovery, conservation, administration and realization of the effects, goods, instruments and earnings coming from the commission of activities of illicit origin (art.1 of Royal Decree 948/2015). To these functions, in generic terms, of recovery and management of assets derived from the commission of illicit activities, it would be necessary to add other additional functions set out in paragraphs 2 and 3 of art.3 of Royal Decree 948/2015[8], respectively:

1. The adjudication of the use of the effects seized preemptively and on the conservation measures to be adopted.
2. Technical advice to courts, tribunals and public prosecutor's offices that request it in matters of execution of seizures and confiscations, in order to avoid uneconomic actions and guarantee within the fulfillment of all procedural guarantees the maximum economic benefit.

The functions of both subdirectorates are a priori independent of each other, but they may or may not be successive to one another, depending on the assignment. Thus, the competent judicial body or the public prosecutor's office may entrust the OARM exclusively with one of these two functions, or request it initially to locate and recover assets, and at a later date to urge the OARM itself to also assume the management of the located and recovered assets. As these functions are very different from one another, these two general subdirectorates have completely different profiles and competences, as set out in art.6 of Royal Decree 948/2015[9]. These can be summarized as follows:

a) General Subdirectorate for the Location and Recovery of Goods. It acts in coordination with the Ministry of the Interior (Judicial Police and CITOC) as well as with the Tax Agency and may seek the collaboration of any public and private entities it deems appropriate.
b) General Subdirectorate of Conservation, Administration and Realization of Goods.
c) In addition to the two general subdirectorates that make up OARM, we would also like to highlight the Commission for the Allocation of Proceeds of Crime. This is a collegiate body organically attached to the Ministry of Justice through the Secretary of Justice, which is responsible for distributing the economic resources previously obtained by the OARM (art.8 of and as professional collaboration as a general).

In accordance with the transversal and multidisciplinary nature of the OARM, the personnel who carry out their functions in it come from different bodies of officials. Article 5 of Royal Decree 948/2015 stipulates that the Director General of the OARM must be appointed from among career civil servants of the State, the Autonomous Communities or the Local Entities belonging to Group A1, or from among members of the Judiciary, the Public Prosecutor's Office or the Legal Service of the Justice Administration. In any case, their appointment will take place through the appropriate Royal Decree of the Council of Ministers at the proposal of the Ministry of Justice. In general, their functions will consist of planning, representation, direction and coordination of the OARM.

With regard to the rest of the personnel who also carry out their functions within the OARM, it is important to highlight their multidisciplinary nature as they come from different positions in the Administration of Justice (in accordance with arts.25 of Law 38/1988, of 28 December, on demarcation and judicial plant) or from the State Security Forces and Corps (in accordance with articles 6.1.a) and 2 of Royal Decree 948/2015) under the temporary assignment of functions of personnel collaborating in the location and recovery of assets.

However, bearing in mind the multiplicity, heterogeneity and complexity of the assets involved in these tracing and management processes (assets derived from the commission of illegal activities), in many cases, in order to carry out these tasks, it is necessary to have a set of specific technical skills that cannot be dealt with exclusively by the staff of the OARM, which means that it is necessary to use, through collaboration agreements, professionals from outside the Justice Administration who have the necessary skills to carry out these tasks. This type of professional collaboration is obligatory, as it is designed, in accordance with the second paragraph of the first section of the Sixth Additional Provision of the LECrim, as professional collaboration with the rank of Law; as professional collaboration with the rank of regulation in art.6.1.a) of Royal Decree 948/2015[10]; and as professional collaboration as a general principle of administrative action in art.3.1k) of Law 40/2015, of 1 October, on the legal regime of the public sector[11].

Purposes of the OARM

The destination given to the different goods that come from the commission of illicit activities obtained by the OARM is regulated through the content of art.2 of Royal Decree 948/2015, which in accordance with its content ("*the products of the management and realization of the effects, goods, instruments and profits of the crime will be applied to the purposes foreseen in the LECrim establishing some priority objectives*") refers us to the third section of the Sixth Additional Provision of the LECrim. Thus, in accordance with the content of the latter, we affirm that the purposes given by the OARM to the property derived from the commission of criminal acts are:

a) Support for crime victim care programs. Including the promotion and equipping of Victims Assistance Offices.
b) Support for social programs aimed at crime prevention and treatment of offenders.
c) Intensifying and improving actions for the prevention, investigation, prosecution and punishment of crime.
d) International cooperation in the fight against serious forms of crime.
e) Other purposes to be determined in the light of time and circumstances, such as the office's own operating and management costs.

Management of Resources by the OARM

The second section of the Fifth Additional Provision of the LECrim distinguishes, with regard to the management of resources, between the assignment made to the OARM at a time prior to that at which the final judicial order of confiscation is issued and the assignment made to the OARM at a time subsequent to that at which the final judicial order of confiscation is issued.

In the first of the above cases -the assignment to the OARM prior to the final judicial confiscation order- the resources are managed through the deposit and judicial consignment account -provided that the money is the result of seizure or the early realization of the effects[12] (for the remaining assets, the OARM may manage them in any of the ways provided for in the legislation applicable to public administrations)-; in the second of the above cases -the assignment to the OARM after the final judicial decision on confiscation has been taken- the resources obtained are to be realized, and the amount obtained from this will be applied in accordance with the provisions of art.376 quinquies LECrim (art.13.2 Royal Decree 948/2015).

Regardless of the differences and nuances between the two cases, the legislator establishes the need to give priority to addressing the costs arising from the operation and management of the OARM (third section of the Fifth Additional Provision of the Law on Criminal Procedure). In accordance with Article 14.1 of Royal Decree 948/2015, the OARM can only assume the costs and expenses corresponding to the assets it manages from the moment they are entrusted to it.

THE OARM AS AN ESSENTIAL TOOL FOR THE ACHIEVEMENT OF LEGAL EFFECTS

The legal reform promoted through the approval of OL 1/2015, of 30 March, which managed to modify Organic Law 10/1995, of 23 November, of the Criminal Code, attributed to the OARM the performance of each and every one of the different activities that integrate its function of recovery and management of assets.

Consequently, as a result of the proposed legal reform, the OARM acquired a central role in the procedure for carrying out judicial effects, clearly demonstrated by the fact that with respect to the assignment for the location, conservation and administration of effects, goods, instruments and profits from the development of criminal activities committed by criminal organizations, the new version of Article 367 septies LECrim foresees the possibility of assigning its development to the OARM itself at the request of the Judge, Prosecutor or Court that is hearing the matter or on the OARM's own initiative, provided that one of the cases described in art.367 quater 1º LECrim occurs[13].

All of this, without forgetting that, as a result of the various legislative reforms that have taken place in recent times, the OARM has a strong presence in the procedure for determining the destination of the

product derived from the realization of the judicial effects of the commission of activities of illicit origin by criminal organizations, and consequently it can be the recipient of all or part of the same (art.367 quinquies.3 LECrim). And, since they are in total or partial possession of the same, to proceed, in consequence, to authorize their provisional use as long as any of the cases contained in art.367 sexies.1 LECrim[14] exist; the measure is adopted by the competent judge ex officio, at the request of the Public Ministry or at the initiative of the OARM; the interested procedural party is given a prior hearing; and furthermore, that none of the circumstances provided for in art.367 quater.2 LECrim[15] exist (art.367 sexies.2 LECrim)[16].

In the same sense, since the OARM is in possession of all or part of the judicial effects resulting from the commission of illicit acts, it may also decide on the capacity to adopt the measures necessary to guarantee their correct conservation (art. 367 sexies 3 LECrim). The only obligation imposed on it to carry out this task is to inform the court and the Public Prosecutor competent to hear the case.

Hence, the need to emphasize the special importance of the correct preparation of an inventory capable of gathering each and every one of the different goods/assets originating from the commission of illicit activities that have previously been seized and confiscated, as well as the registration of any other action and/or activity that has been carried out in relation to them. This information shall be available to the judicial and fiscal authorities and, where appropriate, to the judicial police[17].

CONCLUSIONS

Following the above, we openly acknowledge the centrality of the Office of Asset Recovery and Management in the realization of goods/assets arising from the perpetration of activities of illicit origin. As we have already pointed out, the OARM has the capacity not only to request from the competent judge the realization of the judicial effects obtained from the practice of activities prosecuted and sanctioned by the Law, but also to request from the same Judge (competent to hear the case) the authorization to provisionally use those same judicial effects, as well as to be present in the procedure in charge of determining the destination of the product obtained through its realization. And all this without forgetting that it is up to the OARM to decide on the award of the use of the precautionary confiscated effects and on the conservation measures to be adopted.

As GARRIDO CARRILLO[18] states, the OARM has a unique status, capacities and potential that it must develop in a judicial procedure, so we must pay special attention to how this office carries out its work (remember that it is an administrative body dependent on the State whose legitimacy derives from the law and which participates in the process together with the Public Prosecutor's Office and the parties in the enforcement of the legal effects arising from the commission of illegal activities). There is therefore no doubt that the action of the OARM interferes with criminal proceedings in progress, its action having an impact on the rights and guarantees of the affected party as the owner of the property or effect being sought to be realized, without the existence of any judicial control mechanism responsible for supervising its action.

Consequently, we can conclude by stating categorically that the OARM assumes a position of singular relevance that directly interferes with the balance of guarantees and rights in the criminal jurisdictional process, which should not and cannot be distorted without it appearing to be the best option to articulate the legitimacy, powers and possibilities of the OARM through regulatory means.

ENDNOTES

1. This research work is part of the research project "Enfoque normativo, operativo y judicial en la recuperación y gestión de activos derivados del crimen organizado (Regulatory, operational and judicial approach to the recovery and management of assets derived from organized crime)" (PPJIB2019-08), financed by the Plan Propio de Investigación de la Universidad de Granada and whose IP is Rubén López Picó; and the research project I+D+i "La lucha contra la delincuencia organizada. Enfoques normativo, operativo y judicial en la recuperación y gestión de activos derivados del crimen (The fight against organized crime. Regulatory,

operational and judicial approaches to the recovery and management of assets derived from crime). LUCDELOR" (A-SEJ-054-UGR18), financed by the ERDF Operational Programme (2014-2020) of the Andalusian Government and whose IP is Francisco Javier Garrido Carrillo.

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11. JAÉN VALLEJO, M. y PERRINO PÉREZ, A.L. *La recuperación de activos frente a la corrupción* (Asset recovery in the face of corruption). La oficina de recuperación y gestión de activos (The Office for Asset Recovery and Management), Madrid, Ed. Dykinson, 2016.
12. In this same case, the interests from the money, the profits and the fruits of the goods are destined to satisfy the management costs (including those corresponding to the OARM), but the remaining amount is kept as a result of what is disposed by a final judicial resolution of confiscation (art.13.1 Royal Decree 948/2015).
13. *"a) When they are perishable; b) When their owner expressly abandons them; c) When the costs of conservation and deposit are higher than the value of the object itself; d) When their conversion may be dangerous for public health or safety, or may result in a significant decrease in their value, or may seriously affect their normal use and operation; e) When the effects, without suffering material deterioration, depreciate substantially over time; f) When, duly required, the owner of the destination of the judicial effect, does not manifest".*
14. *"a) When their owner expressly abandons them; b) When, duly requested, the owner of the destination of the legal effect, does not manifest, and the use of the effects allows the administration to take advantage of their value better than with the anticipated realization, or the anticipated realization of the effects is not considered appropriate; c) When the effects are particularly suitable for the provision of a public service"*
15. *"An appeal by the person concerned against the seizure or confiscation of the property or effects is pending, and the measure must not be disproportionate in view of the effects it may have on the person concerned and,*

in particular, of the greater or lesser importance of the evidence on which the precautionary confiscation order was based".

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