Counterfeiting as an activity managed by transnational organized crime. The systemic action within the United Nations framework and anti-counterfeiting law system in Bulgaria.

Todor Kolarov[1]

1. For a long time counterfeiting has been viewed as an intellectual property right issue concerning the rightful owner of the intellectual property rights and those who violate them. However according to the 2007 Unicri Report "Counterfeiting - a Global Spread, a Global Treat" (the Report)[2], the link between counterfeiting and organized crime is now clear and vastly acknowledged. «*Although not all acts of counterfeiting are unequivocally ascribable to large criminal organizations, there is no doubt that a significant portion of counterfeit trafficking is managed – at a variety of levels – by organized crime. There is therefore a growing interest in this activity on the part of criminal organizations and an increasing involvement of the latter*[3]». The Report further notesthat «*the involvement of organized crime is one of the factors which has favored the growth of counterfeiting*[4]» ... «*The appearance of unscrupulous individuals has, in fact, favored the birth of a type of replication activity which intends to exploit all market opportunities – even if this implies marketing product categories which pose a high level of risk for the health and safety of consumers*[5]».

The Report notes that in a great number of national legal systems there is a very low level of deterrence with respect to counterfeiting crimes and trafficking of counterfeit goods. This allows «*one to more easily understand the birth and development of an interest for these activities on the part of organized* crime[6]». Although counterfeiting is a huge source of money for criminals, which moreover are liquid and readily available, there is insufficient response. According to April 2011 UNICRI report which updates UNICRI Report is-

---

[1] Senior fellow of Sofia Centre for the Study of Democracy and American University in Bulgaria Blagoevgrad, Prof. of Judicial cooperation in criminal matters, organised crimes and international crime law.

[2] Unicri Report "Counterfeiting -- A Global Spread, A Global Threat" is available at: *web2012.unicri.it*

[3] *Ibidem* p. 107

[4] *Ibidem*

[5] *Ibidem*

[6] *Ibidem* p. 111.

sued in 2007 entitled «*Counterfeiting - A Global Spread, A Global Threat. An Update*». (Unicri Updated Report) «*low level of risk run by counterfeiters is potentially one of the most appealing elements for criminal organizations, given the lack of adequate deterrents within the applicable legislations of various countries, even if this situation is progressively changing and more deterrent penalties have been approved by legislators or are under discussion. ... Despite an increasing awareness of the scale of the problem, legislation has often been constrained by a purely economic analysis of the phenomenon whose negative effects are believed to exclusively affect legitimate producers from a financial point of view*[7]». This conclusion is confirmed by the recent report of Unicri and ICC Business Action to Stop Counterfeiting and Piracy (BASCAP) report entitled «*Confiscation of the Proceeds of Intellectual Property Crime -- A Modern Tool for Deterring Counterfeiting and Piracy*» (Unicri-Bascap Report).[8]

Studies note that this matter has been for a period of time under the "radar screen" as even consumers sometimes are lenient towards this type of crime. Consumer opinion poll in Spain cited by the Unicri Report demonstrated that in 2006 Spaniards spent 285 million euros on counterfeit goods in the previous year. A similar study in the United Kingdom in 2007 found expenditures of 261 million pounds on watches, 351 pounds on fragrances, and some 3 billion pounds on clothing and footwear. According to a study by the Organization for Economic Cooperation and Development (OECD) counterfeiting represented a volume of international trade worth at least 200 billion USD in 2005, which in 2007 reached 250 billion USD.

Due to the above perception in the recent past, which is yet to be overcome in the public eye in many jurisdictions the viewpoint has been until very recently that counterfeit is a practice that affects intellectual property right holders and is limited to the commercial practices affecting traders rather than consumers. Public tends to see this as a matter that should be resolved in civil litigations between intellectual property right holders and counterfeiters. However, as Unicri Updated Report correctly notes «*...this viewpoint does not ... consider the risks for the safety of citizens and public order. This perspective* is also limited from another point of view: it not only neglects the *elevated risk for the health and safety of consumers — as a result of the trade of certain categories of counterfeit products...*» Unicri conclusion is that counterfeiting is far from being a victimless crime.[9]

[7] Unicri Updated Report "Counterfeiting - a Global Spread, a Global Treat".
[8] See p. 9 of Unicri-Bascap Report
[9] Unicri Updated Report

One particular worrisome aspect that confirms the above findings concerns counterfeit medicines. A Chatham House briefing paper entitled «*Combating Counterfeit, Falsified and Substandard Medicines: Defining the Way Forward*?» dated November 2010[10] deals with the matter and discusses in depth the different aspects of the issue. It comes to the conclusion, *inter alia*, that the problem cannot be tackled unless the matter is discussed at an international level. The briefing paper concludes that *«[f]ailure to reach agreement on the definitions of counterfeit, falsified and substandard medicines hampers the constructive policy debate and collaboration at the international level that are necessary to take effective action against the producers and distributors of these medicines*». Another clear example is one of the more recent interpol-Europol operation "Opson II" resulting in global seizures of fake and illicit food totaling 135 tons of potentially harmful goods ranging from coffee, soup cubes and olive oil, to luxury goods such as truffles and caviar. Operation "Opson II" that took place in december 2012 involved 29 countries from all regions of the world, resulted in the recovery of more than 385,000 liters of counterfeit liquids in addition to fish, seafood and meat declared unfit for human consumption, as well as fake candy bars and condiments[11].

Going back to counterfeit medicines it is noteworthy that they are a point of great concern today as their proliferation is growing incessantly demonstrating the global nature of the problem which calls for an international response. The World Health Organization (WHO) estimates that as much as 10% of all pharmaceuticals globally could be counterfeits. These estimates are particularly troublesome for Asian and African regions which seem to be the most affected, along with parts of Latin America. According to the WHO, more than 30% of medicines on sale in these parts of the world could be counterfeits.[12] This in turn leads to another conclusion – that counterfeit is more of a problem for the developing and least developed countries, thus countering another wide spread "urban legend" that the developed world is affected by counterfeits. The above mentioned Interpol-Europol operation "Opson II" confirms this statement as countries which took part in the operation included Austria, Belgium, Benin, Bulgaria, Colombia, Côte d'Ivoire, Czech Republic, Cyprus, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Jordan, Latvia, the Netherlands, Nigeria, Portugal, Romania, Slovakia, South Africa, Spain, Sweden, Thailand, Turkey, United Kingdom and the USA.

---

www.chathamhouse.org

[11] See press release Interpol-Europol operation results in global seizures of fake and illicit food available at *www.interpol.int*

[12] See *www.who.int*

Similar theoretical research and empirical findings led to recent developments in understanding counterfeiting not simply as commercial issue but as organized crime issue of global scale. Commission on Crime Prevention and Criminal Justice adopted Resolution 20, 6, entitled «*Countering fraudulent medicines, in particular their trafficking*[13]» noted that research on the modalities of transnational organized crime, with respect to fraudulent medicine should be continued. The 2010 Unodc Report «*The Globalization of Crime – A Transnational Organized Crime Threat Assessment*[14]» reads that «*product counterfeiting is a form of consumer fraud: a product is sold, purporting to be something that it is not. This is different from the crime of copyright violation, which involves the unauthorized transfer of licensed material, such as the sharing of music or video files electronically. Product counterfeiting is typically an organized group activity, because the manufacturing of goods takes people and time, and the goal is invariably profit. Many jurisdictions take the offence quite seriously... As a result, most product counterfeiting would be considered organized crime under the Convention*».

This new understanding, that counterfeiting is a territory that organized crime is chartering, emanated in a number of initiatives and international legal instruments. The first report "Counterfeiting -- A Global Spread, A Global Threat", delivered by Unicri in 2007, provides a global assessment of organized criminal involvement in counterfeiting. Upon decision of the United Nations Commission on Crime Prevention and Criminal Justice, Unicri was tasked to review and update this report. Unicri presented its findings to the Commission in April 2011 in the Unicri Updated Report. On April 15, 2011 Commission on Crime Prevention and Criminal Justice adopted Resolution 20, 6, entitled «*Countering fraudulent medicines, in particular their trafficking*». Commission urged Member States to prevent trafficking in fraudulent medicines by introducing appropriate legislation, covering, in particular, all offences related to fraudulent medicines, such as money-laundering, corruption and smuggling. It also underscored the importance of confiscation and disposal of criminal assets, along with extradition and mutual legal assistance, to ensure that no stage in the supply chain of fraudulent medicines is overlooked[15].

---

[13] Resolution 20, 6 of the Commission on Crime Prevention and Criminal Justice «*Countering fraudulent medicines, in particular their trafficking*», *www.unodc.org*.

[14] Available at: *www.unodc.org*.

[15] Resolution adopted by the Economic and Social Council [on the recommendation of the Commission on Crime Prevention and Criminal Justice (E, 2012, 30 and Corr.1 and 2). Strengthening international cooperation in combating transnational organized crime in all its forms and manifestations.

Findings of Unicri Updated Report are that «*[c]ounterfeiting is a rapidly expanding criminal activity, which poses serious threats to consumers' health and safety. Currently, an undeniable link exists between counterfeiting and criminal organizations, as demonstrated by the results of various criminal investigations. Attracted by the profitability of this illicit activity, criminal organizations now control the production, distribution and trade of counterfeit goods*». Unicri Updated Report further notes that «*[d]ue to the involvement of organized crime, the production and distribution phases of counterfeit products have greatly improved in their efficiency. Criminal organizations operating in different countries have established close ties and synergies. The same routes and concealment methods utilized to traffic drugs or firearms... can be exploited for trafficking counterfeit goods... The profiles of several criminal investigations confirm the transnationality of counterfeiting. Criminal organizations operate in close connection, as often happens when the market of destination of an illicit product is distant from its place of production*[16]».

This new perspective into counterfeiting on a regional level already resulted in steps on an international arena at a regional level. At EU level Council give customs officials at EU borders better tools to confiscate, store and destroy counterfeit goods. In January 2013 it was endorsed by Internal Market Committee MEPs. Parliament was to discuss its final plenary endorsement at a second reading without further changing the text. The regulation is expected to apply directly in EU MS from 1 January 2014. The Regulation on Customs Enforcement of Intellectual Property Rights aims to make customs procedures more effective by laying down clear rules on the storage of infringing goods, who should bear the burden of proving that they infringe IPRs, and who should pay the costs of destroying them. The regulation attributed special focus to clarify and strengthen rules on generic medicines in transit through the EU stating that customs authorities must abide by the EU's international commitments to ensure that these medicines are not delayed or confiscated unless there is «*clear and convincing evidence that they are intended for sale in the Union*». The right holder could seek compensation from the infringer or other persons, including intermediaries such as carriers, in accordance with national law. Thus, even in the EU the fact of delving into the investigations and international cooperation tools envisaged at national level is of fundamental importance. We must recall, however, that the crime transna-

[16] Commission on Crime Prevention and Criminal Justice, Twentieth session, 11, 15 April 2011, Item 6 of the provisional agenda, World crime trends and emerging issues and responses in the field of crime prevention and criminal justice, Updates to the report of Unicri entitled Counterfeiting: A Global Spread, a Global Threat (E, CN.15, 2011, CRP.4).

tional nature and the source of counterfeited products or their trafficking often affect countries with very different legislations.
However similar developments are yet to receive its spread on a global scale. It is in this framework that Untoc is ever more important as a tool to tackle counterfeit products. One aspect of this criminal activity is that it is transnational in its character. Such are the conclusions of the above mentioned Unicri Updated Report. This report clearly reiterates that criminal organizations that deal with the matter operate in a manner that is akin to that of international corporations[17]. As it is established international criminal organizations operate with the same purpose as corporations - to accumulate assets and make profit, in the case of international organized crime, illegal profit. The international research has clearly came up to the conclusion that as the objective of organized crime is profit making. It is key to deprive them of these assets as part of the efforts to effectively curb its operations. Similarly, according to recent Unicri and Icc Business Action to Stop Counterfeiting and Piracy (Bascap) report entitled "Confiscation of the Proceeds of Intellectual Property Crime -- A Modern Tool for Deterring Counterfeiting and Piracy" (UNICRI-BASCAP Report) «*[s]ound legislation on confiscation and recovery of assets has already proven to be a very effective way to fight against organized crime and its profit-driven criminal enterprises. However, despite the effective application of Proceeds of Crime (POC) legislation to traditional organized criminal activity, there has been limited application to criminals producing and trading counterfeit and pirated products*[18]».
Therefore it is clear that due to the involvement of the international organized crime in counterfeiting, it should be viewed as intellectual property right violation as well as a criminal phenomenon. There is a need for a synchronized and adequate response to the matter which could be achieved under the auspices of the Un and as part of the Unctoc. As recent organized crime involvement in counterfeiting clearly strives to accumulate profit, as all organized crime activities, it is important in curbing this aspect of organized criminal enterprises. Asset forfeiture is only one of the instrumentalities in the toolbox of law enforcement agencies. However as with other illegal activities of transnational organized crime confiscation of instrumentalities and proceeds of crime for the cases envisaged by Unctoc is pivotal. Along with it of prime importance are effective international cooperation for the purposes of

[17] «*In this regard, the behaviour of criminal organizations resembles the modern production and trade choices performed by legitimate producers of goods, who have found it profitable to delocalize the production in countries characterized by low labour costs*». See (E, CN.15, 2011, CRP.4), op. cit.
[18] Available at *www.unicri.it*. Report is released on 25 April 2013.

the confiscation of instrumentalities, as well as assets and proceeds of crime; extradition of criminals; wide mutual legal assistance in relation to questioning, search and collection of evidence, investigations and confiscations – the tracing of proceeds of crime and the analysis of suspects' bank accounts; the possibility for the various countries' law enforcement agencies to conduct joint investigations; the protection of witnesses.

2. The matter at hand is how to effectively tackle counterfeiting as a phenomenon which has an organized crime nexus. International best practices view asset forfeiture as one of the best tools in countering organized crime[19]. Focusing on asset forfeiture, which is the centerpiece of this study, Unicri-Bascap Report must be recalled. It suggests three groups of measures: 1) dealing with the legal framework to effectively implement asset forfeiture legislation; 2) institutional framework to effectively administer asset forfeiture legislation; and 3) international cooperation mechanisms. Legal framework on asset forfeiture which falls under the first rubric of the above three is of interest considering. It suggests, *inter alia*, introduction of: a) non-conviction based confiscation; b) reversal of the burden of proof as to the origin of the property; c) extended confiscation; iv) third party confiscation and enhance provisions on frozen/seized property management and on disposal of confiscated property and (v) strengthening international recognition of provisional measures, namely freezing or seizure of the property.[20]
The analysis of the Unicri-Bascap Report clearly demonstrates that these steps are not considered as cumulative, but rather as a compilation of methods that could be introduced in combination or as alternatives and only in certain limited instances in cumulation. Discussing extended confiscation the Unicri-Bascap Report reads that «*[i]n order to effectively tackle organized criminal activities there may be a situation where it is appropriate that a criminal conviction is followed by the confiscation not only of property assets associated with a specific crime, but also of additional property which the court determines are the proceeds of other crimes. Thus, extended confiscation signifies the ability to confiscate assets, which go beyond the direct proceeds of a crime. This provision can be tied to the "reversal of the burden of proof" argument noted above*[21]». (Emphasis added.)

---

[19] See ADAMOLI, et al. Organised crime around the world. European Institute for Crime Prevention and Control, affiliated with the United Nations, 1998.
[20] This is not an exclusive list as this rubric also recommends strengthen of tracing and investigation powers. See op. cit. p. 5.
[21] *Ibidem.*

Before going further into these recommendations it should be recalled that such measures are considered extremely potent tools that are to be used in tackling serious organized crime. Above mentioned reports are unanimous that serious organized crime with international elements is becoming increasingly involved in counterfeit which calls for a concerted effort of the international community to tackle this challenge. The optimistic scenario in tackling the issue from a law enforcement point of view might be to make efforts to introduce all of the above instruments in the toolbox. Yet, the realistic scenario might be very different and potential obstacles might become obvious in using the situation with respect to asset recovery within the EU, where we have the Union anti-organized crime legislation which builds on the international legal instrument that is considered the prime vehicle for achieving a more efficient anti-counterfeit regime.

One of the tools that the Unicri-Bascap Report calls for is to introduce non-conviction based asset forfeiture. It should be noted that few EU MS have such legislations (Bulgaria, Italy, Ireland, Slovakia, Slovenia and UK). As the majority of EU MS have conviction based asset forfeiture as part of criminal proceedings, non-conviction based asset forfeiture that is reviewed as part of civil proceedings constitutes a problem to international cooperation on these cases within the EU.[22] Thus, on one hand the issue of limited application of civil asset forfeiture should be kept in mind while on the other hand ramifications related to mutual recognition of decisions and orders coming from a state that applies civil asset forfeiture within civil proceedings should not be overlooked.

The existing EU legal framework on tracing, freezing, seizure and confiscation of assets consists of Framework Decision 2001, 500, JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime; Framework Decision 2003, 577, JHA on the execution in the European Union of orders freezing property or evidence; Framework Decision 2005, 212, JHA on confiscation of crime-related proceeds, instrumentalities and property; and Framework Decision 2006, 783,

[22] As Croatia is to become the 28 MS for the purposes of this review it should be noted that as a general rule Croatian law provides for confiscation of proceeds of crime under prosecution in the respective criminal proceedings - conviction based confiscation (Article 82(1) of the Penal Code; Article 77 of the new Penal Code that shall enter into force on January 1, 2013.). However extended conviction based confiscation of all property which acquisition through legal means cannot be established is applicable if the crime falls under specialized organized crime and corruption prosecution office jurisdiction (Article 82(2) of the Penal Code; article 78 of the new Penal Code). Croatia also has non-conviction based confiscation exception if criminal proceedings cannot be initiated due to death of the defendant or on other grounds that bar criminal prosecution or if criminal proceedings are suspended (Article 2(2) and article 7 of Procedure for Seizure and Confiscation of Proceeds of Crimes and Misdemeanor Act).

JHA on the application of the principle of mutual recognition to confiscation orders, as amended by Framework Decision 2009, 299, JHA amending Framework Decisions 2002, 584, JHA, 2005, 214, JHA, 2006, 783, JHA, 2008, 909, JHA and 2008, 947, JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial and Council Decision 2007, 845, JHA concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime. Framework Decision 2003, 577, JHA and Framework Decision 2006, 783, JHA, as amended by Framework Decision 2009, 299, JHA are directly pertinent to this review as they require MS to implement the principle of mutual recognition of freezing orders and mutual recognition of confiscation.

Both Framework Decision 2003, 577, JHA and Framework Decision 2006, 783, JHA establish rules for mutual recognition and execution of respectively freezing and confiscation orders issued by a judicial authority of another MS in the framework of criminal proceedings. Thus the framework decisions deal with orders of another MS's judicial authority, which may be broader than simply courts pursuant to the legal regime of issuing the order MS. These framework decisions apply to orders issued as part of criminal proceedings only. Cooperation between MS is based on the principle of mutual recognition and immediate execution of judicial decisions which presumes confidence that the decisions will be recognized and executed. The procedure for execution of freezing and confiscation orders is made easier in comparison to Council of Europe Strasburg Convention which had governed these matters for example. The framework decisions established the direct communication between competent authorities rule which is an exception according to Strasburg Convention. Both framework decisions require immediate and without any formalities execution of freezing and confiscation orders.

It appears however that these legal instruments did not achieve the desired results. In an attempt to tackle some of these issues and in response to above mentioned policy initiatives of the Commission and European Parliament in March 2012 the Commission presented a proposal for a Proposal for a Directive on the Freezing and Confiscation of Proceeds of Crime in the European Union establishing minimum rules which are aimed to further harmonize the freezing and confiscation regimes across EU which in turn is expected to have as an additional effect increased effectiveness of cross-border cooperation in freezing and forfeiture of criminal assets. Of particular interest

are the provisions of article 4 (dealing with extended conviction based confiscation) and article 5 (dealing with non-conviction based confiscation).
Other legal instruments exist under the auspices of the Council of Europe. There are Council of Europe conventions which contain provisions on international cooperation in the identification, tracing, freezing and confiscation of criminal assets. Such are Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (Strasbourg Conventions) and Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Warsaw Convention). Article 7(2) of Strasbourg Conventions reads that each Party undertakes the obligation to enable it to comply with requests for confiscation of proceeds of crime. Under article 11 of Strasbourg Convention at the request of another Party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a Party shall take the necessary provisional measures, such as freezing or seizing. As the Explanatory Report to the Strasbourg Convention notes this «*concerns cases where a confiscation order has not yet been rendered by the requesting Party but where proceedings have been instituted. The experts agreed that, in respect of this paragraph, an obligation to take the provisional measures exists, subject of course to the provisions on grounds for refusal and postponement. Freezing and seizing are only examples of provisional measures*». Article 13(1) of Strasbourg Convention describes the two forms of international cooperation regarding confiscation. Paragraph 1.a concerns the enforcement of an order made by a judicial authority in the requesting State. Enforcement of confiscation under Article 13 shall be governed by the law of the requested Party, which shall be bound by the findings as to the facts in so far as they are stated in a conviction or judicial decision. Warsaw Convention contains similar provisions. Article 21 of Warsaw Convention corresponds to article 11 of Strasbourg Convention dealing with provisional measures, while article 23(1)a of Warsaw Convention corresponds to article 13(1)a of Strasbourg Convention. Like under Strasbourg Convention requested Party shall be bound by the findings as to the facts in so far as they are stated in a conviction or judicial decision.
A number of United Nations (UN) conventions promote international cooperation in the identification, tracing, freezing and confiscation of criminal assets. Such are UN Convention against Transnational Organized Crime (UNCTOC) and UN Convention against Corruption. Focusing on the UNCTOC, articles 12-14 of this Convention establishes the measures on asset confiscation that parties to the Conventions are to take to prevent benefit-

ing from crime. Article 12 deals with confiscation and seizure, requiring that signatories adopt, to the greatest extent possible within their domestic legal systems, necessary measures to enable confiscation of the proceeds of crime derived from offenses covered by the Convention (generally crimes punishable with up to four years imprisonment) or property of equivalent value; and property, equipment, or other materials used in or destined for use in offenses covered by the Convention. Article 12 (3) and (4) deal with the transformation and comingling of criminal property and obliges signatory states to confiscate such property up to the assessed value of the proceeds of crime. Article 12 (5) notes that income or other benefits derived from proceeds of crime or transformed property shall also be subject to confiscation. Article 12 (7) asks State parties to consider "requiring that an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to forfeiture", without make the reversal of the burden of proof mandatory. Article 13(1) of the Convention reads that a State Party that has received a request from another State Party having jurisdiction over an offence covered by this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities shall, to the greatest extent possible within its domestic legal system take steps for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it. Thus, it is clear that Palermo Convention may not be sufficient to introduce the proposal in Unicri-Bascap Report with respect to non-conviction based asset forfeiture and its international cooperation aspects.

Further one option suggested by Unicri-Bascap report is the option to confiscate criminal assets from third parties to which they are transferred. Criminals often transfer their assets to knowing third parties as soon as they come under investigation, in order to avoid confiscation. Given that this practice is common and increasingly widespread, it is increasingly topical discuss confiscation of property transferred to third parties. Yet, analysis of EU MS legislation demonstrates that some of the MS do not have an extended confiscation regime in their legislative framework (Czech Republic, Luxemburg, Poland). Moreover Unctoc does not explicitly provide for extended confiscation.

Reversal of the burden of proof is not introduced in asset forfeiture cases in some of the EU MS (Czech Republic, Finland, Luxemburg, Romania, Slovenia, Sweden). One interesting example is Bulgaria which used to have provisions in its civil asset forfeiture legislation which was conviction based. Yet, after changing its law in November 2012 and introducing non –conviction based civil asset forfeiture Bulgaria removed provisions dealing with the reversal of the burden of proof. Similarly, the Unicri-Bascap report reads that

«*[o]ne effective tool is to include provisions that require the defendant to prove that a particular asset, transfer or expenditure has a legitimate source and that it was not due to the criminal activities of the defendant. This reversal of the burden of proof is based on showing the "criminal lifestyle" of the defendant and allows the prosecution to put the burden of proof on the defendant with respect to the origin of their property. Similar provisions exist in Italy and Switzerland*». Unicri-Bascap report clearly discusses "defendants" and "criminal activities" thus implying that there is a nexus between the reversal of the burden of proof and criminal proceedings. As noted above, Ucntoc provides the reversal of the burden of proof as an option but does not mandate signatories to introduce it.

Last but not least, one should consider national and international instruments in the field of human rights protection. Some pioneer national initiatives in the asset forfeiture sphere are very important as they provide guidelines on the possible limits beyond which freezing and confiscation of illegally gained assets might encroach on civil liberties. For example Italian act 646 was subject to such review by the European Court of Human Rights (Ecthr) in the case of Raimondo v. Italy. The court noted that the provisional measure (seizure) is meant to ensure that property that «*appears to be the fruit of unlawful activities carried out to the detriment of the community can subsequently be confiscated if necessary. The measure was therefore justified by the general interest and, in view of the extremely dangerous economic power of an "organization" like Mafia, cannot be said that taking it at this stage of the proceedings was disproportionate to the aim pursued*». UK Drug Trafficking Act (1994) statutory assumption was reviewed by the Strasbourg court in Phillips v. United Kingdom. The court held that the assumptions did not exceed the reasonable limits within which such a reverse onus should be confined by the presumption of innocence inherent in the notion of a fair hearing under Article 6(1) of European Convention of Human Rights noting that drugs are a serious threat to society.

Another case tried by the Ecthr worth exploring is Punta Perotti[23]. The case concerns forfeiture of a lot which turned out to be in a protected area belonging to a developing company that was granted building permit. The facts of the case led the Italian Court of Cassation to the conclusion that construction permission granted to the company by the local authorities in Bari was illegal as it was in violation of the national law. The Court of Cassation however concluded that the regional legal framework was badly formulated, obscure

[23] Sud Fondi S.r.l. et autres c. Italie (Requête no 75909, 01).

and contradicted the national law, which led Bari authorities to an inevitable error.[24] Nevertheless the Italian Court of Cassation ordered confiscation of the plot and construction, as an administrative measure, as the building permit was illegal in the first place. Ecthr found this decision of the highest national jurisdiction to be in violation of the European Convention of Human Rights.[25] It noted that it was clear that this case concerned legal framework that was confusing and contradictory which led the perpetrator of the violation into an honest mistake thus excluding intent to commit crime which excludes possibility to seek criminal punishment.

It should be noted that the disproportionate nature of the confiscation of the plot without compensation in the Punta Perotti case was found by Ecthr in light of the fact that objectives of the national law could be achieved with less intrusive measures. Citing para. 36 of Air Canada ruling Ecthr notes that «*Toutefois, compte tenu de la gravité des faits dénoncés dans la présente affaire, la Cour estime opportun de se livrer à certaines considérations sur l'équilibre devant régner entre les exigences de l'intérêt général de la communauté et les impératifs de la protection des droits fondamentaux de l'individu, en ayant présent à l'esprit qu'il doit y avoir un rapport raisonnable de proportionnalité entre les moyens employés et le but poursuivi*». In para. 140 it clearly states that the objective could be achieved with less intrusive measures. «*Ensuite, la Cour estime que l'étendue de la confiscation (85% de terrains non construits), en l'absence de toute indemnisation, ne se justifie pas par rapport au but annoncé, à savoir mettre en conformité avec les dispositions d'urbanisme les lots concernés. Il aurait amplement suffi de prévoir la démolition des ouvrages incompatibles avec les dispositions pertinentes et de déclarer sans effet le projet de lotissement*[26]».

Limitations of the peaceful enjoyment of property, within which realm falls asset forfeiture, is permissible under article 1 of Protocol 1 «*in the public interest and subject to the conditions provided for by law and by the general principles of international law*». We should recall the ruling of the Ecthr in Reinucci which noted that defining public interest is difficult due to its chang-

[24] *Ibidem*, p. 37 «*A la lumière de ces considérations, la Cour de cassation retint donc le caractère illégal des projets de lotissement et des permis de construire délivrés. Elle acquitta les accusés au motif qu'il ne pouvait leur être reproché ni faute ni intention de commettre les faits délictueux et qu'ils avaient commis une « erreur inévitable et excusable » dans l'interprétation de dispositions régionales « obscures et mal formulées » et qui interféraient avec la loi nationale*».

[25] *Ibidem* para. 112, 116, 117. The court specifically notes in para. 117 «*[s]ous l'angle de l'article 7, pour les raisons développées plus haut, un cadre législatif qui ne permet pas à un accusé de connaître le sens et la portée de la loi pénale est défaillant non seulement par rapport aux conditions générales de « qualité » de la « loi » mais également par rapport aux exigences spécifiques de la légalité pénale*».

[26] *Ibidem* para. 140.

ing nature. National authorities will be in the best position to decide on the matter while Ecthr will strive to establish the existence of proportionality between the aim and the means.
In light of the above it is likely that incorporation of asset recovery in organized crime run counterfeiting operations will be deemed proportionate in cases that jeopardize public health (medicines, poisonous foods and beverages, clothes that contain hazardous to the health chemicals), yet there may be instances that human right courts may deem disproportionate, especially if organized crime nexus is not established. Additionally, asset recovery is yet to be broadly introduced on a global scale, especially some of its elements and forms, such as non-conviction based asset forfeiture and extended confiscation. There is also a need to streamline the international recognition of freezing orders and confiscation decisions issued by jurisdictions adhering to the civil asset forfeiture procedure by those that apply asset forfeiture as part of a criminal case.

3. The prospects *de iure condendo* at national level take up relevance, *inter alia*, in relation to ascertaining whether the single judge instead of the Court of Assize is fit to have functional competence over the trial dealing with confiscation of the assets. The answer to this question deepens primarily on the national legislation and the proceedings it requires. Of particular interest however is the matter in instances concerning mutual recognition of confiscation decisions. Reverting to EU law as a starting point we should recall that it requires free movement of court decisions and direct communication between judicial authorities. Yet it does not deal with the question of functional competences over the trial.
As such cases could be particularly sensitive a special review system may be established. For instance some countries established specialized courts that try organized crime cases (Bulgaria, Slovenia). Others introduced adequate system of control over dismissal of confiscation cases with respect to organized crime cases at prosecutorial level which although outside the scope of the specific point could be used for reference. A note to point on the latter is Croatia where confiscation motion is part of the proceedings on the organized crime criminal case and therefore follows the development of the criminal case. The regime for dismissal of all organized crime cases under jurisdiction of the specialized anti-organized crime and corruption prosecution service (Uskok) are dismissed under a special procedure. Uskok head or deputy investigating the crime is not authorized to dismiss a case on own initiative. Even if the grounds for dismissal or withdrawal of charges in article 28A and

article 28D respectively of Uskok Act are present, Uskok head or deputy shall refer the case for review to Uskok collegial body. The collegial body will hear a report from a designated deputy who is different from the one who requested Uskok collegial body review. If dismissal or withdrawal of charges is authorized it is reviewable by the Internal Surveillance Department of the Attorney General's Office. In the instance of withdrawal of charges such review is mandatory. This system was introduced in addressing concerns for potential "prosecutorial umbrella" over certain individuals in high profile organized crime and corruption cases.

4. The anti-counterfeiting legal regime in Bulgaria on seizure and confiscation/forfeiture falls in the fallowing broad categories:
a. Customs Office seizure at the border
Customs Office seizure is aligned with Regulation 1383, 2003 and regulated in the Customs Act. It allows seizure of goods for up to 10 days which commences at the day the information is transmitted to the holder of the rights or its representative. Within this term the right holder may identify the goods and receive samples. The 10 days can be extended with additional 10 working days should the right holder in a supported with evidence statement claims it will take steps to initiate actions for establishment of violation of its rights. There could be several optional routes that could be taken at this point.
One of the ensuing steps could be civil lawsuit brought by the right holder based on the Trademarks and Geographical Indicators Act. The first step is to establish the violation in civil court proceedings. Following the court ruling the goods are confiscated and should be destroyed at the expense of those who infringed the intellectual property rights. The court could rule indemnification. This mechanism is considered impractical by the representatives of right holders. Its ineffectiveness is due to several reasons.
Firstly, the civil law suit could take years. Moreover, it is expensive and the violator is likely not to cover the expenses associated with the destruction of the goods.
Another option that exists in the Bulgaria after the 2006 amendments to the Penal Code is based on the introduced criminalization of imports of counterfeited goods. Pursuant to Article 172B of the Bulgarian Penal Code the holder of the rights of it representative could inform the prosecution service which shall initiate a criminal case. This is the widely used avenue by the right holders and their representatives. From the viewpoint of right holders this optional rout takes care of the issues they claim to be facing which were

identified above – the expenses associated with the criminal lawsuit are born by the state; destruction is responsibility of the Ministry of Interior. According to the Penal Code even if the criminal proceedings are terminated the established counterfeited goods shall be destroyed. This is not a faster option, but a more effective one. It should be noted that the Ministry of Interior claims it faces some practical difficulties as the goods need to be destroyed by the Customs Office which is part of the Ministry of Finance. Often Customs Office would request Ministry of Interior to cover the expenses association with destruction of such goods.

A third option could kick in if no party requests the return of the seized counterfeited goods. In this instance the suspected counterfeited goods are considered subject to destruction according to the Customs Act. This is rare and occurs in instances of small shipments. The law requires the Customs Office to retain the suspected counterfeited goods for 3 months at which point it could destroy it. In practice the Customs Office keeps the suspected counterfeited goods for years as it would rather have the right holder or its representatives cover the expenses for the destruction of the goods.

Finally, the Patent Office could be involved in the process of forfeiture and destruction. This happens particularly often in instances in which the perpetrators of the violation are legal entities. Article 81 of the Trademarks and Geographical Indicators Act is very similar to the wording of Article 172 B of the Penal Code, as discussed above. The primary difference is the threat to the public which the particular violation constitutes. In addition, Bulgaria does adhere strictly to the established principle of the continental legal system that criminal liability is borne by physical persons only. Legal entities however could be subject to administrative measures. In fact this is conducive to the imposition of prompt administrative punishments towards legal entities should there be counterfeited good imports through less complicated proceedings. Practitioners tend to agree that the result of imposition of Article 81 of the Trademarks and Geographical Indicators Act and Article 172 B of the Penal Code are otherwise similar.

b. Customs Office seizure in the internal market

Bulgarian law also provides for Customs Office checks in the internal market for import and distribution of counterfeited goods in the country. If such goods are identified they are seized and the above described scenario of Article 172 B is applied.

5. It is broadly acknowledged that the above mentioned regime is adequate[27]. One particular element that is of importance concerns the amendment to the Trademarks and Geographical Indicators Act which took place in 2006. In the Additional Provisions of the Act the legislator defined "import" as any import in the national territory. This broad and progressive definition was given mandatory interpretation by the Criminal Division of the Supreme Court of Cassation in Interpretative Decision 1, 2013 issued on May 31, 2013. The Court ruled that even if the goods are in transit the "import" clause in the Trademark and Geographical Indicators Act, which is also applicable in criminal cases, applies to such goods in transit. The Court noted that in each case the transit should be investigated as of whether it is a *de facto* transit and what is the final destination of the shipment. The Court aligned its ruling with the ECJ Nokia, Phillips doctrine[28] noting that if such goods are destined for the EU market they are not in transit. If they are not, they could be considered to be in transit if they are not to be diverted to the EU market.

6. Treatment of pharmaceuticals and counterfeit of pharmaceuticals has some important national characteristics that call for discussing that matter in a distinct section of this submission. In general Bulgaria fallows all international instruments to which it is a party and EU legal instruments. It is to be noted that Article 284A *et seq.* of the Medical Products in the Humanitarian Medicine Act transposes in the national legislation the Council of Europe Convention of the Counterfeiting of Medical Products and Similar Crime Involving Threats to Public Health (Medicrime Convention).
On the enforcement front administrative provision are applied with respect to transgressions in the medical sphere, while medicrimes in the Penal Code are not adequately coved. Yet, even the administrative control over non-prescription drugs is inadequate and existing legislative framework is not applied effectively.
Representatives of the pharmaceutical companies seem to be less concerned with the counterfeited medicines as they assess the Bulgarian market as a small one, thus less susceptible to counterfeited medicines. The small market combined with requirement that each medicine has its medical information leaflet translated into Bulgarian and packaging requirements is a deterrent to

[27] Some exceptions related to medicrimes are discussed below.
[28] Judgment in Joined Cases C, 446, 09 and C-495, 09. The ECJ noted that according to Regulation 1383, 2003 goods in transit should not be treated differently from goods to which the Regulation does not apply. Yet, Customs Offices may detain such goods if they are suspicions that such goods might be de facto destined for the EU market.

counterfeiters as it increases the price of counterfeit. The representatives of the pharmaceutical companies noted that a greater problem is related food additives which are non-prescription and thus not covered by the international regulatory regime. As particular concerns to pharmaceutical intellectual right owners is identified the so-called "*re-coupage*" of pharmaceuticals and sale for commercial use between pharmacies which along with the on-line sale of drugs is banned.

7. It is noteworthy that Bulgaria is in the process of drafting a new Penal Code. Chapter 17, Section 7 provides for regulation of crimes against intellectual property. The assessment of the new provisions is not unequivocal. Some specialists are concerned that the drafted provisions are not necessarily a step forward in strengthening the regime.