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Stop the Kleptocrats: The EU must no longer be a safe haven for stolen assets

Laure Brillaud, Sara Brimbeuf and Matilde Manzi[1]

The Swiss-Uzbek agreement, if respected and effectively implemented, could potentially set an international benchmark for responsible asset return, and should inspire EU leaders to adopt a similar approach and enshrine principles of integrity, transparency, accountability in asset return; as well as commitments to ensure the effective participation of independent civil society.

Introduction

In September 2020, the Swiss government announced the repatriation of $131 million USD in confiscated assets in criminal proceedings against Gulnara Karimova, the daughter of former Uzbek President Islam Karimov. This represents about 15% of the total assets frozen by the Swiss government since 2012.

The Memorandum of Understanding signed between Switzerland and Uzbekistan incorporates commitments made in the GFAR principles, including principles of transparency and accountability, and for repatriated assets to benefit the Uzbek people – the victims of corruption – by supporting the improvement of their living conditions, strengthening the rule of law or fighting impunity in Uzbekistan. The agreement also provides for the effective participation of independent civil society.

In this report we summarise the Karimova case and developments in EU asset recovery policy, before zooming in on France's experience of confiscating and returning stolen wealth. We recommend 10 principles for responsible asset recovery and restitution, which could serve as the basis for a harmonised European framework.

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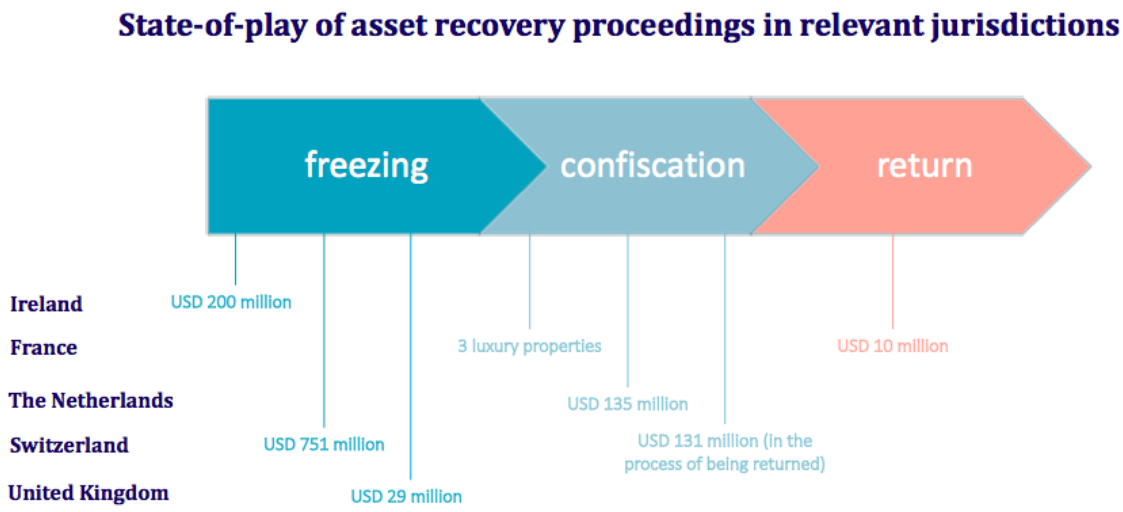
The European dimension of the Gulnara Case

The Swiss restitution of assets is an important step in evolving global asset return practices which may set a precedent for future restitutions by other countries involved in this case. It is believed that the proceeds of Karimova's dealings were stashed away in banks, offshore companies, luxury goods and property around the world, including at least 9 EU countries (Belgium, France, Germany, Ireland, Latvia, Luxembourg, Malta, the Netherlands, Spain). The graph below shows the progress of asset recovery proceedings in several jurisdictions.



Source: https://www.occrp.org/en/daily/5490-uzbekistan-dutch-court-seizes-us-135-m-from-company-linked-to-gulnara-karimova
https://www.reuters.com/article/us-netherlands-uzbekistan-corruption-idUSKCN10026V
https://www.rfi.fr/fr/france/20190708-biens-mal-acquis-ouzbekistan-recuperera-avoirs-saisis-france
https://www.bloomberg.com/news/articles/2020-06-26/hunt-for-owner-of-22-million-u-k-mansion-leads-to-uzbek-jail
https://www.occrp.org/en/daily/13114-switzerland-to-return-to-uzbekistan-131m-from-karimova-accounts
https://www.thegazette.co.uk/notice/3449404
https://www.financeuncovered.org/investigations/serious-fraud-office-targets-luxury-surrey-mansion-linked-to-the-robber-baron-of-uzbekistan/

Asset Recovery in the EU

The EU is composed of 27 Member States with very different legislations and systems in place to govern asset recovery across Europe. Over the past decade, the EU has invested considerable effort into harmonising policy and practice on asset recovery through cooperation between national asset recovery offices and the adoption of a Directive on the freezing and confiscation of the proceeds of crime in the EU[8] in 2014. A Directive on combating money laundering by criminal law and a Regulation on the mutual recognition of freezing and confiscation orders were both adopted in 2018.[9]

However, despite these efforts, available figures on EU asset recovery show that only a fraction of illicit assets are confiscated (1.1%)[2] and even less is returned to compensate victims or benefit the people that were harmed by criminal activities.

The case of Gulnara Karimova is in no way unique. Europe is awash with the stolen wealth of kleptocrats and it is performing poorly when it comes to confiscating and returning stolen wealth.

Sometimes these assets are not returned because of fears that they will end up back in the same corrupt pockets – especially when a kleptocratic government remains in power. The EU does not provide for any harmonised practice across jurisdictions that would guide asset return in these situations. Most of the time, the confiscated money will be absorbed into the confiscating country's national budget or may be integrated into the aid budget and indirectly returned to the country it was stolen from in the form of aid. However, this money cannot be considered the property of EU countries, nor is it aid. These assets belong to the citizens of the country they were stolen from – the victims of corruption- and should be returned to their rightful owners through a transparent and accountable process.

[2] https://www.europol.europa.eu/newsroom/news/does-crime-still-pay

The upcoming reform of the EU asset recovery policy

This systemic issue should be addressed in a comprehensive and harmonised manner at EU level. In a report[3] published in June 2020, the European Commission acknowledged that "there is room for further progress in the area of asset recovery". The report highlighted the restitution phase

> *" among other issues, and announced the Commission's intention to introduce "[...] provisions on the disposal of assets, including the social reuse of confiscated assets [and] laying down rules on the compensation of victims of crime."*

The European Commission is at a very early stage of the reform process. In the coming months it will consider the potential for greater harmonisation of the EU asset recovery regimes with an *"assessment will cover both Directive 2014/42/EU and Council Decision 2007/845/JHA."*

This future EU reform will cover the last phase of asset recovery and there will be an opportunity to introduce a system to guide the return of confiscated assets in international asset recovery cases. This could be done as part of the reform of the Directive 2014/42/EU on asset freezing and confiscation, which is expected by the end of 2021.[4]

The reform will be governed by the normal EU legislative procedure, i.e. the co-decision procedure[5]. In concrete terms, this means that the European Commission is expected to put forward a legislative proposal including an impact assessment in Q4 2021. The process will be led by the Directorate-General for Migration and Home Affairs (DG Home). The European Parliament and the Council will then review the Commission's proposal and produce their own position. On the Parliament's side, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) will be responsible for the file. Once both

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[3] https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-security/20200602_com-2020-217-commission-report_en.pdf

[4] Point 35.d. of the European Commission 2021 work programme: https://eur-lex.europa.eu/resource.html?uri=cellar%3A91ce5c0f-12b6-11eb-9a54-01aa75ed71a1.0001.02/DOC_2&format=PDF

[5] https://www.consilium.europa.eu/en/council-eu/decision-making/ordinary-legislative-procedure/#:~:text=The%20codecision%20procedure%20was%20first%20introduced%20in%201992,legislation.%20It%20applies%20to%20around%2085%20policy%20areas.

institutions have agreed on their respective positions, the three institutions will enter the trialogue phase during which they will strive to agree on a common text.

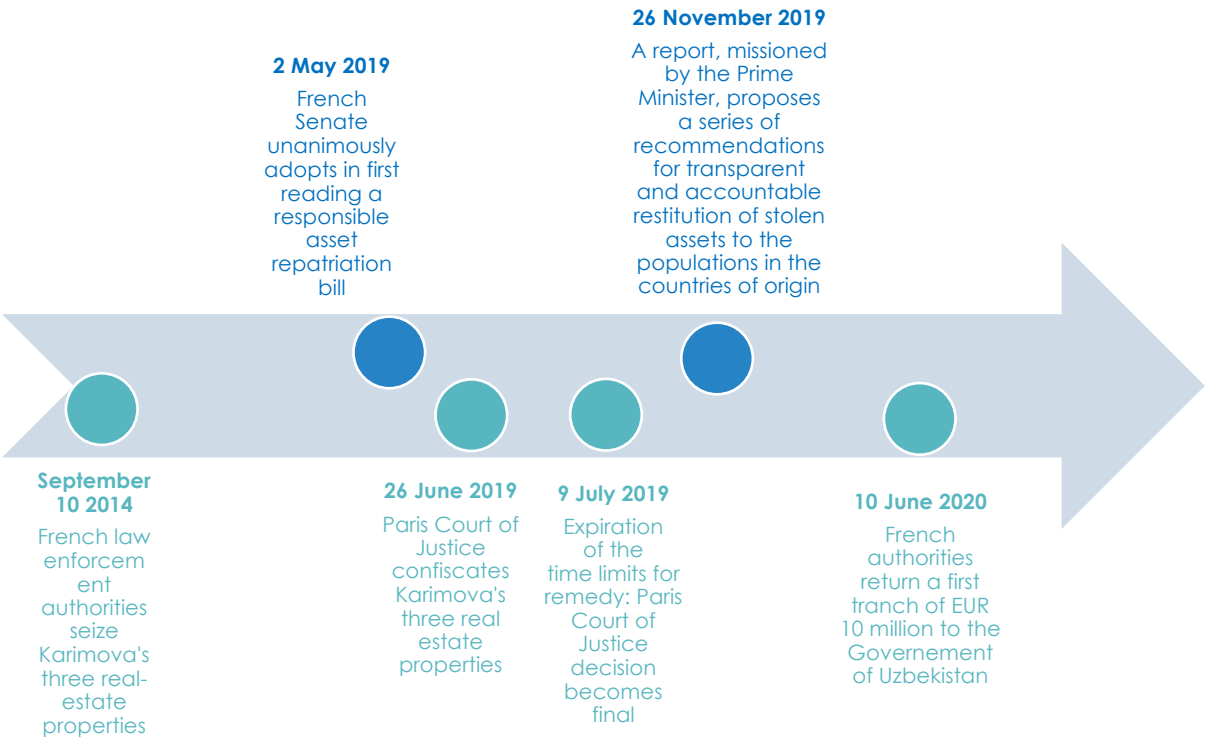
Zooming in on the French experience

EU leaders could learn from the recent experience of some of its Member States. France, for example, has shown its willingness to address transnational corruption both on the judicial and legislative fronts:

In recent years, French courts have ruled on historical convictions of corrupt foreign leaders who had been using France as a destination for their dirty money. These convictions resulted in the seizure of corresponding assets. For example, the French justice system convicted Teodorin N. Obiang M., vice-president of Equatorial Guinea, for money laundering and confiscated EUR 150 million worth of his assets. Likewise, a French court recently convicted Rifaat Al Assad, uncle of Syrian leader Bashar Al Assad, for similar charges and confiscated real-estate estimated at EUR 90 million.

In June 2019 a French court confiscated properties belonging to Gulnara Karimova, valued at several tens of millions of euros. The next question, then, was what to do with these confiscated assets. As French law currently stands, there is no mechanism to return these assets to the country where they were stolen and reuse them for a social purpose. They are simply absorbed into the French national budget. Following the recent rulings, France seemed willing to address this issue through legislation and until recently was making progress on developing its legal framework for responsible asset repatriation and paving the way toward ambitious European reforms in this field.

Despite lacking a legal asset restitution mechanism, French authorities have found a way to return confiscated real estate belonging to Gulnara Karimova. However, the approach adopted by France so far has been very disappointing, radically departing from the Swiss approach. Switzerland seems willing to build transparency and accountability mechanisms into the restitution process with Uzbekistan. By contrast, France sold the confiscated assets and returned the proceeds directly to Uzbekistan in May 2020, outside of any known framework for asset return and without any guarantee of transparency or accountability. This is at odds with its stated intention to introduce a law promoting responsible asset repatriation law.



1. Chronology of the Gulnara Karimova case in France
2. Chronology of the responsible asset repatriation reform process in France

In 2013, following a request for mutual legal assistance from Switzerland, the French Public Prosecutor opened a judicial investigation against Gulnara Karimova for money laundering in connection with bribery offences.

The case ended six years later, in 2019, when a French court of Justice reached a final decision by approving a *Comparution avec reconnaissance préalable de culpabilité*, the French equivalent to a guilty plea proposed at the initiative of the Public Prosecutor. On June 26th 2019, three French companies pleaded guilty for laundering of proceeds the corruption on behalf of Gulnara Karimova. This guilty plea was approved by a Paris court of Justice on the very same day and became final a few days later. Meanwhile, the NGO Sherpa, who was civil party to the proceedings from 2014, had temporarily lost its standing accreditation a couple of months earlier which prevented it from participating in the negotiations[6].

[6] https://multinationales.org/Refus-d-agrement-de-Sherpa-le-gouvernement-veut-il-entraver-l-action-judiciaire

Unexpectedly, the court granted the Government of Uzbekistan the status of civil party, a status usually granted to victims who have personally suffered direct harm from the prosecuted offence. The Government of Uzbekistan was then recognized as a victim and compensated more than EUR 60 million. In an interview[7], the investigating judge and the French prosecutor in charge of the case described how they had travelled to Uzbekistan a few months before the final decision with a view to convincing the Uzbek authorities to request the status of civil party. In their views, this was the only way to return Gulnara Karimova's confiscated assets to Uzbekistan, despite suspicion of the involvement of high-level Uzbek officials in the corruption scheme.

Under French criminal law, damage compensation to victims can be recovered on confiscated assets. In May 2020, this led French authorities, despite their public commitment to responsible asset repatriation[8], to return first tranche of EUR 10 million to a country ranked 153rd out of 180 by the corruption perception index of Transparency International, without being able to guarantee any transparency or accountability in the restitution process[9].

Policy recommendations on asset return

The French example serves to illustrate the need to move towards a systemic policy approach that is harmonised at EU level. The EU should adopt a system to guide asset return across Europe in international recovery cases. This system should be underpinned by principles of transparency, accountability and integrity and ensure the effective participation of independent civil society.

Based on the model outlined in the responsible asset repatriation bill adopted by the French Senate in May 2019, the EU should require Member States to develop a legal framework for restitution mechanisms which are transparent and accountable.

[7] http://www.rfi.fr/france/20190708-biens-mal-acquis-ouzbekistan-recuperera-avoirs-saisis-france

[8] In May 2019, right after the adoption in first reading by the French Senate of a responsible asset repatriation bill, the French government publicly announced its willingness to pass such a reform without delay. http://www.senat.fr/dossier-legislatif/ppl18-109.html

[9] https://www.neweurope.eu/article/france-transfers-10-mln-of-karimovas-illegally-acquired-assets-to-uzbekistan/

Transparency International EU and Transparency International France, together with six other civil society partners, have developed 10 principles for responsible asset return[10] that can be summarised as follows:

1. The freezing, confiscating and returning of assets must be transparent and accountable, from beginning to end.
2. Confiscated assets must be traceable and kept apart from countries' national budgets.
3. Independent civil society organisations must be able participate in the asset recovery process.
4. Agreements on the confiscating and repatriation of assets must be made publicly, transparently available, and with the inclusion of civil society.
5. When stolen assets are returned, they must never be allowed to benefit the person who stole them – either directly or indirectly.
6. There must a process for monitoring the return of funds, with a complaints mechanism and the power to trigger an independent investigation.
7. Anti-corruption, rule of law and accountability mechanisms should be in place to provide oversight of recovered assets.
8. Victims must have access to justice in cases of illicit activities like bribery and money laundering and be able to engage with these cases.
9. Recovered assets must be used to benefit the people of the country from which they were stolen.
10. A wide range of stakeholders, including civil society and victims' organisations, should determine how best to use recovered assets to repair the harm done and to benefit the people they were stolen from.

[10] https://transparency.eu/wp-content/uploads/2020/11/joint-NGO-principles-for-responsible-asset-return.pdf