

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



**THE NEED FOR NEW EU LEGISLATION
ALLOWING THE ASSETS
CONFISCATED FROM CRIMINAL
ORGANISATIONS TO BE USED FOR
CIVIL SOCIETY AND IN PARTICULAR
FOR SOCIAL PURPOSES**

NOTE



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Abstract

The note evaluates the current legislation on the asset recovery process both at the EU and Member States level, with a view to assessing the need and the feasibility of establishing EU regulation on the use of confiscated assets for civil society and in particular for social purposes. It points out that at the EU level only limited attention has been given to the final destination of confiscated assets and that within Member States using confiscated assets for social purposes is not a widely established practice. It analyses the advantages of the social re-use of confiscated assets and comes to the conclusion that there is a clear need for a coherent European approach. The note puts forward a series of recommendations ranging from the adoption of a European Directive on the social re-use of confiscated assets to the creation of a European Asset Recovery Database, a European Asset Recovery Fund and a European Asset Recovery Office.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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LIST OF ABBREVIATIONS

- AGRASC** *Agence de gestion et de recouvrement des avoirs saisis et confisqués* of France
- ANBSC** *Agenzia Nazionale per l'Amministrazione e la Destinazione del Beni Sequestrati e Confiscati alla Criminalità Organizzata* of Italy
- ARO** Asset Recovery Office
- CARIN** Camden Asset Recovery Inter-Agency Network
- CC** Criminal Code
- CEPACA** Multidisciplinary Commission for Establishing of Property Acquired from Criminal Activity of Bulgaria
- CEPAIA** Commission for Establishing Property Acquired through Illegal Activity of Bulgaria
- CoE** Council of Europe
- CPC** Criminal Procedure Code
- EU** European Union
- FATF** Financial Action Task Force
- LFCP** Law on Forfeiture to the State of Property Acquired through Criminal Activity of Bulgaria
- LIBE** Committee on Civil Liberties, Justice and Home Affairs of the European Parliament
- Moneyval** The Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
- NCB** Non-conviction based confiscation
- POCA** Proceeds of Crime Act 2002 United Kingdom

StGB Criminal Code of Germany

StPO Criminal Procedure Code of Germany

TFEU Treaty on the Functioning of the European Union

UNCAC United Nations Convention Against Corruption

UNTOC United Nations Convention against Transnational Organised
Crime

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EXECUTIVE SUMMARY

Background

Much research work has been done on the assessment of the transposition of EU regulation in the field of seizure, management, confiscation and disposal of proceeds and instrumentalities of crime into national legislation. However, there is still a clear need for analysis of the efficiency of the relevant EU instruments and, in particular, of the need for new regulation allowing for the social re-use of such confiscated assets.

The Committee on Civil Liberties, Justice and Home Affairs of the European Parliament (the LIBE Committee) has requested a comprehensive analysis of the existing EU regulation in the field of confiscation of criminal proceeds as well as a proposal for new legislative measures at the EU level in line with the European Parliament Resolution¹ to the Council on the development of an EU criminal justice area and the need to adopt “without delay” a legislative instrument “on confiscation of the financial assets and property of international criminal organisations and on their re-use for social purposes.”

Aim

The aim of the present study is to conduct an in-depth analytical study on the legal framework on the asset recovery process, both at the EU and the Member States levels, with a view to assessing the feasibility of establishing EU regulation on the use of confiscated assets for civil society and in particular for social purposes.

As such, the study shall focus on four main elements:

- i. The management and destination of seized or confiscated assets, to verify what precisely the national legislation allows confiscated assets to be lawfully utilised for and whether the social re-use of confiscated assets by civil society, is permitted under national legislation;
- ii. The social re-use of confiscated assets as a means of compensating communities affected by serious and organised crime;
- iii. The attribution of confiscated assets to be destined to specific core areas (e.g., combating corruption, combating organised crime) which would potentially allow its use for social purposes and for civil-society organisations which focus and are active in such areas, if not done so already; and
- iv. Appropriate mechanisms and institutional aspects for the redistribution of assets provided for by EU regulation.

Moreover, the present study will seek to identify what can be understood as using confiscated assets for ‘social purposes’.

¹ Resolution 2009/2012(INI) of 7 May 2009, available at:
<http://www.europarl.europa.eu/oeil/popups/summary.do?id=1076794&t=e>

The methodology used comprised a twofold methodological approach:

- i. To determine deliverables against which existing or new regulation will have to perform with regards to the social re-use of confiscated assets;
- ii. Revision of the strengths and weaknesses of EU regulation and national legislation of selected member states with regards to the asset recovery process.

KEY FINDINGS

The present study identified the following key findings:

- There is a comprehensive EU regulatory framework for combating of serious and organised crime through the deprivation (through the identification, tracing, seizure and confiscation) of proceeds and instrumentalities of crime.
- The implementation by Member States of the EU regulatory framework, however, is proceeding slowly.
- While there is EU regulation aimed at sharing of confiscated assets and for the compensation of victims of crimes, there is no regulation pertaining to the social re-use of confiscated assets.
- The current EU regulation does not address the social re-use of confiscated assets; however, several EU action plans, reports and strategies refer to the need to introduce regulation pertaining to the social re-use of confiscated assets.
- Most of the selected Member States do not have provisions for the use of confiscated assets for civil society or for social purposes.
- Moreover, the solutions presented by the Member States that have, or intend to have in place provisions for the social re-use of confiscated assets are diverse.
- Some Member States have interesting examples of civil society actively engaging in the combating of serious and organised crime. They are effectively assisting or forcing authorities to investigate serious and organised crime.
- It is not possible to extract from the analysis of the selected Member States examples for a common definition for 'social purpose'. Thus it becomes more difficult to seek to either harmonise or better co-ordinate the diverging interpretations.
- Notwithstanding, common elements for regulation on the social re-use of confiscated assets include the need for transparency and specific destination of the confiscated assets for social purposes.
- There is a clear need to consider the advantages in allowing assets confiscated from criminal organisations to be used for civil society and in particular for social purposes.
- The introduction of EU regulation allowing assets confiscated from criminal organisations to be used for civil society and in particular for social purposes would allow for greater co-operation and harmonisation of existing legislation that would

enable more effective cross-border prevention and combating of serious and organised crime.

- Moreover, it appears that the current EU regulatory framework would allow for a more comprehensive system communication between national AROs which could be further explored for management and re-use of proceeds and instrumentalities of crime for social purposes. However, the success and efficiency of this communication relies with Member States fully complying with the applicable EU regulation.

Recommendations

Several different models seem to offer ways forward in the strive for a more coherent European-wide approach in using confiscated assets for civil society and in particular for for social purposes. These include:

- A Directive aiming at the establishment of coherent and transparent procedures in the Member States, requiring an option for socially re-using confiscated criminal assets and civil society being able to make suggestions as to specific projects of social relevance that should be considered for such funds;
- The creation of a European Asset Recovery Database accumulating statistics on how confiscated assets were used on the national level;
- The creation of a European Asset Recovery Fund;
- A European Asset Recovery Office.

The first option would be the adaptation of a European Directive on the social re-use of confiscated assets. The Directive would list under which circumstances Member States are advised to use confiscated assets for social purposes. Either a certain amount per year would be benchmarked for the social re-use of confiscated assets, or a fraction of the total amount of confiscated assets, which are not foreseen for victim compensation, would be directed towards its use for social purposes.

The creation of a European Asset Recovery Database would cater for some room of manoeuvre for the different Member States on how to execute asset recovery with special focus on the disposal phase. This database would accumulate statistics provided by the national AROs (or the agency responsible for the management of confiscated assets) on the total value of frozen, seized and confiscated assets per annum. There are, as seen previously in this study, efforts undertaken by EUROPOL through the SIENA system to integrate the national databases and these with the EUROPOL database.

However, such a database should include detailed information on the destination given of those assets, whether they went into victim compensation and whether they were used for specific projects (whether for law enforcement projects or for social purposes) and made publicly available. This method would allow for a qualitative assessment of such assets, as opposed to the current quantitative assessment in which the Member States only inform how much has been seized and confiscated. The most important advantage of a European asset recovery database would be transparent reporting. It could also be a platform for civil society to make suggestions for the further use of confiscated assets.

The creation of a European Asset Recovery Fund would go even further than the aforementioned database and would aim at streamlining the tool of using confiscated criminal assets for social purposes. Countries that have confiscated criminal assets and that have closed the procedures compensating victims would be directed towards channelling a defined fraction of the remaining assets into this European fund. The agency responsible for managing this fund would then designate the monies to specific European projects with a social component (whether within or without the European space, as the effect of transnational criminality go far beyond those of the EU borders).

Notwithstanding, whether establishing a database or an European Asset Recovery Fund, these would require the creation of transparent tracking systems which would ensure, on the one hand, accountability for the assets which are to be used for social purposes and, on the other, which would enable effective follow-up mechanisms of the assets which are being transferred for the social re-use.

Another possibility that would enable a more comprehensive system is the creation of a European Asset Recovery Office, which would be responsible for ensuring that all cases that bear a transnational element are overseen and ultimately approved. The European ARO, in accordance with Council Decision 2007/845/JHA, would co-operate with the national AROs and ensure an exchange of information. One of its tasks could be to ensure that a certain fraction of criminal assets that are confiscated in Member States are used for social purposes, after the identifiable victims of serious and organised crime have been compensated. This European ARO would rest on a harmonised interpretation of 'social purposes,' as such term currently has different interpretations within the Member States.

Nevertheless, some questions presented below should be taken into consideration and further studied for a more efficient regulation on the social re-use of confiscated assets. The present study was either not able to review these questions in detail or did not discuss them, as they would go beyond its scope. It is recommended that these be, to the extent possible, given further attention prior to the establishment of regulation pertaining to the social re-use of confiscated assets.

The first question pertains to what would happen to criminal assets that originate from outside the borders of the EU end up in a Member State. This is due to the fact that the current study addresses circumstances in which criminal assets derive from within the borders of the countries which are bound by regulation implemented by the EU and does not take into consideration criminal assets obtained beyond these borders but which find its final destination to be a Member State of the EU. As such, a decision must be made for the sharing and repatriation of these assets. While Council Framework Decision 2006/783/JHA contains provisions for the sharing of confiscated assets between requesting and requested Member States (as does UNTOC and UNCAC), those may be conflicting with other internal legislation or international standards – such as the UNCAC, which requires States to return the entirety of proceeds and instrumentalities of crime to the victim State, deducting only reasonable expenses incurred by the requesting State for the execution of actions needed for the repatriation of the assets. Thus, clear guidance on sharing of assets within Member States should be given.

Secondly, an important angle on asset repatriation and re-use for social purposes comes with the consideration of the increasingly common practice of disgorgements and settlements of criminal cases. Especially in the United Kingdom, but also in federal States

like Germany, cases have not been decided by a Court leading up to a final judgement, but the parties to the criminal case have instead agreed on settling. In such cases, as it has happened with the BAE case² in the UK, or Siemens in Germany, the monies that are paid out to settle the case usually do not go to the States where the actual damage was done, but remain in the State where the court proceedings evolved.³ In such cases, the creation of a mechanism to use assets arising from such settlements, at least partially for social purposes and include social projects in the States that was hit hardest by the crime would be advisable.

² In the BAE settlement and fine to the court there was no order for compensation to victim countries. However, the company did itself agree to an *ex gratia* payment to one of the victim countries, effectively repaying the bribe to them. But this is not part of the judicial process and so it is impossible to enforce in the event that the company does not pay.

³ BAE, in its settlement with the Serious Fraud Office (SFO), had agreed to make *ex gratia* payments to the Government of Tanzania to the total of GBP 30 million less any financial orders imposed by the British Court. On 15 March 2012, the SFO announced that it had entered into a Memorandum of Understanding with the Government of Tanzania, DfID and BAE, through which BAE would pay GBP 29.5 million (plus accrued interests) for educational projects in Tanzania.

GENERAL INFORMATION

The European Parliament recently adopted the Alfano report which states that, “the purpose and basis of organised crime is to make an economic profit and consequently if action to prevent and combat the problem is to be effective, it must focus on identifying, freezing, seizing and confiscating the proceeds of crime,” and that, “the re-use of confiscated assets for social purposes fosters a positive attitude to strategies aimed at tackling organised crime, since confiscating an asset is no longer regarded solely as a means of depriving a criminal organisation of resources but is doubly constructive in that it both helps to prevent organised crime and has an effect of boosting economic and social development.”⁴

Both The Hague⁵ and Stockholm⁶ Programmes had previously identified the return of confiscated assets as compensation to identifiable victims or for social purposes as a priority. On the other hand, the EU Internal Strategy in Action⁷ made no reference to the use of confiscated assets for civil society and for social purposes.

The EU has produced extensive regulation since 2001 – which in turn has been passed and adopted by the Member States – seeking a more efficient and effective way to combat serious and organised crime, such as trafficking in drugs and persons, corruption and money laundering. Focus has been given to the identification, seizure and confiscation of the proceeds and instrumentalities of such criminal actions, as the notion of depriving criminals of their unlawful gains has proven to be an effective mechanism to combat these profit-oriented crimes.⁸

⁴ Report on organised crime in the European Union, 2010/2309(INI), Rapporteur: Sonia Alfano, Brussels, 06.10.2011.

<http://www.statewatch.org/news/2011/oct/eu-ep-organised-crime.pdf>.

⁵ The Hague Programme: Strengthening Freedom, Security and Justice In The European Union, 2005/C 53/01. 3.3.2005. OJ C 53/1.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF>.

⁶ The Stockholm Programme — An Open and Secure Europe Serving and Protecting Citizens, 2010/C 115/01, 4.5.2010. OJ C 115/1.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:115:0001:0038:en:PDF>.

⁷ Communication from the Commission to the European Parliament and the Council. *The EU Internal Security Strategy in Action: Five steps towards a more secure Europe*, COM(2010) 673, Brussels, 22.11.2010. http://ec.europa.eu/commission_2010-2014/malmstrom/archive/internal_security_strategy_in_action_en.pdf.

⁸ Report from the Commission to the European Parliament and the Council, *Proceeds of organised crime Ensuring that "crime does not pay"*.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0766:FIN:EN:PDF>

In this EU context the asset recovery process is acknowledged as a four-phase process:⁹

- **Pre-investigative or intelligence gathering phase**, during which the investigator verifies the source of the information initiating the investigation and determines its authenticity. If there are inconsistencies in the intelligence or incorrect statements and assumptions, then the true facts must be established;
- **Investigative phase**, where the proceeds of crime are located and identified in the pre-investigative phase and evidence of ownership is collated covering several areas of investigative work in more formal processes, e.g., through the use of requests for mutual legal assistance, to obtain information relating to offshore bank accounts and other records, and financial investigations to obtain and analyse bank records. This phase involves substantiating the veracity of the intelligence and information and converting it into admissible evidence. The result of this investigation can therefore be a only a temporary measure – e.g., seizure – in order to later secure a confiscation order through the court;
- **Judicial phase**, where the accused person/defendant is convicted (or acquitted) and the decision on confiscation is determined;
- **Disposal phase**, where the property is actually confiscated and disposed of by the State in accordance with the law, whilst taking into account international asset sharing obligations, where applicable and in appropriate cases, as well as compensation for victims and determination on what to do with the confiscated assets.

While the tranche of the EU regulation has spanned across the abovementioned four-phased process (as will be seen in more detail in section 3.1 below), it has not concentrated on the potential use of confiscated assets for civil society and social purposes. The introduction of further appropriate regulation on the subject may address the following gaps:

- Provide for a more effective prevention of serious and organised crime by boosting economic and social development through social participation;
- Allow for the compensation of damage caused by serious and organised crime in victim societies, as these forms of criminal activity do not often have identifiable victims who could be compensated.
- Empower civil society to take a more proactive stance in the prevention and combating of serious and organised crime, by enabling them to hold accountable their Member States and consequently make the national judicial systems more representative. It would further ensure greater transparency in the interaction between citizens and Member States.

Moreover, the introduction of EU regulation on the subject matter would allow for greater co-operation and harmonisation of existing legislation that would enable more effective cross-border prevention and combating of serious and organised crime.

⁹ ICAR. Tracing Stolen Assets: a practitioner's Handbook, Basel, 2009.
http://www.baselgovernance.org/fileadmin/docs/publications/books/asset-tracing_web-version.pdf.

1. INTRODUCTION

1.1 Definitions

The definitions below are drawn from the existing European regulations and from international standards (e.g., UNCAC, UNTOC and FATF), and provide an integrated understanding of the key terms used in the study. Where diverging definitions or interpretations are found between European regulations and international standards or where none are provided for by the European regulation or international standards then these instances have been highlighted

'Property' includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property, which is considered the proceeds or the instrumentalities of crime, pursuant to the definitions in article 1 of the Framework Decision 2001/500/JHA; article 1(b) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(b) of the CoE Convention on Laundering, search, seizure and confiscation of the proceeds of crime – CETS No. 141.

The definition contained in European regulation is broader than the one found in article 2(d) of both the UNTOC and the UNCAC, as these do not make specific reference to tangible or intangible assets.

'Proceeds' are any economic advantage from criminal offences. It may consist of any form of property as defined in: article 1 of the Framework Decision 2001/500/JHA; article 1(a) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(a) of the CoE Convention on Laundering, search, seizure and confiscation of the proceeds of crime – CETS No. 141.

It should be noted that the 'proceeds of crime' is, pursuant to article 2(e) of both the UNCAC and the UNTOC, any property derived from or obtained, directly or indirectly, through the commission of an offence.

'Instrumentalities' are any property used or intended to be used, in any manner, wholly or in part, to commit a criminal offence or criminal offences, pursuant to: article 1 of the Framework Decision 2001/500/JHA; article 1(c) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(c) of the CoE Convention on Laundering, search, seizure and confiscation of the proceeds of crime – CETS No. 141.

'Freezing' or 'seizure' temporarily prohibit the transfer, destruction, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority, pursuant to article 1(g) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198.

The Council Framework Decision 2003/577/JHA, on the other hand, defines a 'freezing order' as any measure taken by a competent judicial authority in the issuing State in order provisionally to prevent the destruction, transformation, moving, transfer or disposal of property that could be subject to confiscation or evidence.

Article 2(f) of both the UNTOC and the UNCAC differ from the abovementioned definitions, as they do not contain in their definition what we meant by the act of 'destruction'.

'Confiscation' or 'forfeiture' is a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in the final deprivation of property, pursuant to article 1 of the Framework Decision 2001/500/JHA; article 1(d) of the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism – CETS No. 198; and article 1(d) of the CoE Convention on Laundering, search seizure and confiscation of the proceeds of crime – CETS No. 141.

'Value confiscation' or 'value-based confiscation' is when legislative provisions allow for alternative procedures on the confiscation of the proceeds of crime, in cases where these proceeds cannot be seized, for the confiscation of property the value of which corresponds to such proceeds, both in purely domestic proceedings and in proceedings instituted at the request of another Member State, including requests for the enforcement of foreign confiscation orders, pursuant to article 3 of the Framework Decision 2001/500/JHA. Notwithstanding the above, Member States may exclude the confiscation of property the value of which corresponds to the proceeds of crime in cases in which that value would be less than EUR 4,000.00.

'Extended confiscation' or 'extended powers of confiscation' is when a court based on specific facts finds that the property has been derived from the criminal activities of the convicted person during a period prior to conviction, which is deemed reasonable by the court in the circumstances of the particular case, or where the Court is convinced, to the requisite legal standard, that the value of the goods are disproportionate to the known income of the convicted person, pursuant to the Framework Decision 2005/212/JHA. FATF describes extended confiscation as a useful tool in cases in which "property [...] was generated from other or related criminal activity of the convicted person."¹⁰

'Third-party confiscation' involves the confiscation of assets that have been transferred by an investigated or convicted person to third parties, in accordance to the EU Internal Security in Action.¹¹

'Non-conviction based confiscation, or forfeiture' is where confiscation is ordered but does not derive from a criminal conviction. Council Framework Decision 2005/212/JHA refers to NCB confiscation in its article 3(4) ("procedures other than criminal procedures to deprive the perpetrator of the property in question").

'Civil Society'. Although the European Commission has acknowledged that there is no universal or legal definition of civil society or civil society organisation, it has accepted that, "civil society organisations play an important role as facilitators of a broad policy dialogue."¹²

¹⁰ FATF, *Best Practices Confiscation (Recommendations 3 and 38)*, 19 February 2010, available at: <http://www.fatf-gafi.org/dataoecd/39/57/44655136.pdf>.

¹¹ Communication from the Commission to the European Parliament, *The EU Internal Security Strategy in Action: Five steps towards a more secure Europe*, COM(2010) 673 final, Brussels, 22.11.2010.

¹² Communication from the Commission, *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*, 11.12.2002, available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0704:FIN:EN:PDE>.

For the purposes of the present study, civil society shall be defined as including trade unions and employers' organisations, non-governmental organisations, professional associations, charities, grass-roots organisations, organisations that involve citizens in local and municipal life with a particular contribution from churches and religious communities.¹³ CIVICUS¹⁴ defines civil society as "the arena outside the family, the state and the market where people associate to advance common interests."

'Compensation of Victims.' For the purposes of the present study, 'victim' shall mean a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State, in accordance with article 1(a) of the Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceeding.

Compensation of victims is defined in Council Directive 2004/80/EC¹⁵ as relating to compensation to crime victims. According to this Directive, compensation has to be "fair and appropriate".

It should be noted that serious and organised crimes (e.g., corruption, trafficking in persons and drugs, money laundering and organised crime) do not often have identifiable victims. As such, it can be argued that society as a whole is the victim for the serious effects of this form of criminality. As a result, 'compensation of victims' for the purpose of this study shall also include the compensation of society that has suffered from the effects of organised crime as a whole.¹⁶ This compensation can take the form of re-using the confiscated proceeds of aforementioned crimes for social purposes.

'Re-use of Confiscated Assets' does not have a specific definition under the EU regulation or international standards. For the purpose of this study, the re-use of confiscated assets becomes relevant in the allocation or disposal phase of asset management if confiscated assets are not being used for the compensation of victims. During this step the destination of assets is being determined, which involves the question of how assets can be further utilised for future purposes (e.g., allocation of extra resources to law enforcement agencies).

1.2 Study Structure

The study is structured as follows:

- Chapter 2 presents the methodology used to undertake the present study;
- Chapter 3 presents an analysis of the current EU asset recovery framework and the explores possibility of using confiscated assets for civil society and social purposes;
- Chapter 4 presents an analysis of the national legislation of selected Member States with regards to asset recovery and the possibility of using confiscated asset for civil society and for social purposes;

¹³ European Commission, *European Governance, a White Paper*, 25.07.2001, available at: http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf.

¹⁴ CIVICUS Social Society Index. Available at:

http://www.civicus.org/new/media/CSI_Methodology_and_conceptual_framework.pdf

¹⁵ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, Luxembourg, 20.04.2004.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:261:0015:0018:en:PDF>

¹⁶ Repairing Social Damage Out of Corruption Cases: opportunities and challenges as illustrated in the Alcatel Case in Costa Rica. 06.12.2010.

<http://14iacc.org/wp-content/uploads/SocialDamagePaper20.01.2011.pdf>

- Chapter 5 presents the findings of the study, including strengths and shortcomings found both at the levels of the EU and the selected Member States;
- Chapter 6 presents the conclusions and recommendations and whether national regulation and practices of the selected Member States can serve as a model for legislation at the EU level;
- List of Annexes comprising the answers to the questionnaires by the national authorities and members of civil society of the selected Member States, sent out for further substantiation of the production of the study; as well the pertinent legislation cited throughout the study.

2. METHODOLOGY

The methodology undertaken included the following data collection:

- A desktop review of relevant EU regulation and national legislation, as well as literature, academic studies, legislative reports, action plans and peer reviews;
- Questionnaires to gain understanding of key issues in the asset recovery process within the selected Member States;

A first questionnaire was sent to both national authorities and representatives of the selected Member States to better understand issues in all phases of the asset recovery process, as well as to understand the different perspectives from both the government and civil society. A second questionnaire was devised based on the responses received to the first questionnaire and to conducted interviews and sent to the respondents of the first questionnaire to further focus on pertinent elements which comprise chapters 5 and 6 of the study.

2.1 Legislation and Literature Review

An internet-based research of academic journals were reviewed for relevant studies carried out since 2001 with regards to the asset recovery process, the use of confiscated assets from criminal organisations to be used for civil society and in particular for social purposes, and the compensation to victims was conducted. Furthermore, all relevant EU regulations, strategies and reports were reviewed, as well as FATF and Moneyval reports from the selected Member States.

It should be highlighted that the present study also makes use of a study commissioned by the European Commission on assessing the effectiveness of EU Member States' practices in the identification, tracing, freezing and confiscation of criminal assets. To that end, the European Parliament made available to the Institute a copy of the final study commissioned by the European Commission which assesses the effectiveness of EU Member States' practices in the identification, tracing, freezing and confiscation of criminal assets (hereinafter, the Matrix Report).¹⁷

Due to the synergies between the aforementioned Commission report and the present study, the present report shall make direct referencing to the Matrix report, where applicable.

2.2 Questionnaire

The key data collection instrument for the study was a questionnaire developed by the Basel Institute on Governance. The questionnaire was developed taking into account the different phases of the asset recovery process and focused on the disposal of confiscated assets and their final destination. It was sent to both national authorities dealing with asset

¹⁷ Assessing the effectiveness of EU Member States' practices in the identification, tracing, freezing and confiscation of criminal assets. Final Report prepared in June 2009 by Matrix Insights to the Directorate-General Justice, Freedom & Security of the European Commission.

recovery – we tried in particular to target the AROs, where available – and to civil society representatives from each of the reviewed countries. The respondents were given six weeks to respond to the questionnaire.

The questionnaire and the responses thereto are available in Annex 1. In total, the questionnaire was sent to 12 national authorities and representatives from civil society (one national authority and one representative of civil society of each Member States), of which six responses were sent back.

A second supplementary questionnaire was sent out to the national authorities and members to civil society. The additional questions were based on the responses from the initial questionnaire and were directed principally aspects pertaining to chapters 5 and 6 of the present study.

The supplementary questionnaire and the responses thereto are available in Annex 1. In total, the questionnaire was sent to 10 national authorities and representatives from civil society (one national authority and one representative of civil society of each Member States), of which four responses were sent back.

Additionally, the Institute conducted several interviews with national authorities and representatives from civil society of the selected Member States. Where applicable, these are directly cited in footnotes throughout the study.

3. LEGISLATIVE BACKGROUND AND LITERATURE REVIEW

KEY FINDINGS

- While there is EU regulation aimed at sharing of confiscated assets and for the compensation of victims of crimes, there is no regulation pertaining to the social re-use of confiscated assets.
- There is a comprehensive EU regulatory framework for combating of serious and organised crime through the deprivation of proceeds and instrumentalities of crime.
- The current EU regulation does not address the social re-use of confiscated assets; however, several EU action plans, reports and strategies refer to the need to introduce regulation pertaining to the social re-use of confiscated assets.
- It appears that the current EU regulatory framework would allow for a more comprehensive system communication between national AROs which could be further explored for management and re-use of proceeds and instrumentalities of crime for social purposes. However, the success and efficiency of this communication relies with Member States fully complying with the applicable EU regulation.
- Academic literature available appears to focus on the asset recovery process as a whole or parts thereof, but gives little attention to the destination of confiscated assets, including, but not limited to, the social re-use of confiscated assets.

3.1 EU regulations

The Internal Security Strategy of the EU, adopted by the European Council on 25-26 March 2010¹⁸ identifies serious and organised crime, trafficking in drugs and persons, and corruption, among others, as the main crime-related risks and threats which Europe is facing. This strategy is to be understood as, “a wide and comprehensive concept which straddles multiple sectors in order to address these major threats and others which have a direct impact on the lives, safety and well-being of citizens.”¹⁹ The document focuses on the need to exploit the synergies among law enforcement, integrated border management and criminal justice systems, in order to complement and reinforce each other. Thus, the ultimate goal of the internal security strategy is to, “prevent crimes and increase the

¹⁸ Internal Security Strategy for the European Union: “Towards a European Security Model” adopted by the European Council 25-26 March 2010.

http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/QC3010313ENC.pdf

¹⁹ Ibid. p. 8.

capacity to provide a timely and appropriate response to natural and man-made disasters through the effective development and management of adequate instruments."²⁰

However, the Internal Security Strategy does not appear to exploit the potential synergies between the state actors, mentioned above, with civil society and the private sector.²¹ Notwithstanding, it acknowledges both the Treaty of Lisbon and the Stockholm Programme, which in turn make reference to the interaction between state actors and civil society. Furthermore, it sets out common threats and challenges faced by the EU Member States (e.g., serious and organised crime) and the principles underpinning the common internal security policy of the EU, while also defining a European security model. This document does not include any mention of the social re-use of confiscated assets.

A review of the existing EU regulation pertaining to the asset recovery process and the reported levels of compliance was undertaken in order to establish a knowledge base for the presentation of the study. The review focused on five Council Framework Decisions in force since 2001 and which directly refer to the asset recovery process.

As the focus of the present study is the use of confiscated assets from criminal organisations to be used for civil society and in particular for social purposes, it is recommended that the present section be read in conjunction with the Matrix report, which focuses on the effectiveness of the Member States in identifying, tracing, freezing and confiscating criminal assets.

3.1.1 Council Framework Decision 2001/500/JHA22

Seeking to further enhance the effectiveness of the CoE Convention on laundering, search, seizure and confiscation of the proceeds of crime (1990 Convention)²³, the Council Framework Decision 2001/500/JHA worked towards harmonising the approach regarding the confiscation of proceeds and instrumentalities of crime by Member States. It further sought to make the money laundering offence uniform and sufficiently broad by requiring Member States not to make or uphold reservations to the 1990 Convention with regards to:

- The adoption of confiscation of the proceeds and instrumentalities of crime (article 2 of the 1990 Convention);
- The money laundering offence, which is to be punishable by deprivation of liberty or a detention order for a maximum of more than one year (article 6 of the 1990 Convention).

Tax-related offences, however, are an exception to the implementation of article 2 (confiscation measures) of the 1990 Convention, since Council Framework Decision 2001/500/JHA informs that in such cases appropriate tax-debt recovery legislation is applicable.

²⁰ Ibid. p. 9.

²¹ In fact, while the 2000, the 2005 and the 2010 Council and Commission Action Plans on the common area of freedom, security and justice of the EU (the Programmes of Tampere, The Hague and Stockholm, respectively) have identified the return of confiscated assets as compensation to identifiable victims for social purposes as a priority, the 2010 EU Internal Security Strategy in Action makes no reference to the Commission legislating in future on the social re-use of confiscated properties.

²² Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, Luxembourg, 26.6.2001. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:182:0001:0002:EN:PDF>.

²³ Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Strasbourg, 8.11.1990. <http://conventions.coe.int/Treaty/EN/Treaties/Html/141.htm>.

This Council Framework Decision raised two other elements to ensure more effective mechanisms to combat money laundering and serious and organised crime. As such, Member States were required to put in place systems of value-based confiscation (foreseen and required by article 2(1) of the 1990 Convention) for both domestic proceedings and proceedings stemming from another Member State. In this regard, the second report²⁴ on Council Framework Decision 2001/500/JHA provides that value-based confiscation appears to be available in varying degrees amongst Member States, at least as an alternative measure.

Member States were also required to receive requests from one another through mutual legal assistance seeking to identify, trace, freeze, seize or confiscate assets. These requests for mutual legal assistance were to be given the same priority as that given to domestic measures. Thus, under Council Framework Decision 2001/500/JHA, Member States were still required to issue requests for mutual legal assistance to ensure the confiscation of the proceeds and the instrumentalities of crime.

States were requested to adopt these measures by 31 December 2002. The first²⁵ and second²⁶ reports on Council Framework Decision 2001/500/JHA however indicated that, among others, Member States had largely complied with the penalty requirements under article 2, and that value-based confiscation had been made available to varying degrees, at least as an alternative measure (concluding however that the information provided by the Member States was considered “relatively vague”).

It should be noted, however, that while Council Framework Decision 2001/500/JHA expressly mentions the need for effective combating of serious and organised crime through combating money laundering – by depriving perpetrators of their unlawful gains – it does not provide any guidance regarding the potential destination of those confiscated assets. It might therefore be implied that the disposal of confiscated assets was left for Member States to decide on a case-by-case scenario (e.g., through the court decision determining ordering the confiscation, under the laws of the Member States issuing the confiscation order). Unless otherwise expressly provided for under the national legislation of the Member States, confiscated assets will not necessarily be used by civil society or for social purposes.

Nonetheless, with regards to cross-border confiscation, even if there were enabling national legislation to allow for the use of confiscated assets for civil society and for social purposes, and due to the fact that requests for mutual legal assistance would have to be issued across Member States, two possibilities are consequently envisaged (although others may arise depending on the specific national legislation and the possibilities these would entail):

²⁴ Second Commission report based on Article 6 of the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, COM(2006) 72 final, Brussels, 21.02.2006.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0072:FIN:EN:PDF>

²⁵ Report from the Commission based on Article 6 of the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, COM(2004)230, Brussels, 05.04.2004.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0230:FIN:EN:PDF>

²⁶ Second Commission report based on Article 6 of the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, COM(2006) 72 final, Brussels, 21.02.2006.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0072:FIN:EN:PDF>

- **The enabling legislation stems from the requesting State.** The use for social purposes of the confiscated assets would only be possible after the confiscated assets have been returned to the requesting State, as it does not have jurisdiction to forcefully apply this legislation in the jurisdiction of the requested country.
- **The enabling legislation stems from the requested State.** The requested State would not be able to apply its legislation to the assets which are to be returned to the requesting State, although it could ultimately seek some conditions on the return of such assets if no agreement on the terms of return is reached.

3.1.2 Council Framework Decision 2003/577/JHA²⁷

Council Framework Decision 2003/577/JHA came as a response to the special meeting held by the European Council on 15-16 October 1999 in Tampere on the creation of an area of freedom, security and justice in the EU. The meeting endorsed the principle of mutual recognition of judicial decisions and judgements, as well as the approximation of legislation, in order to facilitate “co-operation between authorities and the judicial protection of individual rights.”²⁸ It also addressed the need for applying the principle of mutual recognition to “pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State’s authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.”²⁹

Council Framework Decision 2003/577/JHA thus enables competent judicial authorities to secure evidence and seize the proceeds and instrumentalities of crime. It provides for rules of procedure pertaining to the transmission of freezing orders directly between competent judicial authorities, the duration of the freezing order, the grounds for non-recognition, non-execution or postponement of the request, as well as the subsequent treatment to be given to the seized property. It also introduces a list of criminal offences in its article 3 – amongst which organised crime, money laundering and corruption are included – for which dual criminality checks are to be abolished, as per its article 10(3).

An element introduced by this instrument is that such requests would no longer need to go through the channels of mutual legal assistance – a direct consequence to the principle of mutual recognition of judicial decisions and judgement – in order to ensure the rapid response by Member States to collect evidence and seize proceeds and instrumentalities of crime, thus removing these unlawful assets from the perpetrators of serious and organised crime. Under Council Framework Decision 2003/577/JHA, a freezing order issued by the judicial authority of the issuing State would directly be transmitted to the judicial authority of the executing State, without the formalities of mutual legal assistance. Thus, while the confiscation of proceeds and instrumentalities of crime still requires the use of formal mutual legal assistance channels (under Council Framework Decision 2001/500/JHA), the execution of seizure orders (as well as other interim measures to secure evidence) would no longer require the use of such mechanism.

²⁷ Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, Brussels, 22.7.2003.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:196:0045:0055:en:PDF>

²⁸ Presidency Conclusions to the Tampere European Council meeting, 15-16 October 1999, para. 33. http://www.europarl.europa.eu/summits/tam_en.htm.

²⁹ Presidency Conclusions to the Tampere European Council meeting, 15-16 October 1999, para. 36. http://www.europarl.europa.eu/summits/tam_en.htm.

Member States were to comply with said Council Framework Decision by 2 August 2005. The report regarding the implementation of the Council Framework Decision 2003/577/JHA³⁰ concludes that the level of execution of this Council Framework Decision has not been satisfactory, drawing its conclusion from the low number of notifications and the numerous omissions and misinterpretations in the national legislations.

Council Framework Decision 2003/577/JHA does not contain any provisions for the final destination of seized assets upon their confiscation – as the direct transmission of seizure orders amongst Member States is to be accompanied by a request for confiscation under its article 10(1)(b). Thus, no mention is made for either the possible use of seized assets by either the issuing or executing State or for its use for civil society or for social purposes.

It should be emphasised, nevertheless, that the use of seized assets – which is a practice in several Member States with regards to their own national authorities, but not necessarily for social purposes – may be possible under the provisions of Council Framework Decision 2003/577/JHA, although it would ultimately depend on a case-by-case basis of application of the pertinent legislation and judicial practice of the executing Member State. The use of seized assets, however, is a contentious topic since such use would inevitably depreciate the asset (whether movable or immovable), and as such might result in the payment of damages or reimbursement to the person whose assets have been seized, in the event of an acquittal of the offences which resulted in the initiation of the criminal proceedings. It is furthermore unclear whether the use of these seized assets would be possible for the issuing Member State and not the executing Member State.

3.1.3 Council Framework Decision 2005/212/JHA³¹

Council Framework Decision 2005/212/JHA acknowledges that the existing EU instruments are insufficient to ensure an effective cross-border co-operation regarding the confiscation of proceeds and instrumentalities of crime. It further states that the main motive for cross-border organised crime is financial gain. The main aim of this instrument is to ensure that all Member States have effective rules on the confiscation of the proceeds and instrumentalities of crime, specially in relation to the burden of proof regarding the source of assets held by a person convicted of an offence related to organised crime.

This instrument enables the confiscation, wholly or in part, of instrumentalities and proceeds from criminal offences punishable by imprisonment for more than one year, or property the value of which corresponds to such proceeds. Furthermore, Member States are also encouraged to use procedures other than criminal ones to deprive the perpetrator of the proceeds of crime (e.g., NCB confiscation).

³⁰ Report from the Commission based on Article 14 of the Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, COM(2008) 885, Brussels, 22.12.2008.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0885:FIN:EN:PDF>

³¹ Council Framework Decision 2005/212/JHA on Confiscation of Crime-Related Proceeds, Instrumentalities and Property, Brussels, 24.03.2005.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:068:0049:0051:EN:PDF>

The threshold for applying confiscation under Council Framework Decision 2005/212/JHA is the same as in Council Framework Decision 2001/500/JHA, but the possibility of maintaining reservations in respect of the confiscation of the proceeds for tax offences was abolished. Nonetheless, it is innovative with regards to its provisions regarding extended confiscation, provided for under article 3. It provides for three situations in which Member States can seek confiscation:

- Where a court is satisfied that the property to be confiscated derives from criminal activity of the convicted person during the period prior to the conviction;
- Where a court is satisfied that the property derives from similar criminal activities of the convicted person during the period prior to the conviction; or
- Where it is established that the value of the property is disproportionate to the lawful income of the convicted person and a court is satisfied that the property in question derives from the criminal activity of the convicted person.

A fourth non-mandatory situation foreseen is to allow for the confiscation of property acquired by the “closest relations of the person concerned and property transferred to a legal person in respect of which the person concerned [...] has a controlling influence.”

These four circumstances require a criminal conviction of the perpetrator in order for the extended confiscation to take place. However, it allows for the application of value-based confiscation, as well as the confiscation of not only proceeds of crime, but also intermingled or transformed assets.

Member States were required to comply with this Council Framework Decision 2005/212/JHA by 15 March 2007. In that regard, the report³² on Council Framework Decision 2005/212/JHA expressed the concern of the Commission on little progress which had been done to transpose the instrument in the Member States.

Similarly to the other Council Framework Decision mentioned above, there are no specific provisions contained in this Council Framework Decision expressly mentioning the use for civil society or for social purposes of the assets confiscated under the extended confiscation provisions.

3.1.4 Council Framework Decision 2006/783/JHA³³

Council Framework Decision 2006/783/JHA applies to the principle of mutual recognition to confiscation orders issued by a court competent in criminal matters for the purpose of facilitating enforcement of such confiscation orders in a Member State other than the one in which the confiscation order was issued. It applies to all offences in relation to which confiscation orders can be issued and it has further abolished dual criminality requirements in relation to offences listed in its articles.

³² Report from the Commission pursuant to Article 6 of the Council Framework Decision of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property (2005/212/JHA), COM(2007) 805, Brussels, 17.12.2007.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2007:0805:FIN:EN:PDF>

³³ Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders, Luxembourg, 06.6.2006.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:328:0059:0078:en:PDF>

This instrument seeks to establish the rules under which a Member State should recognise and execute a confiscation order issued by a court competent in criminal matters of another Member State. Article 6 defines offences which give rise to confiscation orders. Articles 8 and 10 extended the list of reasons for non-recognition or non-execution and for postponement of execution, respectively, compared to the 2003 Framework Decision. Member States had to comply with this Instrument by 24 November 2008.

Interestingly, Council Framework Decision 2006/783/JHA contains specific provisions pertaining to the disposal of confiscated assets. While it does not make any direct reference to the use for civil society and for social purposes of the confiscated property, it does set rules for the sharing and repatriation of assets between Member States. As such, article 16 (disposal of confiscated assets) provides that when confiscation does not exceed EUR 10,000, the value of the confiscation is to remain with the executing Member State, while a 50 per cent sharing agreement is to be considered for cases in which the amount is higher than the previously mentioned threshold.

3.1.5 Council Framework Decision 2007/845/JHA34

This instrument has sought to build on the informal co-operation which has taken place within the CARIN network.³⁵ This Council Framework Decision obliges Member States to set up or designate a national ARO, which should co-operate with each other by exchanging information and best practice upon request and spontaneously. Member States are required to meet these requirements by 18 December 2008.

EUROPOL would play an important role: it has been established as the secretariat of the CARIN Network, and it has also established the Europol Criminal Assets Bureau (ECAB) which supports Member States in the identification and confiscation of criminal proceeds.³⁶ Another initiative from EUROPOL which would strengthen communication exchange between AROs is the so-called Secure Information Exchange Network Application (SIENA), which would provide the Member States also the ability to cross-reference and match their data with EUROPOL's database.³⁷

However, there is once again no mention in this Council Framework Decision about the use of confiscated assets for civil society or for social purposes, although the creation of AROs require Member States to centralise their information and data pertaining to confiscated property, which would allow for a more effective management – even though AROs are set up to act as information exchange channels – and as to the final destination of the confiscated assets.

³⁴ 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, Brussels, 06.12.2007. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:332:0103:0105:EN:PDF>

³⁵ CARIN is an informal network of contacts dedicated to improving cooperation in all aspects of tackling the proceeds of crime. It aims to increase the effectiveness of members' efforts in depriving criminals of their illicit profits through cooperative inter-agency cooperation and information sharing.

³⁶ The EU Internal Security Strategy – Written Evidence. UK House of Lords, EU Sub-Committee F (Home Affairs), London, 12.01.2011, p.34.

<http://www.parliament.uk/documents/lords-committees/eu-sub-com-f/ISS/ISScollatedwrittenevidence.pdf>

³⁷ *ibid.* p. 34

The report³⁸ on Council Framework Decision 2007/845/JHA informs that only a few AROs actually are involved in the management of seized assets. It would be beneficial for the purposes of the social re-use of confiscated assets if the AROs were allowed to take a more prominent role in the management and confiscation of proceeds and instrumentalities of crime as it would ultimately allow for a more comprehensive response from States and their civil society to deal with the use for civil society and social purposes of these proceeds and instrumentalities of crime.

3.2 EU reports and strategies

The previously mentioned Alfano Report contains a comprehensive list of EU reports and strategies which refer to the need to implement the social re-use of confiscated assets for the purposes of more efficiently combating money laundering and serious and organised crime in the EU.

These reports and strategies, as well as the Alfano Report, point to the fact that serious and organised crime has a substantial social cost, violates human rights and undermines democratic principles. They further point out that evidence suggests that in some Member States, organised crime has infiltrated the public sector and legitimate economic activities.

With regards to the use of confiscated assets to be used for civil society and social purposes, however, the reports and strategies are vague, informing that "the re-use of confiscated assets for social purposes fosters a positive attitude to strategies aimed at tackling organised crime, since confiscating an asset is no longer regarded solely as a means of depriving a criminal organisation of resources but is doubly constructive in that it both helps to prevent organised crime and has the effect of boosting economic and social development."³⁹

Notwithstanding, attention should be given to the opinion from the Committee of the Regions to the EU Internal Security Strategy. Said Committee recommended that a legislative proposal should specify, "the municipality in which the confiscated property is located as the natural recipient of the right of ownership thereof. [...]The Committee recommends that this should be done for a socially useful purpose, such as giving it to charities and cooperatives, not least because local communities bear the highest cost of the activities of organised criminals and the social re-use of confiscated property has a high value in terms of compensating communities affected by this serious issue."⁴⁰

³⁸ Report from the Commission to the European Parliament and to the Council based on Article 8 of the 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 proceeds from, or other property related to, crime, COM(2011) 176, Brussels, 12.04.2011.

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0176:FIN:EN:PDF>

³⁹ Report on organised crime in the European Union, 2010/2309(INI), Brussels, 06.10.2011, p. 8.

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2011-0333+0+DOC+PDF+V0//EN>

⁴⁰ Opinion of the Committee of the Regions on the Eu Internal Security Strategy, CIVEX-V-018, 91st Session (30 June-1 July 2011), para. 28.

<http://edz.bib.uni-mannheim.de/edz/doku/adr/2010/cdr-2010-0407-en.pdf>

3.3 Academic literature review

A comprehensive research of available literature on the use of confiscated assets for civil society and social purposes was conducted for the purposes of the present study. While there is much literature on the asset recovery process and the problems and obstacles to confiscating and recovering assets, there is little literature available on the further use and destination of confiscated assets, particularly for social purposes. It has to be noted that the terminology of the reviewed literature in dealing with the *destination* of confiscated assets is often described as *disposal* of confiscated assets. (A full list of literature reviewed and further readings can be found in the Annex).

There are a few other comprehensive publications and policy notes that refer to the management and disposal of assets as a side issue, which contain some significant policy considerations when dealing with reusing confiscated assets for social purposes.

The Stolen Asset Recovery (StAR) Initiative has published several studies on Asset management. The most relevant for this subject matter is the publication entitled *the Management of Returned Assets: Policy Considerations*. It addresses several policy considerations such as monitoring systems, autonomous funds and budgeting for stolen assets. Concerning the allocation of returned assets this policy note calls for countries to define and monitor expected results when money is allocated to specific programs, activities and beneficiaries.

Defining the expected results for asset allocation can be used to verify whether the funding is sufficient or not and provides also a basis for verifying whether the funds have been spent for the intended purpose. It also stresses to be cautious whether the use of assets to specific programs is additional or not, "For the returned funds to provide additional resources for the intended purpose, financing from other sources would have to remain constant or increase." (World Bank, 2009). StAR recommends that the management of returned assets and its allocation requires transparent tracking systems and monitoring to ensure that public funds are used as intended.

Brun et al. (2011) refer in their publication to common types of assets and associated problems. This is important, as not every type of assets can be 're-used' for specific purposes. Aside from money in its various forms and to some extent properties, other forms of assets such as businesses, livestock and farms, and precious metals, jewels and artwork are very difficult to manage and to sell. Furthermore, re-using these assets faces more problems when located in foreign jurisdictions. Thus, Brun et al. reveal the significance of an appropriate asset management system and the need for a centralised competent authority to manage confiscated assets.

With regards to assets located in foreign jurisdictions, Golobinek (2006) notes that under the 1990 Convention and the UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances the disposal of confiscated property is left to the domestic law of requested States, unless the State agrees otherwise. He also refers to the CoE Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism, which states that parties shall give priority consideration to returning the confiscated property to the requesting State. He also mentions Council Framework Decision 2006/783/JHA and the possibility of asset sharing to the proportion of 50 per cent by the requesting and requested States.

Furthermore, the G8 has issued a best practices paper on the administration of seized assets, which recommends states to adopt mechanism for the administration of seized assets and to consider the establishment of an asset confiscation/forfeiture fund. It further calls for transparency in administrating seized assets and an annual examination by independent auditors which should be also made available to the public. Key elements as described in the study are, "(i) the express designation of a competent national authority responsible for all aspects of the custody and management of seized assets, (ii) the use of asset managers in particularly complex situations, and (iii) the establishment of a dedicated fund for the deposit of seized and confiscated/forfeited assets." While this study refers to seized assets the above recommendations are likewise important for the proper management of confiscated and its re-use for social purposes.

Another pertinent element to be considered when discussing the social re-use of confiscated assets is the damage incurred to the community. Whereas serious and organised crime normally does not have identifiable victims or, when there are, the effects of such modalities of crime affect also the local communities, there is an ever-growing need to discuss the social damage incurred. While this topic goes beyond the subject matter of this study, due attention to the social cost of serious and organised crime to the local community has to be taken into consideration when confiscating assets. In this regard, Olaya et al. discusses the challenges needed to overcome and identify social costs in the paper entitled *Repairing Social Damage out of corruption cases: opportunities and challenges as illustrated in the Alcatel Case in Costa Rica*.

Finally, an Italian publication entitled *L'uso sociale dei beni confiscati* has been the only recent publication which analyses the re-use of confiscated assets for social purposes. This publication focuses on the legal history in Italy which led to the creation of specific legislation for the social re-use of confiscate assets (albeit for immovable property only) and the limitations of previous legislation for the combating serious and organised, as well as seizing and confiscating the proceeds and instrumentalities of crime arisen thereof.

4. NATIONAL LEGISLATION OVERVIEW

KEY FINDINGS

- Most of the selected Member States do not have provisions for the use of confiscated assets for civil society or for social purposes.
- Many of the selected Member States allows for the use of seized assets, prior to their confiscation. This provision may ultimately depreciate the value of the seized assets and diminish the value of such property for the social re-use of confiscated assets.
- The monetary value of the confiscated property is generally incorporated into the state budget, and is sometimes earmarked for specific government actions which may indirectly impact on its use for social purposes.
- The solutions presented by the Member States which have, or intend to have in place provisions for the social re-use of confiscated assets are diverse.
- Notwithstanding, common elements for regulation on the social re-use of confiscated assets include the need for transparency and specific destination of the confiscated assets for social purposes.
- It is not possible to extract from the Member States examples for a common definition for 'social purpose'. Thus it becomes more difficult to seek to either harmonise or better co-ordinate the diverging interpretations.

The study identified six Member States whose asset recovery system at the national level were analysed, as well as the cross-border co-operation between Member States (or between a Member States and a jurisdiction outside the EU). The present section seeks to determine whether:

- There are provisions for the use of confiscated assets for civil society and in particular for social purposes in the national legislation of Member States; and
- There are legal provisions pre-determining the application of the confiscated assets to a specific fund or use, which may allow or hinder the use of confiscated asset for civil society and in particular for social purposes.

The six Member States which were reviewed were chosen based on the following criteria:

- The existence of legislation for the management of seized assets;
- The existence of relevant institutions for the asset recovery process, such as the AROs;
- Their respective political organisation and legal system;
- Their role in international financial transactions;

- The reliability and quality of the data;
- The information is accessible and is up-to-date.
- A diverse representation of the Member States of the EU.

4.1 Bulgaria

The system for seizure and confiscation of assets in Bulgaria, and especially its management, has been further developed in the past years. Bulgaria has been facing a high amount of organised crime, and as a result effective strategies to counteract that fact and to make crime less attractive to criminals are essential.⁴¹ Thus, the use of confiscated assets for social purposes is one of the newer components of the asset recovery system of Bulgaria, which seems to be currently under development.

The Law on Forfeiture to the State of Property Acquired through Criminal Assets (LFPC) divides the forfeiture procedure into two stages: (i) freezing of assets; and (ii) forfeiture of the frozen assets. The first stage is aimed at ensuring that the respective assets will not be sold before the completion of the procedure, while during the second stage the assets are forfeited.⁴² The LFPC allows courts to issue freezing orders prohibiting the sale of the assets affected by the order.⁴³

Seized assets therefore remain under the management of the perpetrator and no state authority may use or sell such property. LFPC provides an exception to this rule with regards to assets that may be subject to rapid deterioration (e.g., perishable goods), which can be sold by the National Revenue Agency (NRA) before the final court decision. The received amount is kept in a separate bank account.⁴⁴ With the exception of assets subject to rapid deterioration, there is no specific legal regime for the management of seized assets. The fact that the current LFPC does not provide for provisions on the management of seized assets has been also pointed out by a Bulgarian legal expert from the civil society⁴⁵.

Bulgaria's ARO, the Multidisciplinary Commission for Establishing of Property Acquired from Criminal Activity (CEPACA) (since 2010 known as the Commission for Establishing Property Acquired through Illegal Activity – CEPAIA), is a specialised agency responsible for conducting investigation into the property of persons against whom the conditions for forfeiture for assets apply, in order to identify proceeds and instrumentalities of crime in the country and overseas. CEPACA has the following general powers and functions⁴⁶:

- To initiate proceedings for establishment of property acquired through criminal activity;
- To bring to courts requests for the freezing of assets;
- To bring to courts requests for the forfeiture of assets.

⁴¹ Venice Commission, Sixth Revised Draft Law on Forfeiture of Assets Required through Criminal Activity and Administrative Violations, 23 May 2011, p. 29.

⁴² According to the information provided in the questionnaire by the civil society representatives, the term 'confiscation' in Bulgaria is used as a criminal penalty where the origin of the assets do not have to be determined. The respondent civil society representative also informed that 'confiscation' is similar to a fine, although the latter is a concrete amount (e.g., EUR 1,000) of money and the former is a ratio (e.g., one-fifth of the property of the perpetrator).

⁴³ Chapter Four of LFPC.

⁴⁴ Article 23(6) LFPC.

⁴⁵ Interview with Dimitar Markov, Center for the Study of Democracy, 18 January 2012..

⁴⁶ Article 13(1) LFPC

It has to be noted though that CEPACA cannot exercise any of its powers until the pre-trial authorities (the public prosecutor and the investigating authorities) have initiated criminal proceedings. Furthermore, CEPACA cannot submit requests for forfeiture of proceeds and instrumentalities of crime until such time that the conviction has entered into force. Both of these facts have been criticised by the Bulgarian civil society expert.⁴⁷ It would be seen as an advantage if CEPACA could start proceedings on its own initiative without having to wait for the pre-trial authorities to have finished their investigations.

In addition to the provisions contained in the LFCP, article 72 of the Criminal Procedure Code (CPC) allows for freezing of assets to satisfy the amount of a fine. Forfeiture of assets as a form of punishment is also possible under the articles 37(3) and 44 of the Criminal Code (CC). Article 53 CC also allows for extended confiscation. Article 253(4)(6) CC allows for laundered property to be forfeited. According to the CPC, “when the confiscation of certain properties or the freezing of properties pursuant to Art. 53 of the Criminal Code have been ruled with the sentence, the court shall send a copy of the sentence to the NRA for execution. The NRA shall notify the court about the takeover of the frozen and forfeited properties within seven days.”

Thus, under the current Bulgarian framework, the NRA sells assets that have been forfeited. There are currently no provisions under Bulgarian law for the management and the disposition of *confiscated* assets. The NRA follows the general procedures applicable for the collection of taxes and other public claims. The money resulting from the sale of the forfeited assets does not have any specific designation and as such is incorporated into the state budget.⁴⁸ This, also, has been criticised both by the CEPACA itself and Bulgarian civil society.

Notwithstanding the above, Bulgaria is currently drafting a bill for the management of frozen and forfeited assets. This draft bill is still under revision, seeking to incorporate amendments suggested by the Venice Commission – the said Commission concluded that the bill had weak provisions on the management of assets as it was dealt with on a case-by-case basis, which seemed vague and prone to lack of transparency.⁴⁹ Amendments were taken accordingly in 2011 and as a consequence, the new draft bill (as it stands as of May 2011) provides for two types of asset management:

- Management of frozen assets, and;
- Management of forfeited assets

Assets that have been frozen and have not been confiscated yet remain with the owner until forfeiture is ordered, or they are left with a safe-keeper (e.g., when the frozen assets are a bank account, the bank is responsible for managing this bank account).

⁴⁷ Interview with Dimitar Markov, Center for the Study of Democracy, 18 January 2012.

⁴⁸ Answers to Questionnaire Bulgaria Dimitar Markov, Center for the Study of Democracy, 19 December 2011.

⁴⁹ Venice Commission, Interim Opinion on the Draft Act on Forfeiture in Favour of the State of Illegally Acquired Assets, 16 March 2010, para. 88.

The draft bill further proposes the creation of an Interdepartmental Board of Management of Forfeited Assets under the authority of the Ministry of Finance which will be responsible for proposing, "to the Council of Ministers to allocate for management the assets forfeited according to the procedure established by this Act, to donate the said assets for humanitarian purposes, or to order the sale thereof." The article also states, "[r]epresentatives of the National Association of Municipalities in the Republic of Bulgaria, of non-profit organisations, branch and professional organisations may be invited to the meetings of the Board." Once it is decided that the assets are sold, the money resulting from the sale would go into a fund managed by a Management Board. The resources of this fund are to be used for social purposes, amongst others. For example, 30 per cent of the fund is to be allocated to the Social Assistance Fund under the Minister of Labour and Social Policy on a quarterly basis; another 30 per cent is to be allocated to the promotion of small- and medium-sized enterprises.

According to comments received, the draft law of May 2011 has been updated once again in January 2012 and the new draft version seems to no longer provide for the said fund.⁵⁰ If such a draft were to be adopted, it would certainly offer ground for criticism, as the social re-use component contained in the public draft of May 2011 would have been abolished. It was, however, not possible to review the new draft legislation of January 2012 as it was only available in Bulgarian⁵¹ at the time of writing of the present study.

4.2 France⁵²

Law No. 2010-768 of 9 July 2010, to facilitate the seizure and the confiscation of criminal assets and its pertinent legal texts,⁵³ considerably modernises the French legal system concerning the seizure and confiscation of the proceeds and instrumentalities of crime. As regards procedural matters, the new legislation clarifies existing articles of the CPC and thus offers a quicker and more effective asset seizure procedure than the one outlined in the Civil Procedure Code.⁵⁴ The new law provides for the seizure of movable and immovable assets as well as of intangible assets such as bank accounts, and asserts the conservatory character of some seizures.

Concerning institutional matters, the new legislation sets up the *Agence de gestion et de recouvrement d'avoirs saisis et confisqués* (AGRASC), which, in February 2011, and in line with the Council of the European Union decision 2007/845/JAI, was appointed as the national office for asset recovery. The agency's mission and structure have been specified and detailed in two texts⁵⁵. Under the joint supervision of the Ministry of Justice and the Ministry of Finance, the AGRASC is responsible for the management of seized or confiscated assets and for the centralised management of money seized in criminal proceedings as well as for the disposal of assets and, if appropriate, the destruction of property (article 706-160 CPC). It should however be noted that, as a general principle, the owner or property

⁵⁰ Information retrieved through an email exchange with a legal expert from CEPACA, 25 January 2012.

⁵¹ The text of the draft legislation is available at: <http://www.parliament.bg/bg/bills/ID/13814/>

⁵² The information provided in this section is based (i) on the laws and regulation in force and (ii) the answers to the questionnaire provided by national authorities and civil society organisation.

⁵³ Texts pertinent to the provision of the new law: (1) Ministerial circular No. CRIM-10-28-G3 of 22 December 2010; (2) Ministerial circular No. CRIM-10-29-CAB of 22 December 2010. Texts concerning AGRASC: (1) Decree No. 2011-134 of 1 February 2011; (2) Ministerial circular No. CRIM-11-2/G1 of 3 February 2011.

⁵⁴ In fact, before the new law on asset confiscation and seizure came into force in 2010, the provisions regulating matters related to the seizure and management of assets were to be found in the Civil Procedure Code as the then valid Criminal Procedure Code lacked appropriate provisions.

⁵⁵ See note 51 above.

holder of the seized property is responsible for the management of the seized property. Under special circumstances the seized property will be put under the management of AGRASC (article 706-143 §2 and §3 CPC). The owner or property holder managing the seized property, or AGRASC when the seized property is put under its management, are responsible for the costs of managing such seized property. Further, where appropriate, the agency is in charge of supervising the priority payment of indemnities to victims (article 706-164 CPC). Moreover, the agency has a general mission of help and assistance with regard to criminal courts, and can also conduct information or education programmes deemed to promote its own activities and best practices in the subject matter (article 706-161 CPC). Finally, AGRASC is to maintain a centralised national database regarding the seizure and confiscation decisions of which it is in charge as well as concerning the assets at stake (article 706-161 CPC); an activity report, including relevant statistics and recommendations, is to be issued annually. Both national authorities and civil society replied in the questionnaire that they consider the new agency to be efficient.

As to the seizure procedure, the judicial authority can seize proceeds and instrumentalities of crime if these assets are later subject to a confiscation order. A court order is necessary for the seizure of property and in general, the seizure orders are executed by police services. Article 54 of the Criminal Procedure Code allows for the police authority to seize assets in *flagrante delicto*. Once the assets are seized, the judicial authority decides whether the management of these assets requires to be delegated to AGRASC. Furthermore, French legislation also allows for the anticipated sale of assets if these assets are likely to depreciate in value or if the owner of the asset cannot be identified or did not ask for its restitution within two months following formal notice. In such cases, the value of the assets whose sale has been anticipated is transferred to a special account at the *Caisse des dépôts et des consignations*.

The recently enacted legislation regarding the management of seized assets does not contain provisions concerning the destination of confiscated assets or the division of such assets amongst central and regional public bodies or amongst authorities involved. Interestingly however, such a mechanism exists for assets related to drug trafficking cases. Here, a fund has been created, receiving the proceeds of confiscated assets' sales of drug-related cases. Parts of the said fund are then allocated to the public services involved in the fight against drug trafficking. Thus, there are no direct provisions which would enable the use for civil society or for social purposes of proceeds and instrumentalities of crime which have been confiscated.

France's example is particularly interesting as its seizure and confiscation landscape offers interesting structures which have ultimately allowed civil society to remain active in combating serious and organised crime. In 2010, the criminal Chamber of the French Supreme Court (*Cour de Cassation*) overruled a prior decision in the so-called *Biens mal acquis* case and deemed admissible a complaint of an anti-corruption association, namely a complaint filed by TI France in 2008.⁵⁶

Thus, even though no enabling legislation currently exists, allowing the social use of confiscated assets by civil society in such a scenario would ultimately strengthen a more representative and transparent system, which would ultimately ensure a more pro-active participation of civil society in the combating of serious and organised crime.

⁵⁶ <http://www.asso-sherpa.org/nos-programmes/ffid/campagne-ra/bma>.

4.3 Germany

The German system for seizure and confiscation of assets, as well as their management is contained in the *Strafgesetzbuch* (StGB) and the *Strafprozessordnung* (StPO). Some aspects that are relevant to the purpose of this study can also be found in separate laws and regulations that will be mentioned in the course of this section of the report.

The German system contains provisions on preliminary measures that mainly aim at avoiding that assets that are of potential criminal origin be dissipated before a final confiscation order is obtained. §111(b)ff StPO⁵⁷ deals with the seizure of assets (*vorläufige Beschlagnahme*). In these cases, if the reasons to assume that the assets stem of illicit origin do not manifest themselves after six months, the seizure order has to be revoked. Notwithstanding, the measure can be extended, e.g., the case is too complex to be resolved in such a short lapse of time or if unexpected difficulties arise in the collection of evidence. In such cases, the Court can, upon request of the Prosecution, order the preliminary confiscation to be extended.⁵⁸

Movable assets which are seized are managed by the police; immovable assets are left with the owner, who cannot sell or dispose of them. These measures can usually only be ordered by the Court; however, if there is imminent danger (*Gefahr im Verzug*), the Prosecutor or the prosecutorial investigators, in cases of movable assets, can order seizure of the property.

Confiscation is dealt with in §73 and §74 StGB. Those articles regulate under which circumstances the state can seize movable and immovable assets. Before the state can confiscate anything, it has to be worked out that a criminal act was committed. This is the precondition of all articles dealing with confiscation.⁵⁹ In such cases, either the property, that is the proceeds and instrumentalities of crime can be confiscated, or, if those assets have already been sold or used, an equivalent monetary value can be confiscated.⁶⁰

One of the interesting aspects of the German system is the provision contained in § 73d StGB, as this article provides for extended confiscation. In that case, the court does not need to produce evidence proving that each specific asset that is seized was connected to one specific crime. The Court can make the assumption that, if a person has committed crimes before and if its legal income stands in no connection to the value of the assets accumulated, those assets also are of illegal origin and are therefore to be seized.⁶¹ These extended forfeiture powers have been challenged before the German Constitutional Court for reasons of potential violations of the right to property, but have been declared constitutional, as such measures, "are not repressive and retributory, but preventive."⁶² Germany can also confiscate property from third parties: According to §73(3) StGB, "if the perpetrator or inciter or accessory acted for another and the latter acquired something thereby, then the order of forfeiture under subsections (1) and (2) shall be directed at him".

⁵⁷ § 111(b)ff StPO. Objects may be secured by seizure (...) if there are grounds to assume that the conditions for their forfeiture or for their confiscation have been fulfilled.

⁵⁸ German Criminal Procedure Code, § 111(b)3.

⁵⁹ e.g. § 73 German Criminal Code.

⁶⁰ § 73a German Criminal Code.

⁶¹ *The UN Convention against Corruption and Development Cooperation – Corruption Prevention by more Efficient Law Enforcement?*, GTZ Publication, 2007, p. 15.

⁶² 50BVerfG 2 BvR 564/95.

The management of seized and confiscated assets lies with the respective federal state (*Land*) and there is no national asset management office. Management is dealt with in close co-operation between the police and the judiciary. The StPO does not clearly define who is responsible for the management of seized and confiscated assets. However, in practice seized property is either left with the offender and in some cases an equivalent monetary sum is seized, or they are managed by the responsible department of public prosecution. Notwithstanding, certain *Länder* have special asset seizure and forfeiture units that consist of members of the police as well as of members of the judiciary. Baden-Württemberg would be such an example where the Office of the Prosecutor in Mannheim, as well as the Office of the Prosecutor in Stuttgart have such special units in place. Even in *Länder* that do not have special units that exclusively deal with asset forfeiture and management, both the forfeiture and the management of the proceeds and instrumentalities of crime are closely interconnected.

The use of confiscated assets under the German systems prioritises the compensation of victims of the respective crime. Aggrieved parties can make claims until three years after the final judgment for compensation of the damages incurred due to the criminal act.⁶³ The disadvantage in this system is that a first come, first served approach is taken. Thus, if there is insufficient means to satisfy all parties, the ones that applied to be reimbursed first will have an advantage.⁶⁴ Moreover, the Chief Public Prosecutor has the power to determine on a case-by-case basis that certain material assets, e.g., vehicles, are to be given to law enforcement to be used in undercover operations.⁶⁵ Moreover, according to § 73e StGB, the monetary value of confiscated assets is to be allocated to the budget of the *Bundesland* in which the Court delivered the first judgement.⁶⁶ Otherwise, some *Länder* have schemes that envisage that monies that go over a certain benchmark-sum can be earmarked to the judiciary and the police of the respective *Land*.⁶⁷

Germany does not have provisions for the use for civil society or for social purposes of confiscated assets.⁶⁸ Confiscated monies go to the budget of the respective *Land* and are therefore used for anything that is paid out of this budget.⁶⁹ Those expenses might also have a social component, but this is not the declared aim of the use of confiscated assets. In that regard, the interviewed experts were of the opinion that this 'neutral' system was also the most transparent and equal one.⁷⁰ Yet there is one exemption, which is the *Land* Bremen, that since 2004 has been using a model that accommodates for a fraction of confiscated assets (EUR 60.000/year) to go into the budget of the Senator for Justice and Constitution (*Senator für Justiz und Verfassung*). The remaining assets of EUR 24.000 go to the Senator for Employment, Women, Health, Youth and Social Causes (*Senator für Arbeit, Frauen, Gesundheit, Jugend und Soziales*) to finance a centre of advice and support for victims of trafficking in persons and forced prostitution.⁷¹ This can thus be described as a disposal of the assets for social purposes. Experiences with this model and whether it can be described as successful will be further developed in this report in section 5.2.2 below.

⁶³ §111i (2) StPO and §981 German Civil Code.

⁶⁴ Civil Procedure Code §804(3).

⁶⁵ Informal phone interview with Judge Joachim Eckert, Landgericht München, 7 November 2011.

⁶⁶ §111i (6) CPC.

⁶⁷ Answers to Questionnaire Germany, Jürgen Holderied, Bundeskriminalamt SO 35 – Vermögensabschöpfung, 24 November 2011.

⁶⁸ Ibid.

⁶⁹ §73e Criminal Code.

⁷⁰ Informal phone interview with Judge Joachim Eckert, Landgericht München, 7 November 2011.

⁷¹ Answers to Questionnaire Germany, Jürgen Holderied, Bundeskriminalamt SO 35 – Vermögensabschöpfung, 24 November 2011.

Finally, it should be noted that the two German AROs (*Bundeskriminalamt* and *Bundesamt für Justiz*) are not responsible for the seizure, the confiscation, the management or the re-distribution of criminal assets. They are responsible if questions of judicial legal assistance (*Bundesamt für Justiz*) or police co-operation (*Bundeskriminalamt*) arise.⁷²

4.4 Italy

Italy has a long history of dealing with the management of confiscated assets particularly with properties belonging to organised crime and mafia-type organisations. As such, Italy has a comprehensive legislative framework in seizure and confiscation procedures. There are three approaches for confiscation of proceeds and instrumentalities of crime:

- Article 240 and 253 CC provides for the traditional criminal confiscation of assets. A judge can enforce criminal confiscation if the assets were used or intended for use for the commission of an offence. Confiscation is mandatory if the assets arise from an offence ("are the price of the offence") or constitutes the production, the use, the transport, the possession or the transfer of an offence.
- Article 2 *ter* of Law No. 575/65 provides for the preventive seizure of assets in the possession of persons suspected of belonging to mafia-type organisations. This type of confiscation is seen as a security measure and can be ordered even in the absence of a conviction. The confiscation order can be reversed if the defendant can demonstrate the licit origin of assets.
- Article 12 *sexties* of Law No. 356/92 and Law no. 575/65 provides for mandatory confiscation of assets with respect to certain offence such as drug-related offences, organised crime and money laundering. In any of the offences listed in Article 12 *sexties* of Law No. 356/92, the convicted person has to prove the legal source of the assets, thus confiscation of this type alleviates the burden of proof.⁷³

Law No. 109/1996 introduced instruments to provide for the management and destination of seized or confiscated assets. This law regulates not only the maintenance and administration of assets but also its destination and the type of assets, which are divided into:

- Movable assets (e.g., cash, stock and securities, credit, vehicles, etc.);
- Real estate (e.g., buildings, apartments, allotments, etc.);
- Businesses.

According to Law No. 109/96, after the confiscation or the seizure of assets, the court assigns an administrator who is in charge of maintaining and transferring confiscated assets to the Italian Public Property Agency (*Agenzia del Demanio*), representative at a provincial level (*Preffeti*) of the Government or a provincial fund.⁷⁴ Regarding the future use of confiscated assets, law No. 109/1996 introduced regulations to transfer confiscated assets, which must be destined for projects in the public interest such as financing schools for education, assistance to young unemployed people and other social purposes to local

⁷² Information provided by the *Bundesamt für Justiz*, Germany, 1 December 2011.

⁷³ FATF Mutual Evaluation Report o Anti-Money Laundering and Combating the Financing of Terrorism Italy, 2006.

⁷⁴ Law no. 109/96, Article 65(1) of Legislative Decree 300/1999

communities.⁷⁵ Law No. 109/96 provides also for the institution of a database to monitor the situation of seized and confiscated assets.

In 2010, the National Agency for the Management and Use of Seized and Confiscated Organised Crime Assets (ANBSC) was established under the supervision of the Ministry of Interior and the control of the court of auditors.⁷⁶ ANBSC, which has taken over the role of the *Agenzie del Demanio*, liaises with the judicial authority to arrange for the future management of seized property once the final decision on confiscation has been made. It also assists the judicial authorities during the seizure phase in handling the confiscated assets.⁷⁷

Law No. 159/2011 amended the previous asset management provisions and provided for the specific future use of confiscated assets and the role of the ANBSC. Its tasks are to administer and preserve all seized and confiscated property, including businesses. The agency is also involved in the destination of confiscated property, a procedure previously managed by the *Prefetti*.⁷⁸ This new law, amending Law No. 575/1965 and Law No. 109/96, states that confiscated assets – particularly immovable property – are to be transferred to the state to be used by the judiciary, law enforcement or civil protection, or for social purposes to the municipality, the province or region where the property belonged to. Properties can be also sold, liquidated or rented out.⁷⁹

The municipality or region that receives the assets for their social re-use must keep records and information about the use of its assets and monitor assets if transferred to third parties. Local authorities can directly administer assets or assign assets to communities, voluntary organisations, social co-operatives and therapeutic communities, or for the treatment of drug addicts.⁸⁰

The ANBSC deals mainly with confiscated property, businesses and other movable property such as vehicles.⁸¹ The board of the agency decides the destination of assets, after an assessment of the estimated value of the asset.⁸²

The ANBSC keeps extensive records and statistics on the use and destination of confiscated assets. An annual report – which is available online – details the types of assets confiscated (e.g., immovable property, mortgaged properties, businesses or vehicles) and to where these assets have been allocated. The most recent report outlines the amount of assets and to which purpose (such as law enforcement, educational or social, etc.) and which geographical area these confiscated assets have been transferred.⁸³

Other financial assets such as cash or financial titles are returned to the Single Justice Fund (*Fondo Unico Giustizia*) or to the Ministry of Economy and Finance, if assets are not used for the management of seized property or are not to be used for compensation for victims

⁷⁵ Article 2, Law no. 109/96

⁷⁶ Decree-Law No 4. of 4 February 2010, converted into Law No. 50 of 31 March 2010

⁷⁷ Evaluation Report Fifth Round of Mutual Evaluations “Financial Crime and Financial Investigations” Report on Italy, 2011 [hereinafter Mutual Evaluation Report Italy, 2011]

⁷⁸ Article 110, Law no. 159/2011

⁷⁹ Law no. 159/2011

⁸⁰ Article 48, Law No.159/2011

⁸¹ Mutual Evaluation Report Italy, 2011 Decree-Law No 4. of 4 February 2010, converted into Law No. 50 of 31 March 2010

⁸² 2009 Decree-Law No. 127 of 20 July 2009, converted into Degree Regulations No. 119/2010

⁸³ <http://www.benisequestraticonfiscati.it/AgenziaNazionale/beniConfiscati/statistiche.html>

of mafia-type organisations. The *Fondo Unico Giustizia* was created to collect all incomes from fines and other financial titles and maintains and redistributes income to the Ministry of Justice and the Ministry of Interior.⁸⁴

Italy has, in addition to the ANBSC, established an ARO pursuant to Council Decision 2007/845/JHA. The Ministry of Justice has designated the International Police Co-operation Service within the Central Directorate of Criminal Police as the national ARO. The ARO has just recently begun its operational work and it is unclear to what extent the ARO collaborates with the ANBSC regarding asset management. The ARO, however, has not responded to the questionnaires which comprise one of the basis of this study.

Overall, the Italian framework contains specific legal provisions pertaining to the social re-use of confiscated assets. In view of assigning former confiscated assets for social purposes, it has to be noted that the properties remain in possession of the public authorities but can be assigned to specific projects that are administrated by other third parties such as civil society and non-profit organisations. The most prominent civil society organisation in Italy with regards to the social re-use of confiscated assets is Libera, whose mission is the fight against organised crime and mafia-type criminal organisations. According to Libera, Law No. 109/96 has been used to convert over 4500 real estate properties for social purposes.⁸⁵ The re-use of confiscated assets has been also referred as a positive symbolic impact on the local victimised community of organised crime.⁸⁶

Libera has been involved in several initiatives to transform confiscated assets into projects, enhancing the social responsibility of communities by creating jobs for young people or creating agricultural centres. Regarding the latter, the Libera Terra project works with co-operatives trusts and students on confiscated land to produce organic products.

While the re-use of confiscated property is seen as very effective, both from a cultural and economic point of view by civil society actors such as FLARE⁸⁷, there may have been implementation obstacles in re-using confiscated assets. Selling or re-using assets formerly owned by Mafia is hindered by mistrust and reluctance by those who are aware of the origin of such confiscated assets.

4.5 Spain

The Spanish system for seizure and confiscation of assets is contained in the Criminal Code⁸⁸ (*Código Penal*) and in the Criminal Procedure Code (*Ley de Enjuiciamiento Criminal*). The Spanish Criminal Code was revised in 2010 and the confiscation provisions were enlarged to include not only as the effects of the crime, but to also contain the proceeds and instrumentalities of crime and the transformed and intermingled assets (article 127 CC). However, under the provisions of article 127.5 CC, the product resulting from the confiscation of the proceeds is to be first destined to cover the civil responsibilities (*responsabilidades civiles*), unless otherwise stated in law.

⁸⁴ 2010 Decree-Law No 4. of 4 February 2010, converted into Law No. 20 of 2 February 2010

⁸⁵ <http://www.libera.it/flex/cm/pages/ServeBLOB.php/L/IT/IDPagina/70>, see more on Libera and Libera Terra's work here:

⁸⁶ http://www.flarenetwork.org/learn/europe/article/italys_coexistence_with_the_mafia.htm

⁸⁷ <http://www.flarenetwork.org/fight/projects>

⁸⁸ Código Penal. Ley Orgánica 5/2010, Madrid, 22.06.2010.
http://www.ub.edu/dpenal/CP_vigente_31_01_2011.pdf

The enlargement of the provisions of article 127 CC also dismisses the need to prove the unlawful origin of the proceeds and instrumentalities of crime. Although this is an important step to comply with article 3 of Council Framework Decision 2005/212/JHA, it should be noted that this provision is only applicable to criminal offences committed by organised criminal groups. Thus, extended confiscation cannot be applied to serious crimes (e.g., corruption), when such offences were carried out by a person or persons which did not commit the offence through a organised criminal group.

Confiscation of proceeds and instrumentalities of crime arising from money laundering (article 301 CC) is done through the general provisions of article 127 CC, as article 301.5 CC reports to it. However, if the predicate offence to money laundering is trafficking in drugs (article 301.1, 1st paragraph CC), the applicable rule for confiscation is the one contained in article 374.4 CC, which informs that the confiscated assets shall be reverted, in its entirety, to the State.

Thus, the assets will be deposited in the *Fondo de bienes decomisados por tráfico ilícito de drogas y otros delitos relacionados*. This fund was established through Law No. 17/2003⁸⁹. According to article 3 of this Law, the fund can be utilised for National Plan on Drugs (*Plan Nacional sobre Drogas*), or by the *comunidades autónomas* for, among others:

- The development and execution of regional plans on drugs;
- The development and outfitting local law enforcement for the prevention, investigation, prosecution and repression of drug-related offences;
- To law enforcement combating trafficking in drugs, customs and tax authorities;
- To the Special Prosecution Authority for the prevention and repression of illegal trafficking in drugs;
- To non-governmental organisations and other non-for-profit organisations that develop programmes relating to drug addiction.

Thus, as can be seen, there is no provision for the social re-use of confiscated assets, as they will be reverted back to the State. The only exception, and even here with limitations, is when drug-related proceeds of crime are confiscated and they are channelled into the *Fondo de bienes decomisados por tráfico ilícito de drogas y otros delitos relacionados*. However, unlike in the German *Bremen Land* case, there appears to be no earmarking of the amounts that are destined to civil society in such cases.

It should be noted that Spain does not have an asset management system in place. While it has established through enabling legislation for the creation of the ARO, it appears to still be not operational at the time of writing of this study, based on the on-site interviews carried out in Madrid. Nevertheless, and even if the ARO was functioning, there would be no asset management regime by the State. During the on-site interviews with both civil society and government and judiciary officials, it was informed that the assets, once seized by the courts, are managed by the judges themselves, who may, on a case-by-base basis, allow for their use by the law enforcement authorities.

Notwithstanding, Spain has some interesting provisions relating to the actions taken by civil society to combat corruption and money laundering within the country. The Spanish constitution allows any citizen, whether natural or legal, to file a complaint (known as the

⁸⁹ Ley 17/2003, por la que regula Fondo de bienes decomisados por tráfico ilícito de drogas y otros delitos relacionados, Madrid, 29.05.2003.
<http://www.pnsd.msc.es/Categoria2/legisla/pdf/legislaE19.pdf>

acción popular) seeking to investigate any criminal facts which they have knowledge of but which government officials have not taken any action. Thus, while there appears to be no explicit possibility for the social re-use of confiscated assets, it is important to note such powers which allows civil society to proactively prevent and combat serious and organised crime in the country.

4.6 United Kingdom

The restraining of assets that are the proceeds of crime through the criminal justice system is a comparatively recent development in the UK, as in many other jurisdictions where the priority for many years was disrupting the flow of illegal drugs money. The UK now has five different schemes for the recovery of the proceeds of crime by the State. They are:

- Confiscation;
- Deprivation;
- Seizure;
- Forfeiture of cash, and;
- Civil recovery (which also includes taxation).

The legislation and procedures are principally set out in the Proceeds of Crime Act 2002⁹⁰ (PoCA 2002), as amended by SOCPA 2005.⁹¹

It important to acknowledge that the orders can be cast very widely indeed and can be sought against innocent third parties in whose property the target has a legal or beneficial interest, e.g., joint bank accounts and jointly owned property. It can also be sought against recipients of 'tainted gifts', and corporations.⁹²

The UK system is based on the fact that although it is the prosecutor, or sometimes an accredited financial investigator,⁹³ who has the legal power to seek asset restraint, or freezing, orders it is for the courts to exercise the discretion to appoint specialised enforcement management receivers in respect of realisable orders.⁹⁴ Generally the Prosecutor does not have the qualifications or experience necessary to make important decisions relating to the management of restrained businesses etc. It is therefore necessary to appoint someone who is experienced in such areas, for example an accountant or a receiver.

A balance must always be struck between the need to preserve and realise the defendant's property, with allowing the Defendant to continue with the ordinary course of his life whilst he is presumed innocent.⁹⁵ The primary principle to be borne in mind is that the Court must be satisfied that a restraint order alone is insufficient to prevent dissipation of assets, and the appointment of a management receiver is a reasonable and proportionate measure. Given that the fees of a management receiver will almost always be met from the estate under management rather than by the prosecutor the court must always take account of

⁹⁰ Proceeds of Crime Act (2002) Chapter 29, 24.07.2002.

http://www.legislation.gov.uk/ukpga/2002/29/pdfs/ukpga_20020029_en.pdf

⁹¹ Serious Organised Crime and Police Act (2005) Chapter 15, 07.04.2005.

http://www.legislation.gov.uk/ukpga/2005/15/pdfs/ukpga_20050015_en.pdf

⁹² Corruption and Misuse of Public Office, OUP, September 2011, Chapter 8.

⁹³ The Accredited Financial Investigators and their required qualifications are set out in the Proceeds of Crime Act 2002 (References to Financial Investigators) Order 2009

⁹⁴ Section 48(2) POCA

⁹⁵ See *Re P (Restraint Order: Sale of Assets)* [2000] 1 WLR 473

the fact that, if acquitted, significantly depleted assets may be returned to the defendant on the conclusion of proceedings.

It is the prosecutor who makes the application to the Crown Court for the appointment of an enforcement receiver wherever the realisable assets include assets out of the jurisdiction, real property or assets held by and/or in the names of third parties (including limited companies).

As stated above the issue of costs is something that the prosecutor must keep a careful eye on. If, for example, the costs of hiring the receiver are likely to be in excess of the amount that is likely to be realised, a receiver should not be appointed. This may be a particularly pertinent issue in cases where there has been no restraint order, as some assets may have been dissipated prior to the appointment of the receiver.

Once appointed, the receiver is an officer of the court and may be separately represented on future hearings. Separate representation should only occur where there is a potential conflict between the receiver and the prosecutor.⁹⁶

Managing the assets may include selling the property or any part of it or interest in it, carrying on or arranging for another to carry on any trade or business the asset of which are part of the property and incurring capital expenditure in respect of the property.

A management receiver should be considered where the defendant's assets are of such a nature that they require active management. It may be that the defendant is in custody and cannot manage the assets himself or that the circumstances of the case suggest that the Court cannot trust him to manage the assets. An obvious example where the appointment of a management receiver would be appropriate is when a defendant's asset includes a business that needs to be operated in order to preserve its value e.g. a defendant is arrested for money laundering, he trades as an ice-cream maker, he is remanded in custody and his stock, business and livelihood is at risk of dissipation. The appointment of a management receiver would protect the defendant's assets and manage them pending the resolution of the criminal case against him.

Other examples are where management receivers have been appointed to operate haulage businesses, factories and bureau de change. They may deal with letting houses, or finishing a partially completed development and securing property.

There remains an issue with potential third parties who may have a legitimate interest in the assets. In such cases the third party may be forced to give possession of the defendant's "realisable property" to the Receiver but must first be given a reasonable opportunity to make representations to the court.

The costs incurred by a defendant in mounting his defence to the criminal proceedings that he faces may not be met from the property under receivership. In general the rule in the UK is that there is no provision for payment of legal costs from restrained funds, although funding may be available pre-charge from the Legal Services Commission under the Access to Justice Act 1999.⁹⁷

⁹⁶ See *Re G, Manning v G* (No. 4) [2003] EWHC Admin 1732.

⁹⁷ Access to Justice Act (1999), Chapter 22, 27 July 1999.

http://www.legislation.gov.uk/ukpga/1999/22/pdfs/ukpga_19990022_en.pdf

The costs of the management receiver are paid from the assets that he is managing⁹⁸, even where the defendant is ultimately acquitted. If there is insufficient to pay the Receiver's costs then the prosecutor, who will have indemnified the Receiver as to his costs, will pay any remaining costs.

The management receiver will continue to preserve and manage the assets until an enforcement receiver is appointed under a confiscation order (often it is the same individual), or there is no confiscation order, or an acquittal.

In general the proceeds of crime recovered in the UK have not gone to anyone except to the frontline police forces and other agencies instrumental in securing the assets. The Home Office's Asset Recovery Incentive Scheme, which was announced in 2004, sees 50 per cent of the money recovered as part of the asset recovery process is repaid to agencies including the police, courts, Crown Prosecution Service, Serious Organised Crime Agency and Her Majesty's Revenue and Customs. The scheme is designed to reward past performance and drive up future asset recovery activity. The remaining 50 per cent contributes to core Home Office expenditure priorities, including policing and other asset recovery measures.

In a Parliamentary Question put to the government in January 2009, Mr. Alan Campbell (holding answer 19 January 2009) stated that, "the total net value of criminal proceeds recovered in England, Wales and Northern Ireland in the last five years is set out in the following table. From 1 April 2006 the Home Office has paid back 50 per cent of recovered criminal assets to the police and other front-line agencies under the asset recovery incentive scheme".⁹⁹

| Table 1: Proceeds of crime | |
|-----------------------------------|-----------------------------------|
| | GBP million (net total recovered) |
| 2003-04 | 54.5 |
| 2004-05 | 84.4 |
| 2005-06 | 96.0 |
| 2006-07 | 125.3 |
| 2007-08 | 135.7 |

Source: Proceeds of Crime: Consolidated Fund, available at: <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090121/text/90121w0015.htm>

Police forces have invested, or plan to invest, most of the monies from the incentive scheme in further developing their asset recovery and financial investigation capacity, with the funding of Financial Investigator posts, money laundering teams and asset recovery operations. In addition funds have been used to tackle gun crime and criminal networks in London. The Metropolitan Police has also allocated around £500,000 to the Safer London Foundation, a registered charity, which distributes the funds to help a range of local community schemes. Other community initiatives across the country include road shows, prevention of doorstep crime, over 60s club, and provision of equipment for a faith based community centre.

However, since 2009 the UK government has been promoting a scheme called Community Cashback, a multi-million pound fund, set up to spend on projects nominated by the public out of the proceeds of recovered stolen monies. Successful bids will have to demonstrate

⁹⁸ See Section 49(1)(d) POCA.
⁹⁹ <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090121/text/90121w0015.htm>

good value for money and be related in some way to tackling anti-social or criminal behaviour locally.

The Community Cashback scheme is an innovative use of recovered criminal assets which will see up to GBP 4 million reinvested locally this year for the benefit of communities – ensuring local people benefit from the money we have taken from criminals and giving them confidence in the criminal justice service and a say in how it works.

Each of the 42 criminal justice areas in England and Wales will have access to around GBP 95,000 to use on suitable community projects suggested by local people, funding around 100 projects.

The public can nominate projects for funding through neighbourhood policing meetings, citizens' panels, local authority consultation meetings or through other local forums. In addition, we are today launching the Community Cashback website. There the public can suggest projects for funding in their area and have their say on projects nominated by others in their community.¹⁰⁰

There has been a GBP 64 million increase in the value of assets recovered in the last five years with GBP 148 million seized in 2008-09. These significant achievements have resulted in the Government setting an ambitious new target to double the amount seized to GBP 250 million by 2009-10.

Projects nominated by local communities will then be put forwarded by the Local Criminal Justice Board for central scrutiny to ensure they are viable and within the intended scope of the scheme. Whilst we cannot pre-empt the outcome, if there is no obvious reason not to approve funding, the proposal is likely to be successful.

The scheme aims to:

- Raise the profile of asset recovery as an important tool in disrupting and preventing criminal activity and taking the cash out of crime by seizing criminal's ill-gotten gains;
- Give local people more of a say in how the recovered assets can be reinvested within their neighbourhoods and communities; and
- To boost public confidence in criminal justice services and demonstrate that justice is being done by making sure that people can see it being done in their area.

The Home Office has already, in December 2009, undertaken some research into public views of the Community Cashback system.¹⁰¹

¹⁰⁰ <http://cashback.cjsonline.gov.uk>

¹⁰¹ <http://www.homeoffice.gov.uk/publications/about-us/public-opinion-polls/community-cashback-poll>.

5. STRENGTHS AND SHORTCOMINGS OF EU REGULATIONS AND NATIONAL LEGISLATIONS

KEY FINDINGS

- The EU regulation for the identification, tracing, seizure and confiscation is comprehensive, albeit the fact that their implementation by Member States is proceeding slowly.
- Member States do not have a harmonised interpretation of 'social purpose'.
- Some Member States have an active civil society which is effectively assisting in the investigation of serious and organised crime.
- Implementing a legislative framework on the re-use of confiscated assets in practice may face (operational and logistical) challenges as seen in Italy, the only Member State assessed in this study which has a (comprehensive legislative framework for the re-use of confiscated assets) long history in managing confiscated assets particularly properties for social re-use.

The following section of the study focuses on the findings regarding the current EU regulations as well as national legislation that relate to the potential use of confiscated assets for civil society and in particular for social purposes. The data in this section is drawn from deskwork analysis, the questionnaire provided to national authorities and members of the civil society, and informed by our literature review.

The present section further seeks to present the strengths and shortcomings found both in the EU regulation and national legislation of the selected countries during the preparation of the study.

5.1 The EU regulations

The EU framework relevant to the topic of this study has been depicted in detail in section 3.1. The following paragraphs will be used to provide for a brief analysis of relevant strengths and shortcomings.

Generally, it can be asserted that the EU has identified confiscation and asset recovery as a priority.¹⁰² This becomes evident when looking at the different EU legal instruments and at the statements made in the Stockholm Programme¹⁰³, advocating for "more effective identification, confiscation and re-use of criminal assets" or at the Alfano Report.¹⁰⁴ Furthermore, the Commission launched an informal platform for European AROs to further enhance their EU-level cooperation on and coordination of exchanges of information and best practices.¹⁰⁵ This is an important step and the platform could be developed into a key

¹⁰² http://ec.europa.eu/home-affairs/policies/crime/crime_confiscation_en.htm.

¹⁰³ See note 4, page 10.

¹⁰⁴ See note 2, page 10.

¹⁰⁵ http://ec.europa.eu/home-affairs/policies/crime/crime_confiscation_en.htm.

mechanism to exchange experiences of best practices of asset management and disposal and, as a result, ultimately promote the social re-use of confiscated criminal assets. A recent Commission report¹⁰⁶ has identified AROs as an important tool for recovering criminal monies. Yet, the report also shows that cooperation between AROs is still hampered and that they are facing a number of common difficulties, one of them being access to relevant financial information.

Moving on to the strengths of specific instruments the EU has introduced, Council Framework Decision 2006/783/JHA merits attention. This Council Framework Decision includes specific provisions on the disposal of confiscated assets. It sets out rules for situations in which assets of one EU Member States are confiscated in another Member States. This provision is important, but also when looking at potential regulations in the field of social re-use. It is possible for assets originating from a crime committed in one Member States to be confiscated in another. By providing for clear recommendations on how assets could be shared, potential conflicts can be avoided.¹⁰⁷ The next potential step might be for a decision on how each Member States uses a proportion of its share of the assets for social purposes. By having a clear rule on how to divide confiscated assets amongst involved counties, the important decision on how to use a proportion of it for social purposes can be taken quicker, rather than having to discuss asset sharing arrangements first.

As to the shortcomings, it has been noted that the implementation of the respective EU instruments is proceeding slowly.¹⁰⁸ As a result, the potential of the current framework is not being fully utilised in practice. Moreover, it seems that even though several EU countries do provide for non-conviction based (NCB) forfeiture there is no legal instrument encouraging NCB forfeiture within the EU. Promoting NCB regimes might be advantageous, as it would allow for the current EU legal framework in relation to freezing, seizure and confiscation of assets to apply to a wider array of cases.

Overall, it can be stated that the existing EU directives, even though relevant to the processes happening *before* criminal assets can be disposed of, do not provide for any direction as to how to use them *after* confiscation has taken place. For example, Council Framework Decision 2001/500/JHA clearly identifies the need for the effective combating of serious and organised crime through combating money laundering – by depriving perpetrators of their unlawful gains – yet, it does not say *how* those confiscated assets should then be used. As a result, it is not assumed at all that those assets, or even a part of them, will be used for any social purposes. Yet, as the present study shows, this would be a desirable outcome.

The Committee of the Regions rightly pointed out this shortcoming and further recommends, in the case of confiscated property, making the municipality in which the property was confiscated the recipient thereof because “local communities bear the highest cost of the activities of organized criminals and the social re-use of confiscated property has a high value in terms of compensating communities affected by this serious issue”.¹⁰⁹

¹⁰⁶ Report From the Commission to the European Parliament and to the Council, based on Article 8 of the 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 proceeds from, or other property related to, crime, COM(2011) 176 final, Brussels, 12.04.2011.

¹⁰⁷ Council Framework Decision 2006/783/JHA, Art 16.

¹⁰⁸ http://ec.europa.eu/home-affairs/news/intro/docs/1_EN_ACT_part1_v8.pdf.

¹⁰⁹ EU Committee of the Regions, Opinion of the Committee of the Regions on the EU Internal Security Strategy, 91st plenary session 30 June-1 July 2011, para 28.

Consequently, it can be stated that (i) the EU legislative debate is already progressing in the right direction and that (ii) what is needed now is a clear indication from the European Parliament to initiate appropriate EU action in the area of social re-use of confiscated criminal assets.

5.2 National legislations

5.2.1 Bulgaria

The Bulgarian system is, as has been shown in the country profile, currently undergoing important legislative changes when it comes to provisions of confiscated assets management and social re-use. As a result, the analysis of the strengths and shortcomings will be sub-divided into analysing the current situation with the Law on Forfeiture to the State of Property Acquired through Criminal Assets (LFPC) governing questions around forfeiture and disposal of criminal assets and a short outlook depicting the possible scenario resulting from the Sixth Revised Draft Law on Forfeiture of Assets Acquired Through Criminal Activity and Administrative Violations of Bulgaria being adopted.

One of the main points of criticism that is directed towards the current system is the fact that there is no clear legal regime when it comes to managing neither seized nor confiscated assets.¹¹⁰ Even the sale of perishable goods, which is provided for in the LFPC is not implemented properly, which is why the CEPACA recommended introducing the “legal possibility to sell assets before any confiscation or forfeiture order is made, if the cost of management are high or the value of the asset could depreciate quickly.”¹¹¹ The provisions of the LFPC on the management of seized assets are rather general, indicating the assets are to be left with the offender until final judgment is spoken, or under specific circumstances, can be sold by the NRA, with the revenue going into the general state budget and the NRA having no influence on their final use. The responsible agency in this matter would be the Ministry of Finance.¹¹²

In addition, there is a lack of transparency about the final use of the revenue of sold assets and for what purposes other than the state budget it is being used. As a result, it is difficult for the public and civil society to monitor the use of confiscated criminal assets and make suggestions as to how the assets could be used differently. Another important point is the fact that currently, the Bulgarian ARO – CEPACA – is not tasked to manage confiscated assets, even though the ARO seems to be qualified for this position due to its exposure to the topic of confiscation and seizure.

The proposed draft law, which is currently underway, may resolve some of the aforementioned shortcomings. This is however difficult to establish in detail, as only the version that was made available through the Venice Commission was provided for as a basis for legal analysis. As a result, should further changes in the law be decided upon by the Bulgarian authorities, those might not be reflected in the present analysis. Nonetheless, dissecting the draft as it stood as of May 2011, it certainly caters for improvement on the management as well as on the disposal side of criminal assets. The management of

¹¹⁰ Informal Phone Interview with Mr Dimitar Markov, Senior Analyst, Law Program, Center for the Study of Democracy, Basel, 18 January 2012.

¹¹¹ Responses to Questionnaire by CEPACA, 23.1.2012

¹¹² Responses to Questionnaire by CEPACA, 23.1.2012

confiscated assets is regulated more clearly and its responsibility lies with the proposed Interdepartmental Board for Management of Forfeited Assets. This Board has the powers to make suggestions as to the further use of confiscated assets and also to propose to donate them for “humanitarian purposes”. Also, the Board can invite Representatives of the National Association of Municipalities in the Republic of Bulgaria, of non-profit organizations, branch and professional organizations to its meetings. Yet, one can still criticise the fact that civil society seems to only be able to participate upon invitation and not on its own initiative. Ultimately, it will have to be seen what exact legal text will be adopted and how this new law will be put into practice before any final judgment on its practicality can be given.¹¹³

5.2.2 Germany

The strengths of the German model, with regards to the disposal of confiscated proceeds and instrumentalities of crime lie in its impartiality and clarity. It is clear that on a federal level, confiscated criminal assets will go into the state budget. There is no risk of competition or attempts of manipulation by civil society organisations or other groups that could hope to become the beneficiary of confiscated monies that the state wants to use for social purposes. German experts have highlighted this an important advantage of the current system.

After interviewing staff from the Bremen Senator of Justice and Constitution, it became clear that the model described in the country profile for *Land* Bremen is promising. However it also showed some shortcomings in its practical execution. It seems that if a certain fixed amount from the Bremen budget (*Haushalt*), in which confiscated assets flow would be dedicated for specific social projects, the social re-use would be more efficient and easier to put into practice, as this fixed amount is prescribed in the budget as a regular funding (*Regelfinanzierung*). Until now, hardly any money that has been generated through confiscation in Bremen has been used for the projects described in the German country profile. This is, according to the expert, because of the fact that the resolution was cumbersome to put into practice due to the aforementioned fact that the expenses for specific social projects were not codified in the budget right from the start.¹¹⁴

The expert made it clear that the idea behind the resolution was good, but that the execution in practice experienced some difficulties. As a result, such a model can be recommended also for a European level. It has to be ensured however that the expenses for social projects would be prescribed by the European Union budget to avoid the difficulties the Bremen model experienced. Moreover, transparency would be ensured with the possibility for everyone to see which social projects are supported and also comment on, or suggest amendments to the prescribed. If decisions to use confiscated assets entirely or partly for social projects are taken on an ad-hoc basis, this transparency would not be ensured.

¹¹³ In relation to the current draft law, please also see the comment made in the Bulgarian country profile relating to last-minute information provided by the CEPACA about a possible new draft version of the law which would no longer include provisions on a fund.

¹¹⁴ Informal phone conversation with Dr. Henning Maul-Backer, Freie Hansestadt Bremen, Senator für Justiz und Verfassung, 27 January 2012.

Thus, it might be to the disadvantage of the German system that it currently does not cater for a model comprising a social re-use component on a federal level and that, ultimately, using confiscated assets for social purposes does not conform with the German concept.¹¹⁵

5.2.3 Italy

A unique feature of the Italian legislative framework for the social re-use of confiscated assets is that it sets the priority for seized assets, e.g., immovable property, to be transferred to the community where the asset had been confiscated, in order to be used by the regional community, its associations or co-operatives. The Italian model thus allows regional and local authorities to use the assets, compensating local communities affected by serious and organised crime.

According to a representative of the Italian civil society organisation, the social re-use component is an excellent tool for its symbolic and economic value. It is an additional way to create jobs in regions that are under heavy influence of criminal economy.¹¹⁶

In Italy, the ANBSC has an essential role in managing the complex different legal actions concerning seized and confiscated assets. Its involvement in handling confiscated assets include returning confiscated assets to the state, maintaining properties or transferring those assets to regions, provinces, municipalities and third parties. This makes the ANBSC an important institutional body.

One of the ANBSC's benefits seems to be its follow-up monitoring of transferred assets to avoid misuse of those assets or the recycling of confiscated goods into criminals groups. An additional strength is ANBSC's transparency and the disclosure of where the assets are being transferred. It keeps records and statistics for the public on where the assets were allocated and for what purpose they are being used. This monitoring procedure is crucial for any agency or legal framework that provides for the transfer of confiscated assets to third parties. Following up on confiscated assets that have been transferred is also important as it provides for an adequate monitoring of the future use of assets and allows for evaluating the recipients and re-use of confiscated assets.

Even though the Italian legislative framework provides for the future use of property for social purposes, it does not clarify how assets other than immovable property can be used for social purposes. These assets go the Single Justice Fund under the authority of the Ministry of Justice and Ministry of Interior, which has other regulations in place for allocating assets under its competence.

The role of the ANBSC in terms of international co-operation and asset sharing agreements with other countries is unclear and not specified. The ARO, which would be responsible for international co-operation on this matter has just been established and no information has been made available to which extent these two agencies will collaborate.

Furthermore, managing and selling real estate needs extensive resources to maintain and ensure the proper future use of property. A civil society expert noted that returning confiscated property is in practice not satisfactory. There are several difficulties that were reported by both the civil society and the ANBSC. One of the criticisms raised is that there

¹¹⁵ Answers to Questionnaire, Dr. Ralf Riegel, Bundesministerium der Justiz, 30 January 2012.

¹¹⁶ Response to follow-up questionnaire, Roberto Forte, Director FLARE, 25 January 2012.

is still a lack of co-ordination between regional and national levels. In addition, municipalities who lack resources are sometimes not able to control or manage the confiscated assets. Immovable property is often left unoccupied and is either unusable or damaged by criminal organisations, for retaliatory reasons. In some cases criminals are still living in confiscated properties because local authorities are not able to evict them.¹¹⁷

Moreover, properties often have unlawful third parties occupying them or land and property expenses, e.g., mortgages, which make it difficult to establish them for the use for social purposes.¹¹⁸ These challenges are time-consuming to overcome, since some of the properties take several years to be disposed. Local authorities therefore even refuse to manage assets because managing this complex procedure is a too heavy burden for them.¹¹⁹

According to the ANBSC there is more financial assistance necessary to adequately manage assets for the social re-use as provided in the Italian legal framework. Particularly seized companies and businesses face enormous challenges to be re-used as most of them go bankrupt before the reallocation. It was highlighted that some of them have been only functional due to business activities carried out by criminal organisations, or have been profitable due to the support given by criminal organisations to them.¹²⁰

5.2.4 France

France considerably modernised its confiscation system in 2010. By centralising the management of seized assets to the national ARO, it has removed the previous fragmented systems, where the management responsibility remained with each court. France has further developed a centralised database for such seized assets, which in turn facilitates the management and ensure transparency throughout the management process and the confiscation of said assets. Furthermore, another strength of the French system is the fact that it conducts capacity building with its judiciary in order to ensure best practices in the newly established system.

However, the French management and confiscation system lacks a destination for the confiscated assets. Thus, these are deposited in the general budget of the state and there is no legal provision for the division of the assets among the central government, the regions and municipalities. Also, albeit the fact that there is active involvement of civil society in combatting serious and organised crime in France, there are no provisions which would enable, either actively or passively, for civil society to determine to some extent the use of these confiscated assets.

Overall, however, the system is still quite new and has not been tested extensively by the courts. Further observation of the interaction between the judiciary and the ARO, as well as the destination given to the confiscated assets will be needed in order to determine the full effectiveness of the system.

¹¹⁷ Response to follow-up questionnaire, Roberte Forte, Director FLARE, 25 January 2012; Matrix Report (2009)

¹¹⁸ Response to follow-up questionnaire, Roberte Forte, Director FLARE; 25 January 2012. Matrix Report (2009)

¹¹⁹ <http://www.altrodiritto.unifi.it/ricerche/law-ways/tancredi/cap3.htm>

¹²⁰ Response to the follow-up questionnaire, ANBSC, 20 December 2011; Response to follow-up questionnaire, Roberte Forte, Director FLARE, 25 January 2012.

5.2.5 Spain

Spain has a unique constitutional system, which ensures a more representative judiciary by empowering citizens to have the right to request for the administration of justice through the *acción popular*. This is of great importance in combating serious and organised crime, as it enables the citizens to effectively assist law enforcement and prosecutorial authorities in identifying, tracing, seizing and confiscating proceeds and instrumentalities of crime. By way of example, a Spanish civil society organisation has requested an investigating magistrate to initiate investigations in Spain for the alleged commission, by non-EU citizens, of money laundering offences, which were taking place in that country.¹²¹

Nevertheless, confiscated assets only have a specific legal destination if these are a result of trafficking in drugs. If other serious and organised crimes occur, the confiscated assets will be used for the compensation of victims first, and any remaining amounts will be directed to the State budget. Moreover, even when the confiscated assets are a result of trafficking in drugs, these assets have to be shared with a number of governmental institutions and civil society, with not earmarking of the amounts or a determination of a percentage in which each of them would enjoy.

Lastly, it should be underscored that Spain does not have an asset management system in place. Currently, the management of seized assets is decentralised to each judge, who has the authority to, in a case-by-case scenario, determine how the assets will be managed (or simply put in a deposit). This may lead to depreciation of the assets, which will most likely not be sold at their market value, ensuring in such a way a double loss for the State, which will be responsible for the costs of the management and the depreciated amount for which the assets were sold.

5.2.6 United Kingdom

One can easily conclude that the UK system has developed a rather sophisticated asset recovery regime in a very short period. Having transferred from a regime dedicated to the recovery of the proceeds of crime in, principally, drugs related cases in the 1990's to a multi layered and with a multi agency approach with the enactment of the Proceeds of Crime Act 2002 (POCA) the legal landscape has changed dramatically. There are real strengths to the UK system in particular the manner in which it has taken on board the complexities of the NCB regime and applied it successfully across a raft of asset recovery cases with some real success. The fact that NCB is now almost a mainstay of the criminal process provides an indication of how much by way of resources and training of law enforcement has taken place and taken hold. One significant weakness has been the way in which the agencies have often overlapped in this area, with some limited successes. The most significant set back was the manner in which the Asset Recovery Agency (ARA) was created under the 2002 Act and yet was dispatched by the politicians within 4 years. ARA was subsumed in the Serious Crime Agency (SOCA) which has had problems of its own and is increasingly under staffed. Its future is also in some doubt.

Nevertheless, in addressing the specific remit of this study the UK model has reported some significant successes. Early on after the implementation of POCA the government decided to implement a system of incentivisation for the police, initially, and latterly all law

¹²¹ The complaint filed by the Spanish civil-society organisation is available in Spanish and English at: http://www.soros.org/initiatives/justice/litigation/obiangfamily/criminal-sp_20081022.pdf (Spanish); http://www.soros.org/initiatives/justice/litigation/obiangfamily/criminal-en_20081022.pdf (English)

enforcement agencies involved in the process to return a portion (50%) of all proceeds confiscated. The scheme worked and led to a dedication of resources in police forces across the UK to take forward the asset recovery agenda. It has been so successful that in 2009, as documented above, the government then extended the use of confiscated proceeds for local communities affected by crime. Community Cashback has been a success in that monies are now being channelled into projects that seek to restore some normality back to deprived communities, paying for youth clubs, training facilities and community projects. The results are still relatively low key and the monies committed to the scheme are small compared to the incentivisation scheme for the law enforcement agencies. However, it is an important first step and a potential model for other EU countries to adopt.

6. CONCLUSIONS AND RECOMMENDATIONS

6.1 Conclusions

Using confiscated assets for social purposes is not a widely used practice within Member States, even when considering the limited scope of the selected Member States used for this study. Notwithstanding, there is a clear need to consider the advantages in allowing assets confiscated from criminal organisations to be used for civil society and in particular for social purposes.

The EU has adopted a comprehensive set of Framework Decisions which span across the asset recovery process (as seen in chapter 3 above); however, limited attention has been given to what destination the confiscated assets should have. The advantages of the social re-use of confiscated assets – discussed throughout this study – show that there is a clear need for the adoption of EU regulation in the area of the social re-use of confiscated assets.

The social re-use of confiscated assets empowers municipalities which have been affected by serious and organised crime to be better equipped to prevent and combat at the local level such crimes. There is in some instances active participation from civil society, which allows on the one hand for greater transparency of the asset recovery and confiscation systems and which, on the other hand, allows for a greater level of proactive participation of civil society in combating and preventing crime.

The social re-use of confiscated assets can range, based on the selected Member States experiences, from the establishment of drug rehabilitation clinics or support systems for victims of trafficking in persons to the use of immovable property which were proceeds of crime for a specific social project. However, as was shown in the study, members of civil society in some Member States (France and Spain) have been taking the definition of 'social purposes' a step further and have been pro-actively engaged not just in the establishment of prevention and support systems, but also in the actual combating of serious and organised crime through investigation and enforcement. The social re-use of confiscated assets would also be positive in these circumstances, as it would support financing of such initiatives which strengthen the judiciary system and make it more representative, while also raising awareness of preventing and combating serious and organised crime within civil society, empowering it to become self-driven and more participatory in these matters.

6.2 Recommendations

Several different models seem to offer ways forward in the strive for a more coherent European-wide approach in using confiscated assets for civil society and in particular for for social purposes. These include:

- A Directive aiming at the establishment of coherent and transparent procedures in the Member States, requiring an option for socially re-using confiscated criminal assets and civil society being able to make suggestions as to specific projects of social relevance that should be considered for such funds;
- The creation of a European Asset Recovery Database accumulating statistics on how confiscated assets were used on the national level;

- The creation of a European Asset Recovery Fund;
- A European Asset Recovery Office.

The first option would be the adaptation of a European Directive on the social re-use of confiscated assets. The Directive would list under which circumstances Member States are advised to use confiscated assets for social purposes. Either a certain amount per year would be benchmarked for the social re-use of confiscated assets, or a fraction of the total amount of confiscated assets, which are not foreseen for victim compensation, would be directed towards its use for social purposes.

The creation of a European Asset Recovery Database would cater for some room of manoeuvre for the different Member States on how to execute asset recovery with special focus on the disposal phase. This database would accumulate statistics provided by the national AROs (or the agency responsible for the management of confiscated assets) on the total value of frozen, seized and confiscated assets per annum. There are, as seen previously in this study, efforts undertaken by EUROPOL through the SIENA system to integrate the national databases and these with the EUROPOL database.

However, such a database should include detailed information on the destination given of those assets, whether they went into victim compensation and whether they were used for specific projects (whether for law enforcement projects or for social purposes) and made publicly available. This method would allow for a qualitative assessment of such assets, as opposed to the current quantitative assessment in which the Member States only inform how much has been seized and confiscated. The most important advantage of a European asset recovery database would be transparent reporting. It could also be a platform for civil society to make suggestions for the further use of confiscated assets.

The creation of a European Asset Recovery Fund would go even further than the aforementioned database and would aim at streamlining the tool of using confiscated criminal assets for social purposes. Countries that have confiscated criminal assets and that have closed the procedures compensating victims would be directed towards channelling a defined fraction of the remaining assets into this European fund. The agency responsible for managing this fund would then designate the monies to specific European projects with a social component (whether within or without the European space, as the effect of transnational criminality go far beyond those of the EU borders).

Notwithstanding, whether creating a database or an European Asset Recovery Fund, these would require the creation of transparent tracking systems which would ensure, on the one hand, accountability for the assets which are to be used for social purposes and, on the other, which would enable effective follow-up mechanisms of the assets which are being transferred for the social re-use.

Another possibility that would enable a more comprehensive system is the creation of a European Asset Recovery Office, which would be responsible for ensuring that all cases that bear a transnational element are overseen and ultimately approved. The European ARO, in accordance with Council Decision 2007/845/JHA, would co-operate with the national AROs and ensure an exchange of information. One of its tasks could be to ensure that a certain fraction of criminal assets that are confiscated in Member States are used for social purposes, after the identifiable victims of serious and organised crime have been compensated. This European ARO would rest on a harmonised interpretation of 'social purposes,' as such term currently has different interpretations within the Member States.

Nevertheless, some questions presented below should be taken into consideration and further studied for a more efficient regulation on the social re-use of confiscated assets. The present study was either not able to review these questions in detail or did not discuss them, as they would go beyond its scope. It is recommended that these be, to the extent possible, given further attention prior to the establishment of regulation pertaining to the social re-use of confiscated assets.

The first question pertains to what would happen to criminal assets that originate from outside the borders of the EU end up in a Member State. This is due to the fact that the current study addresses circumstances in which criminal assets derive from within the borders of the countries which are bound by regulation implemented by the EU and does not take into consideration criminal assets obtained beyond these borders but which find its final destination to be a Member State of the EU. As such, a decision must be made for the sharing and repatriation of these assets. While Council Framework Decision 2006/783/JHA contains provisions for the sharing of confiscated assets between requesting and requested Member States (as does UNTOC and UNCAC), those may be conflicting with other internal legislation or international standards – such as the UNCAC, which requires States to return the entirety of proceeds and instrumentalities of crime to the victim State, deducting only reasonable expenses incurred by the requesting State for the execution of actions needed for the repatriation of the assets. Thus, clear guidance on sharing of assets within Member States should be given.

Secondly, an important angle on asset repatriation and re-use for social purposes comes with the consideration of the increasingly common practice of disgorgements and settlements of criminal cases. Especially in the United Kingdom, but also in federal States like Germany, cases have not been decided by a Court leading up to a final judgement, but the parties to the criminal case have instead agreed on settling. In such cases, as it has happened with the BAE case¹²² in the UK, or Siemens in Germany, the monies that are paid out to settle the case usually do not go to the States where the actual damage was done, but remain in the State where the court proceedings evolved.¹²³ In such cases, the creation of a mechanism to use assets arising from such settlements, at least partially for social purposes and include social projects in the States that was hit hardest by the crime would be advisable.

¹²² In the BAE settlement and fine to the court there was no order for compensation to victim countries. However, the company did itself agree to an *ex gratia* payment to one of the victim countries, effectively repaying the bribe to them. But this is not part of the judicial process and so it is impossible to enforce in the event that the company does not pay.

¹²³ BAE, in its settlement with the Serious Fraud Office (SFO), had agreed to make *ex gratia* payments to the Government of Tanzania to the total of GBP 30 million less any financial orders imposed by the British Court. On 15 March 2012, the SFO announced that it had entered into a Memorandum of Understanding with the Government of Tanzania, DfID and BAE, through which BAE would pay GBP 29.5 million (plus accrued interests) for educational projects in Tanzania.

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ANNEX 1: QUESTIONNAIRES

a. Bulgaria

i. Questionnaire 1: Answers CEPACA

1. Does your country allow for the management of seized assets, prior to their confiscation?
 - a. What is the purpose of this management? Is it considered effective?
 - b. How does this management operate?
 - c. Can seized assets be used by authorities of your country or other actors while the final judgement for confiscation is pending?
 - d. Does your country have provisions for the anticipated sale of seized assets?
 - i. If so, what are the options?
 - ii. Is the money resulting from the anticipated sale put in an escrow account pending final judgement?

It is not clear what the questionnaire means by seized and confiscated assets so here are some terminological notes. The Bulgarian Law on Forfeiture to the State of Property Acquired through Criminal Activity (hereinafter the Asset Forfeiture Law) divides the forfeiture procedure into two stages: freezing of assets and forfeiture of the frozen assets. The first stage is aimed at ensuring that the respective assets will not be sold before the completion of the procedure, while during the second stage the assets are forfeited. The term confiscation in Bulgaria is used only as a criminal penalty, i.e. confiscation does not depend on the origin of the assets. Confiscation is similar to a fine. The difference is that the fine is a concrete amount of money (e.g. 1000 Euro) while the confiscation is a ratio (e.g. one fifth of the offender's property).

The Asset Forfeiture Law does not allow for the seizure of assets prior to their forfeiture. Before the assets are forfeited, there is a stage called freezing, but although during this stage the owner is not allowed to dispose of the frozen assets, they are not seized and remain under his/her management and no state authority is allowed to use or sell them.

The only exception concerns the so-called "assets that are subject to rapid deterioration" and the assets whose preservation is very expensive. These two types of assets can be sold by the National Revenue Agency before the final court decision and the received amount is kept in a separate bank account (article 23, paragraph (6) of the Asset Forfeiture Law).

There are no provisions for the anticipated sale of seized assets because until the actual forfeiture the assets remain under the management of their owner.

2. Has your country set up an Asset Recovery Office, in accordance to the EU Framework Decision 2007/845/JHA? If the answer is in the affirmative:

- a. What are its powers and functions?
- b. How does the ARO link itself with the criminal procedure and financial investigations?
- c. Is the ARO responsible for managing the seized assets? If not, which institution is responsible in your country to manage the seized assets, and how does it interact with the ARO?

Bulgaria has set up an asset recovery office called Commission for Establishing of Property Acquired from Criminal Activity (CEPACA – www.cepaca.bg). According to the law, the CEPACA is a specialized state authority in charge of inspecting the property of persons, against whom the statutory conditions for asset forfeiture apply, for the purpose of identifying criminal assets in the country and overseas.

The CEPACA consists of five persons: a chairperson, a deputy chairperson and three members. The Prime Minister appoints the chairperson, the Parliament elects the deputy chairperson and two of the regular members, and the President appoints the third regular member. All the members have a term of office of five years and can have only two consecutive mandates (article 12 of the Asset Forfeiture Law). The CEPACA is based in Sofia and has territorial directorates throughout the country.

The CEPACA has the following general powers and functions (article 13, paragraph (1) of the Asset Forfeiture Law):

- to initiate proceedings for establishment of property acquired through criminal activity;
- to bring to the court justified requests for the freezing of assets;
- to bring to the court justified requests for the forfeiture of assets.

The CEPACA is completely dependant on the beginning and the outcome of the criminal proceedings. The CEPACA cannot initiate any procedure for the establishment and freezing of assets before it is notified by the pre-trial authorities that a criminal case has been started. Also, the CEPACA cannot submit any request for forfeiture of frozen assets before the criminal proceedings is over and the conviction has entered into force.

The CEPACA is not responsible for managing the assets before their forfeiture. Until the entry into force of the court decision allowing for the assets to be forfeited they remain under the management of their owners.

3. What is the workflow in your country for seizing, managing and confiscating assets?
 - a. How are these assets seized (e.g., through a court order, by determination of the prosecution)?
 - b. Who is responsible for executing the seizure order and, if applicable, managing the assets?
 - c. Which governmental body is supervising the overall process? (e.g. France: Ministry of Justice; Italy: Ministry of Interior)
 - d. After the seizure of the assets, how are they managed, and by whom?
 - i. By the court or prosecutor, or by a specialised asset management agency?
 - ii. By third-parties (e.g. receivership)?

- iii. On a case-by-case agency?
- iv. How does the managing authority deal with the hidden cost of management of the assets (e.g. taxes, maintenance costs)?
- e. Were there any human rights challenges to the asset seizure, management and confiscation systems in your country (e.g. right to property, right to a fair trial, due process)?
- f. Are there provisions/ regulations in place that regulate how confiscated assets should be used and what their final destination should be?
- g. Are there any provisions/ regulations on how the monies resulting from the seized/confiscated assets are divided amongst the regional public bodies and the central government, or amongst the authorities that are part of the asset management/recovery processes (e.g. division amongst interested parties, central fund)?
 - i. Are there any provisions allowing for civil society and victims to be contemplated in having the confiscated amounts shared with them?
 - ii. Are there any provisions allowing for the confiscated assets to be used for social purposes?
 - iii. What is the role of civil society/ civil society organisations in determining the use of the confiscated assets? – Please explain.
 - iv. To what extent can civil society/ civil society organisations participate in the decision-making on the final use of the confiscated assets?
 - v. How can civil society/ civil society organisations exercise their influence on decision-making?

The pre-trial authorities (the public prosecutor and the investigating authorities) notify immediately the directors of the respective territorial directorate of CEPACA for each initiated criminal procedure concerning a crime covered by the Asset Forfeiture Law. The director of the respective territorial directorate reports the notification to the CEPACA. Based on this report the CEPACA submits to the respective district court a justified request for the freezing of assets. The court orders the freezing of assets following the procedure described in the Civil Procedure Code (article 21-22 of the Asset Forfeiture Law). The ruling of the court admitting or denying the requested freezing the assets can be appealed twice: before the respective court of appeal and before the Supreme Court of Cassation.

In general, the owner of the assets is responsible for the execution of the court ruling for the freezing of assets. He/she should refrain from disposing of the frozen assets. In addition, other institutions may also have certain responsibilities depending on the type of the assets. For example, if the assets are bank accounts the respective commercial bank is obliged not to allow the account owner to use the accounts. If the assets are salaries then the employer will be responsible for not paying the salary (or part of it) to the employee.

Based on the collected evidence the director of the respective territorial directorate of the CEPACA prepares a justified conclusion indicating which assets are assumed to have been acquired through criminal activity and are therefore subject to forfeiture. The CEPACA then submits to the district court a justified request for the forfeiture of the assets (article 27, paragraph (2) of the Asset Forfeiture Law). The request can be submitted only after the

criminal proceedings against the respective individual have ended and a conviction has entered into force, or after the criminal proceedings is closed and cannot continue, e.g. because the defendant has died. (article 27, paragraph (2) of the Asset Forfeiture Law).

The court opens a case and publishes a notification in the State Gazette (the Bulgarian official journal). The court hearings are open to the public and a public prosecutor must take part in the proceedings (article 30, paragraph (2) of the Asset Forfeiture Law). The decision of the court can be appealed (article 30, paragraph 2 of the Asset Forfeiture Law).

As long as the court is the deciding body on both the freezing and the forfeiture of assets no other public institution is allowed to exercise oversight over the courts' decisions. The CEPACA submits an annual report to the Council of Ministers (the government), the National Assembly (the parliament) and the President but is not controlled by these institutions.

The forfeited assets are sold by the National Revenue Agency. There are no specific provisions for the management and the disposition of the confiscated assets. The National Revenue Agency follows the general procedures applicable for the collection of taxes and other public claims. The money received from the sale of forfeited assets does not have any specific designation and together with other funds collected by the National Revenue Agency form the income part of the state budget.

4. Are there any national records/statistics on the use of confiscated assets?
 - a. Are those statistics/records publicly available?

The CEPACA keeps statistics on the request and the court decisions for freezing and forfeiture of assets. However, no statistics are being kept on the use of the money obtained from the sale of forfeited assets. The only publicly available data is the total amount collected by the National Revenue Agency from the sale of forfeited assets. However, in its annual report for 2010, the National Revenue Agency has included only the aggregated amount received from the sale of all types of assets (forfeited property, confiscated property, abandoned property, etc.), which is 7 519 533,99 Leva (or approximately 3.76 million Euro).

We would appreciate that any legislation that is mentioned during the response of this questionnaire is made available to us in its original language and, if available, in its English translation.

b. France

i. Questionnaire 1: Answers AGRASC

1. Does your country allow for the management of seized assets, prior to their confiscation?

YES.

A dedicated asset management office has been created, based on the provisions of the bill n°2010-768 dated July 9, 2010. This AMO, called AGRASC (i.e. agency for management and recovery of seized and confiscated assets) started its activity in February 2011.

- a. What is the purpose of this management? Is it considered effective?

Management of seized or confiscated assets by AGRASC aims to warrant preservation of those assets both from a legal and economical point of view, to prevent any depreciation and to ensure their final transfer/sale at a fair value either to the State or to buyers. AGRASC is also in charge of centralized management of all sums of money seized either in cash, on bank accounts, or related to receivables. This management is considered effective.

- b. How does this management operate?

Management is operated either directly (e.g. for real estate properties or sums of money) or indirectly (for going concerns). Management can be delegated to public or private entities, depending on the nature of the asset or the nature of the managing operations.

- c. Can seized assets be used by authorities of your country or other actors while the final judgement for confiscation is pending?

Criminal assets can be allocated to police services before confiscation judgement. A prior authorization of a judge is required, and a financial compensation is provided in the case where the confiscation is not ordered in the final judgement, corresponding to the depreciation of the asset due to its use by the police services.

- d. Does your country have provisions for the anticipated sale of seized assets?

YES

- e. If so, what are the options?

Anticipated sale of seized assets can be authorized by the judge, subject to the following conditions:

there is no need to keep the asset in nature as evidence or for investigation purposes, confiscation of the asset is incurred as criminal sanction, there is a risk of depreciation of its value.

- f. Is the money resulting from the anticipated sale put in an escrow account pending final judgement?

YES

2. Has your country set up an Asset Recovery Office, in accordance to the EU Framework Decision 2007/845/JHA? If the answer is in the affirmative:

YES

- a. What are its powers and functions?

French legislation provides for 2 AROs :

- the first one, called PIAC (created in 2005), is dedicated to identification of criminal assets,
- the second one, mentioned above, is dedicated to management of criminal assets.

- b. How does the ARO link itself with the criminal procedure and financial investigations?

PIAC is part of the police services, and manages only the financial investigations. It works in cooperation with investigators in charge of case's elucidation, under supervision of judicial authorities.

AGRASC is a public entity, in charge of assets management.

- c. Is the ARO responsible for managing the seized assets? If not, which institution is responsible in your country to manage the seized assets, and how does it interact with the ARO?

One of the 2 French AROs is responsible for assets identification, and the other is responsible for assets management. (see above)

3. What is the workflow in your country for seizing, managing and confiscating assets?

- a. How are these assets seized (e.g., through a court order, by determination of the prosecution)?

- b. Who is responsible for executing the seizure order and, if applicable, managing the assets?

Seizure orders are executed by police services. The judicial authority then decides whether management of those assets requires to be delegated to AGRASC.

- c. Which governmental body is supervising the overall process? (e.g. France: Ministry of Justice; Italy: Ministry of Interior)

General organization issues concerning AGRASC are under supervision of Ministry of Justice and Ministry of Budget. However, in the scope of criminal procedures, AGRASC is working under supervision of judicial authorities.

d. After the seizure of the assets, how are they managed, and by whom?

i. By the court or prosecutor, or by a specialised asset management agency?

Seized assets can be managed directly by prosecutor or investigating judge, or delegated to AGRASC, depending on their nature and on the actual necessity of management.

NO
ii. By third-parties (e.g. receivership)?

NO
iii. On a case-by-case agency?

iv. How does the managing authority deal with the hidden cost of management of the assets (e.g. taxes, maintenance costs)?

The legal or actual owner of the seized assets is liable to pay the hidden costs linked to the assets management.

e. Were there any human rights challenges to the asset seizure, management and confiscation systems in your country (e.g. right to property, right to a fair trial, due process)?

f. Are there provisions/ regulations in place that regulate how confiscated assets should be used and what their final destination should be?

Criminal assets become ownership of the State once confiscated. They can be destroyed when they are illicit or dangerous, allocated to public entities or sold.

g. Are there any provisions/ regulations on how the monies resulting from the seized/confiscated assets are divided amongst the regional public bodies and the central government, or amongst the authorities that are part of the asset management/recovery processes (e.g. division amongst interested parties, central fund)?

There is no general regulation in this respect.

Such a mechanism exists, but only applies to assets related to drug trafficking cases. A public fund has been created in 1995, which receives the proceeds of confiscated assets' sales in this area. Part of these funds is allocated to the services involved in the fight against drug trafficking (polices services, customs services and judicial authorities).

h. Are there any provisions allowing for civil society and victims to be contemplated in having the confiscated amounts shared with them?

N/A

- i. Are there any provisions allowing for the confiscated assets to be used for social purposes?

N/A

- j. What is the role of civil society/ civil society organisations in determining the use of the confiscated assets? – Please explain.

N/A

- k. To what extent can civil society/ civil society organisations participate in the decision-making on the final use of the confiscated assets?

N/A

- l. How can civil society/ civil society organisations exercise their influence on decision-making?

N/A

4. Are there any national records/statistics on the use of confiscated assets?

NO

- a. Are those statistics/records publicly available?

We would appreciate that any legislation that is mentioned during the response of this questionnaire is made available to us in its original language and, if available, in its English translation.

ii. Questionnaire 1: Answers SHERPA

1. Does your country allow for the management of seized assets, prior to their confiscation?

Yes

- a. What is the purpose of this management? Is it considered effective?

The seizure aims at ensuring the confiscation of criminal assets (i.e. to prevent their dissipation) – thus can only be seized assets that may be subject to confiscation.

- b. How does this management operate?

Seizures ordered during a preliminary inquiry by the public prosecutor requires authorisation from the judge of freedoms and detention while investigating magistrates can proceed freely. Seizures entail temporary deposal of the property that is literally "placed under justice".

- c. Can seized assets be used by authorities of your country or other actors while the final judgement for confiscation is pending?

Assets can be sold in certain circumstances (See below).

d. Does your country have provisions for the anticipated sale of seized assets?

Yes

e. If so, what are the options?

Where the restitution of the assets is impossible, the investigating judge can order an asset's sale (or destruction) if:

- In case of the asset being owned by the offender and confiscation is to be ordered, keeping the sealed asset would be likely to diminish its value or keeping the asset is no longer necessary to discover the truth or to the pursuit of the enquiry
- The owner of the asset cannot be identified or did not ask for its restitution within 2 months following formal notice.

f. Is the money resulting from the anticipated sale put in an escrow account pending final judgement?

Yes. The new Agency is the unique authority managing money resulting from the anticipated sale. This money is transferred to a special account at the Caisse des dépôts et des consignations (National fund deposits and consignments).

2. Has your country set up an Asset Recovery Office, in accordance to the EU Framework Decision 2007/845/JHA ? If the answer is in the affirmative:

Since the new law n°2010-768, July 9th 2010, facilitating seizure and confiscation of criminal assets and its decree n° 2011-134, February 1st 2011, an Asset Recovery Office has been set up, in accordance to the EU Framework Decision 2007/845/JHA: l'Agence de gestion et de recouvrement des avoirs saisis et confisqués (Article 706-159 of the Criminal Procedure Code).

a. What are its powers and functions?

Article 706- 160 of the Criminal Procedure Code:

"The agency is responsible for ensuring, on the whole territory and on behalf of justice:

- 1 ° The management of all assets, whatever their nature, seized, confiscated or subject to a protective measure during criminal proceedings, which are entrusted and need for preservation or enhancement , acts of administration;
- 2 ° The centralized management of all money seized in criminal proceedings;
- 3 ° The disposal or destruction of property which she was responsible for the administration under 1 and that are ordered, without prejudice to the allocation of these goods under the conditions provided for in Article L. 2222-9 of the General Code of ownership of public figures;
- 4 ° The disposal of assets ordered or authorized in accordance with Articles 41-5 and 99-2 of this Code.

The Agency may, under the same conditions, the management of seized property, proceed with the disposal or destruction of seized or confiscated, and make distribution of the proceeds of the sale in execution of any request or cooperation from a foreign judicial authority.

The set of skills exercised for seized or confiscated property, including those not covered under XXIX.

The decision to transfer of property subject to seizure criminal Management Agency and the

recovery of assets seized and forfeited shall be notified or published in accordance with the rules applicable to the seizure itself.

In exercising its powers, the agency may obtain the assistance and all relevant information from any person or entity, public or private, without the privilege it is enforceable, subject to the provisions of Article 66 -5 to law No. 71-1130 of 31 December 1971 reforming certain judicial and legal professions.”

Article 706-161 of the Criminal Procedure Code

“The agency provides criminal courts who request guidance and legal assistance and practical help to achieve the planned seizure and confiscation or management of seized and confiscated. It can lead to any action or training information to publicize its activities and promote good practices in seizure and confiscation.

The agency oversees the matching fund assistance received income from the forfeiture of real or personal property of persons convicted of offenses relating to narcotics trafficking.

It may inform the competent authorities and the victims, at their request or on its own initiative, on goods that are returned by court order, to ensure payment of their debts, including tax, customs, social or compensation.

The agency implements a processing personal data which centralizes the decisions of seizure and forfeiture before it regardless of the nature of the goods, as well as all relevant information relating to the goods involved, their location and owners or holders.

The Agency shall establish an annual activity report, including a statistical review, and any discussion and any proposal to improve the law and practice on seizure and confiscation

- a. How does the ARO link itself with the criminal procedure and financial investigations?

See above.

- b. Is the ARO responsible for managing the seized assets? If not, which institution is responsible in your country to manage the seized assets, and how does it interact with the ARO?

Article 706-143 of Criminal Procedure Code provides a general principle and an exception:

- General principle: the owner or the property is responsible for managing the seized assets.

Article 706-143 §1 of Criminal Procedure Code provides that: "Until the release of the seizure or forfeiture of the seized property, the owner or, failing that, the property holder is responsible for its maintenance and conservation. It bears the load, with the exception of costs that may be borne by the state."

- Exception: the prosecutor or the judge could put the Agency in charge with the management of the seized assets

Article 706-143 §2 and §3 of the Criminal Procedure Code: "In case of failure or unavailability of the owner or holder of the property, subject to the rights of bona fide third parties, the prosecutor or the judge may authorize the release of agency management and recovery of assets seized and forfeited the seized property, the sale is not planned in advance so that the agency performs, within the mandate entrusted to him, all legal documents and materials necessary for the preservation, maintenance and the valuation of the property.

Any action which results in turn, substantially change the property or reduce the value is subject to prior approval by the courts and detention at the request of prosecutor who directed, authorized entry , the judge who directed, authorized the seizure or the investigating judge in the case of opening a criminal investigation after the seizure."

3. What is the workflow in your country for seizing, managing and confiscating assets?

- a. How are these assets seized (e.g., through a court order, by determination of the prosecution)?

- In instances of flagrancy: police officers may seize criminal assets with prior authorization from the prosecutor

Article 54 of the Criminal Procedure Code provides: "In cases of flagrant crime, the police officer who is notified, immediately notify the prosecutor, is transported immediately to the scene of the crime and to make all useful findings.

It ensures the preservation of evidence may disappear and all that can be used to ascertain the truth. He seized the weapons and instruments that were used to commit the crime or intended to commit it and everything seems to have been the direct or indirect proceeds of crime.

It is the thing, for recognition, for people who appear to have participated in the crime, if present."

Article 56 of the Criminal Procedure Code provides: "If the crime is such that the proof can be acquired by the seizure of papers, documents, computer data or other objects in the possession of people who appear to have participated in the crime or hold parts, information and objects relating to the alleged crime The police officer is transported without stopping at the home of the latter in order to conduct a search which he shall make a report. The police officer may also be transported anywhere in which are likely to find properties which confiscation is provided for in Article 131-21 of the Penal Code, to conduct a search for seizure of property, if the search is performed solely for search and seize property that is confiscated under the fifth and sixth paragraphs of that article, it must first be authorized by the prosecutor. [...]

All objects and documents seized shall be immediately inventoried and placed under seal. However, if their inventory on site presents difficulties, they are being sealed closed temporary until their inventory and their sealing and final, in the presence of people who attended the search in the manner provided for in Article 57.

It is the seizure of computer data required for the truth by placing under judicial or physical support of these data is a copy made in the presence of persons assisting in the search.

If a copy is made, it can be carried out on orders from the prosecutor, the final deletion, disk media that has not been placed under court administration, computer information whose detention or use is illegal or dangerous to the safety of persons or property.

Agreement with the prosecutor, the police officer does not maintain that the seizure of objects, documents and computer data useful for the discovery of truth and confiscation of property which is laid down in Article 131 -21 of the Criminal Code. The prosecutor may also, when seizure of cash, bullion, bills or values whose conservation in kind is not necessary for the truth or to safeguard the rights of those concerned, authorize their deposit the Deposit and Consignment Office or the Bank of France or an account with a bank by the Agency management and recovery of assets seized and forfeited.

Whether they are likely to provide information on the objects, documents and computer data seized, those present during the search may be retained on site by the police officer the time strictly necessary for the performance of these operations."

- During the preliminary probe: police officer may seize assets at the request of the public prosecutor (1) with the prior authorisation of concerned person or (2) without the authorisation of this latter but in that case with the authorisation of the judge of freedoms and detention (Juge des libertés et de la détention)

Article 76 of the Criminal Procedure Code: "Searches, house searches and seizures of evidence or property forfeiture is provided for in Article 131-21 of the Penal Code can not be made without the express consent of the person with whom the transaction takes place.

This agreement must be a written statement from the hand of the person or, if it does not know how to write, it is mentioned in the minutes as well as assent.

If the needs of the investigation of a crime or an offense punishable by imprisonment for a term not less than five years required or if the search of property confiscation is provided for in Article 131-21 of the Criminal Code warrants, the judge of freedoms and detention of the High Court may, on application by the prosecutor, decide, by a written and reasoned decision, that the operations under this section will be made without the consent of the person with whom they occur. To be valid, the decision by the courts and detention specifies the description of the offense which the evidence is sought and the address of the places in which these operations can be performed, this decision is motivated by reference to the elements factual and legal grounds that these operations

are necessary. The operations are carried out under the supervision of the magistrate who authorized them, and that can move the site to ensure compliance with legal provisions. These operations can not, on pain of nullity, having a purpose other than search and recognition of offenses referred to in the decision by the courts and detention or seizure of property of which forfeiture is provided for in section 131 - 21 of the Criminal Code. However, the fact that these operations reveal offenses other than those stated in the decision does not constitute a ground for invalidating the incidental proceedings."

- During the judicial inquiry: Seizure would be made by the police officer under the authority of the investigating magistrate, and in some cases with the prior authorisation of the judge of freedoms and detention

Articles 92, 94 and 95 of the Criminal Procedure Code.

- Confiscation without a preliminary seizure: the confiscation of assets, being a sentence, is a court's decision.

Article 484-1 of the Criminal Procedure Code: "If convicted and sentenced to confiscation of property that is not under court, the criminal court may, to ensure the execution of such penalty, order the seizure, advanced at the expense of the Treasury, although confiscated.

The court may also authorize the release of agency management and recovery of assets seized and confiscated, for their alienation of movable property confiscated which he ordered the seizure, when these goods are no longer necessary for the determination of truth and that their conservation is likely to diminish its value. In this case the proceeds of the sale is recorded."

- b. Who is responsible for executing the seizure order and, if applicable, managing the assets?

There is no specific body responsible for the seizure but usually it would be the police officers under the authority of either the prosecutor, the judge of freedoms and detention, or the investigating magistrate (See above.).

- c. Which governmental body is supervising the overall process? (e.g. France: Ministry of Justice; Italy: Ministry of Interior)

Both Ministry of Justice & Ministry of Finance

- d. After the seizure of the assets, how are they managed, and by whom?

As we mentioned above, either the assets will be managed by the owner or the property holder or by the Agency.

- e. By the court or prosecutor, or by a specialised asset management agency?

- f. By third-parties (e.g. receivership)?

- g. On a case-by-case agency?

- h. How does the managing authority deal with the hidden cost of management of the assets (e.g. taxes, maintenance costs)?

The assets are managed depending of the case either by property holder at its own cost or by the State at its own cost.

4. Were there any human rights challenges to the asset seizure, management and confiscation systems in your country (e.g. right to property, right to a fair trial, due process)?

Ownership rights of third parties are guaranteed by article 706-145 and 706-146 of the Criminal Procedure Code. As far as we know, no decision has been challenged on HR grounds.

- a. Are there provisions/ regulations in place that regulate how confiscated assets should be used and what their final destination should be?

No

- b. Are there any provisions/ regulations on how the monies resulting from the seized/confiscated assets are divided amongst the regional public bodies and the central government, or amongst the authorities that are part of the asset management/recovery processes (e.g. division amongst interested parties, central fund)?

No

- c. Are there any provisions allowing for civil society and victims to be contemplated in having the confiscated amounts shared with them?

No

- d. Are there any provisions allowing for the confiscated assets to be used for social purposes?

No

- e. What is the role of civil society/ civil society organisations in determining the use of the confiscated assets? – Please explain.

None,

- f. To what extent can civil society/ civil society organisations participate in the decision-making on the final use of the confiscated assets?

There is no such a possibility.

- g. How can civil society/ civil society organisations exercise their influence on decision-making?

By raising awareness about the need to use confiscated assets for social purposes.

5. Are there any national records/statistics on the use of confiscated assets?

No, All is available is the number of confiscation ordered between 2004 and 2008: p. 159, *Annuaire Statistique de la Justice*, Edition 2009-2010, available here: http://www.justice.gouv.fr/art_pix/1_stat_anur09_10_20101122.pdf

- a. Are those statistics/records publicly available?

N.A

We would appreciate that any legislation that is mentioned during the response of this questionnaire is made available to us in its original language and, if available, in its English translation.

c. Germany

i. Questionnaire 1: Answers Federal Ministry of Justice

1. Does your country allow for the management of seized assets, prior to their confiscation?
 - a. What is the purpose of this management?
 - b. How does this management operate?
 - c. Can seized assets be used by authorities of your country or other actors while the final judgement for confiscation is pending?
 - d. Does your country have provisions for the anticipated sale of seized assets?
 - e. Is so, what are the options?
 - f. Is the money resulting from the anticipated sale put in an escrow account pending the final judgement?

2. What is the workflow in your country for seizing, managing and confiscating assets?
 - a. What are its powers and functions (e.g. through a court order, by determination of the prosecution)?
 - b. Who is responsible for executing the seizure order and, if applicable, managing the assets?
 - c. Which governmental body is supervising the overall process (e.g. France: Ministry of Justice; Italy: Ministry of Interior)?
 - d. After the seizure of the assets, how are they managed, and by whom?
 - e. By the court of prosecutor, or by specialised asset management agency?
 - f. By third-parties (e.g. receivership)?
 - g. On a case-by-case agency?
 - h. How does managing authority deal with the hidden cost of management of the assets (e.g. taxes, maintenance costs)?

Antwortbeitrag

A. Vorbemerkung (Frage 1 a. bis d., Frage 3 a. und b.)

Zu einer effektiven Strafverfolgung zählen die Verurteilung des Täters und der Entzug inkriminierter Vermögenswerte. Legislativ kommt dies in den Verfalls- und Einziehungsvorschriften des materiellen Strafrechts (§§ 73 ff. Strafgesetzbuch – StGB) zum Ausdruck. Dabei wird den Belangen der Opfer dadurch Rechnung getragen, dass der Verfall bei Vorliegen von Ansprüchen Tatverletzter ausgeschlossen ist. Ergänzt werden diese Regelungen durch strafverfahrensrechtliche Vorschriften (§§ 111b ff. Strafprozessordnung – StPO), die es erlauben, vorläufige Vermögenssicherungen zugunsten zivilrechtlicher Ansprüche Geschädigter durchzuführen (sog. Rückgewinnungshilfe). Die StPO ermöglicht bereits in einem frühen Stadium, dem Ermittlungs- bzw. Vorverfahren, den Zugriff auf kriminell erworbene Vermögenswerte oder sonstiges Schuldnervermögen. Damit soll verhindert werden, dass Ansprüche des Verletzten oder eine später vom Gericht zu treffende Verfalls- oder Einziehungsanordnung ins

Leere laufen, weil auf den Vermögensgegenstand oder das Schuldnervermögen nicht mehr zugegriffen werden kann.

B. Rechtsgrundlagen

Die Sicherstellung erfolgt grundsätzlich durch Beschlagnahme und dinglichen Arrest gemäß §§ 111b ff. StPO. Der verfahrensrechtliche Sicherungsmechanismus ist jedoch je nach materieller Anspruchsgrundlage (§§ 73 ff. StGB) unterschiedlich.

I. Sicherung der materiellen Ansprüche durch Beschlagnahme (§ 111b Abs. 1 StPO)

Liegen materiell die Anspruchsgrundlagen nach §§ 73 Abs. 1 bis 4, 73d Abs. 1 StGB (Verfallsgegenstände, auch Rechte, Forderungen, Nutzungen und Surrogate, die der Täter, Teilnehmer oder Dritte für oder aus rechtswidrigen Taten erlangt hat = inkriminiertes Vermögen) und nach §§ 74 und 74a StGB (Einziehungsgegenstände wie Tatmittel, Tatprodukte und Beziehungsgegenstände, die dem Täter gehören oder zustehen oder ein Dritter in vorwerfbarer Weise gewährt oder übertragen erhalten hat = bemakeltes Vermögen) vor, erfolgt die Sicherung durch die Beschlagnahme nach §§ 111b Abs. 1, 111c StPO.

1. Voraussetzungen und Dauer

Nach § 111b Abs. 1 StPO können Gegenstände beschlagnahmt werden, wenn Gründe für die Annahme vorhanden sind, dass die Voraussetzungen für ihren Verfall (§§ 73 Abs. 1 bis 4, 73d StGB) oder ihrer Einziehung (§§ 74, 74a StGB) vorliegen. Die Beschlagnahme stellt den vorläufigen Vollstreckungstitel dar, der den Zugriff auf das inkriminierte oder bemakelte Vermögen erlaubt. Ohne Vorliegen des Vollstreckungstitels ist ein Zugriff auf die Gegenstände unzulässig.

Nach § 111b Abs. 1 StPO ist ein vorläufiger Vollstreckungstitel in Form der Beschlagnahme bereits bei einem einfachen Verdacht (vgl. § 152 Abs. 2 StPO), dass die Voraussetzungen des Verfalls oder der Einziehung vorliegen, möglich. Liegen dringende Gründe nicht vor, ist die Anordnung spätestens nach sechs Monaten aufzuheben (§ 111b Abs. 3 Satz 1 StPO).

Begründen bestimmte Tatsachen den Tatverdacht und reicht die Frist von sechs Monaten wegen der besonderen Schwierigkeit oder des besonderen Umfangs der Ermittlungen oder wegen eines anderen wichtigen Grundes nicht aus, so kann die Maßnahme verlängert werden, wenn die genannten Gründe ihre Fortdauer rechtfertigen (§ 111b Abs. 3 Satz 2 StPO). Ohne Vorliegen dringender Gründe darf die Maßnahme über 12 Monate hinaus nicht aufrechterhalten werden (§ 111b Abs. 3 Satz 3 StPO).

2. Anordnungscompetenz

Zur Anordnung der Beschlagnahme ist nach § 111e Abs. 1 Satz 1 StPO nur der (Ermittlungs-) Richter (vgl. § 162 Abs. 1 StPO), bei Gefahr im Verzug auch die Staatsanwaltschaft befugt. Zur Anordnung der Beschlagnahme einer beweglichen Sache sind bei Gefahr im Verzug nach § 111e Abs. 1 Satz 2 StPO auch die Ermittlungspersonen der Staatsanwaltschaft (§ 152 GVG), mithin die Polizei, befugt.

Der Beschlagnahmebeschluss durch das Gericht oder die Beschlagnahmeanordnung durch die Staatsanwaltschaft und ihre Ermittlungspersonen stellt bei beweglichen Sachen gemäß

§ 111b Abs. 1 in Verbindung mit § 111e Abs. 1 StPO den vorläufig vollstreckbaren Titel dar, um auf die Gegenstände Zugriff zu nehmen.

In dem Beschluss oder der Anordnung ist der zu sichernde Gegenstand individuell und bestimmt aufzuführen sowie identifizierbar zu bezeichnen. Hat die Staatsanwaltschaft die Beschlagnahme angeordnet, beantragt sie nach § 111e Abs. 2 Satz 1 StPO innerhalb einer Woche die richterliche Bestätigung der Anordnung. Dies gilt nicht, wenn die Beschlagnahme einer beweglichen Sache angeordnet worden ist (§ 111e Abs. 1 Satz 2 StPO). Der Betroffene kann nach § 111e Abs. 2 Satz 3 StPO jederzeit die richterliche Entscheidung beantragen.

3. Einleitung und Durchführung

Die Kompetenz zur Einleitung und Durchführung der Vollstreckungsmaßnahme auf der Grundlage des nach § 111b Abs. 1 i.V.m. § 111e Abs. 1 StPO bestehenden vorläufigen Vollstreckungstitels ist in § 111f StPO geregelt, der folgende Zuständigkeiten vorsieht:

a) Bewegliche Sachen

Nach § 111f Abs. 1 StPO kann die Staatsanwaltschaft die vom Gericht oder von ihr selbst bei Gefahr im Verzug angeordnete Beschlagnahme ausführen. Innerhalb der Staatsanwaltschaft ist der Rechtspfleger zuständig (§ 31 Abs. 1 Nr. 2 Rechtspflegergesetz – RPfIG). Haben Ermittlungspersonen der Staatsanwaltschaft nach § 111e Abs. 1 Satz 2 StPO die Beschlagnahme beweglicher Sachen angeordnet, so können sie diese Anordnung selbst vollstrecken. Unabhängig davon kann sich die Staatsanwaltschaft auch ihrer Ermittlungspersonen bedienen.

b) Grundstücke und grundstücksgleiche Rechte

Die Einleitung und Durchführung der Vollstreckungsmaßnahmen in Grundstücke und grundstücksgleiche Rechte obliegt nach § 111f Abs. 2 StPO der Staatsanwaltschaft oder dem Gericht, das die Beschlagnahme angeordnet hat. Die hierbei anfallenden Geschäfte sind dem Rechtspfleger von der Staatsanwaltschaft (§ 31 Abs. 1 Nr. 1 RPfIG) oder dem Gericht (§ 22 Nr. 1 RPfIG) übertragen. Wie sich aus § 31 Abs. 6 RPfIG ergibt, kann aber auch der Richter bzw. der Staatsanwalt die entsprechenden Vollstreckungsmaßnahmen selbst einleiten, da er bei Erinnerungen gegen die Rechtspflegerentscheidungen selbst abhelfen kann und damit auch weisungsbefugt ist. Die Einleitung der Vollstreckungsmaßnahmen in Grundstücke erfolgt durch ein Eintragungssuchen an das Grundbuchamt um Eintragung eines Beschlagnahmevermerks.

c) Forderungen und andere Vermögensrechte

Nach § 111 f Abs. 1 StPO ist für die Einleitung und Durchführung der Vollstreckung in Forderungen und andere Vermögensrechte die Staatsanwaltschaft zuständig. Die Geschäfte sind dem Rechtspfleger (§ 31 Abs. 1 Nr. 2 RPfIG) übertragen. Die Einleitung geschieht durch Erlass eines Pfändungsbeschlusses, der dem Drittschuldner zuzustellen ist (vgl. § 111c Abs. 3 in Verbindung mit § 829 Zivilprozessordnung (ZPO)). Mit der Beschlagnahme ist die Aufforderung zur Abgabe der Drittschuldnererklärung nach § 840 ZPO zu verbinden (§ 111c Abs. 3 Satz 2 StPO).

d) Eingetragene Schiffe, Schiffsbauwerke und Luftfahrzeuge

Die Einleitungs- und Durchführungskompetenz in Schiffe, Schiffsbauwerke und Luftfahrzeuge, die in ein Register eingetragen sind, hat gemäß § 111f Abs. 2 StPO sowohl das Gericht als auch die Staatsanwaltschaft. Die entsprechenden Geschäfte sind dem Rechtspfleger der Staatsanwaltschaft (§ 31 Abs. 1 Nr. 1 RPfIG) bzw. des Gerichtes (§ 22 Nr. 1 RPfIG) übertragen. Handelt es sich um nicht eingetragene Schiffe bzw. Luftfahrzeuge, so erfolgt die Vollstreckung wie bei beweglichen Sachen nach § 111f Abs. 1 StPO.

4. Vollstreckung

Die Vollziehung des vorläufigen Vollstreckungstitels der Beschlagnahme ist in § 111c Abs. 1 bis 4 StPO nach Art des Gegenstandes unterschiedlich geregelt.

a) Bewegliche Sachen

Die Vollstreckung ist gemäß § 111c Abs. 1 StPO erfolgt, sobald der bewegliche Gegenstand von dem Vollstreckungsorgan (Staatsanwaltschaft oder ihre Ermittlungspersonen im Sinne von § 152 GVG) in Gewahrsam genommen, versiegelt oder in anderer Weise kenntlich gemacht wird.

b) Grundstücke und grundstücksgleiche Rechte

Nach § 111c Abs. 3 StPO erfolgt die Vollstreckung bei Grundstücken und grundstücksgleichen Rechten (wie z.B. Erbbaurecht, Wohnungseigentum, Miteigentum, Sondereigentum) durch die Eintragung eines Beschlagnahmevermerks in Abteilung II des betreffenden Grundbuchblattes. Dieser Vermerk wird von dem zuständigen Grundbuchbeamten (Rechtspfleger, Bezirksnotar) aufgrund eines Antrages bzw. Grundbuchersuchens nach § 13 Grundbuchordnung (GBO) in die Abteilung II des betreffenden Grundbuchblattes eingetragen. Bereits beim Eingang des Eintragungersuchens beim Grundbuchamt ist der Rang des noch einzutragenden Rechtes gemäß §§ 17, 45 GBO in Verbindung mit § 878 Bürgerliches Gesetzbuch (BGB) gesichert.

c) Forderungen und andere Vermögensrechte

In Forderungen und andere Vermögensrechte wird gemäß § 111c Abs. 3 StPO nach den Vorschriften der ZPO die Sicherung durch Pfändung bewirkt. Dabei sind die Vorschriften des 8. Buches der ZPO über die Zwangsvollstreckung in Forderungen und andere Vermögensrechte (§§ 828 ff. ZPO) sinngemäß anzuwenden. Die Pfändung hat zur Folge, dass bei Beschlagnahme einer Geldforderung ein Pfändungsbeschluss nach § 829 ZPO erlassen werden muss, der jeweils dem Drittschuldner und dem Schuldner zuzustellen ist.

In diesem Pfändungsbeschluss wird dem Drittschuldner verboten, an den Schuldner zu zahlen (§ 829 Abs. 1 Satz 1 ZPO) und gleichzeitig dem Schuldner geboten, sich jeder Verfügung über die Forderung, insbesondere ihrer Einziehung zu enthalten (§ 829 Abs. 1 Satz 2 ZPO). Die Pfändung der Forderung wird gemäß § 829 Abs. 3 ZPO mit Zustellung an den Drittschuldner wirksam. Daraus ergibt sich die Notwendigkeit, eine Ausfertigung des Pfändungsbeschlusses zunächst dem Drittschuldner zuzustellen und erst danach die Zustellung einer Beschlussausfertigung an den Schuldner zu bewirken.

Die Aufforderung zur Abgabe einer Drittschuldnererklärung nach § 840 Abs. 1 ZPO, die der Gläubiger binnen zweier Wochen vom Drittschuldner verlangen kann, ist nach § 111c Abs.

3 Satz 3 StPO zwingend mit der Beschlagnahme zu verbinden. Der Inhalt der Drittschuldner-erklärung ergibt sich aus § 840 Abs. 1 ZPO.

d) Eingetragene Schiffe und Luftfahrzeuge

Nach § 111c Abs. 4 StPO erfolgt die Vollstreckung in Schiffe und Luftfahrzeuge, die in einem Register eingetragen sind, durch Eintragung eines Beschlagnahmevermerks in das Register.

5. Wirkung der vollzogenen Beschlagnahme

Die vollzogene Beschlagnahme eines Gegenstandes nach § 111c Abs. 1 bis 4 StPO hat nach Absatz 5 ein relatives Veräußerungsverbot im Sinne des § 136 BGB zur Folge. Das Verbot umfasst auch andere Verfügungen als Veräußerungen. Spätere Verfügungen des beschuldigten Schuldners über den beschlagnahmten Gegenstand bzw. Vermögenswert sind dem Staat oder dem Anspruchsberechtigten (bei Rückgewinnungshilfe) gegenüber unwirksam.

Der Beschuldigte kann also nach einer Beschlagnahme aufgrund § 111c StPO nicht mehr zum Nachteil des Staates oder des Geschädigten verfügen. Er kann den sichergestellten Gegenstand bzw. Vermögenswert weder veräußern, verschenken noch anderweitig belasten (z.B. verpfänden). Eine beschlagnahmte bewegliche Sache kann dem Betroffenen gegen sofortige Erlegung des Wertes zurückgegeben oder unter dem Vorbehalt jederzeitigen Widerrufs zur vorläufigen weiteren Benutzung bis zum Abschluss des Verfahrens überlassen werden. Der erlegte Betrag tritt an die Stelle der Sache. Die vorläufige Überlassung kann da-von abhängig gemacht werden, dass der Betroffene Sicherheit leistet oder bestimmte Auflagen erfüllt (§ 111c Abs. 6 StPO).

6. Gerichtliche Verfallsanordnung

Wird ein Gegenstand durch rechtskräftiges Urteil für verfallen erklärt, wird eine Beschlagnahmeanordnung gegenstandslos, weil das rechtskräftige Urteil an ihre Stelle tritt. Das Eigentum an dem Gegenstand geht nach § 73e bzw. § 74e StGB i.V.m. § 60 Abs. Strafvollstreckungsordnung kraft Gesetzes – ohne weitere Vollstreckungsakte – auf den Staat über.

Sieht das Gericht im Urteil von der Anordnung des Verfalls ab, muss es in seinem Urteil die Sicherstellungsmaßnahmen aufheben. Die Sicherstellungsmaßnahme verliert bei einer gleichwohl unterbliebenen Aufhebung ihre Wirkung erst mit Rechtskraft des Urteils.

II. Rückgewinnungshilfe

1. Anwendungsbereich und Wirkung

Nach § 111b Abs. 5 StPO sind die Absätze 1 bis 4 zugunsten des Verletzten anzuwenden, soweit der Verfall wegen Verletztenansprüchen nach § 73 Abs. 1 Satz 2 StGB ausscheidet. Die prozessuale Sicherung der Rückgewinnungshilfe erfolgt gemäß § 111b Abs. 1 StPO durch Beschlagnahme, sofern der Gegenstand, auf den der Verletzte einen unmittelbaren Anspruch hat, beim Täter bzw. Teilnehmer oder Schuldner noch individuell oder als Surrogat vorhanden ist.

Der Beschlagnahmebeschluss bzw. die Beschlagnahmeanordnung erfolgt zur Sicherung von Ansprüchen des Tatverletzten. Gläubiger ist aber nicht der Verletzte, sondern der Staat. So wird zum Beispiel bei der Vollstreckung eines Beschlagnahmebeschlusses in ein Grundstück, das der Täter durch Verwirklichung eines Betruges vom Geschädigten übertragen bekommen hat, das Eintragungersuchen auf Eintragung eines Beschlagnahmevermerks beim Grundbuchamt zugunsten des Landes bzw. des Bundes eingetragen und nicht zugunsten des Verletzten.

§ 111g StPO erweitert das relative Veräußerungsverbot dahingehend, dass Verfügungen des Rechteinhabers und Zwangsvollstreckungsmaßnahmen Dritter auch dem Verletzten gegenüber unwirksam sind.

2. Verletztenbenachrichtigung

Nach § 111e Abs. 3 SPO ist der bekannte Verletzte unverzüglich vom Vollzug der Beschlagnahme zu benachrichtigen. Die Mitteilung kann nach § 111e Abs. 4 StPO durch einmaliges Einrücken in den elektronischen Bundesanzeiger oder in anderer geeigneter Weise erfolgen, wenn eine Mitteilung gegenüber jedem einzelnen mit unverhältnismäßigem Aufwand verbunden wäre oder wenn zu vermuten ist, dass noch unbekanntes Verletzte aus der Tat Ansprüche erwachsen sind. Zusätzlich kann die Mitteilung auch in anderer geeigneter Weise veröffentlicht werden.

3. Vom Verletzten einzuleitende Maßnahmen

Der vollzogene Beschlagnahmebeschluss bzw. die Beschlagnahmeanordnung hat für den Geschädigten keine unmittelbaren Auswirkungen, da die Sicherungsmaßnahmen ihre Wirkung nur zwischen dem Schuldner (d.h. dem von der Maßnahme Betroffenen) und dem Staat entfaltet. § 111k StPO sieht vor, dass bewegliche Sachen, die nach § 111c Abs. 1 StPO beschlagnahmt worden sind, an den bekannten Tatverletzten herauszugeben sind.

Im Übrigen müssen die Geschädigten aktiv werden, um auf die sichergestellten Vermögenswerte zugreifen zu können. Hierzu müssen vom Verletzten zumindest vorläufig vollstreckbare Titel, etwa einstweilige Verfügungen oder dingliche Arreste gegen den Schuldner erwirkt werden. Mit diesen Titeln kann er dann im Wege der Zwangsvollstreckung auf die gesicherten Vermögenswerte zugreifen.

4. Zulassung der Zwangsvollstreckung des Verletzten

Breibt der Verletzte die Zwangsvollstreckung in beschlagnahmte Forderungen oder andere Vermögenswerte, so bedarf es nach § 111g Abs. 2 StPO der Zulassung durch den Richter, der für die Beschlagnahme zuständig ist. Die Befriedigung durch den Verletzten erfolgt im Wege der Zwangsvollstreckung nach den Vorschriften der ZPO, so dass der Verletzte sich einen Titel verschaffen muss, der ihm den Zugriff auf die von den Strafverfolgungsbehörden gesicherten Gegenstände ermöglicht. Diesem Titel ist jedoch häufig nicht zu entnehmen, ob der titulierte Anspruch aus der Tat herrührt, derentwegen die Beschlagnahme erfolgt ist.

Das Zulassungsverfahren nach § 111g Abs. 2 StPO dient dem Zweck festzustellen, ob der Vollstreckungsgläubiger zu dem privilegierten Personenkreis der auch durch die Straftat Verletzten gehört. Wird die Zwangsvollstreckung des Verletzten zugelassen, so tritt der Staat, der aufgrund der Beschlagnahme vorrangiger Pfändungspfandgläubiger ist, mit seinem Pfandrecht hinter dessen Pfandrecht zurück. Die Schutzposition in Form des

Veräußerungs-verbotes, die der Staat durch die Beschlagnahme erlangt hat, wird gleichsam an den Verletzten abgetreten.

Wird die Zwangsvollstreckung zugunsten mehrerer Verletzter zugelassen, hat das trotz des rückwirkend auf den Zeitpunkt der Beschlagnahme entstandenen Veräußerungsverbotes (§ 111g Abs. 3 Satz 1 StPO) nicht zur Folge, dass alle Verletzten mit ihrem Pfändungspfandrecht den gleichen Rang erwerben. Die Rangfolge der Verletzten richtet sich ausschließlich nach den Zeitpunkten, zu denen ihre Pfändungspfandrechte nach § 804 Abs. 3 ZPO entstanden sind.

Bei Grundstücken wirkt die Eintragung des Beschlagnahmevermerks nach § 111c Abs. 2 Satz 1 StPO zugunsten des Staates nach § 111c Abs. 3 Satz 1 StPO auch zugunsten des Verletzten. Nach § 111g Abs. 3 Satz 2 StPO gilt die Eintragung des Veräußerungsverbotes als Eintragung zugunsten solcher Verletzter, die während der Dauer der Beschlagnahme als Begünstigte aus dem Veräußerungsverbot in das Grundbuch eingetragen werden. Dies findet nach § 111g Abs. 3 Satz 4 StPO auch auf eingetragene Schiffe, Schiffsbauwerke und Luftfahrzeuge Anwendung.

Zum Zulassungsantrag des Verletzten werden der Beschuldigte und die Staatsanwaltschaft gehört. Gegen den Beschluss des zulassenden Gerichts ist die sofortige Beschwerde gegeben (§ 111g Abs. 2 StPO). Auch der Drittbegünstigte (§ 73 Abs. 3 StGB), gegen den die Beschlagnahmemaßnahmen angeordnet und vollzogen wurden, hat dieses Beschwerderecht. § 111g Abs. 2 Satz 2 StPO ist entsprechend anzuwenden.

Nach der richterlichen Zulassung steht der Gegenstand dem Geschädigten zur Durchführung der Zwangsvollstreckung zur Verfügung. Die Beschlagnahme des Staates verliert gegenüber dem Verletzten ihre Wirkung.

5. Aufrechterhaltung der Beschlagnahme zugunsten Verletzter

Hat das Tatgericht nach § 111i Abs. 2 StPO lediglich deshalb nicht auf Verfall erkannt, weil Ansprüche eines Verletzten im Sinne von § 73 Abs. 1 Satz 2 StGB entgegenstehen, kann es dies im Urteil feststellen. In diesem Fall hat es das Erlangte zu bezeichnen. Gleichzeitig hält das Gericht nach § 111i Abs. 3 Satz 1 StPO die Beschlagnahme des Erlangten durch Beschluss für drei Jahre aufrecht.

Wird das Urteil erst nach drei Jahren rechtskräftig, so endet die Frist mit dem Eintritt der Rechtskraft. Sollte der Verletzte bis zum Ablauf der Fristen auf das Erlangte nicht Zugriff genommen haben, erwirbt nach § 111i Abs. 5 StPO der Staat die bezeichneten Vermögenswerte entsprechend § 73e Abs. 1 StGB. Das Gericht stellt nach § 111i Abs. 6 StPO den Eintritt und den Umfang des staatlichen Rechtserwerb durch Beschluss fest.

III. Sicherung der materiellen Ansprüche durch dinglichen Arrest (§ 111b Abs. 2 StPO)

Die materiellen Ansprüche der §§ 73a, 73d Abs. 2 (Wertersatzverfall) und 74c StGB (Wertesatzeinziehung) werden durch dinglichen Arrest nach § 111b Abs. 2 StPO gesichert. Die Normen lassen einen Rückgriff auf das sonstige, legale Vermögen des von der Anordnung Betroffenen zu. Mit der Rechtskraft des Urteils steht dem Staat gegen den Betroffenen ein Zahlungsanspruch in Geld zu. Die Regelungen zur Rückgewinnungshilfe gelten nach § 111b Abs. 5 StPO auch für den dinglichen Arrest. Insoweit kann auf die vorstehenden Ausführungen verwiesen werden.

1. Voraussetzungen und Dauer

Nach § 111b Abs. 2 StPO können Gegenstände im Ermittlungs- bzw. Vorverfahren durch einen dinglichen Arrest sichergestellt werden, wenn Gründe für die Annahme vorhanden sind, dass die Voraussetzungen für den Verfall von Wertersatz (§§ 73a, 73d Abs. 2 StGB) oder der Einziehung von Wertersatz (§ 74c StGB) vorliegen. Der dingliche Arrest stellt den vorläufigen Vorstreckungstitel dar, der den Zugriff auf sonstiges Tätervermögen erlaubt. Wie bei der Beschlagnahme nach § 111b Abs. 1 StPO ist ein lediglich einfacher Verdacht ausreichend, dass die Voraussetzungen für Wertersatzverfall oder –einziehung vorliegen.

Gemäß § 111b Abs. 3 Satz 1 StPO ist der dingliche Arrest – wie die Beschlagnahme – nach sechs Monaten aufzuheben, wenn bis dahin keine dringenden Gründe für die Annahme vorliegen, dass die Voraussetzungen der Einziehung oder des Verfalls gegeben sind. Maßgeblich für die Berechnung der Frist ist der Anordnungszeitpunkt.

Reicht diese Frist wegen der besonderen Schwierigkeit oder des besonderen Umfangs der Ermittlungen oder wegen eines anderen wichtigen Grundes nicht aus, so kann das Gericht auf Antrag der Staatsanwaltschaft die Maßnahme auf sechs Monate verlängern (§ 111b Abs. 3 Satz 2 StPO). Ohne Vorliegend dringender Gründe darf die Maßnahme über 12 Monate hinaus nicht aufrechterhalten werden (§ 111b Abs. 3 Satz 3 StPO).

2. Anordnungscompetenz

Zur Anordnung des dinglichen Arrestes ist nur der (Ermittlungs-)Richter (vgl. § 162 Abs. 1 StPO), bei Gefahr im Verzug auch die Staatsanwaltschaft befugt (§ 111e Abs. 1 StPO). Den Ermittlungspersonen der Staatsanwaltschaft kommt keine Anordnungscompetenz zu. Hat die Staatsanwaltschaft den Arrest angeordnet, beantragt sie nach § 111e Abs. 2 Satz 1 StPO innerhalb einer Woche die richterliche Bestätigung der Anordnung. Der Betroffene kann nach § 111e Abs. 2 Satz 3 StPO jederzeit die richterliche Entscheidung beantragen.

Nach § 111d Abs. 1 Satz 1 StPO kann der dingliche Arrest neben Wertersatzverfall und Wertersatzeinziehung auch zur Sicherung einer Geldstrafe und der voraussichtlich entstehenden Kosten des Verfahrens erlassen werden. Für diese Zwecke darf der dingliche Arrest nach § 111d Abs. 1 Satz 2 StPO erst mit Erlass des Urteils durch das erkennende Gericht angeordnet werden.

3. Notwendiger Inhalt des dinglichen Arrestes

Für den Erlass eines dinglichen Arrestes und seiner Vollziehung gelten § 111d Abs. 2 StPO und einzelne Vorschriften aus dem 5. Abschnitt des 8. Buches der ZPO. Danach muss jeder dingliche Arrest nach §§ 917, 920 Abs. 1 und § 923 ZPO einen Arrestgrund, die Höhe und Bezeichnung des Anspruchs (aus dem Arrestgrund) und eine Abwendungsbefugnis enthalten.

Ein Arrestgrund ist nach § 917 ZPO die Besorgnis, dass ohne Verhängung des dinglichen Arrestes die spätere Vollstreckung des Urteils, in dem der Verfall oder die Einziehung von Wertersatz ausgesprochen wird, vereitelt oder wesentlich erschwert würde. Gemäß § 920 Abs. 1 ZPO soll das Arrestgesuch die materielle Anspruchsgrundlage, den Arrestanspruch und die Höhe des Anspruchs enthalten.

Daher sind der staatliche Anspruch bzw. bei der Rückgewinnungshilfe die Ansprüche des Verletzten nach §§ 73a, 73d Abs. 2 StGB oder § 74a StGB – in Verbindung mit der anspruchsbegründenden Strafnorm (§ 111b Abs. 5 StPO) – in bestimmter Höhe zu nennen.

Da ein dinglicher Arrest seinem Charakter nach nur zur Sicherung einer späteren Vollstreckung dient, muss er stets auch die Möglichkeit der Abwendung seiner Vollziehung enthalten. Diesem Gedanken trägt § 923 ZPO Rechnung, der besagt, dass im Arrestbefehl ein Geldbetrag festzusetzen ist, durch dessen Hinterlegung die Vollziehung des Arrestes gehemmt und der Schuldner zum Antrag auf Aufhebung des vollzogenen Arrestes berechtigt wird (§ 934 ZPO).

4. Einleitung und Durchführung

Die Kompetenz zur Einleitung und Durchführung der Vollstreckungsmaßnahmen auf der Grundlage des nach § 111b Abs. 2 i.V.m. § 111e Abs. 1 StPO bestehenden vorläufigen Vollstreckungstitels ist in §§ 111f StPO geregelt, der folgende Zuständigkeiten vorsieht:

a) Bewegliche Sachen

Bei beweglichen Gegenständen ergibt sich die Zuständigkeit der Staatsanwaltschaft aus § 111f Abs. 3 Satz 1 i.V.m. § 1 Abs. 1 Nr. 1 und 2 a, § 2 Abs. 1 Justizbeitreibungsordnung und §§ 451, 459g StPO. Die Einleitung erfolgt dadurch, dass die Staatsanwaltschaft einer ihrer Ermittlungspersonen (§ 152 GVG) oder dem Gerichtsvollzieher einen Vollstreckungsauftrag erteilt.

b) Grundstücke und grundstücksgleiche Rechte

Zuständig ist nach § 111f Abs. 3 Satz 2, Abs. 2 StPO die Staatsanwaltschaft oder das Gericht, das den dinglichen Arrest erlassen hat. Die Zuständigkeit beschränkt sich auf das Ersuchen um entsprechende Grundbucheintragungen. Die hierbei anfallenden Geschäfte sind dem Rechtspfleger der Staatsanwaltschaft (§ 31 Abs. 1 Nr. 2 RPfIG) bzw. des Gerichts (§ 22 Nr. 2 RPfIG) übertragen.

Staatsanwalt bzw. Richter können das Eintragungsersuchen auch selbst fertigen, da sie bei Erinnerungen gegen die Maßnahmen „ihrer“ Rechtspfleger jederzeit Abhilfe leisten bzw. Anweisungen erteilen können.

Das Eintragungsersuchen ist im Falle des § 111d Abs. 2 StPO i.V.m. §§ 928, 930, 932 ZPO auf die Eintragung einer Sicherungshypothek gerichtet. Das Eintragungsersuchen kann im Einzelfall aber auch auf die Sicherung von zu pfändenden Grundpfandrechten wie Hypotheken oder Grundschulden gerichtet sein (vgl. §§ 839, 857 Abs. 6 ZPO). Für die hierzu zusätzlich notwendigen Forderungspfändungen sind die nachfolgenden Ausführungen von Bedeutung.

c) Forderungen, Schiffe und Schiffsbauwerke

Bei Forderungen, eingetragenen Schiffen und Schiffsbauwerken ist nach § 111f Abs. 3 Satz 3 StPO die Staatsanwaltschaft oder auf deren Antrag das Gericht, das den Arrest angeordnet hat, zuständig. Die Durchführung der Vollstreckung ist auf den Erlass eines Pfändungsbeschlusses gerichtet, der dem Drittschuldner zuzustellen ist (vgl. § 111d Abs. 2 StPO i.V.m. §§ 928, 930, 829 ZPO).

Funktional zuständig ist nach §§ 22 Nr. 2, 31 Abs. 1 Nr. 2 RPfIG i.V.m. § 20 Nr. 16 RPfIG der Rechtspfleger beim Gericht bzw. der Staatsanwaltschaft. Auch hier können der Staatsanwalt und Richter selbst den Pfändungsbeschluss erlassen, da ihnen dem Rechtspfleger gegen-über ein Weisungsrecht zusteht.

5. Vollstreckung

Auch bei der Vollziehung des dinglichen Arrestes ist zu unterscheiden, in welche Vermögenswerte vollstreckt werden soll.

a) Bewegliche Sachen

Die Pfändung beweglicher Sachen erfolgt gemäß § 111d Abs. 2 StPO i.V.m. §§ 928, 930 ZPO nach denselben Grundsätzen wie jede andere Pfändung und begründet ein Pfandrecht mit den in § 804 ZPO bestimmten Wirkungen. Dies bedeutet, dass die Pfändung nach den Vorschriften über die Zwangsvollstreckung wegen Geldforderungen in das bewegliche Vermögen erfolgen muss.

Aus der Verweisung der §§ 928, 930 ZPO auf die Anwendbarkeit der Vorschriften des 8. Bandes der ZPO ergibt sich, dass für die Pfändung körperlicher Sachen grundsätzlich der Gerichtsvollzieher zuständig ist, der gemäß §§ 808 ff. ZPO die im Gewahrsam des Schuldners oder eines herausgabebereiten Dritten (§ 809 ZPO) befindliche Sache in Besitz nimmt.

Nach § 111f Abs. 3 Satz 1 StPO steht die Vollstreckungskompetenz neben dem Gerichtsvollzieher auch dem Staatsanwalt und seinen Ermittlungspersonen (§ 152 GVG) zu. Bei jeder Pfändung entsteht ein relatives Verfügungsverbot nach den §§ 135, 136 BGB zugunsten des Gläubigers (sog. Verstrickung) und gleichzeitig ein Pfändungspfandrecht am gepfändeten Gegenstand.

Letzteres ist das Recht des Gläubigers, sich aus dem Gegenstand, d.h. durch dessen Verwertung, zu befriedigen. § 930 Abs. 2 ZPO sieht vor, dass vom Gerichtsvollzieher gepfändetes Geld zu hinterlegen ist. Die Vorschrift verweist auf die Hinterlegungsordnung und legt fest, nach welchen Bestimmungen zu verfahren ist.

b) Grundstücke und grundstücksgleiche Rechte

Die Vollziehung erfolgt durch die Eintragung einer Sicherungshypothek in das betreffende Grundstück (§ 932 ZPO). Im Übrigen gelten bei der Vollstreckung in eingetragene Hypotheken und Grundschulden § 857 Abs. 6 i.V.m. § 830 ZPO.

c) Forderungen und andere Vermögensrechte

Die Vollziehung des dinglichen Arrestes in Forderungen und andere Vermögensrechte erfolgt nach den Vorschriften der §§ 928, 930 i.V.m. 829 ff. ZPO. Die Pfändungen sind in der Regel als bewirkt anzusehen, sobald der Pfändungsbeschluss dem Drittschuldner zugestellt worden ist.

d) Eingetragene Schiffe, Schiffsbauwerke und Luftfahrzeuge

In eingetragene Schiffe und Schiffsbauwerke wird gemäß §§ 928, 930 und 931 ZPO durch Anordnungsbeschluss und Eintragungersuchen in das Schiffsregister sowie Inbesitznahme

durch den Gerichtsvollzieher vollstreckt. Bei Luftfahrzeugen ist § 99 des Gesetzes über das Recht an Luftfahrzeugen maßgebend.

6. Wertersatzverfall im Urteil

Mit Rechtskraft des Strafurteils wegen Wertersatzverfall steht dem Staat gegen den Schuldner ein Zahlungsanspruch in festgestellter Höhe zu. Dieser Anspruch bedarf nach Rechtskraft der Entscheidung der endgültigen Vollstreckung. Diese kann sich auf die mit dinglichem Arrest gesicherten Vermögenswerte richten. Wird im Strafurteil nicht auf Wertersatzverfall erkannt, so endet der dingliche Arrest, falls er nicht aufgehoben wird, erst mit Rechtskraft des Urteils (vgl. BGHSt 29, 13, 14 f.).

C. Verwaltung der Vermögenswerte während der Sicherstellung (Frage 1 d. und Frage 3 d.)

Die Verwaltung sichergestellter Vermögenswerte obliegt der Staatsanwaltschaft. Beschlagnahmte Vermögenswerte wie Schmuck und andere Kostbarkeiten (vgl. § 5 Hinterlegungsordnung) sowie Bargeld hat die Staatsanwaltschaft bei der Hinterlegungsstelle des Amtsgerichts zu deponieren. Bargeld wird gemäß § 8 Hinterlegungsordnung nach Ablauf einer Dreimonatsfrist mit 1 Prozent verzinst.

Darüber hinaus dürfen Vermögenswerte, die nach § 111c StPO beschlagnahmt oder aufgrund eines Arrestes (§ 111d StPO) gepfändet worden sind, vor der Rechtskraft des Urteils veräußert werden, wenn ihr Verderb oder eine wesentliche Minderung ihres Wertes droht oder ihre Aufbewahrung, Pflege oder Erhaltung mit unverhältnismäßigen Kosten oder Schwierigkeiten verbunden ist (§ 111i Abs. 1 Satz 1 StPO).

In den Fällen des § 111i Abs. 2 StPO können Vermögenswerte, die aufgrund eines Arrestes gepfändet worden sind, nach Rechtskraft des Urteils veräußert werden, wenn dies zweckmäßig erscheint. Der Erlös tritt an ihre Stelle (§ 111i Abs. 1 Satz 2 und 3 StPO).

Im vorbereitenden Verfahren und nach Rechtskraft des Urteils wird die Notveräußerung durch die Staatsanwaltschaft angeordnet (§ 111i Abs. 2 Satz 1 StPO). Die Anordnung ist nach § 31 Abs. 1 Nr. 2 RPfIG dem Rechtspfleger übertragen. Den Ermittlungspersonen der Staatsanwaltschaft (§ 152 GVG) steht diese Befugnis zu, wenn der Gegenstand zu verderben droht, bevor die Entscheidung der Staatsanwaltschaft herbeigeführt werden kann (§ 111i Abs. 2 Satz 2 StPO).

Der Beschuldigte, der Eigentümer und andere, denen Rechte an der Sache zustehen, sollen vor der Anordnung gehört werden (§ 111i Abs. 4 Satz 1 StPO). Die Anordnung sowie Zeit und Ort der Veräußerung sind ihnen, soweit dies ausführbar erscheint, mitzuteilen (§ 111i Abs. 4 Satz 2 StPO).

Die Notveräußerung wird nach den Vorschriften der ZPO über die Verwertung einer gepfändeten Sache durchgeführt. An die Stelle des Vollstreckungsgerichts (§ 764 ZPO) tritt im Fall des § 111i Abs. 2 StPO die Staatsanwaltschaft (§ 111i Abs. 5 Satz 1 und 2 StPO). Gegen Anordnungen der Staatsanwaltschaft oder ihrer Ermittlungspersonen (§ 152 GVG) kann der Betroffene gerichtliche Entscheidung beantragen. Das Gericht, in dringenden Fällen der Vorsitzende, kann die Aussetzung der Veräußerung anordnen (§ 111i Abs. 6 Satz 1 und 3 StPO).

D. Dienstaufsicht (Frage 3 c.)

Soweit Staatsanwaltschaften und Gerichte der Länder bzw. des Bundes vorläufige Sicherungsmaßnahmen nach §§ 111b ff. StPO anordnen und vollstrecken, obliegt die Aufsicht darüber den Landesjustizverwaltungen bzw. dem Bundesministerium der Justiz jeweils als oberste Dienstaufsichtsbehörden. Bei gerichtlichen Entscheidungen haben sie jedoch die verfassungsrechtliche garantierte richterliche Unabhängigkeit zu beachten. Sie gewährleisten, dass Richter bei ihren Entscheidungen nur dem Recht und Gesetz unterworfen sind. Eine Überprüfung oder Einflussnahme auf Entscheidungen der gerichtlichen Praxis ist der Dienstaufsicht durch die Landesjustizverwaltungen und das Bundesministerium der Justiz entzogen.

3. Are there any national records/statistics on the use of confiscated assets?

4. Are those statistics/records publicly available?

Statistische Angaben über die Vermögensabschöpfung werden in der "Erhebung von statistischen Daten bei den Staats- und Anwaltschaften (StA-Statistik)", in der "Erhebung von statistischen Daten in Straf- und Bußgeldsachen (StP/OWi-Statistik)" und in der "Strafverfolgungsstatistik" erfasst. Ergebnisse dieser Statistiken werden vom Statistischen Bundesamt veröffentlicht.

Angaben zur Vermögensabschöpfung sind enthalten in der StA-Statistik 2010 in Tabelle 2.2.1.1 auf S. 28, in der StP/OWi-Statistik 2010 in den Tabellen 2.1 auf S. 26, 4.1 auf S. 62 und 7.1 auf S. 112, in der Strafverfolgungsstatistik 2010 in Tabelle 5.1 und 5.2 auf den Seiten 330 ff.

Die jeweiligen Veröffentlichungen sind beigefügt, sie können auch auf der Internetseite des Statistischen Bundesamts

http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Navigation/Publikationen/Fachveroeffentlichungen/Rechtspflege,templateId=renderPrint.psm1__nnn=true heruntergeladen werden.

ii. Questionnaire 2: Answers Federal Office of Justice

1. Has your country set up an Asset Recovery Office, in accordance to the EU Framework Decision 2007/845/JHA?

Deutschland hat zwei sog. Asset Recovery Offices (AROs) gemäß dem EU-Rahmenbeschluss 2007/845/JI eingerichtet:

Das Bundeskriminalamt ist als nationaler polizeilicher Ansprechpartner, das Bundesamt für Justiz als nationaler justizieller Ansprechpartner benannt.

Das Bundesamt für Justiz dient somit deutschen und ausländischen Behörden als zentraler rechtshilferechtlicher Ansprechpartner der Justiz. Davon zu trennen ist die Zuständigkeit für die Bewilligung und Vornahme von Rechtshilfehandlungen betreffend vermögensabschöpfende Maßnahmen. Diese Zuständigkeit wurde auf die Bundesländer übertragen; entsprechende Ersuchen sind auf dem jeweils vorgesehenen Geschäftsweg zu übermitteln. Soweit ein völkerrechtliches Übereinkommen nicht den Geschäftsweg mit dem Bundesamt für Justiz oder unmittelbar mit der zuständigen Justizbehörde zulässt, ist der diplomatische Geschäftsweg einzuhalten.

Dem Bundeskriminalamt obliegt die Bearbeitung polizeilicher Fragestellungen, d.h. die Einleitung und Durchführung von konkreten Maßnahmen zum Aufspüren, der Sicherung und der Vollstreckung in Vermögenswerte in Zusammenarbeit mit den jeweils zuständigen Staatsanwaltschaften und den Polizeien der Bundesländer. Das Bundeskriminalamt widmet

sich auch entsprechenden Grundsatzfragen der polizeilichen Arbeit. Auf Arbeitsebene werden ferner die weiteren Funktionen wie die Pflege von Kontakten, Fortbildung, Vertretung in nationalen und internationalen Fachkreisen für den Bereich der Vermögensabschöpfung durch das Bundesamt für Justiz und das Bundeskriminalamt wahrgenommen. Sie unterstützen damit die jeweils zuständigen Bundesministerien, namentlich das Bundesministerium der Justiz und das Bundesministerium des Innern. Die beiden deutschen AROs sind nicht für die Verwaltung, Bewirtschaftung und Verwertung von sichergestellten Vermögenswerten zuständig. Dies obliegt jeweils der Staatsanwaltschaft, die das Strafverfahren führt, ggf. auf deren Anordnung den sog. Ermittlungspersonen der Staatsanwaltschaft (§ 142 Absatz 1 Gerichtsverfassungsgesetz), d.h. z.B. Polizeidienststellen. Eine Zuständigkeit der beiden deutschen AROs liegt nur vor, wenn Fragestellungen der justiziellen Rechtshilfe bzw. der polizeilichen Zusammenarbeit mit dem Ausland auftreten.

iii. Questionnaire 2: Answers Federal Ministry of Justice

1. Are you satisfied with the current legislative framework on the management of confiscated assets and their disposal/destination in your country?

Auch in Fällen der internationalen Zusammenarbeit richtet sich die Verwaltung sichergestelltem Vermögens nach nationalem Recht. Den Angaben von Frau Dr. Becker kann ich daher nichts hinzufügen.

2. Are you satisfied with the asset management procedure in practice?

Siehe Antwort zu Frage 1.

3. What are the most pressing problems in the management of confiscated assets in your country?

Siehe Antwort zu Frage 1.

4. Do you feel a EU directive or regulation is needed to introduce provisions on the re-use of confiscated assets for social purposes?

In erster Linie soll Vermögen, das aus der Straftat stammt oder dem Straftäter zugerechnet wird, der Entschädigung der Opfer dienen. Erst wenn diese nicht in Betracht kommt, wird Verfall angeordnet. Eine Verteilung zu Gunsten sozialer Zwecke kennt das deutsche Recht nicht, da diese Zwecke aus den allgemeinen Staatseinnahmen gefördert werden. Eine Verteilung im Einzelfall, noch dazu an miteinander konkurrierende Organisationen aus verschiedenen Staaten, deren Tätigkeit aus dem Ausland kaum zu beurteilen und zu überwachen ist, halte ich nicht für sinnvoll.

5. If so, what other instruments would you consider could be transposed or created at the EU level?
 - a. European Asset Recovery Fund/ European Bank account
 - b. EU Asset Recovery Agency ii) for non-financial assets and ii) and financial assets
 - c. European Network and /or Database
6. Please also provide reasons if one or more of these instruments are considered to be useful and if not, why so.

Maßnahmen a) und b) würden in ein gut funktionierendes deutsches nationales System eingreifen. Ich halte sie nicht für erforderlich. Zudem ist die Zahl der grenzüberschreitenden Maßnahmen in der EU derart gering, dass es wenig überzeugend scheint, gerade an dieser Stelle neue Organisationen einzubinden.

Maßnahme c) halte ich nicht für erforderlich. Ein Austausch findet auf der Ebene bestehender Netzwerke (EJN, CARIN) und zwischen den Vermögensabschöpfungsstellen statt.

7. What would be the challenges on a European level

Im Hinblick auf das Vorhin ausgeführte wird sich die Frage stellen, ob die EU aus Gründen der Subsidiarität auf eigene Maßnahmen verzichten muss. Zudem wird sich die Frage stellen, ob das Schuldprinzip im Strafrecht Grenzen für den Umgang mit Vermögen von mutmaßlichen Straftätern stellt.

8. What can be improved on a European level?

Bedeutsamer als Verbesserungen auf europäischem Level sind Anstrengungen auf der Ebene der Mitgliedsstaaten, bestehende Instrumente engagiert umzusetzen und in der Praxis verstärkt zu nutzen.

9. In your opinion, is a European framework even desirable or should the re-use of confiscated assets for social purposes be managed by national jurisdictions?

Die Herausgabe von Vermögen an soziale Einrichtungen entspricht nicht dem deutschen Konzept.

d. Italy

i. Questionnaire 2: Answers FLARE and Libera

1. Are you satisfied with the current legislative framework on the management of confiscated assets and their disposal/destination in your country?

Not completely. For sure, the so-called “Rognoni-La Torre Law” about confiscation and Law 109/96 about social re-use of seized criminal assets are a very significant starting point, unique at European level. In particular, social re-use has to be considered an excellent tool, both for its symbolic value, for its importance in the cultural struggle against mafia and for its economic efficiency. The social re-use of criminal properties, in fact, is also a way to create job and new production: in a word, economical value in zones normally under the heavy bad influence of criminal economy.

Nevertheless, something is still missing: one example is the matter of bank mortgages insisting on the properties, another the structural problem of shortage of public funds for the management of the properties.

2. Are you satisfied with the asset management procedure in practice?

The real problems here: laws are good, practice is still not satisfying. The re-allocation of assets normally takes very long periods, with seized properties neglected during years. The lack of a national/regional coordinated plan for the management and the allocation of assets, with a common fund create a lot of differences among the various Italian regions. Normally, it happens that the smaller towns are not able to control those assets, to make them safe. And this means that the re-use of assets becomes impossible in practice: sometimes, criminals are still living in confiscated properties, because local authorities are not able to clear them.

Talking about seized companies, the situation is even worse: 90% of those companies goes bankrupt before the reallocation, because we still don't have a public agency able to manage them during the transitional phase.

3. What are the most present problems in the management of confiscated assets in your country?

As I already said, problems are in particular two: mortgages on properties and lack of public funds to manage the assets.

4. Do you feel a EU directive or regulation is needed to introduce provisions on the re-use of confiscated assets for social purposes?

I do, definitely. I reckon it is crucial - in order to have an efficient contrast to criminal organization – to create a system to re-use rapidly and efficaciously seized assets.

This system would be useful, as I said before, both for its cultural and economical value.

5. What other instruments would you consider could be transposed or created at the EU level?

a) European Asset Recovery Fund

b) EU Asset Recovery Agency ii) for non-financial assets and ii) and financial assets

c) European Network and /or Database

I think all those three measures are necessary in order to build an effective system against organised crime in Europe. Furthermore, I believe that would be necessary to apply

confiscation and social re-use also to corruption-generated assets, as long as corruption is intimately linked to organised crime. Generally speaking, then, it would be helpful to have a unique European legislation about those matters, so that national confiscation could be recognized in all EU-area and any member state could have access to European funds dedicated to this aim. It would be important to have European harmonization also in the contrast to organized crime.

6. Please provide reasons if one or more of these instruments are considered to be useful

A European fund for asset recovery is necessary to support Member State and European areas in their contrast to organised crime through confiscation and social re-use of properties. Then, it would also be important to create a European fund also for the management of re-used assets. This could be a way to render Europe a new area of "transnational economical development": and the starting point, as far as I can see, could be exactly the confiscated assets, the enormous amount of resources organized crime take away every day from a lot of European zones. A solution, for example, could be the use of all the seized financial assets to manage the confiscated real estate.

EU Agency, finally, is necessary for the nature of organized crime itself. Today, organized crime is a globalized phenomenon, and the lack of legislative globalization is a big advantage for them. We must organized the struggle against organized crime at a supranational level.

7. If not, why?

8.

9. What would be the challenges on a EU level?

As I already said, the EU challenge is to create a system able to conduct an harmonized struggle against criminal organization and then to re-use their assets to build a transnational economical and social development. And I believe this mechanism could be very helpful to create a common sense of European citizenship, too. Let's take a simple example: imagine a criminal estate belonging to an Italian criminal organization, confiscated in Spain and re-used as farm with the aid of European fund created with seized criminal financial assets. In only one process, we generate economical value and a cultural change and we hit the (economical and cultural) power of a criminal organization thank to a European system which reveals a European Union able to take care of its own citizens.

10. What can be improved on European level?

At EU level, we must harmonize and potentiate every tool useful in order the attack criminal assets. We must harmonize the system of management and re-use of assets. We must crate a central-controlled fund dedicated to the social re-use of properties.

11. In your opinion, is a European framework even desirable or should the re-use of confiscated assets for social purposes be managed by national jurisdictions only?

My opinion is absolutely favourable to a European strong framework, which should be necessary in order to have an effective struggle against organized crime. This framework should, of course, respect the differences among various areas; but what really matters is to have a new common policy, which would be an important signal to European and national institutions of European concern about social and economical development of every European area.

ii. Questionnaire 2: Answers ANBSC

1. Are you satisfied with the current legislative framework on the management of confiscated assets and their disposal/destination in your country?

Brevemente: occorre considerare che l'attuale quadro normativo relativo all'amministrazione e destinazione dei beni confiscati alla criminalità organizzata è il frutto dell'evoluzione almeno cinquantennale della legislazione italiana in materia di lotta alla mafia e riposa su disposizioni di livello costituzionale. Va anche distinto l'aspetto relativo ai mezzi di aggressione dei patrimoni mafiosi, attualmente a disposizione della magistratura e delle forze dell'ordine, da quello relativo ai provvedimenti che si collocano, logicamente e temporalmente, a valle dell'operato di queste istituzioni. Tali aspetti riguardano, più precisamente, l'attività dell'Agenzia Nazionale, la cui istituzione, com'è noto, risale all'anno 2010. Nel complesso, si ritiene di poter esprimere un giudizio di adeguatezza del quadro normativo di riferimento; per quanto riguarda, in particolare, l'implementazione dell'attività dell'Agenzia Nazionale, si segnala l'esistenza di molti complessi problemi da risolvere.

2. Are you satisfied with the asset management procedure in practice?

Il livello di complessità dei problemi che possono affliggere un bene confiscato ai mafiosi è particolarmente significativo. Le procedure indicate dalla legge sono talvolta difficili da realizzare, tenuto conto che uno dei fini prioritari è dato dalla riutilizzazione dei beni stessi per scopi istituzionali o sociali. Talvolta questi fini sono irrealizzabili senza un impegnativo intervento finanziario per il recupero dei beni stessi; in altri casi, si pensi alle aziende confiscate, occorre confrontarsi con contesti in cui l'azienda mafiosa riusciva ad essere produttiva solo grazie ad una gravissima distorsione delle regole, determinata proprio dalla "gestione" mafiosa che la caratterizzava. Uno dei compiti dell'Agenzia Nazionale è proprio quello di riuscire a creare una "rete" che consenta il contributo di tutte le componenti istituzionali, pubbliche e private, impegnate nella restituzione alla collettività di un patrimonio che sia pienamente e legittimamente fruibile.

3. What are the most present problems in the management of confiscated assets in your country?

Si va da difficoltà di tipo materiale, quale appunto lo stato di parziale o completa "vandalizzazione" in cui versano alcuni beni immobili, ad altre di natura giuridica, quale ad esempio l'esistenza di garanzie reali in favore di terzi in buona fede (pignoramenti, ipoteche di varia natura), a ostacoli oggettivi quali ad esempio l'occupazione abusiva dei beni stessi.

4. Do you feel a EU directive or regulation is needed to introduce provisions on the re-use of confiscated assets for social purposes?

In Italia, come si è appena detto, questa finalità esiste già ed è al centro dell'attività di un organismo specializzato ed autonomo quale l'Agenzia Nazionale. Se si pensa, invece, ad uno strumento legislativo a valenza generale per gli Stati membri, certamente la risposta è affermativa, anche se è facile prevedere che una disciplina di questo tipo potrà incontrare numerosi ostacoli nelle legislazioni nazionali di settore.

5. What other instruments would you consider could be transposed or created at the EU level?

- European Asset Recovery Fund
SI

- EU Asset Recovery Agency ii) for non-financial assets and ii) and financial assets
SI

- European Network and/or Database ?

Quale sarebbe la differenza rispetto ai data-base/network dei singoli Stati Membri?

6. Please provide reasons if one or more of these instruments are considered to be useful

Per quanto riguarda l'istituzione di un fondo europeo destinato al recupero dei beni, se ne ravvisa la particolare utilità sia in relazione alla diffusione globale dei patrimoni mafiosi, che costituisce un ulteriore elemento di complicazione delle indagini, già di per sé lunghe e difficili, sia in relazione all'opportunità di mettere a disposizione degli inquirenti mezzi per la prosecuzione delle indagini all'estero, di cui, talvolta, i bilanci nazionali potrebbero risultare carenti. Per quanto riguarda l'istituzione dell'Agenzia Europea, in assenza di un quadro normativo comune, potrebbe risultare un utile elemento unificante e per la condivisione delle buone pratiche messe a punto dagli Stati. Appare più difficile, invece, immaginare oggi un nucleo di competenze operative proprie di quest'organismo, in assenza di indicazioni più precise sull'orientamento degli Stati Membri.

- If not, why?

7. What would be the challenges on a EU level?

Già oggi la cooperazione tra le Agenzie per il Recupero dei Beni (ARO) costituite presso alcuni Stati Membri consentono di mettere a fuoco le differenze normative e procedurali esistenti e di tracciare quindi un percorso che tenda al raggiungimento di un nucleo di norme generali e di procedure condivise.

8. What can be improved on European level?

Risposta chiaramente ravvisabile in quelle precedenti.

9. In your opinion, is a European framework even desirable or should the re-use of confiscated assets for social purposes be managed by national jurisdictions only?

Risposta chiaramente ravvisabile in quelle precedenti.

1.1. Spain

1.1 destino de los activos

P 8: ¿Podría indicar las condiciones en las que se produce la confiscación de los activos criminales así como el régimen aplicable a los activos confiscados? (Principios generales)

P 9: Vistos los hechos de este caso concreto, ¿cuál podría ser el destino de los activos ilícitos?

P 10: ¿El Estado víctima podría reivindicar su recuperación?

España es parte del Convenio del Consejo de Europa relativo al blanqueo, seguimiento, embargo y decomiso de los productos del delito, de 8 de noviembre de 1990, cuyo instrumentoderatificación disponelaconfiscacióndeproductos,bienesoinstrumentos procedentes de actividades delictivas, regula las medidas provisionales previas a la confiscación en el procedimiento penal, y establece los principios de cooperación para hacerla efectiva.

La norma general de aplicación para la confiscación de activos procedentes de actividades ilícitas en general, la constituye el art. 127 del Código Penal, que extiende el decomiso y confiscación no sólo a los efectos del delito y a los medios e instrumentos de preparación de las mismas, sino también a las ganancias provenientes del mismo, "*cualquiera que sea*

las transformaciones que éstas hubieran podido experimentar". De esta forma se facilita el acotamiento del círculo sobre las posibles maniobras financieras, industriales o contables que el culpable hubiera podido hacer para evitar el rastreo de efectos, instrumentos o ganancias, persiguiendo asimismo dichas operaciones de ocultamiento. Si se demuestra la situación patrimonial ilícita, es posible el comiso de los bienes aunque el culpable no resultara condenado por estar exento de responsabilidad criminal o por haberse ésta extinguido (surge aquí un parecido con la denominada receptación civil, pues también en la regla del art. 122 se parte de que la obligación de restitución de los bienes o resarcimiento del daño es independiente de la inexistente responsabilidad penal de quien los posee; este caso se produce, por ejemplo, cuando un tribunal ordena que la esposa de un narcotraficante restituya el lujoso automóvil o las joyas que le ha regalado su marido, razonablemente con las ganancias obtenidas traficando con drogas y por lo que ha sido condenado). Por otra parte y una vez han sido decomisados, si los efectos son de lícito comercio, el producto obtenido con su enajenación se destinará a cubrir las responsabilidades civiles del penado salvo que la ley disponga otro destino (art. 127.5)

El proyecto de modificación del Código Penal español que ha sido recientemente aprobado el 23 de junio de 2010, introduce novedades positivas en materia de comiso aunque no exentas de crítica. Mientras que hasta el momento actual los únicos activos susceptibles de incautación eran aquellos concretos respecto de los que se haya probado su procedencia de actividades delictivas, la ampliación del citado art. 127 incorpora desde ahora "una presunción de procedencia de actividades delictivas cuando el valor del patrimonio sea desproporcionado respecto de los ingresos legales de todas y cada una de las personas condenadas por delitos cometidos en el seno de la organización o grupo criminal", ampliándose de esta forma los bienes objeto de comiso aún cuando no exista vinculación probatoria con una concreta acción ilícita.

Si bien esta reforma responde a los objetivos previstos en la Decisión Marco 2005/212/JAI del Consejo, de 24 de febrero de 2005, es censurable que sólo sea aplicable a las actividades delictivas cometidas en el marco de una organización o grupo criminal, quedándose fuera de la "presunción" la riqueza acumulada del delincuente individual o "no organizado" o los casos de corrupción continuada en el tiempo, en los que la estabilidad de las relaciones entre corruptores y corrompidos, dificulta el poder imputar a una u otra ganancia una operación delictiva concreta en el tiempo, y sin que sea tampoco fácil calificar esa relación como un supuesto de criminalidad organizada.

En cierta clase de delitos, como el blanqueo de capitales, la corrupción o las transacciones comerciales internacionales, la actuación de las personas jurídicas se hace más evidente que en otras acciones delictivas. Con el fin de facilitar la prevención y sanción de estos delitos, la citada reforma amplía la responsabilidad penal de las personas jurídicas también a los supuestos en que no se pueda individualizar la responsabilidad penal de la persona física, estableciendo un catálogo más amplio de penas respecto de las ya existentes, que incluye la multa por cuotas, o la inhabilitación para obtener subvenciones y para contratar con la administración pública. La disolución y clausura de la sede social de la persona jurídica, con la consecuente finalización de sus actividades, son otras de las medidas accesorias legalmente previstas.

Y a este art. 127 del CP se remite el art. 301 del CP, regulador del blanqueo de capitales (tanto de cualquier delito en general como del tráfico de drogas en particular), cuando se refiere al decomiso de las ganancias provenientes de dichos delitos (art. 301.5). Con la

salvedad que este mismo 301 realiza cuando se trata del blanqueo procedente del tráfico de drogas, remitiéndose en este caso al art. 374, que -aunque también remite al art. 127.

Como norma general para el decomiso de bienes, instrumentos y ganancias- relaciona asimismo unas normas especiales (concretamente estableciendo en su apartado Cuarto que "los bienes, medios, instrumentos y ganancias definitivamente decomisados por sentencia, que no podrán ser aplicados a la satisfacción de las responsabilidades civiles derivadas del delito ni de las costas procesales, serán adjudicados íntegramente al Estado". Por tanto, en el caso concreto del tráfico de drogas, se destinarán a actuaciones de prevención, investigación y represión de delitos relacionados con el tráfico de drogas o a programas de prevención de toxicomanías.

Aparte del decomiso basado en sentencia firme, prevé este art. 374 del Código Penal que los jueces que conozcan de la causa puedan declarar nulos aquellos actos o negocios jurídicos por los que se haya transmitido, gravado o modificado la titularidad real o derechos sobre los bienes, instrumentos o efectos provenientes del delito.

Concretamente, los bienes se depositarán en el Fondo de bienes decomisados por tráfico ilícito de drogas y otros delitos relacionados, regulado por la Ley 17/2003, de 29 de mayo, y dependiente del Plan Nacional sobre Drogas. Esta Ley establece, respecto al destino de los bienes del Fondo, la obligación general de enajenación de los bienes inmuebles, admitiendo también la posibilidad de ceder el uso a los beneficiarios de forma gratuita, no sólo de los inmuebles sino también de los bienes muebles. En general, el art. 4 de la Ley dispone que los bienes "que sean de libre comercio y susceptibles de valoración económica,..., serán enajenados por los procedimientos establecidos reglamentariamente, procediéndose seguidamente a ingresar el producto de dicha enajenación en el referido fondo". Con el fin de facilitar y agilizar la integración de los bienes en el fondo, cuya demora pueda incidir negativamente en su valor económico, se obliga a los órganos judiciales a que remitan los mismos a la mayor brevedad posible a la Mesa de Adjudicaciones del Fondo, junto con la sentencia que declare el decomiso.

También es importante la novedad que se introduce en esta Ley tras la reforma de su predecesora del año 1995, en cuanto a cooperación interestatal en materia de decomiso, porque, de conformidad con los tratados internacionales, dispone que los bienes decomisados en España a instancia de Estados extranjeros, deberán ser entregados a estos últimos, al igual que se integrarán en nuestro Fondo aquellos bienes que hubieran sido decomisados en territorio extranjero.

La reforma aprobada también incorpora un nuevo precepto, en este caso en la Ley de Enjuiciamiento Criminal (el artículo 367 septies) para la regulación del destino de ganancias, bienes e instrumentos procedentes de delitos cometidos en el marco de una organización criminal, disponiendo la creación de una Oficina de Recuperación de Activos, que se encargará de su localización, administración y asignación, y que el producto de la realización de estos efectos podrá asignarse total o parcialmente de manera definitiva, en los términos y por el procedimiento que reglamentariamente se establezcan, a la Oficina de Recuperación de Activos y a los órganos del Ministerio Fiscal encargados de la represión de las actividades de las organizaciones criminales. Y termina diciendo que «El Plan Nacional sobre Drogas actuará como oficina de recuperación de activos en el ámbito de su competencia».

Cuál podría ser el destino de los activos ilícitos en el caso concreto? ¿El Estado víctima podría reivindicar su recuperación?

Como acabamos de exponer, dice el párrafo 4o de este nuevo artículo 367 septies de la LECr: "El producto de la realización de los efectos, bienes, instrumentos y ganancias a los que se refiere este apartado podrá asignarse total o parcialmente de manera definitiva, en los términos y por el procedimiento que reglamentariamente se establezcan, a la Oficina de Recuperación de Activos y a los órganos del Ministerio Fiscal encargados de la represión de las actividades de las organizaciones criminales se les dará el destino que se disponga reglamentariamente y, en su defecto, se inutilizarán ».

Es decir, que es posible la asignación definitiva de los efectos a la propia Oficina de Recuperación de Activos, si bien aún debe reglamentarse de forma más concreta.

ANNEX 2: RELEVANT LEGISLATION

a. Bulgaria

Venice Commission, Sixth Revised Draft Law on Forfeiture of Assets Required through Criminal Activity and Administrative Violations, 23 May 2011: [http://www.venice.coe.int/docs/2011/CDL-REF\(2011\)032-e.asp](http://www.venice.coe.int/docs/2011/CDL-REF(2011)032-e.asp).

Law on Forfeiture to the State of Property Acquired through Criminal Assets (LFPC): <http://www.google.ch/url?sa=t&rct=j&q=republic%20of%20bulgaria%20thirty-ninth%20national%20assembly%20law%20on%20the%20forfeiture%20of%20criminal%20assets%20to%20the%20exchequer&source=web&cd=1&ved=0CCQQFjAA&url=http%3A%2F%2Fwww.anticorruption.bg%2FfileSrc.php%3Fid%3D1506&ei=sH16T9OcEIXT-gbAtNCsBw&usq=AFQjCNHTboEDSck1CAUyLrJffLsJZHv16A>.

b. France

Law No. 2010-768 of 9 July 2010

Ministerial circular No. CRIM-10-28-G3 of 22 December 2010

Ministerial circular No. CRIM-10-29-CAB of 22 December 2010

Decree No. 2011-134 of 1 February 2011

Ministerial circular No. CRIM-11-2/G1 of 3 February 2011.

c. Germany

Criminal Procedure Code: http://www.gesetze-im-internet.de/englisch_stpo/german_code_of_criminal_procedure.pdf

Criminal Code: http://www.gesetze-im-internet.de/englisch_stgb/german_criminal_code.pdf

Civil Code: http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf

d. Italy

Decreto legislativo 6 settembre 2011, n. 159

Codice delle leggi antimafia e delle misure di prevenzione, nonché nuove disposizioni in materia di documentazione antimafia, a norma degli articoli 1 e 2 della legge 13 agosto 2010, n. 136

http://www.interno.it/mininterno/export/sites/default/it/sezioni/servizi/legislazione/antimafia/0984_2011_0

[9_06_Dlgs06092011n.159.html](#)

Legge 31 marzo 2010 n.50 (PDF - 316 KB)

Istituzione dell'Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata

http://www.benisequestraticonfiscati.it/Joomla/images/pdf/normativa_leggi/d_l_4_2_2010_n_4.pdf

Legge 31 maggio 1965 n.575 (PDF - 578 KB)

Disposizioni contro le organizzazioni criminali di tipo mafioso, anche straniere

http://www.benisequestraticonfiscati.it/Joomla/images/pdf/normativa_leggi/l_31_5_1965_n_575.pdf

D.L. 6-9-2011 n.159 (PDF - 392 KB)

Codice della legge antimafia

http://www.benisequestraticonfiscati.it/Joomla/images/pdf/normativa_leggi/codice_antimafia.pdf

Legge 7 marzo 1996 n.109 (PDF - 2,11 MB)

Disposizioni in materia di [gestione](#) e destinazione di beni sequestrati o confiscati.

http://www.benisequestraticonfiscati.it/Joomla/images/pdf/normativa_leggi/legge_109_96_rognoni_la_torre.pdf

e. Spain

Código Penal: http://www.ub.edu/dpenal/CP_vigente_31_01_2011.pdf

Ley de Enjuiciamiento Criminal:

http://www.boe.es/aeboe/consultas/enlaces/documentos/leyes_procesales/ley_enjuiciamiento_criminal.pdf

Ley 17/2003: <http://www.pnsd.msc.es/Categoria2/legisla/pdf/legislaE19.pdf>

f. United Kingdom

Proceeds of Crime Act, 2002: <http://www.legislation.gov.uk/ukpga/2002/29/contents>

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS **C**

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