

# DISPOSAL OF CONFISCATED ASSETS IN THE EU MEMBER STATES

LAWS AND PRACTICES



CENTER FOR  
THE STUDY OF  
DEMOCRACY

# **DISPOSAL OF CONFISCATED ASSETS IN THE EU MEMBER STATES**

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This report was prepared in the context of the Study RECAST – *REuse of Confiscated Assets for Social Purposes: towards Common EU Standards*. The Study was awarded to the University of Palermo – Department of European Studies and International Integration (Coordinator: Giovanni Fiandaca, Professor of criminal law) by the European Commission, DG Home Affairs, under the 2010 ISEC Programme. It was carried out in cooperation with the Center for the Study of Democracy and the FLARE Network (co-beneficiaries) and with the support of the Italian Agenzia Nazionale per l'amministrazione e la Destinazione dei Beni Sequestrati e Confiscati alla Criminalità Organizzata and UNICRI (associate partners).

This report analyses laws and practices for the management and disposal of confiscated assets in the European Union. The analysis explores the challenges and best practices of the Member States in this hitherto neglected area and strives to contribute to improvement of the overall effectiveness of the existing confiscation systems. This mapping has been carried out by the University of Palermo – Department of European Studies and International Integration (UNIPA) and by the Center for the Study of Democracy (CSD). The main tool used to gather relevant information was a questionnaire administered to one (or more) national expert/s in each Member State; this information was complemented with secondary data.

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## LIST OF ABBREVIATIONS

|               |  |
|---------------|--|
| <b>AED</b>    | The Land Registration and Estates Department, Luxembourg (Administration de l'enregistrement et des domaines)  |
| <b>AGRASC</b> | Agency for Management and Recovery of Assets Seized and Forfeited, France (Agence de gestion et de recouvrement des avoirs saisis et confisqués)   |
| <b>ANBSC</b>  | National Agency for Administration and Destination of Assets Seized and Confiscated from Organised Crime, Italy (Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata) |
| <b>ARO</b>    | Asset Recovery Office  |
| <b>BOOM</b>   | the Criminal Assets Deprivation Bureau of the Prosecution Service, the Netherlands (Bureau Ontnemingswetgeving Openbaar Ministerie)  |
| <b>CAB</b>    | Criminal Assets Bureau, Ireland  |
| <b>CEPOL</b>  | European Police College  |
| <b>CJIB</b>   | Central Fine Collection Agency, the Netherlands (Centraal Justitieel Incassobureau)  |
| <b>COSC</b>   | Central Office for Seizure and Confiscation, Belgium   |
| <b>EU</b>     | European Union   |
| <b>FATF</b>   | Financial Action Task Force  |
| <b>FIU</b>    | Financial Intelligence Unit  |
| <b>GAB</b>    | Gabinete de Administração de Bens, Portugal  |
| <b>HMCTS</b>  | HM Courts and Tribunal Service, United Kingdom   |
| <b>KLPD</b>   | National Police Services Agency, the Netherlands (Korps Landelijke Politie Diensten)   |
| <b>LIBE</b>   | Civil Liberties, Justice and Home Affairs Committee of the European Parliament   |
| <b>MILDT</b>  | The Interministerial Mission for Combating Drugs and Addictive Behaviours, France (Mission interministérielle de lutte contre la drogue et la toxicomanie)   |
| <b>MSs</b>    | Member States  |
| <b>MOKAS</b>  | The Unit for Combating Money Laundering, Cyprus (Μονάδα Καταπολέμησης Αδικημάτων Συγκάλυψης – ΜΟ.Κ.Α.Σ)  |
| <b>NGO</b>    | Non-Governmental Organisation  |
| <b>NRA</b>    | National Revenue Agency  |
| <b>OGPRA</b>  | Office of Government Representation in Property Affairs, Czech Republic  |
| <b>PCA</b>    | Proceeds of Crime Act 1996 – 2005, Ireland   |
| <b>POCA</b>   | Proceeds of Crime Act 2002, United Kingdom   |
| <b>TSIPC</b>  | Tax and Social Insurance Procedure Code, Bulgaria  |
| <b>UK</b>     | United Kingdom   |
| <b>ZOPNI</b>  | Forfeiture of Assets of Illegal Origin Act, Slovenia   |

## EXECUTIVE SUMMARY

Contemporary theory and practice establish that the confiscation of proceeds of crimes is indispensable if the fight against serious criminality is to be effective. They also establish that the objective behind asset confiscation extends beyond depriving criminal enterprises of their ill-gotten gains. Being increasingly aware of the full array of considerations behind asset confiscation, EU MSs have turned their attention to the compensation of victims – individual victims and deprived communities alike – and to the maintenance of public confidence in the justice system.

At political level, **development of the EU legislative framework on asset recovery** took place following the Tampere European Council of 1999. Yet the issues pertinent to this study are clearly set out in the *Stockholm Programme*. At legislative level, the disposal of confiscated assets was initially regulated by the 1990 Council of Europe *Strasbourg Convention*. In 2005 it was further developed by the *Warsaw Council of Europe Convention*. The main weakness of the latter is that half of the MSs are not signatories to it. 2006 saw introduction of the first EU secondary piece of legislation to address the issue of the disposal of confiscated property, namely *Council Framework Decision 2006/783/JHA*.

Although the above-noted legal instruments – in particular, the Framework Decision 2006/783/JHA as amended – have impacted on international cooperation in the disposal phase, this study demonstrates that the plethora of national competent authorities charged with the issuance and recognition of confiscation orders may create difficulties.

The study reviews **national confiscation legislations** and notes marked differences among approaches to confiscation. MS's legislations provide for criminal confiscation. Indeed, criminal confiscation regimes across the EU normally require a criminal conviction, but in half of the MSs conviction is not the necessary prerequisite for the confiscation of assets within criminal proceedings. The majority of MSs provide for extended confiscation. Reversal of the burden of proof and third party confiscation is envisaged by most MSs. Moreover, seven MSs also provide for the confiscation of proceeds of crime outside criminal proceedings, but these civil confiscation regimes vary greatly in their extent.

In regard to the **management of seized assets**, it is noteworthy that the legal frameworks of almost all MSs regulate the management of seized assets. These provisions strive to optimise the value and reduce the deterioration of assets. Provisions on maintaining the value of seized assets are of pivotal importance for the achievement of the three main objectives of confiscation.

This study pays especial attention to **the institutional dimensions of the disposal of confiscated assets**. Although in most MSs the disposal



of confiscated assets is currently executed by agencies in charge of the disposal of state assets, there is a trend towards specialisation in asset disposal. The degree of specialisation varies. According to the approaches adopted by EU MSs, the institutional aspects of disposal are classified as:

- a centralised approach with specialised institutions;
- a centralised approach with non-specialised institutions;
- a decentralised approach.

This study recommends introduction of the specialised centralised approach. While acknowledging that all the mentioned approaches have their strengths as well as areas that require further improvement, the study indicates that the centralised specialised approach addresses a number of the issues raised by interviewees. The study argues that some of the challenges are more effectively addressed by specialised systems for the disposal of confiscated criminal assets which have a centralised institution that advises and provides guidance and training to other national agencies with roles in the confiscation, preservation and disposal of confiscated assets; specialisation which is conducive to resolving issues related to the sale at subprime prices of confiscated assets and has the potential to contribute to the more effective disposal of these specific types of assets.

The other key element of the analysis is **the disposal of confiscated assets and their destination**. The EU legal framework does not set mandatory minimum standards for the disposal of confiscated assets in the MSs. The report establishes that, while all MSs utilize diverse disposal mechanisms, the main one is the sale of confiscated criminal assets. Transfer of property for re-use is also an option applied by several MSs. The other options are the renting of property, which is done sparingly among MS, and the destruction of harmful, dangerous, banned, or valueless property.

The study also explains the term '**social re-use**', distinguishing the social re-use of confiscated assets from the traditional transfer of confiscated assets to the state budget. It categorises the established models for the social re-use of confiscated assets in the EU as the direct re-use of confiscated assets for social purposes and the re-use of the proceeds from the assets confiscated via specialised programmes. It distinguishes social re-use models between 'soft' and 'hard' forms of social re-use of confiscated assets depending on their utilisation as movables or immovables. It also distinguishes between the national and local scope of re-use, depending on the territorial dimensions of its utilisation. Finally, it distinguishes between scopes of application by using the source of confiscated assets as a marker discriminating between drug trafficking offences and all (serious) crimes.

The overview of national legislation and practices demonstrates that, domestically and in instances of international cooperation, the sale of confiscated assets is the most frequent disposal method. The re-use of confiscated property exists as an option, and it is the second most

important disposal method. Nevertheless, it is more often utilised in the form of re-use by public bodies, municipal or state. The social re-use of confiscated property is also a possibility in several MSs, but it is under-used.

Another point concerns the **destination of the funds received from the sale of confiscated criminal assets**. The study questions the universal adequacy of the sale of confiscated assets. Although reports confirm that MSs use funds received from the sale of confiscated criminal assets to compensate victims of crime, it is noted that even if such funds are used for social programmes, their route through the budget does not allow the general public clearly to see how confiscated assets are used for social purposes. Heavy reliance on the cashing of confiscated assets as the primary disposal mechanism does not address the variety and status of the property for disposal and the full range of disposal of criminal assets objectives.

The study argues that **direct utilisation of confiscated property for social re-use** purposes has several positive features. One of them is that this method allows the transparent return to the public of assets misappropriated from society. The study maintains that this method can better serve the needs of the wider group of victimised communities than can 'cashback' programmes.

In conclusion, the study makes two sets of **recommendations** – proposals at EU level and proposals at national level. While the former argue in favour of legislative standards incorporated in the EU legal framework observing the subsidiarity principle, the latter concern the practices applied by the MSs with respect to the disposal of confiscated criminal assets. The study argues in favour of minimum EU requirements observing the subsidiarity principle related to disposal. It supports funds for victim compensation not through the state budget but directly, thereby streamlining the process of victim compensation. EU legislation could also be instrumental in implementing the social re-use of confiscated assets as a disposal option of greater applicability. It could employ some of the best practices of the MSs to ensure that confiscated property disposed through assignment for direct social re-use is not misappropriated or misused. Another area that warrants common regulation by the EU is the assignment of confiscated assets to direct social re-use. EU legal instruments could also promote a proactive approach by both civil society and the national authorities tasked with the disposal of confiscated assets in the assignment of the disposed assets. The report suggests that, although all institutional approaches to disposal of assets have their strengths, it seems that there are certain benefits to be gained from a centralised body charged specifically with the task. The final crucial element that warrants especial attention at EU level is the issue of international cooperation in the disposal of assets from non conviction-based confiscation. The lack of adequate regulation at EU level in this regard hampers efforts to achieve successful cooperation among EU MSs in the disposal phase.

Unlike the recommendations at EU level, **those at national level** primarily concern the improvement of domestic practices. The reason is that

legislative changes would lead to results across the board in all MSs if adopted within a mandatory minimum standard set by the EU. The only possible exception to this general principle concerns the recommendation that MSs introduce value confiscation as a subsidiary option. The study recommends that MSs should introduce reliable, comprehensive and statistically accurate data management systems on confiscated assets. MSs are also advised to introduce specialised training. The broader inclusion by the MSs of civil society in the disposal phase is recommended. Finally, yet importantly, MSs should improve inter-agency communication and cooperation.

# 1. INTRODUCTION

The confiscation of assets acquired from criminal activities – organised crime and corruption in particular – has been a topical issue in recent years. In the contemporary theory and practice both domestically and internationally, it is established that confiscation of the proceeds of crimes is indispensable in order effectively to combat serious criminality of the above-mentioned types. Classic methods of criminal prosecution fall short of achieving the objectives of dismantling criminal enterprises, for which, like all enterprises, the main objective is to accumulate wealth. Depriving criminal enterprises of their main *raison d'être*, which also prevents the criminal enterprise stripped of its funds from functioning, is the focus of contemporary efforts by the law enforcement community.<sup>1</sup>

The mere deprivation of criminal enterprises and corrupt officials of their illegal gains is the first step. Yet, however important confiscation may be, it cannot achieve its full purpose if the disposal of confiscated property is not done in a manner that covers the entire range of functions vested in this activity. Previous analyses show that the three main problems that require the confiscation and recovery of criminal assets are the existence of organised crime within the EU; the rights of identified victims and deprived communities; and the need to maintain public confidence in justice systems.<sup>2</sup> The second and third of these issues clearly link with disposal of confiscated assets. It is important to demonstrate to society that the state intervenes to restore justice and to eliminate the negative role models that organised criminal groups and corrupt individuals may create.

**To fulfil these functions, it is important to demonstrate that confiscated assets are returned to those who have suffered direct negative effects of such anti-social behaviour,** namely the identified individual victims, as well as the society as a whole, which suffers indirectly from such illegal activities. It is contended that the re-use of confiscated assets for social purposes fosters a positive attitude to strategies aimed at tackling organised crime.<sup>3</sup> This is because confiscating an asset is no longer regarded merely as a means to deprive a criminal organisation of resources; it also helps to prevent organised crime and has an effect of boosting economic and social development. Moreover, the social re-use of confiscated assets can empower communities which have been affected by serious and organised crime to resist such crimes better at the local level. The social re-use of confiscated assets would also be positive because it would enhance “awareness of preventing and

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<sup>1</sup> See Stolen Asset Recovery Initiative of the World Bank and UN Office of Drugs and Crime Asset Recovery Handbook, A Guide for Practitioners, p. 1.

<sup>2</sup> Rand Europe, Study for an impact assessment on a proposal for a new legal framework on the confiscation and recovery of criminal assets – Technical Report, European Union, 2012.

<sup>3</sup> Report on organised crime in the EU, 2010/2309(INI), 06.10.

combating serious and organised crime within civil society, empowering it to become self-driven and more participatory in these matters.”<sup>4</sup>

It is apparent that the EU and its MSs are becoming increasingly aware of the need to focus not only on the actual confiscation of assets from organised crime and corrupt individuals but also on the methods of disposal. The approach taken by the EU institutions demonstrates a clear focus by the EU on disposal methods. Experts increasingly emphasise the significance of the social re-use of confiscated criminal assets as an important element in the social function and as a prerequisite for the improved effectiveness of anti-organised crime efforts by MSs.

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<sup>4</sup> Basel Institute on Governance, *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*, 2012.

## 2. EU AND MS DISPOSAL CONTEXT

### 2.1. HOW DISPOSAL BECAME AN ISSUE IN THE EU CONTEXT

A substantial development in the EU legislative framework on asset recovery followed the Tampere European Council of 1999. In its Conclusions, the European Council expressed its determination to ensure that the EU took concrete steps to trace, freeze, seize and confiscate the proceeds of crime. The Conclusions, however, did not discuss the disposal of confiscated assets. Since the Tampere EU Council, at policy level, the disposal of confiscated assets has been clearly identified as a separate issue in the Stockholm Programme.<sup>5</sup> Although the Hague Programme<sup>6</sup> also discussed issues related to asset confiscation and victim compensation, identification of the matter pertinent to this study is clearly outlined in the Stockholm Programme, which calls<sup>7</sup> on the EU to work for identification of criminal assets “more effectively and seize them and, whenever possible, consider reusing them wherever they are found in the Union”.

At legislative level, the **disposal of confiscated assets first became a topic in the EU** with the adoption of the 1990 Council of Europe *Strasbourg Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*.<sup>8</sup> In line with the general trend of policy developments in the EU Justice and Home Affairs field at that time, Council of Europe conventions had an important role for cooperation within the then Third Pillar. This is because all EU MSs are Council of Europe members. Regulation of the matter in the 1990 Council of Europe Convention entitled Confiscated Property was general in its scope.<sup>9</sup> It stated that “[a]ny property confiscated by the requested Party shall be disposed of by that Party in accordance with its domestic law, unless otherwise agreed by the Parties concerned.” The Regulation therefore simply noted that there should be some disposal mechanism and that there could potentially be agreement on asset sharing between the Parties.

The first secondary EU legislative act on asset recovery was *Framework Decision 2001/500/JHA*,<sup>10</sup> which built on the legal basis established with

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<sup>5</sup> The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens (2010/C 115/01) 4.5.2010. OJ C 115/1.

<sup>6</sup> The Hague Programme: Strengthening Freedom, Security and Justice in the EU (2005/C 53/01) 3.3.2005, OJ C 53/1.

<sup>7</sup> Section 4.4.5 Economic Crime and Corruption.

<sup>8</sup> CETS No 141 of 8.XI.1990.

<sup>9</sup> Article 15.

<sup>10</sup> Council Framework Decision 2001/500/JHA of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime.

the 1990 Council of Europe Convention. It did not contain provisions on disposal. Similarly, *Framework Decision 2003/577/JHA*<sup>11</sup> and *Framework Decision 2005/212/JHA*<sup>12</sup> did not establish minimum requirements for the EU MSs on this matter. Later, *Decision 2007/845/JHA*<sup>13</sup> focused exclusively on cooperation among AROs and did not address the matter of disposal.

In 2005 an important legal instrument came into being – the Council of Europe *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* (2005 Council of Europe Convention).<sup>14</sup> The 2005 Council of Europe Convention retained the provisions of the 1990 Council of Europe Convention on the disposal of confiscated property. It confirmed that confiscated property should be disposed in accordance with the domestic law of the executing Party.<sup>15</sup> However, it incorporated an important novelty pertinent to the subject matter of this study. If a Party acts on a request made by another Party, if its domestic legislation permits it, the Party shall consider requests to return the confiscated property to the requesting Party if such property is to be used, *inter alia*, for compensation to the victims of the crime.<sup>16</sup> Thus, the 2005 Council of Europe Convention opened the way for a further very important innovation in the regime of disposal of confiscated assets. Besides the main consideration behind the introduction of asset recovery – depriving criminal enterprises of their financial resources – consideration in asset disposal was now given to the need to compensate victims of crime. To be stressed is that victim compensation should not be confused with the rights of third parties or rightful owners affected by the asset confiscation proceedings, whose rights are a separate matter. Although the 2005 Council of Europe Convention did not mandate the executing Party to comply with the request, it was nevertheless an important development with respect to asset disposal and international cooperation in its regard.

*Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition of confiscation orders*<sup>17</sup> was the **first EU secondary piece of legislation to address the matter of the disposal of confiscated property**.<sup>18</sup> It provided rules of disposal if there was no agreement on disposal between the EU MSs concerned. Hence the *Framework Decision 2006/783/JHA*, as amended, did not set minimum standards, but rather guiding rules applicable in the absence

<sup>11</sup> Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence.

<sup>12</sup> Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property.

<sup>13</sup> Council Decision 2007/845/JHA of 6 December 2007 concerning cooperation between Asset Recovery Offices (ARO) of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime.

<sup>14</sup> CETS No 198 of 16.V.2005.

<sup>15</sup> Article 25, paragraph 1.

<sup>16</sup> Article 25, paragraph 2.

<sup>17</sup> As amended by Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial.

<sup>18</sup> Article 16.

of an agreement between the respective MSs.<sup>19</sup> Moreover, the wording of the provision clearly indicated that any agreement abrogated the rules described below. Therefore, any treaty that applies in general to all instances of disposal of confiscated assets or *ad hoc* agreements that cover specific situations, even if those agreements are reached *post factum*, makes the provision of this EU secondary legislation inapplicable.

*Framework Decision 2006/783/JHA* distinguished between the disposal of money and of property. With respect to funds, it set the threshold of 10000 EUR as a benchmark for the sharing of confiscated funds between the requesting and the executing MS. Up to this threshold the amount accrued to the executing State, while above it the two MSs split the funds in half. On disposal of property, other than money, the Framework Decision provided for three different options. The discretion of choice was granted to the executing MS.<sup>20</sup> The options were:

- sale of property and distribution of funds according to the aforesaid rule;
- transfer of the property to the issuing MS; or
- any other method of disposal if these two options are not applicable in accordance with the law of the executing MS.

Consideration of the guiding rules set out in *Framework Decision 2006/783/JHA* leads to the conclusion that the **current EU regime allows for diversity in disposal methods**. It seeks to strike a balance between different legal regimes in the MSs on the disposal of confiscated assets, which are reviewed below, while opening the way for options other than sale, which is widespread among EU MSs. Transfer of property to the issuing MS, which is possible unless the confiscation order covers an amount of money and the issuing MS disagrees with that disposal method, seems to lean towards the sale of confiscated property. Moreover, property may be disposed for social re-use, which falls under the rubric of any other method in accordance with the executing MS's legal order. However, this impartiality by the EU legislator towards the various disposal methods exhibits a different dynamic if viewed from the standpoint of practical application under national regimes in the different MSs.

Another factor to be borne in mind with respect to *Framework Decision 2006/783/JHA* is that it **restricts its application to criminal court orders alone**.<sup>21</sup> The regime is inapplicable to the disposal of assets confiscated through civil asset recovery proceedings. This limitation is interesting, given that article 1 of the *Framework Decision 2005/212/JHA*, article 1 of the *1999 Council of Europe Convention*, and *2005 Council of Europe Convention* all indicate that confiscation is considered a punishment or a measure, which clearly suggests civil asset confiscation. *Directive 2012/42/EU of the European Parliament and the Council of 3 April 2014 on the freezing and*

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<sup>19</sup> Article 16, paragraph 4.

<sup>20</sup> The executing MS shall not be required to sell or return specific items covered by the confiscation order which constitute cultural objects forming part of the national heritage of that MS.

<sup>21</sup> Article 1, paragraph 1.



confiscation of instrumentalities and proceeds of crime in the European Union did not address the matter of civil confiscation.

The majority of the MSs have implemented the *Council Framework Decision 2006/783/JHA*. Several countries have still not transposed the framework decision into their national legislation (Estonia, Greece, Ireland, Italy, Luxembourg, Slovakia, the UK), so that execution of foreign confiscation orders in their jurisdiction is either cumbersome or even practically impossible. Some of these countries recognise foreign confiscation orders under the *1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (Greece, Luxembourg). A further problem is that civil confiscation orders are not covered in the framework decision. The recently adopted *Directive 2014/42/EU* has yet to be transposed by MSs.

The plethora of national competent authorities charged with the issuance and recognition of confiscation orders is potentially difficult to navigate. In most MSs, designated as national authorities competent to issue and recognise foreign confiscation orders have been either the territorially competent courts (Austria, Bulgaria, Czech Republic, Hungary, Latvia, Lithuania, Poland, Portugal, Slovenia, Spain and Romania) or the territorially competent offices of the public prosecution services (Belgium, France, Germany). Some of these MSs have designated central bodies responsible for assistance and transmission of documents in cases where direct contact is not possible. As a rule, this is the Ministry of Justice (Belgium, Bulgaria, Czech Republic, Ireland, Latvia, Lithuania, Poland, Romania, and Slovenia). Some countries have established a central competent authority (Cyprus, Denmark, Finland, Malta, Netherlands and Sweden).

*Directive 2012/42/EU* was extensively debated. The final version adopted by the EU legislative institutions, the European Parliament and Council of EU, was considered a compromise. The initial European Commission proposal underwent substantial editing, while the views of the parties involved differed substantially. At the time of the Council meeting to which the European Commission draft was presented,<sup>22</sup> the Danish presidency noted that some MSs underscored the importance of further developing provisions concerning non conviction-based asset forfeiture, while others emphasised the need to draft provisions coherent with national legal instruments.<sup>23</sup> The European Parliament, and the LIBE Committee<sup>24</sup> in particular, proposed substantial changes to the European Commission draft. The LIBE Committee's report stated that the rapporteur intended to promote stricter provisions in the field of non conviction-based asset forfeiture so that they could be effective in curbing the use of illegal gains to fund criminal activities and their investment in legal businesses. The LIBE's proposals did not receive support. The issue of cooperation on disposal in instances of non-conviction based asset forfeiture stands.

<sup>22</sup> 3162 meeting of the Council of EU on JHA (26-27.IV.2012).

<sup>23</sup> European Council – PRES/12/172 26/04/2012.

<sup>24</sup> Civil Liberties, Justice and Home Affairs Committee of the European Parliament.

*Directive 2012/42/EU did not introduce changes in the disposal of assets.* It called for more reliable data on the entire asset recovery process,<sup>25</sup> which is the extent to which it directly dealt with disposal. It also introduced a ‘Safeguards provision’<sup>26</sup> stating that if “[a]s a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure provided for under this Directive, MS shall take the necessary measures to ensure that the confiscation measure does not prevent those victims from seeking compensation for their claims”.

To recapitulate, the current regime on the disposal of confiscated assets is based on the *2005 Council of Europe Convention and Framework Decision 2006/783/JHA*, as amended (see Table 1). The important caveat is that the Framework Decision covers only orders issued by a court competent in criminal matters of another MS, while the Convention does not impose such restrictions. Although the regime set out in the *2005 Council of Europe Convention* is broader in scope, it is not as elaborate on disposal mechanisms. Clearly, the issue of social re-use is not embraced by the Council of Europe legal instruments. On the other hand, the secondary legislation of the EU is less inclusive because it does not apply to the disposal of assets from civil asset recovery, yet it opens the way for different disposal options. These include social re-use, although the Framework Decision does not explicitly mention it. Given that *Framework Decision 2006/783/JHA* may be made inapplicable by an agreement between the MSs, one may conclude that *de facto* there are no mandatory minimum standards. Nor are there minimum standards on disposal established by the EU at national level. This conclusion is in line with the expert view that the EU legal framework deals with redistribution only in cross-border cases.<sup>27</sup>

**TABLE 1. LEGAL INSTRUMENTS FOR THE RECOGNITION OF CONFISCATION ORDERS IN THE EU**

| Confiscation orders                      | Legal instrument   |
|--|--|
| Conviction-based confiscation orders     | Framework Decision 2006/783/JHA, as amended  |
| Non conviction-based confiscation orders | 1990 Council of Europe Strasbourg Convention<br>2005 Council of Europe Warsaw Convention |

<sup>25</sup> Point 36.

<sup>26</sup> Article 8, paragraph 10.

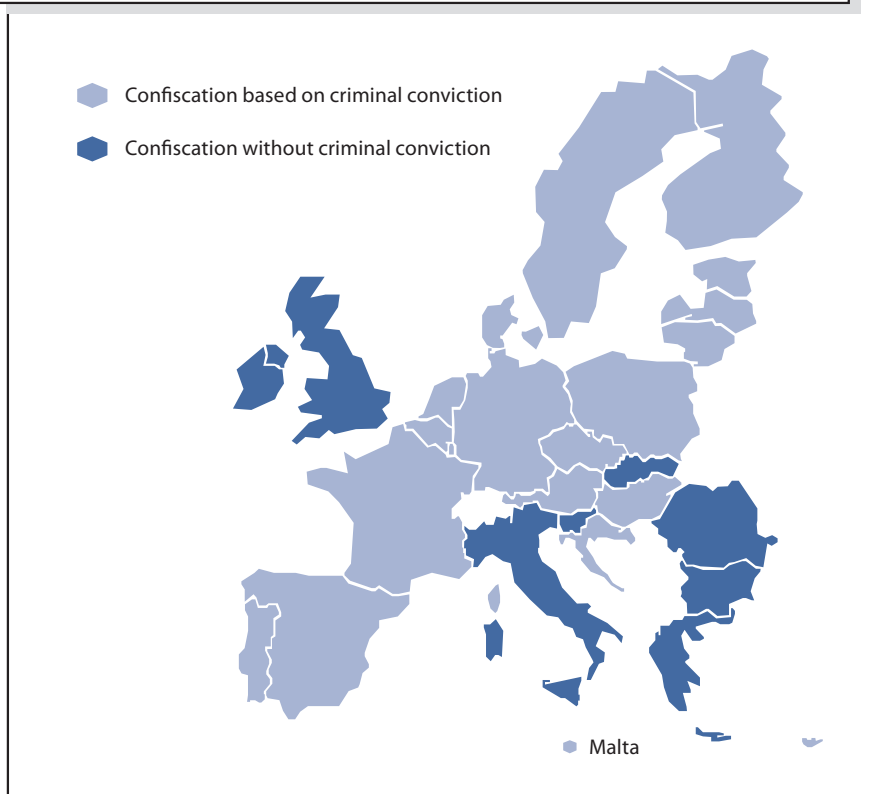
<sup>27</sup> Study for an impact assessment on a proposal for a new legal framework on the confiscation and recovery of criminal assets.

## 2.2. OVERVIEW OF NATIONAL CONFISCATION LEGISLATIONS

### 2.2.1. MS's confiscation regimes

All EU MSs apply criminal confiscation. Only in seven MSs (Bulgaria, Greece, Ireland, Italy, Romania, Slovakia, Slovenia, the UK) is it possible to confiscate proceeds also outside criminal proceedings. To be noted is that the civil confiscation regimes in place in these countries vary greatly in their extent. Countries such as Bulgaria, Italy, Ireland and the UK have wider ranges of non-criminal confiscation systems covering a variety of serious crimes. All EU countries also implement confiscation as an administrative sanction in regard to various customs law violations. These, however, fall outside the scope of this study.

FIGURE 1. CONFISCATION REGIMES ACROSS THE EU



Criminal confiscation regimes across the EU normally require a **criminal conviction** (Belgium, Czech Republic, Estonia, France, Ireland, Italy, Luxembourg, Malta, Poland, Portugal, Slovenia, Sweden and the UK). In about half of countries, conviction is not the necessary prerequisite for the confiscation of assets within criminal proceedings; but usually in a limited number of circumstances (e.g. the defendant dies or absconds prior to conviction).

In the majority of countries, **extended confiscation** is envisaged, thus making it possible – normally in limited circumstances (i.e. crimes not committed on a one-off basis, typically by criminal organisations) – to confiscate the proceeds from crimes other than the one to which the conviction refers.

Countries not providing for extended confiscation are Czech Republic, Luxembourg, Malta, Poland.

**Reversal of the burden of proof** is also envisaged by most countries, the only exceptions being Czech Republic, Finland, Germany, Luxembourg, Romania, Slovenia, Spain and Sweden. In an even larger number of countries criminal proceeds may be **confiscated from third parties** as well; the only exceptions are Ireland, Malta, Slovakia, Spain.

Finally, all but two MSs (Cyprus and Malta) have both **property and value confiscation**.

### 2.2.2. Management of seized assets

In all but four Member States (Denmark, Lithuania, Luxembourg, Malta) there are legal provisions on the management of seized assets intended to optimise their value/minimise their deterioration. **Provisions on the management of seized assets are incorporated in different legal instruments.** Some MSs incorporate them in their criminal procedure codes (Estonia, Germany, Hungary, Lithuania) or in criminal law instruments and supporting legal acts (Austria, Czech Republic). Some MSs regulate the matter under the general rubric of management of state property (Slovakia). Other MSs prefer specialised legal instruments, such as specific legislation on confiscation, (Italy, Portugal). Lastly, in some MSs there is a dualism on the matter whereby it is regulated in criminal and civil law acts: this is characteristic of MSs that apply both conviction- and non conviction-based confiscation (Ireland, Slovakia). Where provisions on the management of seized assets are missing, this is often felt by practitioners to be a significant shortcoming (e.g. Denmark, Luxembourg, Malta).

**Legal provisions on the management of seized assets aim to protect the property, optimise its value, and minimise its deterioration.** This is a principle followed by the MSs (Austria, Cyprus, Estonia). Some also consider disproportionate storage costs as a reason for disposal of the assets at this stage, which precedes the final confiscation order. This, however, is always done following a court order (Hungary, Slovenia) or at least following a judicial review of the decision by the administrative body following a request by the owner (Sweden). There are specificities in some MSs: for instance, the provision which allows the sale of vehicles whose owners cannot be identified (Romania).

Although the majority of MSs have established adequate systems for the management of seized assets, some of the examples examined are characterised by this study as **best practices**. A case in point is France, where the judge or the investigating magistrate may decide, in relation to seized personal property only, to entrust AGRASC with selling the property before judgement if the assets no longer need to be kept in order to establish the truth and if maintenance of the seizure is likely to reduce their value.

Provisions on maintaining the value of the seized assets are important because it affects the next stage – confiscation. It would be impossible to achieve the three main objectives of confiscation if the value of the property that is seized and to be confiscated depreciated. The assets of organised crime would be confiscated but they could not be used for victim compensation; nor would confiscation achieve the objective of supporting societal trust in the justice system of the state. Being aware of these considerations, some MSs step up their efforts in this sphere. A case in point is Portugal, which has recently established a specialised asset management office that assumes responsibility in this respect.

However, **notwithstanding these provisions, a wide array of problems arises.** First, these regulations sometimes have a limited scope of application (e.g. Ireland), or they are limited to certain types of asset (e.g. Belgium). In some countries, administrators of seized assets are

excessively expensive (e.g. the UK), so that the costs of management often outweigh the value of what is recovered. Administration is not always competent or proactive (e.g. Italy and Greece): even though the legal framework encourages active administration, a passive administration is promoted (conservation). The bad condition of seized assets is another issue (e.g. Estonia). Moreover, asset registration systems do not always work properly and databases are not always up to date or complete (e.g. Netherlands). Effective management may be hampered by scant sensitivity to the importance of the management of seized assets (e.g. Portugal), by a lack of sufficient means to take proper care of the assets, or by the delay with which interim measures are adopted (e.g. Romania).

### 2.2.3. Disposal

MSs have adopted different legislative approaches to the disposal of confiscated assets. In some MSs disposal is regulated by **substantive or procedural criminal legislation and penalty enforcement acts** (Austria, Czech Republic, Denmark, Finland, Germany, Lithuania, Luxemburg, Malta). There are some MSs in which disposal is **regulated by different legal acts**, some of which may include criminal procedure acts that complement one another on the matter (Belgium, Bulgaria, Cyprus, France, Greece, Hungary, Ireland, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia Spain, Sweden). There is also a distinct group of MS that seem to pay especial attention to particular types of confiscation, such as non conviction-based, and which therefore regulate confiscation and disposal of such types of confiscated assets in **special legislative acts** (Bulgaria, Italy, Ireland, the UK). It seems that, although the majority of the MSs adhere to conviction-based confiscation, the multitude of matters associated with the disposal of confiscated assets calls for a more elaborate legislative regulation on a wider range of matters.

**The disposal mechanisms** that MSs utilise are sale, transfer of property, rent and destruction. As for the **destination of the confiscated assets**, the receipts from sold assets are used to complement the state budget or for victim compensation. Transferred property is directed to public bodies for institutional purposes or property is transferred to NGOs or society (social re-use). Finally, property that is dangerous, banned, or under special regime is destroyed.

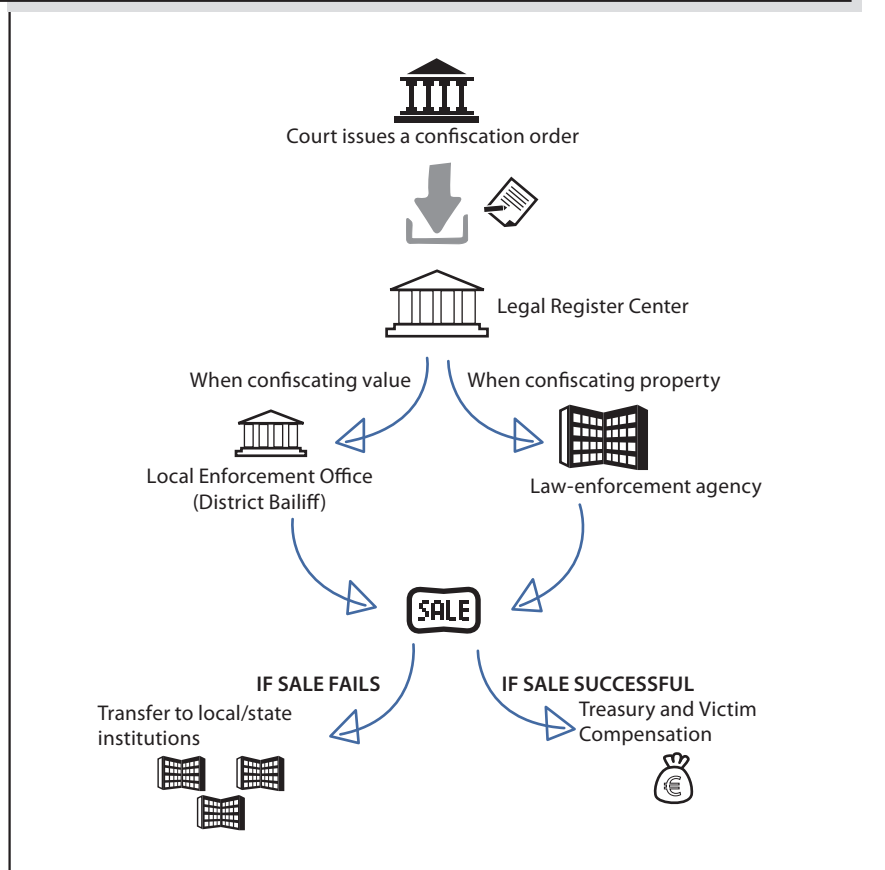
Despite the different options in Framework Decision 2006/283/JHA, *de facto* in all MSs **sale is the main disposal option** (see Figure 2).<sup>28</sup> Studies show that all MSs have put in place mechanisms to ensure that victims can be compensated. However, in procedural terms these mechanisms differ greatly. In some MSs, the compensation procedure is part of (or joined to) the criminal proceedings, while others require separate civil proceedings.<sup>29</sup> The present study finds that most MSs have introduced the **re-use of assets**. Yet Italy is the only MS in which the direct re-use of confiscated assets through transfer of property is the disposal option most frequently taken. Although the re-use of confiscated assets

<sup>28</sup> The 2009 Matrix Report confirms that “[t]he most popular way of coping is rapid conversion of non-cash assets to cash”, pp. 13-14.

<sup>29</sup> Id. point 3.6.5, p. 56.

is envisaged in the national legislations of the MSs, disposal for re-use often consists in the transfer of confiscated property to institutions, rather than their transfer for social re-use to NGOs or society.

FIGURE 2. DISPOSAL PROCEDURE IN FINLAND



Disposal is hampered by various factors; one of the most acute ones seems to be the lack of legal provisions disciplining the **timing of the disposal phase**. Even when these exist, problems related to the excessive length of the phase arise. Despite the importance of confiscating and disposing of assets within a reasonable time span, so as to reduce the risk of value loss and depreciation, in most Member States there are no legal provisions disciplining the extent of the disposal phase (especially its recommended/maximum duration). The only exceptions are **Greece** (disposal shall take place within 3 months from seizure), **Hungary**, **Italy** (maximum recommended duration of the disposal phase in civil confiscation cases is 90+90 days), **Lithuania** (the bailiff must transfer the assets to the competent Territorial State Tax Inspectorate within 10 business days from the

date when the judgement to confiscate assets came into force), **the Netherlands** (execution must be completed in a time frame equal to the statute of limitations plus a given offence, plus one third), **Romania** (actual disposal must take place within 180 days from the disposal order) and **the United Kingdom** (via 'time to pay' limits). Nevertheless, even in these countries there are problems related to the excessive length of the phase.

Another common problem concerns **final confiscation orders**, which are unclear, incomplete or provide insufficient or outdated information on the assets to be disposed of (Belgium, France and Netherlands). **Parallel and often uncoordinated proceedings on assets due to third party claims** (e.g. bankruptcy or matrimonial proceedings) also hamper the disposal process (Belgium, Hungary, Italy and the UK).



### 3. INSTITUTIONAL ASPECTS OF MS DISPOSAL. WHO IS IN CHARGE?

In most MSs, the disposal of confiscated assets is undertaken by agencies in charge of disposal of state assets.<sup>30</sup> The current study confirms the above finding that **in most MSs there continues to lack a single entity exclusively charged with the task of confiscated asset disposal at the national level.** The confiscation order is executed with the involvement of a variety of actors. In most cases, the same entities dealing, in general, with the enforcement of penalties are responsible for the enforcement of confiscation orders as well.

This finding is not surprising, given that neither the EU legislative framework nor *Financial Action Task Force Recommendations (FATF) (2012)*<sup>31</sup> **requires MSs to adhere to a particular institutional arrangement for the disposal of confiscated criminal assets.** FATF Recommendation 4 states that countries should adopt measures to enable their competent authorities to dispose of confiscated criminal assets. The explanatory note specifies that “Countries should establish mechanisms that will enable their competent authorities to effectively manage and, when necessary, dispose of, property that is frozen or seized, or has been confiscated.” There is no further guidance on the institutions tasked with that responsibility.

However, this study seems to demonstrate that there is a **trend among MSs to introduce specialisation in asset disposal.** Although this is observed in some MSs, there are agencies charged with the matter, often in conjunction with asset management issues. The degree of specialisation varies. Nevertheless, it seems that the trend towards specialization demonstrates awareness among the MSs that the disposal of confiscated criminal assets is a very specific activity that requires particular expertise. Moreover, in some MSs (e.g. Italy and France), this specialised expertise contributes to better and more focused educational programmes.

According to the approaches adopted by EU MSs, the institutional forms of disposal are:

- Centralised approach with specialised institutions
- Centralised approach with non-specialised institutions
- Decentralised approach

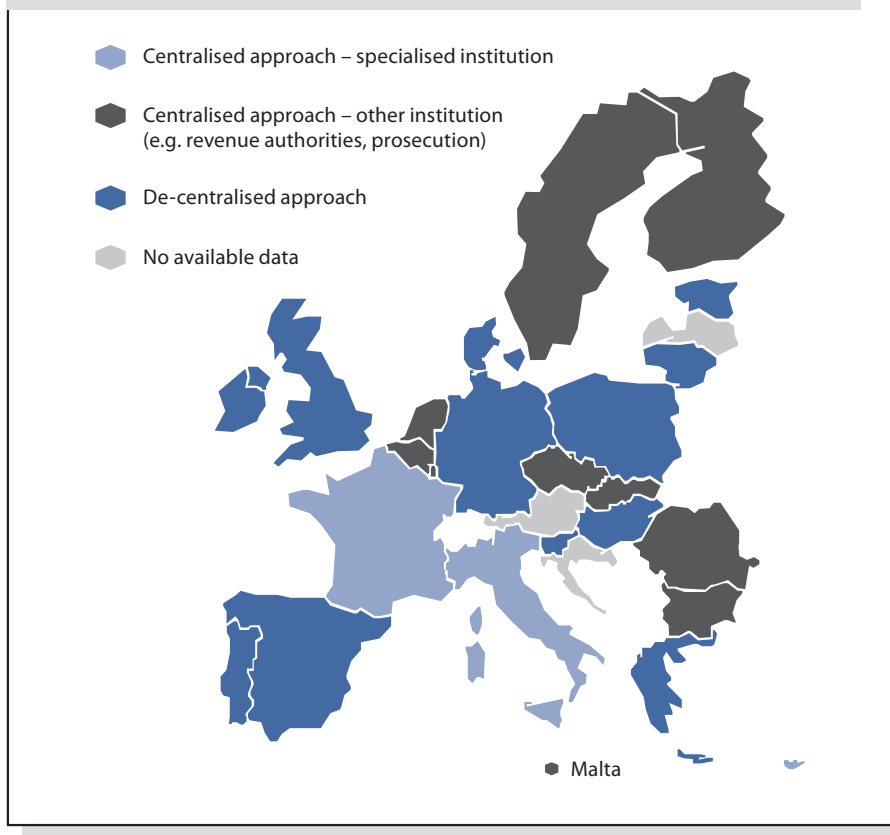
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<sup>30</sup> Id. p. 64.

<sup>31</sup> International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation available at: [http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF\\_Recommendations.pdf](http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF_Recommendations.pdf)



**FIGURE 3. INSTITUTIONAL ARRANGEMENTS IN REGARD TO THE MANAGEMENT AND DISPOSAL OF CONFISCATED ASSETS**



### 3.1. CENTRALISED APPROACH WITH SPECIALISED INSTITUTIONS

Analysis demonstrates that **MSs which utilise the centralised approach do not follow one and the same pattern in structuring their specialised centralised agencies**. The structure and operational responsibilities vary. However, it seems that, considering the specificity of the disposal of confiscated criminal assets, specialised institutions are preferable. Moreover, **centralisation of the process is conducive to the collection and analysis of disposal data**, which are identified as requiring further improvement by *Directive 2014/42/EU*.<sup>32</sup> This approach tackles another challenge related to the disposal process: in some MSs, lack of central specialised body leads to the **excessive length of the disposal proceedings**. Some countries report **communication problems relative to the timely and proper notification of the relevant asset management office** (Belgium, Bulgaria, Finland), whereas others point out instances of a **lack of cooperation between the institutions involved** (Greece, Italy, Slovenia). MSs that have adopted the centralised specialised agency approach do not have such issues (Cyprus, France, Italy). While some MSs that adopt the decentralised approach to management and disposal do not report major problems (Denmark, Estonia, Germany, Ireland, Lithuania, Poland,

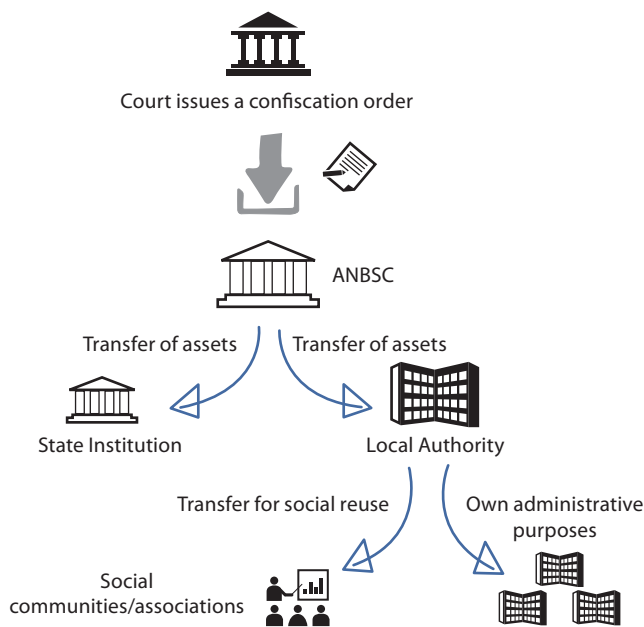
<sup>32</sup> Id.

Portugal, Spain, United Kingdom), others report communication and coordination difficulties (Greece, Hungary, Slovenia).

Examples of the centralised approach are France, Italy and Cyprus. In **France** AGRASC<sup>33</sup> is a public administrative body under the Ministry of Justice and the Ministry of Budget. It was established by *Law no. 768 of 9 July 2010* that entered into force in 2011. The Agency, *inter alia*, plays a key role in the disposal of confiscated assets throughout the country. In the disposal phase, it is responsible for the sale of seized movable assets and for the sale or destruction of property which the Agency previously managed. The **Italian** ANBSC<sup>34</sup> was established by law decree no. 4 of 4 February 2010 (converted into law by law no. 50 of 31 March 2010). The Agency is supervised by the Minister of the Interior. Its headquarters are in Reggio Calabria (branches are in Milan, Palermo, Naples, Rome). In the disposal phase it is tasked with planning the disposal of assets (both in criminal and civil (preventative) proceedings) and identification of key problems in terms of asset disposal; disposal of assets confiscated from organised crime (i.e. in civil proceedings and in certain criminal proceedings instituted under art. 12-sexies law 356/1992); and adoption of urgent acts to assign confiscated assets rapidly. The **Cypriot** Unit for Combating Money Laundering (MOKAS) is an example of an ARO that is also charged with asset disposal, and therefore has a unique overview of the assets from investigation to disposal. The Unit was established

according to section 54 of the *Prevention and Suppression of Money Laundering Activities Law 2007* (former Law No. 61 (I)/96), in December 1996, and became operational in January 1997. Amongst other things, it is charged with the execution of all confiscation orders. If the recipient fails to comply with the confiscation order, an application is made by MOKAS to the Court to appoint a receiver to sell previously restrained assets (alternatively the recipient may be authorized to sell them on his/her own) or other assets belonging to the defendant not previously restrained. The money from such sale is returned to the victims, if any; otherwise it is transferred to the Accountant General and deposited in the State Budget.

FIGURE 4. DISPOSAL PROCEDURE FOR REAL ESTATE IN ITALY



<sup>33</sup> Agence de gestion et de recouvrement des avoirs saisis et confisqués.

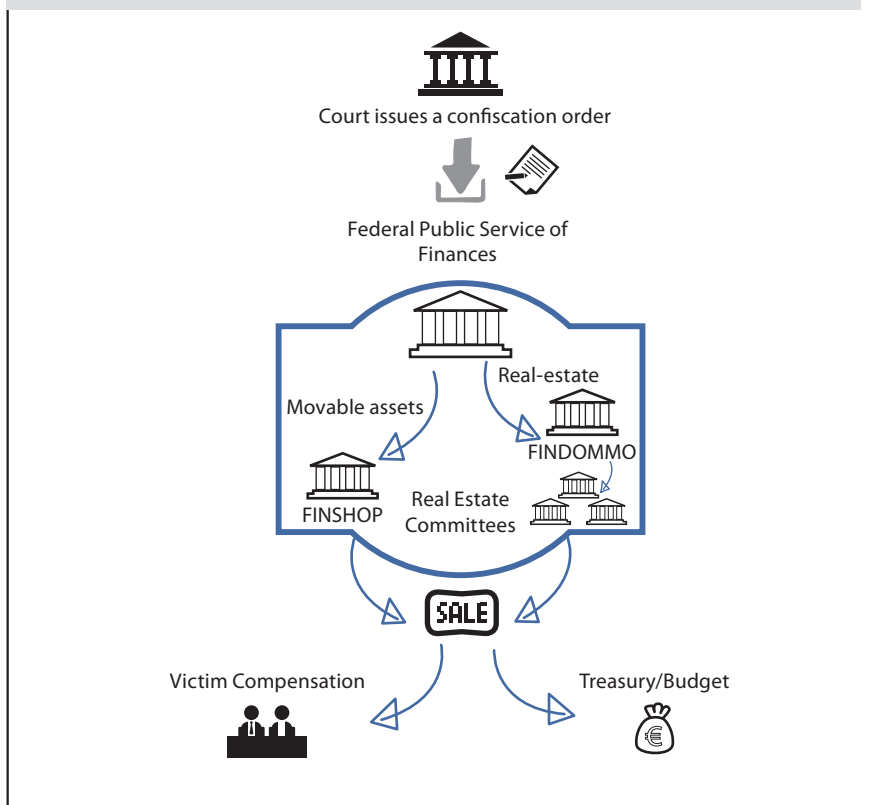
<sup>34</sup> Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata.

Thus, while the French model tasks the respective agency with specific elements of the disposal phase, namely disposal of movables or the sale of seized property that the agency managed prior to the final disposal decision, the Cypriot and Italian approach is different. Both the Italian and Cypriot agencies deal with all disposal cases; however, the Cypriot agency also acts as the local ARO.

### 3.2. CENTRALISED APPROACH WITH NON-SPECIALISED INSTITUTIONS

This is the approach in the vast majority of the MSs. In this group of MSs there is no specialised approach to the disposal of confiscated assets. There is no specific entity exclusively charged with the task at the national level. A confiscation order is executed like any other penalty, with the involvement of a variety of criminal justice actors, which may comprise a key central authority responsible for the collection of tax duties or, the management of public property or the enforcement of criminal and administrative penalties.

FIGURE 5. DISPOSAL PROCEDURE IN BELGIUM



MSs that use their **tax administration as the centralised non-specialised disposal authority** are Belgium, Bulgaria and Romania. The **Belgium** Federal Public Service of Finances (or the Patrimonial Services) is involved in the process after a final confiscation order is issued. Movable assets are physically transferred to the Patrimonial Services. Real estate is first transcribed at the mortgage office, and after the final confiscation order the Patrimonial Services take over management of the confiscated real estate. FINDOMMO, a special central office within the Patrimonial Services, prepares real estate sales by another service (real estate committees) specialised in the sale of real estate. In **Bulgaria** an Inter-Institutional Council receives information on confiscated property from the Commission

for Forfeiture of Illegally Acquired Assets and proposes to the Council of Ministers whether the property should be granted to budgetary entities, municipalities or sold by the National Revenue Agency (NRA). The NRA

will sell property that is not allocated to anyone. The National Revenue Agency disposes of confiscated property via a special unit, the Sales Department at the Collection Directorate. Court confiscation orders on property confiscated in criminal proceedings are sent by the Prosecution Office to the NRA for public auction executed under the *Tax and Social Insurance Procedural Code* (TSIPC). In a limited number of cases, the NRA allocates confiscated property, primarily motor vehicles, for use by other state agencies. The **Romanian** disposal authority is the Ministry of Public Finance through the Directorates General of Public Finance of the counties or Bucharest, as well as district Public Finance Administration Offices.

The **Czech Republic** is the MS in which the disposal of confiscated criminal assets is undertaken by the agency in charge of management of public property. This is the Office of Government Representation in Property Affairs (OGPRA). The role of OGPRA in the administration of the property of the Czech Republic is as follows: it acts on behalf of the state in legal procedures concerning property and deals/administers state property that is not entrusted to specialised authorities (e.g. forests) or does not serve the needs of other state authorities (e.g. ministry buildings). Typically, a state institution offers property which it does not need to other state institutions. If no state institution asks for the property, it is transferred to non-state beneficiaries (including local authorities), either through sale by public tender or gratuitous transfer to a selected beneficiary. If the assets are not sold or gratuitously transferred, the property is either rented through public tender or gratuitously used.

Disposal by **entities tasked with the enforcement of criminal and administrative penalties** is the approach of choice in Finland, Luxembourg, Malta, Netherlands and Sweden. In **Finland**, the Local Enforcement Office (District Bailiff) receives confiscation orders. Depending on whether enforcement is through confiscation of property or its monetary equivalent, execution is performed by the police or by the local enforcement office respectively. Notification is sent to the Legal Register Centre when the enforcement activities have taken place. In **Luxembourg**, once a definitive decision concerning their confiscation has been taken, the objects may be sold in a public auction organised by the Tax Administration if they have some commercial value. Confiscated bank funds are transferred upon instruction by the Prosecution Service. In **Malta**, the Registrar of the Criminal Court is responsible for the disposal of confiscated property. In **the Netherlands**, the Public Prosecutor's Office executes the confiscation order. Confiscated money is transferred to the public treasury by the public prosecutor. Confiscated properties like vehicles are sold by the state body in charge of the destruction, storage and sale of goods seized by official investigation authorities. In regard to *value* confiscation, when a confiscation order is final, the public prosecutor sends it to the agency dealing with the national collection/recovery of confiscation orders. In **Sweden** disposal is undertaken by the Enforcement Authority.

The above survey describes a diversified system for the disposal of confiscated criminal assets in MSs that adopt the centralised non-specialised approach to disposal. Based on the analysis and respondent

opinions, there are certain issues that such systems raise. To be noted is that, because there is no specialization focusing on the disposal of confiscated criminal assets, the **disposal authorities** in this group **have a restricted capacity to provide guidance and training, and to conduct in-country analysis focused on improvement of the system**. This is in contrast with the MSs that adhere to the centralised specialised system: in those countries the respective authorities do have such responsibilities (e.g. Italy and France).

Another issue is that there are limited opportunities for specialisation within the disposal services. The disposal of confiscated criminal assets is an activity with significant idiosyncrasies. It is generally accepted that the disposal of certain specific assets, such as real estate in particular, poses problems because potential buyers may shy away from acquiring such property due to its previous ownership. Past Italian experience is telling in this regard. Consequently required is specific training of the agencies that dispose of the assets in question. Such training, however, is less likely to be effective in a non-specialised structure in which personnel do not focus specifically on property of this type. Some respondents from MSs with a non-specialised central disposal authority highlighted the training issue (e.g. Finland and Luxembourg).

A lack of specialisation may reduce the effectiveness of disposal methods. Data from some jurisdictions (e.g. Bulgaria) indicate low disposal prices by the executing authority in cases of public sale. This is also due to a lack of specialised expertise by the disposal authority. Bulgaria and other jurisdictions also report a lack of information among potential beneficiaries about the possibility of being assigned confiscated assets. It seems, however, that this is partly due to inadequate information distribution by the disposing authority to potential beneficiaries.

The non-specialised approach gives rise to another problem, which concerns the **keeping of accurate statistics**. This matter is identified by Directive 2014/42/EU, which mandates MSs to improve collection of disposal statistics. A similar recommendation is made by this study. Some of the MSs that adopt this institutional option on disposal share this view. Some respondents (e.g. Czech Republic) point out that confiscated criminal assets are not distinguished from other property. As a result, it is not possible to distinguish what property has been obtained under what circumstances.

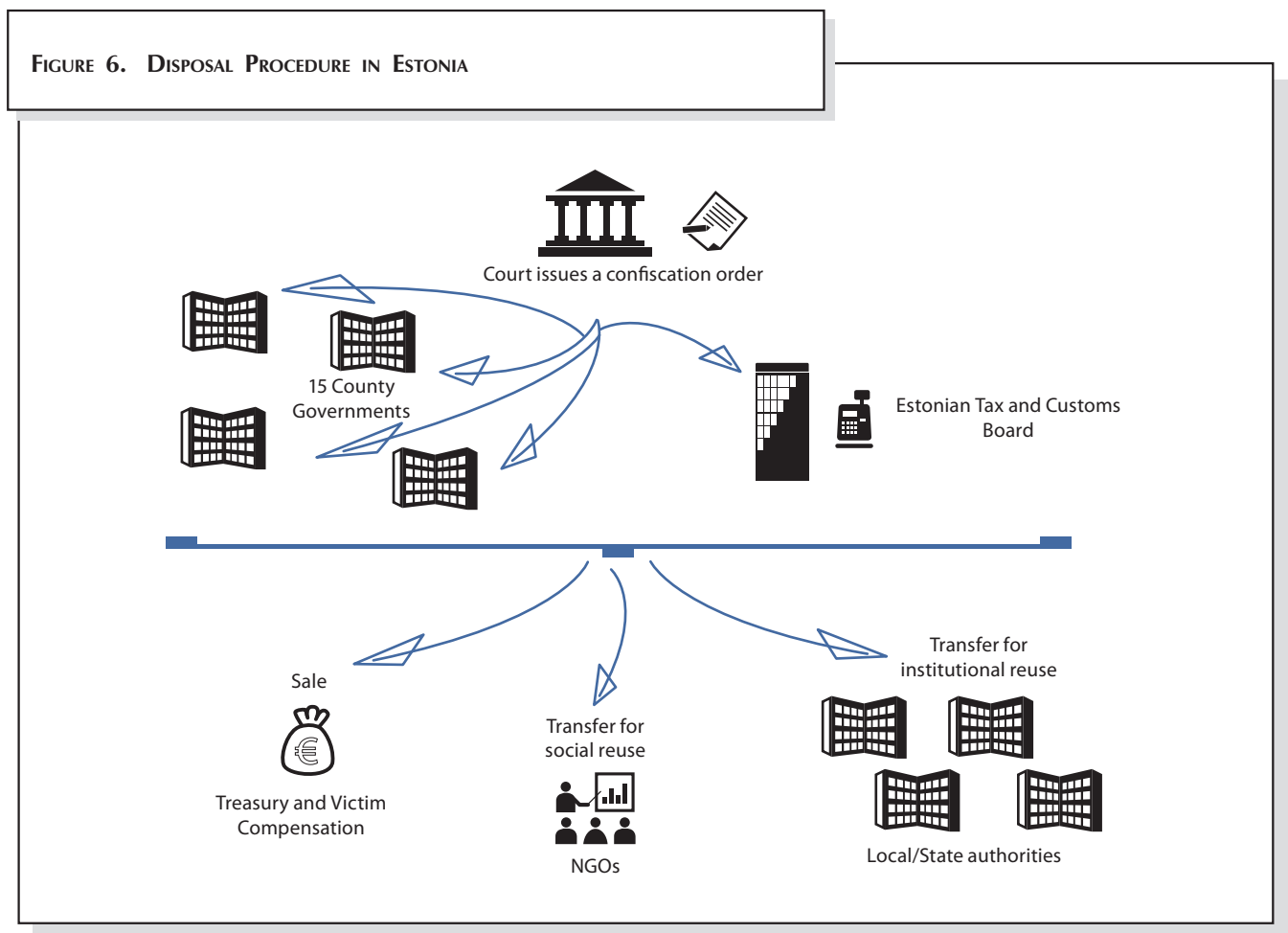
### 3.3. DECENTRALISED APPROACH

A good number of MSs rely on more decentralised systems, where the tasks related to the disposal of assets are distributed among several institutions or managed at local level by the courts. In some MSs, local government and its authorities have the leading role; in others, court agents implement the disposal; in yet another group of MSs, the prosecution or the police take the lead; while in other MSs the decentralised approach

is implemented by many different disposal authorities usually allocating the tasks according to functional criteria.

The comparative overview of the institutions involved in the decentralised model of disposal demonstrates that **some MSs rely almost exclusively on one type of decentralised authority** charged with disposal; others opt for a greater role of local authorities. In **Denmark**, the local police district manages the disposal, which is done through sale either at auction or on the free market. If the defendant is against the sale, a procedure is opened in the enforcement courts, which are competent to order sale of the assets. In **Germany**, the bailiff implements the disposal order. Items which are worthless, unusable, pose public danger, or are “illegal” are usually destroyed. All remaining items are re-used or sold. As a rule, the sale is through public auction. If it appears that this is not feasible or impractical, the items are sold privately.

This group also includes **local level courts and local government offices**. In **Estonia**, the fifteen county governments manage confiscated assets at their location and are in charge of the disposal of confiscated assets. The customs authority and the police authority also dispose of specific types of confiscated assets. In **Slovakia**, there are district offices that are consulted by a specialised commission on the potentially most effective disposal method. Disposal in **Lithuania** is undertaken by the ten



Territorial State Tax Inspectorates at county level. In **Portugal**, the court agent takes the actions necessary to sell or to deliver the confiscated goods to the beneficiaries. In **Slovenia**, the courts rule on how assets are to be disposed, and executors auction confiscated assets. In **Spain**, court clerks direct the disposal process, except for assets in drug trafficking and money laundering cases, which are disposed by the Government Delegation for the National Plan on Drugs.

Another distinct group consists of MSs that implement disposal through **different institutions based on their functional responsibilities**. In **Greece**, the key actors involved in the disposal phase are the General Directorate of Customs and Excise of the Ministry of Finance, which disposes of confiscated means of transport, machinery and other items; the Directorate of Movement of Capitals, Guarantees, Loans and Securities of the State's General Accounting Office of the Ministry of Finance, which disposes of confiscated securities; and the Directorate of Public Property of the Ministry of Finance, which disposes of real estate. In **Hungary**, the Police, National Tax and Customs Administration and Office of Public Prosecutors have roles in the disposal of different types of confiscated assets. In **Ireland**, the Criminal Assets Bureau is appointed receiver in all cases under the PCA, while the Director of Public Prosecutions deals with all assets seized under the Criminal Code. In **Poland**, the Judicial Enforcement Officer is in charge of disposal, except in cases where the State Treasury is the beneficiary of the measures. In the latter instance, disposal is implemented by the Revenue Office. In the **UK**, the key institutions involved in the disposal phase are the Crown Prosecution Service (for the enforcement of more serious cases) and the HM Courts and Tribunals Service (for the enforcement of bulk, low-value cases).

Analysis of the challenges encountered by MSs taking the decentralised option demonstrates that they are very similar to those identified for the group of MSs adopting the centralised approach with non-specialised institutions. **The training of personnel** is an issue. While in Spain there is no specialised training, in the UK training is available but lacks the necessary depth. There is no system for certified education or training in Estonia, Luxembourg, Slovenia and Slovakia. This is identified as a reason for the **lack of specialised expertise on the subject**. As noted above, a lack of specialised training or insufficient training in the MSs adopting the decentralised system is the reason for the lack of specialization in the disposal agencies. This conclusion is reached by Slovenian respondents for example. A lack of sufficient expertise, or limited expertise, hampers the ability of these bodies to advise other institutions involved in criminal asset recovery and disposal with the purpose of improving efficiency and boosting effectiveness. It seems that some of the above present even greater intricacies in decentralised models. Some MSs seem to find that the **decentralised model hampers communication and effective cooperation among the agencies involved** in the disposal of criminal confiscated assets (e.g. Greece, Hungary, Slovenia).

The overall conclusion on the institutional aspects of disposal is that the EU legislation does not establish any minimum standards with which MS need to comply. Consequently, MS choose different options. Some

have established specialised centralised bodies in charge of disposal, while others have centralised non-specialised or decentralised bodies. Although each of the models has its strengths and weaknesses, it seems that MSs which adhere to the centralised specialised model successfully tackle more of the challenges concerning the disposal of confiscated criminal assets. As a consequence, an increasing number of MSs deem it beneficial to establish centralised specialised bodies. Following expert advice, France and Italy have introduced legislative changes that have led to the creation of such bodies. Moreover, Portugal, which identifies some of the above mentioned issues as problems in its decentralised national models, expects to overcome some of them once a new central agency on disposal of confiscated criminal assets has established. Some of the challenges that centralised specialised models for disposal of confiscated criminal assets more effectively address are the creation of an institution that advises and provides guidance and training to other national agencies with roles in the confiscation, preservation and disposal of confiscated assets. France is a case in point. Moreover, specialisation is conducive to resolving issues related to subprime price sales of confiscated assets, and has the potential to contribute to the more effective disposal of these specific types of assets (see Table 2).

**TABLE 2. INSTITUTIONAL APPROACHES TO DISPOSAL AND THEIR IMPLICATIONS**

| <b>Issues</b>                                 | <b>Institutional approach</b> | <b>Specialised centralised approach</b> | <b>Non-specialised centralised approach</b> | <b>Decentralised approach</b> |
|---|-------------------------------|---|---|-------------------------------|
| Lack of specialisation                        |                               | Not an issue                            | An issue                                    | An issue                      |
| Interagency communication                     |                               | Not and issue                           | Some problems                               | An issue                      |
| Accurate statistics                           |                               | Not an issue                            | An issue                                    | An issue                      |
| Lack of an institution that provides guidance |                               | Not an issue                            | Limited capacity                            | An issue                      |
| Training                                      |                               | Not an issue (in general)               | An issue                                    | An issue                      |





## 4. METHODS OF DISPOSAL AND DESTINATION OF PROCEEDS

As already noted above, the EU legal framework does not set mandatory minimum standards for the disposal of confiscated assets in the national jurisdictions of the MSs. This report establishes that all MSs utilise at least one of the disposal mechanisms available, namely the sale of confiscated criminal assets. A good number of the MSs also apply transfer of property for re-use, which is done when such property is not harmful or under special regimes and can be easily used. Some rent the property in lieu of transferring the ownership to third parties. Finally, should the property be under special regime, harmful, dangerous or banned, or of no value, it is destroyed. Thus methods used to dispose of confiscated criminal property are these: sale; transfer of property; rent; and destruction.

However, this does not provide the full picture of the destination of the proceeds. As already stated, destination is of prime importance for achieving the full range of the objectives of confiscation of criminal assets. These objectives include not only curtailing the existence of organised crime within the EU, but also addressing the rights of identified victims and deprived communities, and the need to maintain public confidence in justice systems. The analysis demonstrates that in order to achieve these objectives, MSs transfer funds received from sale of confiscated criminal assets to the state budget or victim compensation funds. Other MS increase the beneficiaries of the disposal methods that they utilize by transferring confiscated property directly for social or institutional re-use (see Table 3).

TABLE 3. DISPOSAL METHODS AND DESTINATION OF PROCEEDS

| Disposal method      | Destination of proceeds               |
|----------------------|---------------------------------------|
| Sale                 | State budget<br>Victim compensation   |
| Transfer of property | Social re-use<br>Institutional re-use |
| Rent                 | State budget                          |
| Destruction          | State budget                          |

It is at this point that the term ‘social re-use’ should be clearly defined. What distinguishes the **social re-use of confiscated assets** from the **traditional transfer of confiscated assets to the state budget** (which is still the main disposal option within the EU) is the **visibility of the confiscated assets among citizens** that it guarantees. Even in the context of traditional forms of re-use, assets are, broadly speaking, used for public purposes (since

they become part of the state budget). However, they are mixed with other public resources, so that citizens cannot link their subsequent public/social re-use to their original nature as confiscated assets.

Social re-use in the strict sense of the term instead makes this link explicit: the proceeds of crime are openly given back to society, thus disseminating an important cultural message that promotes the so-called 'social fight' against organised crime. Currently established are two models of social re-use of confiscated assets in the EU: 1) direct re-use of confiscated assets for social purposes, and 2) re-use of the proceeds of the confiscated assets via specialised funds/programmes that invest these proceeds in the fight against drug trafficking or in crime prevention.

Social re-use takes different forms across the EU:

- **soft vs. hard forms of social re-use:** in some countries, social re-use applies to movable assets only (e.g. Greece and Hungary), while in other countries it applies to land and real estate (e.g. Italy);
- **national vs. local scope of application:** social re-use typically applies to the entire national territory, with the exception of Belgium, where it is envisaged only in the Dutch/Flemish Region, and the "CashBack Programme", which is only implemented in Scotland, not in the other parts of the UK;
- **drug trafficking offences vs. all (serious) crimes:** in some countries social re-use is possible only in relation to the proceeds from certain offences (typically drug trafficking, e.g. Spain and France), while other countries (e.g. Luxembourg and Italy) envisage it in relation to all (serious) crimes.

MSs that can be pointed to as good examples in regard to social re-use are Belgium (in the Flemish Region), France, Italy, Luxembourg, and the UK (in Scotland). In the **Flemish Region of Belgium** the municipality is given the right to socially manage confiscated real estate property. The owner retains ownership of the confiscated real estate, but the municipality has the right to manage the buildings temporarily, which includes the possibility to rent them to needy people and to restore them. In **France**, a special body<sup>35</sup> manages a fund to collect the proceeds of confiscated assets in connection with drug trafficking. The Fund's proceeds are allocated the Ministry of the Interior, the Ministry of Justice, the Ministry of Finance, and the Ministry of Social Affairs. In **Italy**, the social re-use of assets confiscated from organised crime has been envisaged since the mid-1990s. Real estate and land may be transferred to state institutions or, for institutional purposes or social re-use, to local entities. Furthermore, companies can be rented to worker cooperatives for free. In **Luxembourg**, the Fund to Fight Certain Forms of Criminality<sup>36</sup> consists of all property confiscated from drug trafficking, money laundering and other serious crimes. It supports programmes to fight these crimes. Its beneficiaries include international organisations, national institutions and NGOs. In **Scotland**, recovered criminal assets are invested in the 'CashBack for Communities' programme, which finances community projects, facilities and activities largely for young people at risk of turning to crime/anti-social behaviour. **Spain** has established a fund financed out of the assets confiscated in drug cases, as well as in

<sup>35</sup> Mission interministérielle de lutte contre la drogue et la toxicomanie

<sup>36</sup> Fonds de lutte contre certaines formes de criminalité.

drug contraband ones. The fund finances programmes for drug addiction prevention, assistance to drug addicts and their social and occupational rehabilitation. It promotes and improves measures to prevent, investigate, prosecute and repress drug-related crimes; and it fosters international cooperation on such matters. In **Romania**, the National Anti-Drug Agency may be the beneficiary of assets confiscated from drug-related crimes.

Regardless of the above examples, as already noted, the cashing of confiscated assets remains the main disposal option. The fact that MSs extensively utilize the sale of confiscated assets as a disposal method has direct implications for the disposal of confiscated assets in instances of international cooperation under Framework Decision 2006/283/JHA. Although the Framework Decision provides for different disposal options, given that virtually all MSs are leaning towards sale in their disposal preferences, it is clear that in most instances of trans-border cooperation the execution of criminal court orders takes the form of the sale of confiscated assets.

It is worth mentioning that **in many MSs civil society is left out of the decision process in regard to the disposal of confiscated properties**, as well as in regard to the destination of the proceeds from the assets. This is mainly because in most MSs the confiscated assets are considered property of the state. After the victims have been compensated, the proceeds from the confiscated assets are usually transferred to the state budget. Even if civil society is a beneficiary according to the national legislation, the MS does not resort to consultations with the civil society. The notable exception is **Hungary**, where the so-called Charity Council has been established. The Charity Council consists of representatives of the Ministry of Human Resources, as well as representatives of the most well-established charity organisations in Hungary. The Council enables civil society organisations to participate in determination of the allocation of confiscated goods, as well as to monitor the disposal process.

A few countries (Finland, France, Ireland, Italy, Netherlands, Romania and the UK) report the **implementation of dedicated ICT data management systems to support asset recovery, management and utilisation**, as well as to provide reliable statistics on the outcomes. Most competent national authorities collect the information on confiscated assets primarily on paper. This largely impairs the overall effectiveness of the process and obstructs objective evaluation of the outcomes of the asset recovery and utilisation process. The availability of statistics on confiscations also appears to be problematic. Although many countries produce statistics of some kind, in most of them the data are partial and not publicly available.

Lastly, but importantly, as already mentioned, the fact that *Framework Decision 2006/283/JHA* applies to orders issued by a criminal court influences the effectiveness of the disposal of confiscated property through international cooperation. In regard to criminal confiscation regimes, these are envisaged by all MSs. In about half of countries, conviction is not the necessary prerequisite for the confiscation of assets within criminal proceedings; though it is usually so in a limited number

of circumstances (e.g. the defendant dies or becomes a fugitive from justice prior to conviction). The remaining countries (Belgium, Czech Republic, Estonia, France, Ireland, Italy, Luxembourg, Malta, Poland, Portugal, Slovenia, Sweden and the UK) instead require a criminal conviction to adopt criminal confiscation.

The issue related to this legislative structure is that MSs that utilize civil asset confiscation and confiscation outside criminal proceedings need to seek international cooperation in the execution of confiscation orders abroad and the prospective disposal of confiscated property through the *2005 Council of Europe Convention*. As noted above, however, this legal instrument does not contain provisions on broader social re-use. Instead, it provides for the return of confiscated property if it is used for victim compensation. This provision indicates, however, that disposal of such confiscated property is likely to be through sale. Because victim compensation is done monetarily, it is less expensive and more practical to sell the confiscated property and provide funds for victim compensation to the requesting party. This in turn is another deterrent to more extensive recourse to social re-use as a disposal method in international cooperation.

The overview of national legislations and practices thus demonstrates that both domestically and in instances of international cooperation the sale of confiscated assets continues to be the main disposal method. Re-use of confiscated property exists as an option, although it is more often utilized in the form of re-use by public bodies, municipal or state. The social re-use of confiscated property is also a possibility in several jurisdictions; however, despite a lack of sufficient statistics, it seems to be under-used. This study consequently finds that utilising confiscated assets for social purposes is not a widespread practice among the EU MSs.

## 4.1. DISPOSAL METHOD

### 4.1.1. Sale

All EU Member States utilise public sale as a disposal method. Although virtually all MS use more than one disposal option, this study, like the ones before it, indicates that the sale of confiscated criminal property is the most widespread method of disposal. This is due to the fact that sale is used in other instances when property is confiscated or when the state disposes of unneeded property. As said, victim compensation is entrenched in EU and MS legislative frameworks. A case in point is *Council Directive 2004/80/EC*.<sup>37</sup> Thus, all MS regard the disposal of confiscated assets as instrumental for compensation of the victims of crime and for consolidation of the state's budget.

However, the sale of confiscated assets poses problems. **Challenges related to the sale of confiscated immovable property** such as real estate and land occur when confiscated real estate has mortgage liens

<sup>37</sup> Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.

or is subject to other executive procedures which lead to related claims by *bona fide* third parties (Belgium, Bulgaria, Cyprus, Portugal, United Kingdom). Similar problems arise with properties under instalment sale agreements (Portugal), properties under shared ownership (Belgium, Bulgaria, Portugal, Slovenia), unlawfully occupied or with unresolved issues concerning tenant owner's rights (Belgium, Sweden). High-value real estate (Portugal), industrial and agricultural properties (Spain) are also reported as being more difficult to sell. The reputation of the previous owner is reported to be another detrimental factor for potential buyers of real estate, especially when s/he has an organised crime background (Bulgaria, Denmark, France). Most complicated seem to be cases where criminals have made deliberate efforts to hide the real ownership of their property by means of money laundering and fraud techniques. Furthermore, in many cases only the natural persons are criminally prosecuted, whereas the legal entities affiliated with them are not. Therefore, when the court announces the confiscation order, the company appeals against it as a *bona fide* third party distinct from the convicted criminal. Sometimes such companies also deliberately go bankrupt, which leads to the initiation of proceedings at the commercial court and appointment of an external judicial liquidator. These prove to be well-designed strategies by criminals to obstruct the disposal of their property, because the confiscation order cannot be enforced before all concurrent claims and proceedings at the civil court have been settled.

**Financial assets and companies**, too, often pose challenges for disposal. Usually such assets consist of packages of rights and obligations that the state has no interest in keeping but are difficult to evaluate and sell (Czech Republic). Small family businesses or shares in such businesses rarely attract interest (Denmark). Problems also arise in relation to bankruptcy proceedings against such confiscated companies (Cyprus, Italy).

**The challenges related to the sale of movable assets** differ markedly from all those described above. The main critical factors are often rapid deterioration, considerable value depreciation and disproportionate storage costs, which are often exacerbated by prolonged judicial trials. All MSs except for Denmark, Lithuania, Luxembourg and Malta have provisions providing for the preliminary sale of such frozen or seized goods prior to issuance of the confiscation order, with the proceeds being kept in an interest-bearing account instead. However, in many countries these provisions are rarely applied.

In order to deal with some of the above challenges, some MSs adopt **value-based confiscation** as an option. All MSs except for Cyprus and Malta have both property and value confiscation. In some jurisdictions, value-based confiscation is reported to be the principal method (e.g. Finland and Sweden). Value-based confiscation has some positive features. One major advantage of value-based confiscation is that it is easy to administer: it is much easier for the state to confiscate money in lieu of the actual property. This automatically makes the disposal phase of the process straightforward. Redistribution of funds is swift and easy, which apparently enables the state to achieve all its objectives. Moreover, this study identifies other **models successful in tackling issues related to**

**properties with mortgages.** Should the mortgaged real estate be more costly to sell, no freezing order is imposed (Sweden). This is an example of adequate application of the value-based confiscation which is widely applied in Sweden.

It should be pointed out that there are further considerations concerning value-based confiscation. Value confiscation often does not take into account the risks of criminals retaining possession of the confiscated property. This seems automatically to defeat one of the objectives of criminal asset confiscation, namely maintenance of public confidence in the justice system. It is unlikely that negative behavioural models will be removed if organised crime groups retain their property, regardless of the fact that they have paid for it. Not surprisingly, in paying special attention to this consideration, the **Italian Antimafia Code provides that upon a citizen's report or information at the prefecture, the act of assignment may be reviewed if it becomes clear that the property has been reacquired by the mafia.**<sup>38</sup> Thus, the approach, which has indisputable positive features, and which addresses many of the issues related to the sale of confiscated criminal property, seems to have some areas that need further improvement in some of the MSs in order to ensure that organised crime does not reacquire confiscated assets. Indeed, this is noted in the Directive 2014/42/EU, which calls on the MSs to take measures to prevent it from happening.

The above examples apparently demonstrate that disposal authorities should have discretion to apply the most adequate approach even within one disposal method (sale of confiscated assets in this particular instance). Of course, because of the important functions performed by the disposal of confiscated assets and asset confiscation as a whole, it is crucial that such discretion be applied judiciously. Disposal within rigid guidelines that do not take account of the specifics associated with the disposal of confiscated assets is not the approach that would yield the best possible results. Nevertheless, because of high social sensitivity and the important objective of increasing social trust in the judiciary, any disposal method should be applied after careful consideration and good motivation on behalf of the disposal authority. Full transparency is crucial.

#### 4.1.2. Disposal method: transfer of property

Re-use of assets through transfer of property is usually the second most frequently applied disposal option – with the exception of Italy, where re-use for social purposes is the leading approach. When discussing the sale of confiscated criminal assets, it was noted that MSs view the funds received from the sale as a source for compensation of victims of crime. However, it should be borne in mind that serious and organised crime does not always have identifiable victims. If society as a whole is perceived as a victim of this form of criminality, it can be argued that the compensation can take the form of re-use of the confiscated proceeds of the aforementioned crimes for social purposes.<sup>39</sup> Social re-use is better

<sup>38</sup> Art. 48, paragraph 15 of the Italian Antimafia Code.

<sup>39</sup> Basel Institute on Governance, *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*, 2012.

suitable to instances in which compensation is granted to communities, rather than to identifiable victims such as those of human trafficking or drug-related offences. In the former case, transfer of property for social re-use seems the better option.

Re-use of property is not immune to various challenges. **Many of the problem areas are the same as those related to public sales:** mortgage liens and third party claims to the property which have to be settled or otherwise transferred to the final beneficiaries (Italy); rapid deterioration or bad condition of the assets, which makes them unattractive for re-use or entail additional costs for restoration (Italy); infringement of property rights in cases involving counterfeited goods, which precludes gratuitous transfer or in any case necessitates the removal of branding, which may also be costly (Hungary, Lithuania).

#### 4.1.3. Disposal method: rent

Rent is yet another disposal option applied by some MSs (Belgium, Czech Republic, Ireland, Malta). In such instances, the property remains under state ownership. The fact that it is leased does not materially change the fact that the state retains property rights. MSs usually limit its application to specific types of property – usually expensive property such as real estate or businesses. In Belgium and Malta only real estate is rented, while in Italy this is a disposal option with respect to companies if business activities are likely to continue. Companies can be rented either to worker cooperatives or to public/private companies.

#### 4.1.4. Disposal method: destruction

There are certain types of property that can neither be sold nor re-used through transfer of property or rent. This is primarily due to the fact that such property is under a specific regime, banned in the MS, or unfit for use. This applies, for instance, to perishable movable property that has expired, drugs, or counterfeit goods. Of course, in such instances MSs choose destruction as the disposal option.

## 4.2. DESTINATION OF PROCEEDS

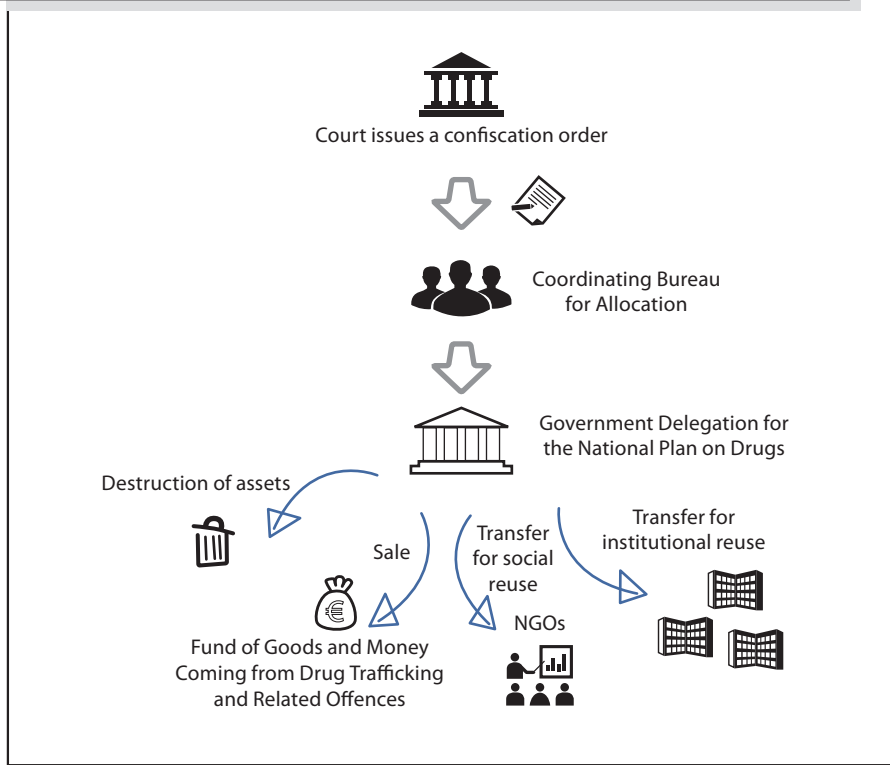
### 4.2.1. Destination of proceeds from sale

Another point that warrants specific attention is the destination of the funds received from the sale of confiscated criminal assets. Although reports confirm that MSs make efforts to compensate victims of crime using funds received from the sale of confiscated criminal assets, it seems that sometimes these funds are viewed by state authorities as a budgetary source that should contribute to the state budget in general. This demonstrates a fundamental misconception – unfortunately sometimes among decision-makers – of the rationale behind the confiscation of criminal assets. It seems that better understanding of the motivation for asset confiscation would contribute to the improvement of national legislations and its application. MSs that have extensive experience (e.g. Italy) have realised that, in certain instances, investing additional funds in the disposal phase can yield better results.



Even if confiscated funds are used for social programmes, their route through the budget raises some issues. The general public cannot fully assess the results of confiscation of criminal assets and measure the effectiveness of this anti-organised crime measure. To tackle this problem, some MSs channel funds received from the sale of confiscated assets directly to specific funds. This earmarked money is usually employed to directly assist victims of particular serious crimes that affect a larger group of members of society.

**FIGURE 7. DISPOSAL PROCEDURE FOR ASSETS FROM DRUG-RELATED CRIMES IN SPAIN**

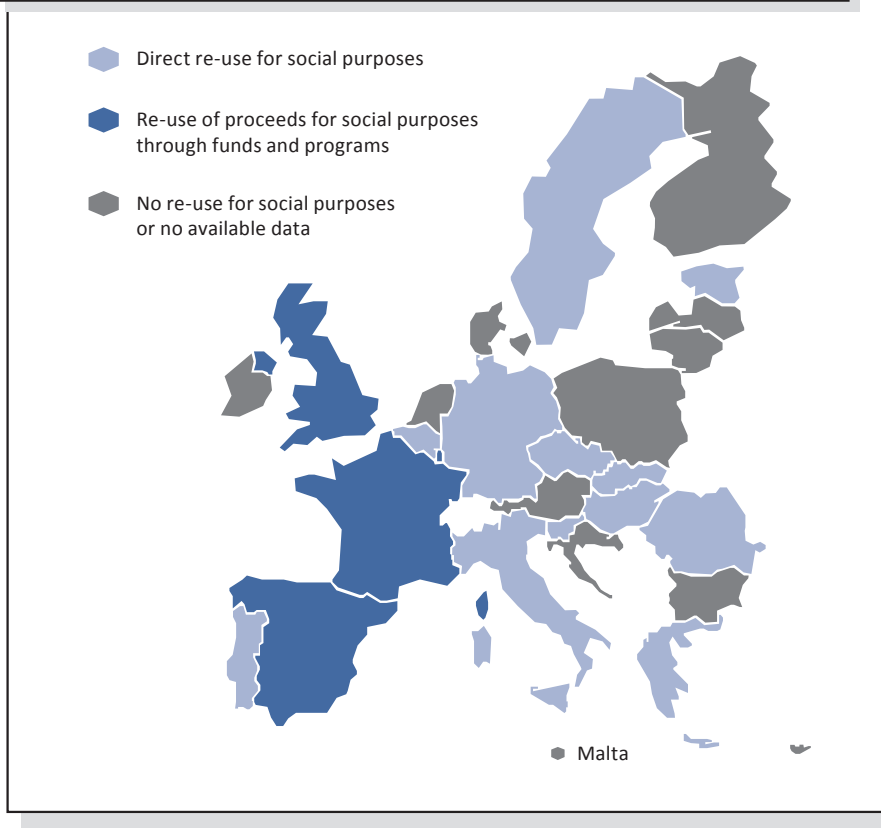


This social use of funds received from the sale of confiscated criminal assets is a method of social re-use. Although this method has positive features, it is not widespread, and it is applied by few MSs (France, Spain and the UK). The case studies on these three MSs also demonstrate that this option has certain limitations with respect to its scope. Although in Scotland recovered criminal assets are invested in the 'CashBack for Communities' programme, facilities and activities largely for young people at risk of turning to crime/anti-social behaviour, this approach is an exception. It seems that cashed assets are best employed if they are earmarked for countering drug-related offences (France and Spain) because funds are needed for the treatment and

social rehabilitation of the victims, who are easily identifiable. It could be argued that this approach is a good practice in the case of specific serious crimes whose victims are easy to identify, and who need rehabilitation and reintegration. It seems that such are victims of drug-related crime for funds confiscated from drug-related offences, or victims of human trafficking for assets confiscated from human trafficking. However, the use of 'cashback' programmes as a universal social re-use mechanism may not be the best practice.

A final note concerning sale as the disposal option is that heavy dependency on it as the main method has weaknesses. That is to say, the sale of confiscated assets is not the best option in all instances. However, heavy reliance on the cashing of confiscated assets as the primary disposal mechanism does not address the variety and status of property for disposal and the full range of disposal of criminal assets objectives.

FIGURE 8. SOCIAL RE-USE PRACTICES IN THE EU



#### 4.2.2. Destination of transferred property

A specific problem that arises with the re-use of property as a disposal option in some countries is identification of possible beneficiaries of the assets (Bulgaria, Estonia). Another critical factor is the quality of the information provided by the relevant authorities to the potential beneficiaries about the items available for re-use. The lack of proper descriptions and photographs of the items and their condition, or information on the time of confiscation, complicates the decision by the beneficiaries on whether to apply for the available assets (Hungary).

This concern, it seems, directly links with the issue of the **lack of a specialised central disposal authority**. This study identifies the lack of a dedicated centralised database as **a factor that complicates access to information by potential beneficiaries**. Of course, a specialised central national authority would manage such a database. To be noted is that the centralised non-specialised authority option does not mitigate the issue because MSs which adhere to such a regime (e.g. Bulgaria) indicate that it creates problems. On the other hand, MSs that have such a centralised specialised body seem better able to manage the process: in France, for example, AGRASC provides leadership on the matter.

Empirical data demonstrate that, although a specialised central authority managing the process is one of the best practices identified in this report, it is not the sole solution for the problem. The examples of a MS that adheres to the decentralised model (Estonia) and a MS that adheres

to the centralised non-specialised approach (Romania) indicate that there are other solutions. The **Estonian Tax and Customs Board and the General Directorate of Public Finance in Romania maintain publicly accessible lists of goods available for social re-use purposes on the Internet, and eligible beneficiaries can submit applications for them.**

The approach applied by Romania and Estonia is a best practice because it seeks to address the matter. Nevertheless, it is reactive approach which relies on beneficiaries that are willing and able to take the initiative. It is apparent that a non-specialised disposal entity will find it difficult to apply a proactive approach in identifying potential beneficiaries. The reactive approach does not have deficiencies *per se*. However, the combination of the two approaches, it seems, is a better option, with the potential more effectively to achieve the objectives of the social re-use disposal option. It is clear that only a central specialised authority is in the position to do so, thus providing the MS with a wider range of options.

The survey of MS legislations conducted by the current study shows that there are two destinations for re-use of confiscated criminal funds. One of them is the state or municipality, to which confiscated property is granted for utilisation. This is the most frequent beneficiary. The other option is to provide the confiscated criminal assets for social re-use.

**The direct utilisation of confiscated criminal assets for institutional purposes** is widespread in MSs. This disposal method with state or municipal bodies as the beneficiaries is usually employed with respect to vehicles and real estate. This option is sometimes criticised as not providing direct benefit to the public from the confiscated assets. Indeed, there are instances in which such practices are not economically sound and do not seem to enhance the trust of citizens in public institutions. For example, allocating a confiscated luxury vehicle, with a substantial market price, for use by the head of a local revenue service seems questionable. On the other hand, there are instances in which a disposal method of this kind is the only feasible option.

Past Italian experience shows that real estate confiscated from the mafia is not a sought-after asset in the disposal process through public sale. Similar issues are reported by other MSs (Bulgaria, Denmark and France). Such property is often exorbitantly expensive. For this reason MSs (Portugal) report that such property is difficult to dispose of. This is coupled with the risk of selling such property to individuals or entities associated with the criminal enterprises from which it was confiscated in the first place, thereby annulling the main rationale for the confiscation. Therefore, in certain cases, disposal through re-use by state or municipal institutions may be the most viable disposal option.

The direct utilisation of confiscated property for social re-use purposes has several positive features. Firstly, assets that are misappropriated from society are returned to the public in a transparent manner. This is particularly true of this disposal method. As noted above, although both cashing the property and transferring the funds to the state budget may

be only intermediary steps in use of the funds for social needs, it is more difficult for the public to perceive this. Direct re-use of confiscated property, in particular for social purposes, is a powerful means to enhance public confidence in the justice system.

It seems that this approach can better serve the needs of wider victimized communities than cashback programmes. Use of this disposal method, in which a wider community of victims can benefit from the results of successful criminal asset confiscation, should be supported. An argument in favour of this option is that communities may suffer from the operations of criminal enterprises without being able to clearly identify the source of their suffering. A case in point is operations by criminal enterprises in a region where it runs 'legal' businesses financed through funds from their illegal operations. Not only is this a money-laundering technique but it also distorts fair competition. Rather than seeking funding from legitimate credit institutions at market prices, which could be expensive in a period of economic crisis, such 'legal' businesses can obtain virtually limitless credit from the shady operations of the funding criminal enterprise. Thus, business owners whose businesses that went bankrupt might not be that easy to identify as a victim of organised crime operations. Still, they are such victims, as is their community.

Direct social re-use is not problem-free, however. The issues are similar to those generally related to the sale of confiscated criminal assets. There are problems related to the social re-use of property under joint ownership, mortgaged real estate, etc. One major argument against direct social re-use it is that it is not always the most economically sound option. Re-use of funds received from the sale of confiscated proceeds is more economically sound and easier to manage. It is more efficient; however, it is difficult to argue that it is always more effective in achieving all the objectives of confiscation.

#### **4.2.3. Destination of rented property**

Rent is further limited in its application as a disposal option by the fact that it is used as an interim measure. In Belgium, this disposal option is employed for real estate if the market price is depressed. In such cases the Patrimonial Services may decide to rent: a public procedure is opened, and the real estate is rented to the highest bidder.

Analysis suggests that rent is an option in cases where sale is not feasible or the property will be sold at a loss, or the property cannot be conclusively assigned to a beneficiary. It seems to be an alternative to the re-use of property by the state because the state retains ownership rights. The distinct added value of rent as a disposal option resides in the method employed by Belgium. This is particularly true, in some MSs (Bulgaria, Greece, etc.) which report that depressed real estate prices cause problems in disposal of confiscated real estate.



## 5. POLICY PROPOSALS ON “THE WAY FORWARD”

After the foregoing analysis of current legal frameworks at EU and MS level, as well as of the practices applied by the MSs with respect to the disposal of confiscated criminal assets, the question that now arises concerns the way forward. Proposals can be made at both national and EU level (see Table 4).

TABLE 4. POLICY PROPOSALS

| Policy proposals at EU level   | Policy proposals at national level                                   |
|--|--|
| Minimum standards on funds for victim compensation                               | Value confiscation as a subsidiary option                            |
| Social re-use of confiscated assets – a disposal option of greater applicability | Statistically accurate data management systems on confiscated assets |
| Monitoring system – property is not reacquired by organised crime                | Specialised training   |
| Establishment of specialised central national authorities for disposal           | Civil society’s role in the disposal phase                           |
| Mutual recognition of non conviction-based asset confiscation                    | Interagency cooperation and communication                            |

### 5.1. PROPOSALS AT EU LEVEL

The fundamental issue is **whether it is advisable to adopt a legal instrument at EU level that sets minimum standards for the disposal of confiscated criminal assets**. This study demonstrates that EU MSs are paying more attention to disposal methods. This is due to their better understanding of the objectives behind confiscation, which go beyond the simple deprivation of criminal enterprises of their assets. Only limited attention is paid to the final destination of the confiscated assets.<sup>40</sup> Despite this growing awareness in the EU, as demonstrated above, a wide range of options are utilized by MSs in similar scenarios. This creates a lack of predictability in international cooperation on the disposal of criminal assets in the EU. It may also hamper mutual recognition in

<sup>40</sup> Basel Institute on Governance, *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*, 2012, p. 54.

certain instances. To mitigate these potential negative developments in certain areas in which there seems to be unanimity, the EU could set minimum requirements observing the subsidiarity principle. This could be done with respect to selected elements of disposal.

**One such element is victims compensation.** The EU legal framework could set minimum requirements for the MSs to establish funds in which the proceeds of sold assets confiscated from criminal enterprises are deposited for victim compensation. MSs have already put in place systems to compensate victims of crime,<sup>41</sup> partly because there are standards established by pertinent EU legislative instruments on victim compensation and international agreements to which MS are signatories.

Although MSs compensate victims of crime through such funds, they do so in different ways. The change will be if victim compensation funds do not go through the state budget. Streamlining the process of victim compensation could be a good candidate for EU action observing the subsidiarity principle. This report seeks to demonstrate **that earmarked funds for victim compensation are a better option due to their transparency.** This is particularly true in cases where MSs cash property to fund victim programmes. Some MSs already have experience with such earmarked funds. Because MS extensively use the sale of confiscated criminal assets as a primary disposal mechanism, this is yet another argument in favour of this proposal. Although this option could be used for all confiscated assets, this report suggests that it should be employed for victims of specific types of crime such as drug-related ones and human trafficking. The reason is that the victims of these crimes are easy to identify, and they are in need of special treatment and rehabilitation programmes.

**EU legislation could also be instrumental in implementing the social re-use of confiscated assets as a disposal option of greater applicability.** This approach would respond to the lack of EU norms on the matter<sup>42</sup> It would also be in line with the 2010 Report on organised crime in the European Union,<sup>43</sup> where the European Parliament calls for urgent EU legislation on the re-use of crime proceeds for social purposes in order to re-inject the funds of criminal organisations into legal and transparent economic activities.<sup>44</sup> There are EU MSs that have experience in social re-use, and in certain cases it could be the option that yields the most positive results. There is growing support for the idea of EU legislation on social re-use.<sup>45</sup> The re-use of confiscated assets for social purposes is considered to foster a positive attitude to strategies aimed at tackling

<sup>41</sup> Rand Europe, Study for an impact assessment on a proposal for a new legal framework on the confiscation and recovery of criminal assets – Technical Report, European Union, 2012.

<sup>42</sup> This recommendation is in line with the 2012 Basel Institute of Governance Report reads, which on p. 9 reads “current EU regulation does not address the social re-use of confiscated assets.”

<sup>43</sup> European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Report on organised crime in the EU (2010/2309(INI)).

<sup>44</sup> Ibid., p. 11 of the report.

<sup>45</sup> The Basel Institute on Governance recommends “a Directive aiming at the establishment of coherent and transparent procedures in the MS, requiring an option for socially re-using confiscated criminal assets.”

organised crime. The rationale is that the confiscation of assets is no longer regarded solely as a means to deprive a criminal organisation of resources; it is also a means to prevent organised crime and boost economic and social development. It seems feasible to use it with respect to real estate in particular.

It is advisable that EU legal instruments employ some of the best practices of the MSs to ensure that confiscated property disposed through assignment for direct social re-use is not misappropriated or misused. Considering MS experience that criminal enterprises use third parties to acquire assets for them, **it is advisable to mandate the MSs to introduce a monitoring system that ensures that property is not reacquired by organised crime.** This monitoring mechanism could be assisted by community whistleblowers; yet in order to make such oversight feasible, it is strongly recommended that the allocation of assets for social re-use be done in transparent manner. This is in line with the recommendations of the European Parliament in its 2010 Report on organised crime in the European Union, which underscored the pivotal importance of public sector transparency in combating organised crime, further calling for EU rules that ensure that the allocation and use of EU funds is fully transparent and supervised by the competent institutions and society.<sup>46</sup>

Another area that requires common regulation by the EU is the assignment of confiscated assets for direct social re-use. Identification of the beneficiaries of assets allocated for social re-use is not an easy task. This report identifies as a best practice the approach whereby information on assets assigned for social re-use is made available to the general public. Civil society is encouraged to take a proactive approach in applying for assignment of the confiscated property. This is fully in line with the above recommendation on a transparent system of assigned property.

As previously noted, this call for civil society to be proactive in the distribution of confiscated assets is one aspect of the endeavour to improve and promote social inclusion in the disposal of confiscated criminal assets through social re-use. However, as already stated, the results could be enhanced through a combination of the proactive approach on behalf of civil society and the national authorities tasked with the disposal of confiscated assets. Therefore, possible EU legislation should promote both these approaches.

Although all institutional approaches to the disposal of assets have their strengths, it seems that there are certain advantages to a centralised specialised body charged with the task. Its benefits are clearly identifiable when it comes to encouraging a proactive approach by MSs in the assignment of confiscated assets for social re-use. Therefore, **an EU legal instrument could also promote the establishment of such specialised central national authorities, which could also provide guidance to**

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<sup>46</sup> European Parliament, Committee on Civil Liberties, Justice and Home Affairs, Report on organised crime in the EU (2010/2309(INI)), p. 16 of the report.



**the other bodies involved in the asset recovery process and collect reliable data on criminal asset disposal.** Such an approach would also maximize the added value of any disposal method employed by the MS. Finally, yet importantly, it would be conducive to making international legal cooperation in the disposal phase clear and streamlined.

The final crucial element that requires especial attention at EU level is the issue of international cooperation in the disposal of assets from non conviction-based confiscation. As noted above, despite high expectations, Directive 2014/42/EU does not address the matter. Because, under EU secondary legislation, only confiscation orders issued by a criminal court are recognised, the disposal of assets through trans-border cooperation encounters problems. **It is mandatory that the EU address the broader question of mutual recognition of non conviction-based asset recovery because recognition of confiscation orders issued by non-criminal courts, and in MSs that adhere to non-conviction asset confiscation, is hampered.** This finding is in line with the 2012 Basel Institute for Governance Report. This confirmed that several EU countries provide for non conviction-based confiscation but there is no legal instrument encouraging it within the EU, and it advocated introduction of EU legislative rules promoting non conviction-based confiscation. In its turn, the lack of adequate EU-level regulation of non conviction-based asset confiscation undermines efforts at successful cooperation among EU MSs in the disposal phase. (See Table 4)

## 5.2. PROPOSALS AT MS LEVEL

Unlike the recommendations at EU level, those at national level primarily concern improvement of domestic practices. The reason is that legislative changes would lead to results across the board in all MSs if adopted within a mandatory minimum standard set by the EU. Of course, in light of the above recommendations, improvement is possible and desirable. However, this study does not seek to make MS-to-MS recommendations. It provides an analysis of best practices and lets each MS choose the best way to apply them in their national jurisdictions.

The only possible exception to this general principle concerns the **recommendation to MSs to introduce value confiscation as a subsidiary option.** MSs are mandated to introduce value compensation in any event. This study, however, supports its role as a subsidiary tool. As reported by respondents consulted by this study, it may be difficult to cash certain confiscated asset for various reasons. They may be mortgages on the real estate, which in certain instances can make the sale price of the real estate prohibitive, rights of third parties, confiscation of companies that are compilations of assets and obligations if the obligations substantially exceed the assets, assets that have been hidden by criminal enterprises and are beyond the reach of law enforcement, etc. This study suggests that, in such cases, value confiscation can be a good way to avoid complications in the disposal

process. This study maintains that national legislations should introduce value confiscation as a subsidiary option. In fact, in certain instances the public will be unable to see organised crime enterprises stripped physically of their possessions if the confiscation is not as far-reaching as desired and leaves hidden assets beyond law-enforcement reach. Yet this approach has its economic rationale, which means that it should be available for sparing utilisation.

**MSs should introduce reliable, comprehensive and statistically accurate data management systems on confiscated assets.** As noted above, the introduction of such systems has been recommended by previous reports.<sup>47</sup> It is also set as an obligation on MSs by Directive 2014/42/EU, which indicates that currently “existing statistics are limited”.<sup>48</sup> This report also discusses the system in the previous subsection devoted to policy proposals at EU level. However, it does so in relation to the mandatory introduction of a centralised specialised national authority responsible for the disposal of confiscated assets. Here the recommendation is that, irrespective of compliance with the above suggestion, the need to rectify this particular flaw at a national level is indispensable. Article 11 of Directive 2014/42/EU mandates MSs to collect only a certain type of statistics related to disposal: “the estimated value of property recovered at the time of confiscation”. The Directive suggests that the collection of such data could impose administrative and financial burdens on the MSs which they may deem disproportionate.<sup>49</sup> Yet it does not require MS to collect further statistical data shedding more light on the disposal phase. It seems, however, that such data could be highly instrumental in developing national and EU policies with respect to the disposal of confiscated criminal assets.

**MSs are advised to introduce specialised training.** This issue has been extensively discussed in the report and in the summary. Approximately half of MSs declare that they have no specialised training, which undoubtedly hampers the effectiveness of their disposal efforts.

**The broader inclusion by the MSs of civil society in the disposal phase is advised.** As already noted above, some MSs, Hungary in particular, have established a viable practice of consulting civil society on the final destination of confiscated assets. This could address one of the issues identified, namely locating beneficiaries of the funds, which, as noted above, some MSs report to be difficult to find. It could be argued that such a policy change does not necessarily call for legislative change. Any national authority charged with disposal could consult civil society in various ways, such as the establishment of consultative forums inviting submissions of *amicus* briefs, etc. All such formats will suffice to comply with the recommendation to include civil society in the process, thereby enhancing the objective of confiscation related to consideration for the rights of victims and deprived communities, and meeting the need to maintain public confidence in justice systems.

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<sup>47</sup> Ibid.

<sup>48</sup> Point 4, Preamble of Directive 2014/42/EU.

<sup>49</sup> Ibid, point 37.

**Finally yet importantly, MSs should improve interagency communication and cooperation.** The lack of adequate cooperation or communication among national authorities is cited as one of the critical factors hampering disposal. One way to improve interagency cooperation is to create a centralised specialised body, which *inter alia*, could be charged with the task.

In conclusion, it is worth mentioning that the findings and recommendations of this chapter appear in another study focused on global challenges to asset confiscation. The 2011 StAR Initiative study<sup>50</sup> identifies some of the above issues identified at EU level as global challenges to more effective asset confiscation: for instance, a lack of non conviction-based confiscation and the lack of a publicly available registry. (See Table 4)

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<sup>50</sup> Stolen Asset Recovery Initiative (StAR) of the World Bank and UN Office of Drugs and Crime, *Barriers to Asset Recovery; An Analysis of the Key Barriers and Recommendations for Action*.

# ANNEX I. COUNTRY PROFILES

## AUSTRIA

Confiscation within criminal proceedings in Austria is regulated by the *Criminal Code* and the *Criminal Procedure Code*. Confiscation outside criminal proceedings is not an option.

Legal provisions exist on the **management of seized assets** aimed at optimising their value/minimising their deterioration. Section 115e Criminal Procedure Code as amended by the *2nd Budget Stabilisation Act 2012 – 2nd StabG 2012*, which entered into force on 1 September 2012, provides the option of selling frozen or seized assets. The safekeeping of frozen or seized assets often causes organisational problems or sometimes implies enormous costs. Therefore, the sale of assets subject to rapid deterioration or considerable value reduction, or that can only be stored at disproportionately high costs, should be facilitated. Upon request by the public prosecutor, the sales decision is taken by the court, but sale is not permitted if seized assets are required for evidence purposes (section 110 (4) Criminal Procedure Code). No sale due to disproportionate storage costs shall be made if an adequate amount of money is paid in a timely manner to cover such costs. If the court has ordered forfeiture, extended forfeiture, confiscation or confiscation according to section 26 of the Criminal Code, and if the assets are not yet in the keeping of the court, the sentenced person or affected persons (section 64) are requested in writing to deposit them within 14 days or otherwise transfer the power of disposal to the court. If they do not comply with the court order, the office for collection of debts (*Einbringungsstelle*) has to be requested to initiate execution proceedings.

According to existing **legal provisions** in Criminal Procedure Code on the disposal of confiscated assets, an object declared forfeit or confiscated which is of scientific or historical interest or of interest for teaching, experimentation, research or other expert activities, must be handed over to the public institutions or collections existing for such purpose in Austria. Moreover, objects that can be directly used to cover the costs of the judicial system must be used for that purpose. Other objects must be alienated as provided in section 377. Objects that can neither be used nor alienated must be destroyed (section 408). According to section 409b CCP, fines, confiscated money and money from sales (sections 115e, 377) go to the State. According to sections 20 and 20b of the PC, 20 % of the forfeited assets are transferred to the Ministry of the Interior.

If a case involves **mutual recognition of a foreign confiscation order**, the confiscated assets are repatriated from Austria to a requesting EU Member State and USA with a 50/50 split.

## BELGIUM

Confiscation in Belgium is a penalty following criminal conviction. In regard to the **management of seized assets**, specific legal provisions to optimise their value/minimise their deterioration are contained in the law of 26 March 2003 that created the Central Office for Seizure and Confiscation (COSC). Art. 6 requires the prosecutor (or the investigative judge, during instruction) to ensure that seized assets are managed so as to maintain a “constant value”, which results in one of the following actions: 1 sale of the assets; 2 restitution of seized assets against payment of a sum of money; 3 conservation in nature of the assets, based on available means. Another relevant article is art. 280*octies* (and art. 61*sexies*, for instruction) of the Code of Criminal Instruction: ex officio or upon request by COSC, the prosecutor/investigative judge that decides to keep certain assets under seizure may authorize their alienation by COSC or return them to the defendant against payment of an equivalent sum of money. The decision to sell may concern replaceable assets, assets whose value is easy to determine and whose conservation in nature may cause depreciation, damage or costs disproportionate to their value. The 2003 law therefore made it possible to sell movable seized assets. COSC works with the Patrimonial Services (an office within the Federal Public Service of Finances) to organise these sales or with a specialised seller (art 10 of the Law of 26 March 2003). Real estate, in fact, can only be sold with the consent of the defendant. Legal modifications are still due so that seized real estate can be sold without the need to reach an agreement with the defendant.

Various **legal acts** discipline the disposal of confiscated assets. Final confiscation orders are executed on behalf of the public prosecutor by the Patrimonial Services, based on instructions from COSC. The Patrimonial Services carry out the activities and submit to the Treasury the applications necessary to guarantee the rights recognised by the confiscation order (art. 197*bis* of the Code of Criminal Instruction). Other relevant acts include the Royal Decree of 10 December 1868, the law of 31 May 1923, the law of 17 July 1991 and the law of 22 May 2003. To be noted is that these laws concern, in general, the sale of state property. The following disposal options are envisaged:

- *sale to the general public*, which is the main disposal option. Arts. 117 to 120 of the 2003 law state that real or personal property belonging to the State, which cannot be re-used and can be alienated, shall be sold or otherwise realised with the assistance of the Patrimonial Services;
- *rent of real estate*: if it is not a good time to sell real assets, the Patrimonial Services may decide to rent them. A public procedure is opened, and the real estate is rented to the highest bidder;
- *temporary transfer* of movable assets to other Federal departments based on borrow protocols (on demand): in many cases confiscated cars are requested by the Police or by the State Security;
- *destruction/recycling of movable assets*: assets with no value or dangerous in themselves are destroyed, while paper/metals/computer hardware are recycled;

- *restitution* to victims (civil parties);
- *social re-use (for real estate, in the Flemish Region only)*: this is based on the Decree containing the Flemish Housing Code<sup>51</sup> of 15 July 1997.

The **key actors** involved in the disposal phase in Belgium are the following:

- criminal courts, which issue the final confiscation order;
- COSC, which is the intermediary between the Courts and the Patrimonial Services;
- Federal Public Service of Finances – Patrimonial Services, that attends to the realisation of state properties in any form (sale, destruction, recycling, rent).

The **workflow** is different for movable and immovable assets. In general, after a final confiscation order is issued, it is sent to the Federal Public Service of Finances, and a Domains receiver is appointed. After a 90-day period (in which any third party can claim the goods), sale can be arranged. More in detail: 1) *movable assets*: legally have to be physically transferred to the Patrimonial Services. However, if these assets were not seized before confiscation, a physical transfer often never happens; 2) *real estate*: the decision is subject to transcription at the mortgage office. If indeed final, the Patrimonial Services take over the management of the confiscated real estate. A special central office, FINDOMMO, has recently been created to ensure the more efficient management of all real estate, including confiscated real estate. This office prepares real estate to be sold by another service (real estate committees) specialised in the sale of real estate.

There is no legal provision regarding the **timing of the disposal phase**. In practice, sales of movable assets are planned at regular intervals by the various offices within the Patrimonial Services. Regarding real estate, in theory its sale (including transcription at the mortgage office) should take between 6-12 months. However, the problems in practice are so numerous that even a reasonable time scale is mostly not the case.

A variety of problems arise **in existing practices**. Some of them concern *interagency cooperation*. For example, not all final confiscation orders are transferred to the Patrimonial Services. This typically happens when a decision is appealed, because different clerk offices are involved.

The following assets are usually difficult to dispose of:

- foreign vehicles, or ones reported stolen elsewhere: these often create problems for buyers;
- assets without any real value but a high cost of destruction (used items);
- movable assets which were not seized before the confiscation decision;
- real estate, as long as legal actions take place or occupation/permit/mortgage/environment issues continue;

<sup>51</sup> Décret contenant le Code flamand du Logement.

- properties belonging to third parties (both personal and real property). Legal action is often taken against confiscation.

**Assets usually easier to dispose of** are the following:

- movable assets that have been seized and are physically delivered to the Patrimonial Services;
- when an early decision is made on the condition of a car as a wreck, it can be quickly sold to a scrap dealer officially recognised by the authorities (the procedure works with bids on lists sent by e-mail to all recognised dealers);
- a real estate property free of occupation/mortgage/permit or environment problems (this situation is exceptional).

The **social management of real estate** is most used in Antwerp, while there are fewer cases in other parts of the Flemish region.

Belgium has implemented Council Framework Decision 2006/783/JHA on the **mutual recognition of confiscation orders**. The territorial competent prosecutor sends the request to the Court of first instance. After hearing the prosecutor and the defendant, the Court decides if the confiscation order may be executed, considering grounds for refusal or reasons to postpone the execution. The decision of the Court of the first instance may be appealed before the Court of Appeal. In these cases, problems arise if the assets were not previously seized, since there is the risk that they may be sold before enforcement of the confiscation order.

In regard to **available resources**, an office (two persons) has been created within the Patrimonial Services to handle problems concerning confiscation. At the COSC there are two permanent liaison officers from the department of Finances/Patrimonial Services.

As for **training**, every year several days of training are held within the Patrimonial Services on seizures and confiscations (background information, because 'selling' is their core business, regardless of whether the items come from confiscation or other sources).

## BULGARIA

Currently, Bulgaria has criminal confiscation and civil forfeiture regimes. These are not alternatives and may be cumulated. Until 19 November 2012, civil forfeiture was regulated by the Law on Forfeiture of Proceeds of Crime, while criminal confiscation was regulated by the Criminal Code. In the spring of 2012 the Parliament adopted a new Law on Forfeiture of Illegally Acquired Assets that entered into force in November 2012.

The main legal acts that regulate the **management of seized and confiscated assets** are: (1) Law on Forfeiture of Illegally Acquired Assets; (2) Civil Procedure Code; (3) Criminal Code; and (4) Criminal Procedure

Code. According to the current Law, the freezing and seizure of proceeds of crime under the civil forfeiture procedure is applied by the civil court upon request by the Commission for forfeiture of illegally acquired assets, following charges brought by the Prosecutor's Office under the provisions of the Criminal Code that fall within the scope of the Law. Similarly, the freezing and seizure of property that may be subject to criminal confiscation is secured by the criminal court upon request by the Prosecutor's Office (art. 72 Criminal Procedure Code). There are no provisions in the current legislation to optimise their value/minimise deterioration before the assets are confiscated, but, exceptionally, the Commission may request permission from the court to sell movable assets, which may depreciate substantially during the period of their keeping, may entail substantial expenses in relation to their keeping, or may deteriorate rapidly (Art. 84 of the Law).

The main **legal acts** that regulate the disposal of confiscated assets are the Law on the National Revenue Agency and the Tax and Social Insurance Procedural Code (TSIPC).

The main **actors** involved in the disposal process are:

- Prosecutor's Office: requests seizure and confiscation in criminal proceedings;
- Commission for Forfeiture of Illegally Acquired Assets: requests seizure and confiscation in civil proceedings;
- criminal/civil court: orders seizure and confiscation;
- National Revenue Agency: disposes of confiscated property via a special unit, the Sales Department at the Collection Directorate;
- Inter-Institutional Council: according to the new Law on Forfeiture of Illegally Acquired Assets, it receives information on forfeited property from the Commission for forfeiture of illegally acquired assets and proposes to the Council of Ministers whether the property should be granted to budgetary entities, municipalities or sold by the NRA. The Council is composed of one deputy minister of the following Ministries: Ministry of Justice, Ministry of Finance, Ministry of Economy, Energy and Tourism, Ministry of Labour and Social Policy, Ministry of Regional Development and Public Works.

The **disposal procedure** starts with the issuance of a court order. After the assets become public property, the Prosecutor's Office and the Commission for forfeiture of illegally acquired assets send court confiscation and forfeiture orders to the National Revenue Agency (NRA) for public auction executed under the Tax and Social Insurance Procedural Code (TSIPC). In a limited number of cases, the NRA grants forfeited property, primarily motor vehicles, for use by other state agencies. Under the current regime, the Commission for forfeiture of illegally acquired assets sends the information about forfeited property to the Inter-Institutional Council, which, under art. 89 of the new Law, proposes to the Council of Ministers how to dispose of that property. Budgetary organisations or municipalities may be beneficiaries. The NRA will sell property that is not allocated to any entity (art. 90 of the new Law).



Turning to **existing practices**, the NRA encounters the following key problems in asset disposal: ownership issues (mortgages and shared ownership of property); procedural problems (related to incomplete/inaccurate ownership documents). The most acute and frequently encountered problem in the sale of confiscated property is the existence of real estate mortgages. Since the market value of mortgaged properties fell after 2009, in most cases the creditors have claimed the entire proceeds from the sale. Other issues relate to the owner's reputation and market conditions. When a property owned by members of organised criminal groups is offered, a buyer can seldom be found. Market factors, such as the demand for and the value of real estate, have major impacts on the ability of the NRA to sell confiscated property. In recent years, falling real estate values and contraction of the market have been the main barriers to successful sales. These problems are exacerbated by the type of procedure applied by the NRA, which was originally intended to collect unpaid taxes and social or health insurance fees. The lack of a specific legal procedure under the TSIPC for public auctions of confiscated property creates various 'grey zones' and legal gaps affecting the practical outcome of the sales.

Moreover, experience shows that cooperation between the Commission for forfeiture of illegally acquired assets and NRA needs improvement. The Commission should make more effort to inform the NRA in timely manner about prospective difficulties with the forfeited property. Although the Law on the NRA provides for the re-use of confiscated assets, to date this procedure has been applied mainly to personal property (motor vehicles), and to a much lesser extent to real estate. The focus on sales, the relatively limited amount of confiscated property, and the lack of awareness among potential beneficiaries, are the most important reasons for the low level of real estate property re-use.

Currently, the sales procedure for forfeited and confiscated property in compliance with the TSIPC takes between 4 months and 2 years. No prediction can be made concerning the duration of the process under the new Law on Forfeiture of Illegally Acquired Assets.

Bulgaria has transposed the Framework Decision 2006/783/JHA on **mutual recognition of foreign confiscation orders** through the Law on Recognition, Execution and Dispatch of Confiscation or Forfeiture Decisions and Decisions for Imposition of Financial Sanctions. It should be noted, however, that this Law and the Framework Decision that it transposes apply only to criminal confiscation: Cases covered by this Law do not introduce deviation from the general procedure for disposal. The district court is the competent authority for recognition. The NRA is competent to execute recognised foreign decisions. The NRA has no practical experience in the execution of foreign confiscation orders, given that it received only two orders in 2011 and 2012.

Currently, all institutions involved in the confiscation and disposal of criminal assets in Bulgaria have sufficient **material and human resources**. The Prosecutor's Office, the Commission for forfeiture of illegally acquired assets, and NRA need additional **training**.

## CYPRUS

Proceeds from crime confiscation are regulated in Cyprus by The Prevention and Suppression of Money Laundering and Terrorist Financing Laws of 2007 and 2010.

Regarding the **management of seized assets**, section 14 provides for the appointment of a receiver. In fact, a receiver is appointed for movable property in order to prevent loss of value (e.g. cars). Bank accounts, instead, do not need a receiver because the money remains in the bank account, which is partly/totally frozen.

As regards seized real estate and bonds (which cannot be sold), the relevant provision is section 15, which envisages charging orders: these create a charge on the realizable property in order to secure payment to the State in the case of confiscation. There are no significant critical factors hampering the timely and successful management of seized assets. This is because most cases are not complex.

The above-mentioned laws of 2007 and 2010 are the **key legal acts** regulating the disposal of confiscated assets. The disposal options envisaged are the following:

- *transfer of the money (eventually obtained via the sale of certain assets) to the State budget*: section 17 (1) states that after a confiscation order has been made for which there was no appeal and which remains unenforced, the court may on application by the prosecution exercise the following powers: (a) appoint a receiver for realization of the property; (b) empower the receiver so appointed or the receiver already appointed to manage seized assets or under other provisions which relate to the issue of charging orders, to enforce any charge imposed under section 15 and to take possession of any other realizable property not affected by a charge; (c) to order any person having possession of realizable property to give possession of it to any such receiver; (d) to empower any such receiver to realize realizable property in such manner as the court may direct; (e) to order any person holding an interest in realizable property to make such payment to the receiver in respect of any interest held by the accused, or, as the case may be, the recipient of a prohibited gift, and then the court may, after the payment is made, order the transfer, grant or extinction of any interest in the property;
- *restitution to victims*: if there are victims, it is common practice to use the money recovered from the confiscation order to satisfy their claims.

The **key actors** involved in the disposal phase in Cyprus are the following:

- criminal court: issues the confiscation order;
- public prosecutors working on the main case (which focuses on the criminal liability of the defendant);

- MOKAS<sup>52</sup> (FIU Cyprus): a public prosecutor, member of MOKAS, assists the public prosecutor of the case in the confiscation proceedings, which start after conviction in the main case has been pronounced; enforces the confiscation order;
- Accountant General: deposits the confiscated assets in the State Budget.

After a confiscation order has been issued, it is transmitted to MOKAS, which waits until the order becomes final (i.e. no appeal is pending against it) and then issues a letter requiring the convicted person to pay the amount due under the confiscation order. If the person fails to comply with the confiscation order, an application is made by MOKAS to the Court to appoint a receiver to sell previously restrained assets (alternatively the person may be authorized to sell them on his/her own) or other assets belonging to the defendant. The money from such sale is returned to the victims, if any, or is transferred to the Accountant General for deposit in the State Budget.

There are no specific provisions disciplining the **timing** of the disposal phase. Following a final decision, a couple of months are normally needed, although in complex cases (e.g. bankruptcy) the phase lasts much longer.

As regards **existing practices**, interagency cooperation seems to work well. The main critical factors hampering the successful and timely completion of the disposal phase can be summed up as follows:

- the restrained assets are insufficient to cover the amount to be paid under the confiscation order;
- bankruptcy cases;
- the assets are to be recovered in other jurisdictions.

The types of assets usually easy to dispose of are cash/deposits. Conversely, the types of assets usually difficult to dispose of are:

- real estate, where a receiver must be appointed and a buyer must express interest in the property;
- real estate with mortgages, especially when the value of the mortgage is higher than the real market value of the property.

Cyprus has implemented Council Framework Decision 2006/783/JHA on the **mutual recognition of confiscation orders**. The relevant provisions are contained in Part IVA of the 2007 and 2010 Laws. A 50/50 split applies in these cases, unless the value of the assets is below 10,000 €. Section 39(3) instead applies to MSs which have not ratified FD 2006/783/JHA and third countries. When the foreign order concerns the confiscation of proceeds or property, the proceeds or property may, after the enforcement of the said order, be distributed among the competent authorities of the foreign country and the Republic

<sup>52</sup> MOKAS: Unit for Combating Money Laundering (Μονάδα Καταπολέμησης Αδικημάτων Συγκάλυψης – ΜΟ.Κ.Α.Σ).

of Cyprus. According to section 43(1), any request for execution as regards a freezing order or confiscation order is submitted directly to MOKAS, which, if it considers that the requirements for recognition are met, submits it to the Court as soon as possible for registration and enforcement. Enforcement follows the procedure explained above for national confiscation orders. No obstacles have been so far observed in this procedure.

Available **human and material resources** seem to be sufficient. As regards **training**, within MOKAS there is on-the-job training delivered by people taking part in relevant fora at the EU and international level.

## CZECH REPUBLIC

Czech legislation allows confiscation only in criminal proceedings; these are regulated by the Criminal Code. The Czech Criminal Procedure Code allows both property and value confiscation.

The **management of seized assets** is undertaken by the prosecuting authorities in accordance with Act no. 279/2003 Coll., Act on enforcement of seizure of assets and items in criminal proceedings and on amendments to some acts. The entity which temporarily administers seized property is obliged to provide due protection of the property and care for its preservation, to use it efficiently and economically in such a manner that there is no damage to it or unjustified reduction in its volume, value or revenues from it.

The key **legal acts** governing disposal of confiscated assets are Act no. 219/2000 Coll., Act on the Property of the Czech Republic and Act no. 141/1961, Code of Criminal Procedure. There are two ways to deal with confiscated property: (i) financial assets that have been confiscated are administered by the Ministry of Finance. They directly become an income of the Czech Republic's state budget; (ii) material assets are administered after confiscation by the Office for Government Representation in Property Affairs (OGRPA) and other authorities under Act no. 219/2000 Coll. The following disposal options are available:

- *sale to the general public* through public tender (§ 22 Act no. 219/2000);
- *rent to the general public* through public tender (§ 27 Act no. 219/2000);
- *transfer to local authorities or state institutions* (§ 22(2) and § 19(3) Act no. 219/2000);
- *social re-use*: assets of any type of may be used to fulfil the state's social obligations (§ 19(3) Act No. 219/2000);
- *victim restitution* (§ 47-49 Criminal Procedure Code);
- *destruction* of movable property of no value (§ 81(3) Criminal Procedure Code);

- *other* (§ 9(1) of Act no. 219/2000): all relevant state institutions mentioned in §11 of the Act can keep property for their own use if they need it to fulfil their obligations.

The **key actors** involved in the disposal process are the following:

- prosecution service: requests the confiscation;
- courts: grant the confiscation;
- customs authority: confiscates property connected with the violation of customs regulations;
- Radioactive Waste Repository Authority: radioactive waste;
- Ministry of Environment: plants and animals;
- Police: telecommunication, radio-communication and recording equipment, computers and vehicles;
- Office of Government Representation in Property Affairs (OGPRA): deals with all property, except for the above mentioned property.

In practice, 99 % of disposal procedures are realized by the state police and by the OGRPA. The role of the OGRPA in the system for administration of the Czech Republic's property is as follows: acting on behalf of the state in legal procedures concerning property and dealing/administering state property that is not entrusted to specialised authorities (e.g. forests) or does not serve the needs of other state authorities (e.g. ministry buildings). The OGRPA has no administrative, inspective or executive powers besides inspecting such property that has been transferred from state ownership to non-state subjects free of charge, and enforcing sanctions, if necessary.

The **typical workflow** is as follows. The first step, which is obligatory for any disposal of any type of state property, is when the respective state institution offers the property (which it does not need for its own use) to other state institutions for pertinent use in execution of their own obligations. If no state institution asks for the property, this becomes unneeded by the state and is disposed in favour of non-state beneficiaries (including local authorities), either through sale by public tender or gratuitous transfer to a selected beneficiary. If the assets are not sold or gratuitously transferred, then other options are applied: rent of the property by public tender or gratuitous use. Contracts for rent or gratuitous use are always for a fixed period of up to 8 years maximum.

There are no statistics on the **timing of disposal**.

No major problems are encountered in **existing practices**, except for the disposal of shares in companies. Such assets are packages of rights and obligations which the state does not have an interest in keeping, and which are also difficult to evaluate and sell. Civil society is not involved in decisions on the disposal of confiscated property because 1) in the Czech Republic, confiscated assets are not distinguished from other property obtained by the state based on other legal titles; 2) the temporary administration of seized property as well as its disposal are decentralised (managed by several state institutions). As a result, it is

not possible to distinguish what property has been obtained in what circumstances.

In cases involving the **mutual recognition of a foreign confiscation order**, 50 % of the value of confiscated assets is repatriated to the requesting Member State if the value is above 10,000 €. Repatriation is executed according to Framework Decision 2006/783/JHA, which has been transposed into §460zj of the Criminal Procedure Code. The step-by-step procedure is described in §460z - §460zp of the same Code.

Human and material **resources** seem to be sufficient. With respect to **training**, personnel receive regular training on disposal, generally according to the Act on the Property of the Czech Republic and its representation in legal relations (on average once every two years). This, however, is not specialised training in confiscation and disposal.

## DENMARK

In Denmark, confiscation typically follows a criminal conviction. Seizure provisions are contained in the Danish Administration of Justice Act. Seized assets are managed either by local police districts (there are 12 in the country, each covering a given region) or by the ARO, at the State Prosecutor for Serious Economic Crime, in nationwide cases or in cases where the police districts ask the ARO to seize on a case-to-case basis.

There are no legal provisions on the **management of seized assets** to optimise their value/minimise their deterioration. This poses problems especially in the cases of 1) cars, which during the proceedings remain stored at the garage of the local police district, where their value diminishes; 2) items difficult to manage: hence, for example, even though animals may in certain cases be of great value, they are not seized because the competent officers do not know how to manage them.

The **legal framework** on the disposal of confiscated assets is not very developed. The two key disposal options available in the country are: sale of the confiscated assets and transfer of the money to the State budget, or their use to compensate victims' claims for damages. Moreover, another option is available when items like drugs or weapons are confiscated, i.e. their destruction.

As a general rule, confiscated proceeds from crime go to the Treasury, typically after the sale of assets other than cash. This is not stated by any specific legal provision contained in the Criminal Code; it is instead included in the documents/reports accompanying the draft Code and discussed by the Parliament before its approval.

There are no specific provisions disciplining the sale of confiscated assets other than cash. The system is based on daily practice.

The **key actors** involved in the disposal phase in Denmark are the following:

- local police districts/ARO;
- criminal courts;
- the enforcement courts.

The **workflow** to be followed when, as a general rule, confiscated assets are to be sold and the money obtained transferred to the State budget is as follows:

- a final confiscation order is issued by the criminal court;
- the order is transmitted to the local police district (or to the ARO) that will manage the sale of the assets at auction;
- typically the ARO asks the defendant how s/he prefers to sell the assets, i.e. either at auction or on the free market via a market operator (where a higher value can normally be obtained). This consultation is of particular interest for the defendant in those cases where the proceeds from crime have been only partially recovered, and the remaining money will be taken from the sale of other property;
- if the defendant is against the sale, a procedure is opened before special courts, i.e. the enforcement courts, which are competent to order sale of the assets at a so-called “under constraint” auction;
- the money from the sale is transferred to the State budget, where it is treated like any other public money.

There is no legal provision regarding the **timing** of the disposal phase. Confiscated assets are typically sold very quickly (when the sale is handled by the ARO, it is a matter of a few days). When auctions, instead of sales on the free market, must be arranged, some more time is needed.

There are few critical factors in **existing practices**. Interagency cooperation is not at all problematic. The types of assets usually easy to disposed of are cash and accounts, as well as cars and jewellery.

The types of assets usually difficult to disposed of are:

- *real estate*: in Denmark it is possible to buy a small house built in a plot (a so-called allotment garden): the person owns the house and has the right to use the garden. The sale of such a house (without the right to use the garden) can be difficult;
- *shares in companies, especially small family companies*: unless the other family members decide to buy the defendant’s shares, it may be difficult to find a buyer.

Problems may arise in relation to the so-called “under constraint” auction, especially when the criminal is a member of a motorcycle gang. In these instances, it may happen that potential buyers are threatened by the criminal group.

There are frequent cases of the disposal of properties with mortgages. They are not particularly problematic because the police open a procedure before the Enforcement Court, asking for the permission to sell the house at auction. The bank is invited to take part in the procedure, as well as in the auction. After the auction the bank receives an amount of money equal to the mortgage.

The same procedure is opened in the case of real estate property under joint ownership.

If a case involves **mutual recognition of a foreign confiscation order**, the confiscated assets are repatriated from Denmark to the requesting Member State based on the asset sharing envisaged in the Framework Decision 2006/783/JHA, which is transposed into the Danish law. The competent authority is the Ministry of Justice. At this stage it is not possible to provide an assessment of such cases, since to date only one request has been received and is currently being processed.

Even though the **resources** devoted to the disposal phase seem to be sufficient, there is no *ad hoc* **training**. Officials in the competent offices 'learn by doing'.

## ESTONIA

In Estonia, confiscation typically follows a criminal conviction. Since 2007 a specific legal provision has regulated the **management of seized assets** to optimise their value/minimise their deterioration. This is § 126 (2<sup>1</sup>) of the Code of Criminal Procedure, which states that property seized in order to secure confiscation may be transferred/sold with the consent of the owner of the property and at the request of the Prosecutor's Office on the basis of an order issued by a preliminary investigation judge. Property may be transferred or sold without the consent of the owner if this is necessary to prevent a decrease in its value. Besides movable assets and consumables, this provision also applies to real estate, but it has not been used in practice. The key critical factor hampering the successful management of seized assets is often their bad condition.

The main **legal acts** regulating the disposal of confiscated assets are the Criminal Code, § 83<sup>1</sup>-85 (rationale for confiscation); the Code of Criminal Procedure, § 126 and chapter 16<sup>1</sup> (confiscation proceedings); the State Assets Act (2010), Chapter 4 (on the transfer of state assets); the 2004 *Procedure for transfer, delivery and destruction of confiscated assets, repayment of funds received from transferring the assets from the budget to their lawful owner, recording and destruction of evidence, safekeeping, assessment and transfer of attached assets, and assessment, transfer and disposal of perishable evidence*, chapters 2, 4, 5 (procedure for registration, storage, transfer and destruction of seized and confiscated property); the Customs Act, § 45, 97-99 (rationale and procedure to dispose of assets confiscated by the customs). The available disposal options include the following:



- *sale to the general public*: assets of all kinds of are sold in public auctions organised by the county governments (there are 15 in the country). The money is then transferred to the state budget. When assets are sold according to § 126 (2<sup>1</sup>) of the Code of Criminal Procedure before a confiscation order, the sale is organised by the police and the money is deposited until the final confiscation order;
- *social re-use by legal persons in public law, non-profit organisations or foundations*: this applies to assets of any type provided that the organisations cited need them to perform their tasks;
- *social re-use by state institutions*: this applies to computer systems; confiscated counterfeit goods from which unlawful markings have been removed; goods and means of transport which the customs authorities have confiscated, occupied or transferred to state ownership; and abandoned goods or means of transport occupied by customs authorities. Confiscated computer systems may be transferred free of charge to police authorities. Confiscated counterfeited goods, other goods and means of transport may be transferred free of charge to a health care provider, social welfare institution or local government;
- *social re-use by local authorities*: this applies to confiscated counterfeited goods from which unlawful markings have been removed. These goods may be transferred free of charge to local government;
- *social re-use by NGOs, etc.*: according to the Customs Act, confiscated counterfeit goods, other goods and means of transport may be transferred free of charge to a health care provider and social welfare institution;
- *destruction*: goods that cannot be sold and those infringing intellectual property are to be destroyed.

The **key institutions** involved in the disposal phase are the following:

- Prosecutor's Office: requests confiscation;
- criminal courts (at state level): issue confiscation orders;
- county governments (there are 15): manage confiscated assets (except those disposed by customs authority and police authority) at their location and are in charge of the disposal of confiscated assets; hence, for example, they organize public auctions to sell confiscated assets or assign them to designated beneficiaries;
- Estonian Tax and Customs Board (at state level);
- Police and Border Guard Board: in charge of disposal of specific confiscated assets that cannot be re-used for social purposes (such as weapons, drugs, illegal alcohol).

The **workflow** is as follows:

- a final confiscation order is issued by a criminal court;
- the confiscated assets are accounted as state property and the confiscation order is transmitted for execution to the county government where the assets are located;
- the county government assesses the feasibility of delivering the assets to designated beneficiaries (social re-use). Execution is performed following a verdict by the Governor;

- the county government delivers the confiscated assets to the designated beneficiary;
- for assets to be socially re-used under the Customs Act, the final confiscation order is transmitted to the police, which in turn transfer them to the customs authority for disposal.

There are no specific provisions regarding the **timing** of the disposal phase. In fact, the Governor's verdict is reached within one month after the assets are accounted as state property. The assets are delivered to the beneficiaries approximately one week after the Governor's decision. In the case of sale, auctions are regularly arranged by county governments.

As regards **existing practices**, interagency cooperation seems to work efficiently. The types of assets usually easy to dispose of are those in good condition and that can be used practically (clothes, sports equipment, bicycles). Conversely, assets usually difficult to dispose of are outdated and decayed ones.

As regards confiscated counterfeit goods from which unlawful markings have been removed and which can be used for social purposes in certain circumstances, there are no problems in identifying the beneficiaries. Customs authorities manage a list of confiscated counterfeit goods on the webpage of the Estonian Tax and Customs Board, and health care providers, social welfare institutions or local governments can submit an application for the transfer of the goods. An important problem concerns the social re-use of confiscated assets managed by county governments. It may be difficult to identify the beneficiaries, because there is no dedicated database (because of a lack of resources and the absence of a legal obligation). This impedes the involvement of society in the disposal of confiscated assets. In fact, non-governmental civil society organisations can make proposals to county governments concerning the confiscated property; but the problem is that civil society organisations do not have an overview on the assets.

Estonia has not yet implemented Council Framework Decision 2006/783/JHA on the **mutual recognition of confiscation orders**. The standard procedure stipulated in chapter 19 of the Code of criminal procedure applies. The request must be submitted to the Ministry of Justice. It is then decided by the Harju County Court. No information is available on obstacles against effective disposal in such cases.

Available human and material **resources** seem to be sufficient. As regards training, there is no *ad hoc* **training** for personnel. This is because the number of confiscated assets is not particularly high, and therefore there are no individual officials in county governments whose main tasks are limited to disposal.

## FINLAND

In Finland confiscation is only possible as part of criminal proceedings and is regulated by the Criminal Code. Finland applies both property confiscation and value confiscation. Value confiscation is the leading principle.

Specific provisions exist on the **management of seized assets** to optimise their value/minimise their deterioration. Pursuant to section 10, Chapter 4 of the Coercive Measures Act (450/1987) an object can be sold if its value is decreasing rapidly, or if it is easily spoiled, or if its maintenance is very expensive. Such sales seldom occur and usually concern perishables (food) or animals (because they require special care).

Key **legal acts** governing disposal are sections 38-45 of the Criminal Sanctions Enforcement Act (672/2002), which deals with issues related to property confiscation and value in lieu of property confiscation, and the Enforcement Code (705/2007). The Legal Register Centre asks police to execute decisions concerning property confiscation. In the case of value confiscation, the Legal Register Centre asks the local enforcement office to take care of execution. The following disposal options are envisaged:

- *sale to the general public*: section 38 of the Criminal Sanctions Enforcement Act states that property of all kinds is subject to sale. The state is the beneficiary;
- *transfer to state institutions or local authorities*: this option is envisaged in the same section 38. Property of all kinds can be transferred for use to state institutions. There are no limitations on the use of the property (also social re-use, eventually);
- *destruction*: section 38 states that property other than real estate (such as crime instrumentalities, guns, drugs, etc.) can be subject to destruction.

The overall logic is as follows. Property goes either for sale, which is the usual route, or for use by institutions or local authorities. If public sale fails, use by authorities will be considered. If this is not an option, destruction follows. In cases of the disposal of mortgaged property, this is sold, and first the mortgage holder receives payment; the rest goes to the state. Even if the sale will not realize enough funds to cover the state's claim, it will still take place.

The **main actors** involved in the disposal phase are the following:

- prosecutor or victim when acting as private prosecutor: requests confiscation;
- Court: orders confiscation;
- Legal Register Centre: applies enforcement;
- Police: enforces decisions when property is confiscated;
- Local Enforcement Office (District Bailiff): enforces decisions when value is confiscated.

The **typical workflow** starts with the prosecutor/victim's request for a confiscation order. Then the confiscation order goes to the Legal Register Centre for enforcement. Depending on whether enforcement is through confiscation of property or its monetary equivalent, execution is performed by the police or by the local enforcement office respectively. Notification is sent to the Legal Register Centre when the enforcement activities have taken place. There is no legal provision regarding the **timing** of the disposal phase; however, most cases are completed within a year.

Sale is the most common of **existing practices**. Property is seldom transferred to state institutions. Some problems arise with the sale of real estate. However, real estate is seldom confiscated, so that mortgaged or joint owner property issues are not encountered. Communication between the police and the Legal Register Centre should be improved, so as to ensure that notifications to the Legal Register Centre are properly communicated. The Legal Register Centre sends information on enforcement orders to police and bailiffs. However, it only has access to the bailiffs' database and harvests information on executed orders. It happens that the police do not provide feedback to the Legal Register Centre on executed orders.

Finland has implemented Framework Decision 2006/783/JHA through act 222/2008 and follows those rules in cases involving **mutual recognition of a foreign confiscation order**. The procedure starts when a foreign application arrives at the Legal Register Centre. The latter recognises a confiscation order if there are no grounds for refusal. After the confiscation order is not appealable, the Legal Register Centre asks the police or the local enforcement agency for execution. If execution is successful, the Legal Register Centre is notified and assets are transferred to it. The LRC transfers assets to the requesting state.

Human and material **resources** are scarce owing to budgetary constraints, but to date enforcement officials have managed to be effective. Legal Register Centre officials have no specific **training**. The Police College is responsible for basic police training in relation to the investigation of financial crime. Staff investigating financial crime can also take part in international training, including CEPOL courses. The National Police Board organises further training and themed training on financial crime as necessary. The Unit for Assessment of Economic Crimes is responsible for topical training. For example, every year a national financial crime seminar is organised at which key issues related to financial crime are discussed. Target groups for the seminar are financial crime investigators and authorities combating financial crime. The National Bureau of Investigation provides training on general legal assistance and targeted training on financial crime matters such as the freezing of assets and the safeguarding of recovered crime proceeds. The Customs Administration provides similar training for its crime investigators.

## FRANCE

In France, confiscation typically follows a criminal conviction. The key provision is art. 131-21 of the Criminal Code. Assets that are subject to confiscation under art. 131-21, can be seized.

Before 2011, **management of seized assets** was not envisaged. Some provisions now exist in the Code of Criminal Procedure. The judge of freedoms and detention or the investigating magistrate may decide, in relation to seized personal property alone, to entrust a recently established Agency for Management and Recovery of Assets Seized and Forfeited – i.e. AGRASC<sup>53</sup> – to sell them before judgment if these assets no longer need to be kept in order to establish the truth and if the maintenance of the seizure is likely to reduce their value. If no decision is made to sell the assets, or if the assets are real properties, these must be maintained by the owner/holder. If these persons do not comply with this requirement, the assets can be given to AGRASC. In addition, AGRASC can be entrusted with the task of managing complex assets, such as companies, bonds and real estate.

Finally, since 2011 it has been possible for the judge of freedoms and detention/investigative magistrate to assign personal property likely to diminish in value during seizure for free to police, gendarmerie units, or services of the customs administration conducting judicial police missions. This provision has not been applied to date.

The key **legal acts** regulating disposal – and the disposal options that they envisage – are the following:

- the *sale of confiscated assets* (art. 707-1 Code of Criminal Procedure);
- for certain types of assets only, their assignment for free, either to the state/state institutions (for real estate only) or to law enforcement agencies (for movable assets only). As regards the transfer of confiscated real estate to the state/state institutions, its legal basis is art. 1124-1 of the General Code of the Property of Public Persons, which states that confiscated property, movable or immovable, shall be vested in the state. Before AGRASC sells confiscated real estate, it consults the State Property Administration to see if the state is interested in it. As regards the assignment of movable assets to law enforcement agencies (art. 2222-9 General Code of the Property of Public Persons), movable goods transferred to the state following a final judicial decision may be assigned free of charge to police services, gendarmerie or customs units performing judicial police activities. In concrete, a law enforcement agency, upon authorization by the Ministry of the Interior, may ask the Court, before the final confiscation order, to have them assigned at the end of the procedure;
- *social re-use/incentivisation schemes to state institutions*, foreseen by decree no. 322 of 17 March 1995, which established a fund to collect the proceeds of assets confiscated in connection with drug trafficking that

<sup>53</sup> Agence de gestion et de recouvrement des avoirs saisis et confisqués.

is managed by the Interministerial Mission for Combating Drugs and Addictive Behaviours (MILDT);<sup>54</sup>

- *restitution to victims* (sections 99 and 478 Code of Criminal Procedure);
- *destruction*, under section 131-21 of the Criminal Code and section 41-4, 41-5, 99-2 of the Code of Criminal Procedure, for illegal assets (such as drugs, weapons) or dangerous assets;
- *compensation to victims*: (art. 706-164 Code of Criminal Procedure);
- *incentivisation schemes*: part of the AGRASC's budget consists of the proceeds from the sale of certain confiscated assets.

The **key actors** involved in the disposal phase are the following:

- judiciary auctioneers: competent to sell movable assets before judgment;
- criminal courts: issue the final confiscation order;
- the State Property Administration: sells the confiscated movable assets and is consulted by AGRASC before any sale of real estate;
- AGRASC: sells the confiscated real estate and "complex" movable assets;
- MILDT: manages the fund established by decree no. 322 of 17 March 1995 to collect the proceeds from drug trafficking.

The workflow varies according to the type of asset. In the case of movable assets, after the judgment, the prosecutor sends them to the State Property Administration, which sells the confiscated assets at auction. The price goes to the fund for the fight against drugs (if the movable asset was confiscated in a drug case) or to the state budget. In the case of real estate, the court sends the judgement to AGRASC, which consults the State Property Administration to see if the state is interested in the property. If not, AGRASC chooses a notary, who sells the confiscated building at auction. Mortgages are paid with a part of the price, and the rest of it goes to the fund for the fight against drugs (if the building was confiscated in a drug case) or to the state budget.

There is no legal provision regarding the **timing** of the disposal phase. For cars, the average time is two or three months. For real estate, it takes a little longer on average (a sale may last 3-4 months).

As regards **existing practices**, the implementation of existing provisions has rapidly improved since AGRASC was established. There are still problems, however. First, the final confiscation order does not always include all the information necessary for disposal. Second, there are some difficulties related to the disposal of complex real estate: these cases require the Agency to bring together complete files to transfer ownership, and this is sometimes problematic. Third, problems arise with the disposal of certain residential buildings/technical machinery, which can be difficult to sell when the previous owner is a well-known or dangerous criminal/the assets have a limited market. Finally, problems arise in regard to the fund managed by MILDT: for many

<sup>54</sup> Mission interministérielle de lutte contre la drogue et la toxicomanie.

years the fund has not been able to gather all drug trafficking-related proceeds due to uncertainties at the Court level on how to ascribe them to the fund.

Sale of confiscated assets is the most frequently used option, especially for real estate. Although French legislation makes it possible to assign these assets to the state/state institutions, this disposal option has never been implemented to date, since the state is only interested in office buildings (confiscated buildings are mostly residential ones). Assignment of movable assets to law enforcement agencies is very frequent, especially in the case of cars and computers, and it is very efficient.

France handles numerous cases involving the **mutual recognition of a foreign confiscation order**, especially regarding real estate and bank accounts. The competent Court is the *Tribunal correctionnel* of the location of the confiscated asset. Normally a 50/50 split applies.

Regarding **resources**, when AGRASC was established, in 2011, its staff was made up of 11 people. It has now increased to 16 people, and hopefully it should reach 30 units in 2013. These are not high numbers.

All the personnel are given initial and on-going **training** on all topics (freezing, seizure, confiscation, etc.). Instead, State Property Administration staff do not receive specific training on confiscated assets.

## GERMANY

Germany applies confiscation within criminal proceedings, which are regulated in the German Criminal Code (GCC). Enforcement is a task performed by authorities at state level (not at the federal level).

Specific provisions exist on the **management of seized assets** to optimise their value/minimise their deterioration. § 111 (1) of the Code of Criminal Procedure states that “assets may be disposed before the judgment becomes final if there is the threat of their deterioration or a substantial reduction of their value, or their storage, maintenance or preservation is related to disproportionate costs or difficulties”. The confiscation order transfers ownership of the assets to the state (the Treasury department of the federal state in which the court has decided in first instance). The order imposes, for the period between its issue and its entry into force, a ban on sale and disposal. If a confiscation/asset forfeiture/destruction court order is issued, and if the asset is not yet in custody of the state, the enforcing authority enforces the order by removing the asset from the convicted person through an enforcement officer.

The **legal acts** that govern the disposal of confiscated assets are the Criminal Code, the Criminal Procedure Code and the Code of Penalty Enforcement. The disposal options available are the following:

- *sale to the general public* through public auction or private sale. In the latter case only persons or bodies are invited to the sale, and are allowed to purchase such items;
- *transfer to state institutions or local authorities*: ownership of all assets is transferred to the federal state (Treasury);
- *transfer to NGOs*: in the case of assets confiscated in relation to intellectual property infringements. NGOs can participate on a preferential basis in the free (private) sale of such assets;
- *transfer to the police*: specific objects of significance for forensic training/research purposes are offered to the state or federal criminal police;
- *restitution to victims*: movable objects in criminal proceedings can be offered to the victim from whom the object was removed by the criminal act;
- *destruction*: for objects that are worthless, unusable, or dangerous to the public, or objects that are “illegal”.

The **key actors** involved in the disposal phase are the following:

- court: orders forfeiture;
- State prosecution: executing authority;
- bailiff (*Gerichtsvollzieher*): implements sale of the confiscated assets;
- judicial officer (*Rechtspfleger*): acts if there are third parties claiming rights on the frozen/confiscated assets;
- notary: should participate in the sale of real estate together with the bailiff.

The **workflow** to be followed when (as a general rule), confiscated assets are to be sold starts with the request for confiscation by the Prosecution service. If the court issues a confiscation order, the bailiff implements it. Items that are worthless, unusable, pose a public danger, or are “illegal” are usually destroyed. All remaining items are re-used or sold, unless otherwise specified. The disposal is usually done by public auction. If it appears that this is not feasible or impractical, the items are sold privately. The enforcing authority commissions execution of the public auction or the private sale to an enforcement officer/judicial officer. Each state court has a list of authorized enforcement officers. In certain cases the sale can be entrusted also to a private company/trader. Proceeds from the sale are transferred to the responsible treasury of the federal state. If there is a danger that the item/asset will rapidly lose its value, or if its maintenance and storage is associated with costs or problems, its disposal/sale should be accelerated. If confiscated assets are of significance for forensic training/research purposes, they should be offered to the state or the federal criminal police.

There is no legal provision regarding the **timing** of the disposal phase. Public auctions take from one to eight weeks; there are no particular problems related to the sale of movables. Every three years the assets that have not been sold due to a lack of interest are offered again for sale, so that this procedure can take a long time.

**Existing practices** show that the role of civil society/NGOs is limited. In the free (private) sale of assets that are suitable for the requirements



of NGOs and needy persons, these are supposed to be prioritized. Moreover, assets that have been confiscated in relation to intellectual property law, and which are suitable for use for charitable or humanitarian purposes, should be given to the relevant organisations free of charge. Otherwise, civil society and NGOs have no influence on disposal decisions. In practice, however, this option is not widely applied. There is no provision in the existing legislation for the transfer of such assets for social re-use because social services are largely financed by the state budget. The use of confiscated assets in Germany prioritises the compensation of victims.

Cases involving the **mutual recognition of a foreign confiscation order** are regulated by the Act on International Cooperation in Criminal Matters (AICCM), which follows the 2006 Framework Decision. AICCM, § 88f provides that, if the proceeds without deduction of costs or compensation do not exceed an amount of 10,000 € and no other agreement has been made, they are split 50/50 between the requesting and requested MS. In all other cases, the matter is decided in a discretionary manner. The disposal and re-use of confiscated assets largely follow the regulations applicable to national proceedings. This matter is also regulated by § 57 (4) of the AICCM. Problems that arise are generally the same as in national proceedings. To these can be added language barriers and differences among national legal provisions, which, however, are relatively minor.

The Federal Ministry of Justice does not report of any specific issues related to the human and material **resources** in this area which would set them apart from the general context of the public administration in Germany. The Federal Ministry of Justice reported that there are **training** opportunities. The state prosecution generally has sufficient human resources. The interviewee noted that in Würzburg for instance there is one judicial officer who mostly handles confiscation orders because he focuses on economic crime. However, the enforcement of such orders represents about 20 % of this officer's workload. For all other judicial officers in Würzburg it represents up to 5 % of their workload.

## GREECE

Proceeds from crime confiscation can take place both within and outside criminal proceedings (the latter being disciplined by law 3691/2008). Regarding the **management of seized assets**, this is regulated by art. 266 par. 1 of the Criminal Code: seized items are subject to the custody of the secretary of the Court or, if this is not possible, of any other competent or trustworthy person appointed by the investigating person. In fact, seized items are only stored and not used at all.

The key disposal options, and the **key acts** regulating them, are the following:

- *sale to the general public*, governed by Law 251/1976, which provides for sale by auction of any corporate movable items, especially vehicles, ships, machinery;
- *transfer to state institutions or local authorities*, governed by Law 2168/1993, for weapons and ammunition which the eligible beneficiaries deem useful to their needs;
- *transfer to state institutions/municipal bodies for social re-use*, regulated by Law 251/1976; any corporate movable items, especially vehicles, ships, machinery, may be transferred for use to them even *pro bono*;
- *transfer to NGOs for social re-use*, governed by Law 251/1976, which states that vehicles may be transferred at a price not less than half of their estimated value to charitable institutions;
- *restitution to victims*, governed by the Criminal Code;
- *destruction*, governed by the Criminal Code; items useless, of no value at all, or of insignificant value are destroyed five years after seizure. Polluting items or ones harmful to public health may be destroyed before.

The **key institutions** involved in the disposal phase are the following:

- General Directorate of Customs and Excise of the Ministry of Finance (disposal of confiscated means of transport, machinery and other items);
- Directorate of Movement of Capitals, Guarantees, Loans and Securities of the State's General Accounting Office of the Ministry of Finance (disposal of confiscated securities);
- Directorate of Public Property of the Ministry of Finance (disposal of real estate property of the state).

In regard to the **timing** of the disposal phase, seized items must be sold by auction or otherwise disposed of if, within 3 months from seizure, the Directorate of Customs' Procedures is not notified of the lifting of the seizure order.

The main problems in **existing practices** derive from the lack of a central organisation that can coordinate all the institutions involved in the disposal phase and the scattered acts of law on confiscation, which have a critical impact on the relevant procedures. Together with this factor, poor communication between the institutions involved and the complex bureaucratic procedures often prolong the disposal procedure beyond a reasonable time frame. Market factors also play an important role because lack of interest in the auctions makes the sale of confiscated items impossible.

**Recognition of foreign confiscation orders** may be obtained within the framework of implementation of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (CETS no 141), which has been ratified by Greece with Law 2655/1998.

In terms of **resources**, in recent years the country has suffered a severe financial crisis which has led to institutional and organisational changes, so that a lack of material resources is reported. Moreover, a

shortage of human resources is observed because some employees have retired and no recruitment has taken place. There is no special **training** for employees, either new or ones those with senior positions in the service.

## HUNGARY

In Hungary, proceeds from crime are confiscated within criminal proceedings. However, conviction is not always the necessary prerequisite for confiscation.

Regarding the **management of seized assets**, according to section 154 (1) of the Criminal Procedure Act, any object seized shall be deposited. If the object is not suitable for deposit or if some other important reason justifies it, the object's preservation shall be arranged in another way. Further provisions are set out in the Joint Decree no. 11 of 2003: the investigating authority, the public prosecutor or the court put into deposit a seized object which serves as evidence during proceedings and/or which needs to be identified and examined. If the object is not suitable for deposit, it may be left with the keeper, owner, user etc. This person must arrange for the asset to be handled at his/her own expense in such a way that its condition, quality and value do not deteriorate to more than an average extent during storage. According to section 156 (1)-(2) of the Criminal Procedure Act, the court shall order the sale of the seized object if it may deteriorate rapidly or is not suitable for long-term storage. The court may also order the sale of the seized object if its handling, storage and preservation would involve unreasonably high expenses or if its value would significantly diminish due to the foreseeably long-term storage. In fact, preliminary sale is exceptional because of excessive caution among prosecutors. Seized assets are held by the authorities until the end of the criminal proceedings (sometimes for 5-6 years), so that they are mostly unusable in the end.

The **key disposal options**, and the **key legal acts** regulating them, are the following:

- *sale to the general public*, under section 55-61 of Joint Decree no. 11 of 2003 issued by the Ministry of Justice, the Ministry of the Interior, and the Ministry of Finance and section 89 (1) of Decree no. 11 of 1979 on the execution of punishments and measures. Sale usually occurs through commercial activities or auction (electronic auction);
- *transfer to state institutions or local authorities*, under section 120 (8) of Act CXXVII of 2003 on excise taxes and the special regulations on the distribution of excise goods; it applies to confiscated mineral oil products in instances of disaster or flood;
- *transfer to NGOs for social re-use* in accordance with Act XIII of 2000 on the social re-use of confiscated assets. It applies to food, clothing, items for grooming, cleaning or education, home maintenance equipment, household equipment, telecommunication equipment, household

appliances, toys, kitchen equipment, or sports gear. Members of the Council of Charity decide and transfer goods to needy beneficiaries;

- *restitution to victims*, according to section 54-55 of the Criminal Procedure Act;
- *destruction*, under section 50-51 of Joint Decree no. 11 of 2003 issued by the Ministry of Justice, the Ministry of the Interior, and the Ministry of Finance and section 89 of Decree no. 11 of 1979 on the execution of punishments and measures; it applies to goods which cannot be sold or those whose sale would damage or endanger the public order, public health or public morals and intellectual property rights.

The **key institutions** involved in the disposal phase are the following:

- Police: seizure, handling, disposal;
- National Tax and Customs Administration: seizure, handling, disposal, confiscation (in excise procedures);
- Office of Public Prosecutors: seizure, handling, disposal;
- court: exclusive competence to order confiscation and confiscation of property in criminal proceedings;
- Secretary of the Council of Charity: organisation of council meetings, decision making, coordination;
- member organisations of the Council of Charity: delivery of confiscated assets to needy beneficiaries in accordance with Act XIII of 2000.

As for the **timing** of the disposal phase, some provisions are included in the Act XIII of 2000 on the social re-use of confiscated assets. After it has been notified by the competent authority, the Council of Charity has 15 days to express its intention to start the social re-use procedure and 30 days to deliver confiscated assets.

In fact, several years elapse from seizure to confiscation, and several months, sometimes more than a year, from confiscation to delivery. When confiscated goods are used for social purposes, five to six years typically elapse from the confiscation order to their offer by the National Tax and Customs Administration to the Council of Charity.

In regard to **existing practices**, the most critical factors hampering the timely and successful completion of the disposal phase are the prolonged criminal procedure, the lack of preliminary sales and preliminary confiscations, as well as certain restrictions (brands and logos found on counterfeited clothing must be removed). Another critical factor is the quality of information provided by NTCA on items available for social re-use (the offers contain little information, no indication on the time of confiscation, no photographs of the objects).

A key problem is that other enforcement procedures have priority over the criminal confiscation. This is the case, for example, of child support, alimony, wages, and property with mortgages, all of which have priority over claims arising from confiscation.

Practical problems exist in the disposal of computer hardware because of its rapid depreciation. Machines and processing lines are also difficult

to transfer. Their maintenance is also an issue. Seizure of real estate is uncommon, so that there is little information about potential issues. A major problem with real estate is that information about the property is often missing. Easy to dispose are small and inexpensive assets, such as tools, metal hardware, ore.

Hungary implemented Council Framework Decision 2006/783/JHA on the application of the principle of **mutual recognition to confiscation orders**.

Due to the financial and economic situation, the available **resources** (both human and financial) are limited.

In regard to **training**, in the judiciary there are regular courses every year or every two years for the employees of the county court, finance officers and also for judges. As for the National Tax and Customs Administration, a conference is held every year on changes in the legal framework. Human and material resources and training issues are in general problematic.

## IRELAND

Confiscation of proceeds from crime is possible both within criminal (Criminal Justice Act 1994, CJA) and civil (Proceeds of Crime Act 1996-2005, PCA) proceedings.

Regarding the **management of seized assets within criminal proceedings**, a specific legal provision exists to optimise their value/minimise their deterioration, but has limited application and only relates to cash (which must be held in an interest-bearing account). There is no similar legislation relating to other tangible assets. Experience shows that in some cases the assets (particularly cars) lose value (also due to deterioration).

Specific regulations exist on the **management of seized assets outside criminal proceedings**. When an order to take possession of an asset is granted under the PCA, the High Court appoints a receiver who is then responsible for maintaining the asset and its value if possible, and who is obliged to keep the Judge informed on how the asset is being managed. Prior to any sale of the asset, the receiver will inform the court of the pending sale, the value being obtained so as to seek the High Court's approval for the sale. Problems arise when there is only a restraint order in place, since it can take a long time before a final order is granted to allow the sale of the asset. This can place a burden on the receiver, who on occasion may have to pay for upkeep of the asset and to maintain insurance on it. Cars depreciate very quickly in value.

The **key legal acts** regulating the disposal of confiscated assets are the following:

- Proceeds of Crime Act 1996/2005 (section 4 and 4A);
- Criminal Justice Act 1994 (section 4 as amended by section 25 Criminal Justice Act 1999, which deals with crimes other than drug trafficking; sections 9 and 20 regarding drug trafficking offences).

The **key disposal options** envisaged are the following:

- *sale to the general public*: under the PCA the High Court can order the sale by public tender of all assets seized under the Act. All money is then forwarded to the state;
- *restitution to victims*: in certain circumstances money from sale of the assets (previous option) can be repaid to a victim of the crime if they can be identified;
- *rent to general public & transfer to state institutions or local authorities*: under the PCA the High Court can order the court-appointed receiver to rent a property. The money goes into a receivership account until final determination of the case. The High Court will make the final order and the asset is transferred to the state. The Ministry for Finance can use that asset and assign it to another department for use;
- *destruction*: under the Criminal Code the asset can be destroyed following a conviction on the order of a court. This is usually done in drugs cases.

The **key institutions** involved in the disposal phase are the following:

- Criminal Assets Bureau: the Bureau Legal Officer is appointed receiver in all cases under the PCA;
- Director of Public Prosecutions: deals with all the assets seized under the Criminal Code;
- Ministry for Finance: funds from the sale are forwarded to this Ministry.

The systems vary from one asset to another. Properties are sold through auction by an auctioneer and cars are generally sold by way of a tender process from car dealers. Jewellery is often sold directly to the trade. The method of sale is approved by the courts before any final deal is made. The practice is to sell the property as soon as possible. Once the funds have been received, they are sent to the Ministry of Finance.

In regard to the **timing** of the disposal phase, there are no time limits on the sale of goods once a final confiscation has been made. The practice is to sell the property quickly and transparently.

Moving to **existing practices**, the following problem arises under the PCA: in some cases when an order under section 3 PCA is granted, 7 years must elapse before a final order under section 4 is made. The normal approach is to sell the asset and put the funds in an interest-bearing account, but this does not happen in all cases. Houses and cars are generally sold easily because they are sold through a normal, well established method. There are no types of assets that are difficult to dispose of.

Nor do particular problems arise in relation to real estate under joint ownership (that is, sold in the same manner as described once the court has issued the order), nor to properties with mortgages or subject to other executive procedures (CAB<sup>55</sup> keeps the mortgage holder constantly informed about the progress of the case. On occasion, mortgage holders will have their own legal representatives in court).

At present, **recognition of foreign non conviction-based orders** is not envisaged. The practice is that the CAB will apply for an order under the Irish legislation if it is a suitable case. Following this, money can then be repatriated if victims have been identified.

Available human and material **resources** seem to be sufficient. No specific **training** is given in Ireland. The Bureau employs its own Legal Officer and engages the services of legal representatives in court and auctioneers to sell the properties or other persons that it deems necessary.

## ITALY

Italy has developed a complex confiscation system in order to attack the financial bases of organised crime. Confiscation of proceeds from crime is possible both within criminal proceedings and outside (civil confiscation as a preventative measure – the so-called *confisca di prevenzione*).

Regarding the **management of seized assets** within preventative proceedings and under art. 12-sexies of law no. 356/1992 (confiscation of unjustified values) (certain crimes only), specific provisions exist to optimise their value/minimise their deterioration. Art. 35, comma 5 of legislative decree 159/2011 (Antimafia Code) states that, when adopting seizure, the court appoints the judge and an administrator, who is chosen from among those enrolled in a special registry. The administrator is tasked with the custody, conservation and administration of seized assets, also in order to increase, if possible, their value. Within 30 days from its appointment, the administrator must submit to the judge a detailed report on the seized assets, including a list of them, their conditions, estimated value, any third party rights, and preferable management options.

Some problems arise in the management of seized assets. They relate both to administrators, who are not always competent, and to the tribunals themselves. Courts in different regions take different approaches to management of the assets. In some regions (e.g. Calabria), a more passive administration is promoted (conservation). In others (e.g. Lazio, Sicily, Campania) a more active management is encouraged.

The **main legal acts** regulating the disposal of confiscated assets are:

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<sup>55</sup> Criminal Assets Bureau, Ireland.

- for assets confiscated within preventative proceedings and under art. 12-sexies of law no. 356/1992 related to the confiscation of unjustified values (certain crimes only): law no. 575/1965 (now incorporated into the Antimafia Code), which allows the use of confiscated assets for social purposes, identifies the National Agency for Administration and Destination of Assets Seized and Confiscated from Organised Crime (ANBSC)<sup>56</sup> as the key actor, and specifies disposal options for different types of assets;
- for the remaining assets confiscated under art. 12-sexies of law no. 356/1992, and assets confiscated within criminal proceedings in general: art. 88 of the provisions executing the Code of Criminal Procedure.

The **key disposal options** for assets subject to preventative confiscation and to confiscation under art. 12-sexies of law no. 356/1992 are:

- *transfer* of confiscated money to the Single Justice Fund;<sup>57</sup>
- *sale* of personal property (including registered assets) and transfer of the related income to the Single Justice Fund;
- *transfer for free or destruction (for personal property, including registered assets)*: when the sale of personal assets, including registered ones, is not cost effective;
- *rent (for companies)*: this is applied when business activities are likely to continue. Companies can be rented either to worker cooperatives (for free) or to public/private companies;
- *sale to the general public (for companies)*: this option applies when it better satisfies the public interest or when the purpose of the sale is to compensate victims. The sale price cannot be lower than the ANBSC estimate;
- *liquidation (for companies)*: when this option better satisfies the public interest or when the purpose of the sale is to compensate victims;
- *transfer to state institutions (for real estate)*: assets may be used a) for justice/public order purposes, or to respond to other governmental or public needs related to the institutional activities carried out by state entities, fiscal entities, universities, cultural institutions; b) for economic purposes by the ANBSC;
- *transfer for institutional purposes or social re-use to local entities (for real estate)*: assets are transferred for institutional or social purposes to the municipality in which they are located, or, alternatively to the province/region. Local entities may manage the assets/assign them for free to social communities/associations;
- *sale to designated entities, in exceptional cases (for real estate)*: real assets that cannot be used for social purposes are sold. The decision is taken by the ANBSC. The sale can be made only to public entities whose mandate includes real estate investments, to certain associations and to bank foundations;
- *compensation* of mafia victims via the sale of real estate.

<sup>56</sup> Agenzia nazionale per l'amministrazione e la destinazione dei beni sequestrati e confiscati alla criminalità organizzata.

<sup>57</sup> Fondo unico giustizia.



With reference to assets confiscated under ex artt. 240 and 416-*bis*, these are either sold or destroyed.

The **key institutions** involved in the disposal phase are the following:

- criminal courts (for criminal confiscation) and *Tribunali di prevenzione* (for civil confiscation);
- National Agency for Administration and Destination of Assets Seized and Confiscated from Organised Crime (ANBSC): in charge of asset management and disposal;
- local authorities;
- *National Public Property Agency*<sup>58</sup> (to check needs for allocation of real estate to state institutions);
- *Prefecture* (supports the ANBSC because of its understaffing).

In regard to the **timing** of the disposal phase, a provision in the Antimafia Code (art. 47) sets 90+90 days as the recommended duration for civil confiscation. In practice, it takes 15-20 days. However, in complex cases, it may last years (even five to ten years to sort out mortgages).

As for **existing practices**, numerous key factors hamper timely and successful disposal. First, the ANBSC has been set up recently, and legislation is not clear about its competences. Second, confiscation orders are sometimes notified with (much) delay to ANBSC. There are also interagency cooperation problems because state administrations and local authorities are not always cooperative with the ANBSC. In some cases there is a lack of professionalism at Prefectures as well. Assets that are usually easy to dispose of are movable property. Assets instead difficult to dispose of are:

- real estate unlawfully occupied or with mortgages;
- confiscation pro-quota, where complex bargaining procedures are carried out with joint owners to reach an agreement, and which may be followed, if agreement is not reached, by civil proceedings;
- simultaneous judicial proceedings involving the assets (e.g. bankruptcy proceedings involving a confiscated company);
- cases in which the assets are in bad condition;
- real estate to be sold (the entities that can buy it are normally not interested).

Italy has not yet ratified Framework Decision 2006/783/JHA on the **mutual recognition of confiscation orders**.

In terms of **resources**, the ANBSC is severely understaffed: it has only 30 officials in total at the 5 branches of the Agency across the Italian territory. The officials are not provided with any **training**.

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<sup>58</sup> Agenzia del demanio.

## LITHUANIA

In Lithuania, confiscation generally follows a criminal conviction. No specific provisions exist on the **management of seized assets** to optimise their value/minimise their deterioration before they are confiscated. Art. 152 of the Criminal Code only states that – with a view to securing a civil claim, possible confiscation of assets, or extended confiscation of assets – a prosecutor may impose a temporary limitation of ownership rights upon a suspect, or a natural person or persons who, according to the law, are materially liable for the actions of a suspected person, and who are in possession of criminal proceeds.

The property rights of a legal person may also be temporarily restricted by the prosecutor's decision to secure confiscation. The assets of the person whose ownership right is temporarily restricted are attached. The assets to which the ownership right has been temporarily restricted, at the prosecutor's discretion may be transferred for safekeeping to the representative of a municipal institution, owner of those assets, or his/her close relative or another person. They must be advised about criminal liability for dissipation or concealment of the assets. If necessary, such property may be seized. In the case of restriction of ownership rights to pecuniary deposits, all transactions with the said deposits are terminated, if the decision on temporary restriction of ownership rights does not provide otherwise. Therefore frozen assets stay with the individuals or institutions that already have them (i.e. the defendant or his/her relatives; the bank, in the case of a bank account), or are given to the police (e.g. cars involved in accidents). In general, there are no substantial problems hampering the timely and successful management of seized assets.

The **legal act** disciplining the disposal of confiscated assets is the Decision of the Government of the Republic of Lithuania no. 634 dated 26 May 2004 "On Approval of Rules for Transfer, Accounting, Safekeeping, Selling, Returning and Recognizing as Waste of Assets subject to Confiscation, Assets Inherited by the State, Assets Transferred as Revenue to the State, Material Evidence, Treasures and Findings". On the basis of this piece of legislation, the disposal option available in Lithuania is sale. Confiscated assets are accounted and sold, whereas pecuniary funds received are transferred to the state budget.

The **key actors** involved in the disposal phase are the following:

- criminal courts, which issue confiscation orders;
- prosecutors, who monitor the execution of sentences;
- bailiffs, who transfer the assets to the competent Territorial State Tax Inspectorate;
- the Territorial State Tax Inspectorates, who dispose of the assets. These are 10 in total in the country, at county level.

The **workflow** is as follows. When a confiscation order is issued, after it is final (no further appeals are possible), the court sends a copy of the judgment, copies of documents on the confiscated assets, and a

writ of execution to the bailiff competent to operate at the location of enforcement of the judgment and who advises thereof in writing a Territorial State Tax Inspectorate.

The bailiff must transfer the assets to the competent Territorial State Tax Inspectorate within 10 business days from the date on which the judgment to confiscate assets has come into force; and within the next 3 days the bailiff must return the writ of execution to the court which pronounced the judgment along with an inscription stating that the assets have been confiscated. The Territorial State Tax Inspectorate records confiscated assets, sells them (usually in auctions or by announcing tenders) and transfers the income from the sale to the budget income account. The law does not provide for a special use of confiscated assets.

There is no legal provision regarding the **timing** of the disposal phase. In fact, the sale takes most of the time (normally months, but the exact duration of the phase varies according to the type and condition of the assets), because confiscated assets are sold by way of auction or by announcing a contest. This is also because some time is needed to publicize it (about a month).

In regard to **existing practices**, there are not many critical factors hampering the disposal phase. Interagency cooperation is not problematic; also because bailiffs work in the private sector, and their remuneration depends on the amount of assets that they transfer to the Territorial Tax State Inspectorate.

In general, what is usually easy to dispose of is cash. However, unsolvable problems do not arise when selling confiscated assets. If confiscated property is not sold during the first auction, a repeated sale is arranged. If the sales of assets during a second auction, the rules approved by the Government establish the procedure: the assets may be transferred by trust to state or municipal institutions or (if the assets have lost value) recognised as waste and therefore destroyed.

If a case involves **mutual recognition of a foreign confiscation order**, the confiscated assets are repatriated from Lithuania to the requesting Member State based on Framework Decision 2006/783/JHA, which has just been transposed into the national law. The related piece of legislation entered into force on 1 January 2013, so that it is too early to assess its implementation.

It seems that sufficient **resources** are allocated to the disposal phase. The officials of the Territorial State Tax Inspectorates are given *ad hoc* **training** on confiscated assets, also via courses on legislative developments and presentations by magistrates.

## LUXEMBOURG

In Luxembourg, confiscation is typically a penalty which follows a criminal conviction. The key provision is art. 31 of the Criminal Code.

Seizure is disciplined under art. 66 of the Code of Criminal Instruction. There are no provisions on the active **management of seized assets**, which, under art. 66, are kept at the registry or entrusted to a guardian. This is a large gap in the legislation. Seizure only prevents the account holder from disposing of seized assets, but no legal provision allows a public authority to take preventive measures without the agreement of the former. As a result, seized assets typically depreciate. As regards real estate, a provision on conservative seizure was introduced in 2007 (art. 66-1 Code of Criminal Instruction). It states that, in the case of conservative seizure of real property, the order of the judge must contain the factual circumstances justifying the act, as well as designation of the property and of its owner. The order must be notified to the owner and to the curator of the mortgage registry in the municipality in which the seized property is located for transcription. The provision is not frequently adopted, also because in organised crime cases real estate belongs to companies, and it must be proven that the defendant is the beneficial owner. A recent case illustrates that management provisions are lacking. A defendant asked the magistrate for maintenance of a house, however as there are no provisions regarding management, the house will deteriorate.

The **key legal acts** regulating disposal and the disposal options envisaged are the following:

- *sale to the general public* (Ministerial Decree of 8 October 1844, regulating the use of assets confiscated for the benefit of the state). Objects confiscated for the benefit of the state are to be sold periodically by public auction. Dangerous objects, unhealthy assets, or rapidly deteriorating goods are to be sold within 24 hours;
- *transfer to public authorities* (art. 5 of the above-mentioned 1844 Ministerial Decree) for assets that, instead of being sold, can be more helpfully used for a public service;
- *social re-use of proceeds from drug trafficking and money laundering*: this option is foreseen by the law of 17 March 1992 on drug trafficking. Its art. 5 establishes the Fund to Fight Drug Trafficking.<sup>59</sup> In 2010 the Fund was renamed Fund to Fight Certain Forms of Criminality,<sup>60</sup> so as to cover other crimes, such as money laundering and other serious crimes;
- *restitution to victims* (art. 194-1 to 194-7 Code of Criminal Instruction).

The **key actors** involved in the disposal phase are the following:

- criminal courts, which issue the final confiscation order;
- the General Prosecutor Office (one office, based in Luxembourg),

<sup>59</sup> Fonds de lutte contre le trafic de stupéfiants.

<sup>60</sup> Fonds de lutte contre certaines formes de criminalité.

- which is tasked with the enforcement of confiscation orders;
- the Land Registration and Estates Department (AED),<sup>61</sup> which sells confiscated assets;
  - the Fund to Fight Certain Forms of Criminality, which is the government institution that receives confiscated proceeds from drug trafficking and money laundering and is enabled to support programmes fighting “certain forms of criminality”;
  - the beneficiaries of the Fund to Fight Certain Forms of Criminality, which include international organisations, national institutions and NGOs.

The **workflow** is as follows:

- a final confiscation order is issued by the competent criminal court;
- the order must be enforced by the General Prosecutor Office (there is one office for the entire country), which must inform the Treasury about the confiscation order. As stated by art. 197 of the Code of Criminal Instruction, proceedings for the recovery of fines and forfeitures are conducted on behalf of the General Prosecutor Office by the Director of AED;
- confiscated *objects* are transferred to a public depository managed by the district court. Once a definitive decision concerning their confiscation has been taken, these objects may be sold in a public auction organised by the Land Registration and Estates Department if they have some commercial value. Otherwise they are destroyed;
- confiscated *funds* remain in the seized bank account. Once a definitive decision has been taken, the bank is instructed by the public prosecutor to transfer the assets to the State Treasury.<sup>62</sup> If the assets are proceeds from drug trafficking or money laundering, they are kept at the disposal of the Fund to Fight Certain Forms of Criminality.

There is no legal provision regarding the **timing** of the disposal phase. In fact, auctions are regular, and on average are arranged every 2 weeks.

As for **existing practices**, sale of the assets is the most frequently used option. The revenues are streamlined to the Fund for the Fight against Certain Forms of Criminality, which since its establishment (in 1993) has funded projects worth over 34 million €. Interagency cooperation works smoothly. Amongst all types of assets, convertible currencies are easiest to dispose of. Previously seized assets are sometimes problematic: owing to the lack of centralised information (the seizure is only written in the court record), it may happen that an asset remains frozen even after the final sentence.

<sup>61</sup> The Luxembourg Land Registration and Estates Department (Administration de l'enregistrement et des domaines, AED) is one of the three tax authorities in Luxembourg together with the Luxembourg Inland Revenue (Administration des contributions directes, ACD) and the Customs and Excise Agency (Administration des douanes et accises). All fees, taxes and duties related to the legal circulation of goods in particular fall under its responsibility and constitute the main part of indirect taxation.

<sup>62</sup> Trésorerie de l'Etat.

In cases involving the **mutual recognition of a foreign confiscation order**, confiscated assets are shared 50/50 with the requesting state, unless their value is less than 10,000 €. In fact, this is an anticipated application of the provisions of the FD 2006/783/JHA (not yet ratified). Proceedings must be initiated by the public prosecutor before a district court, which decides if the foreign confiscation order shall be executed to the benefit of the Luxembourg state. If so, the public prosecutor orders the transfer of the assets to the *Trésorerie de l'Etat* and seeks a 50/50 agreement with the requesting state. Finally the Minister of Justice orders the transfer according to the agreement. Before this regime (which anticipates the application of FD 2006/783/JHA) was implemented, procedures used to be time-consuming.

There are no officers or material **resources** dedicated exclusively to asset recovery, but at least one magistrate at the prosecutor's office at the Luxembourg district court is appointed as an ARO officer. Currently there are three magistrates who deal with all ARO matters, but not exclusively. They can rely on their usual human and material resources in order to deal with those matters. The same applies to police forces, where some officers are specialised in ARO matters. No specific **training** is provided to officers in charge of the disposal phase. Certain specialised expertise is available only at the Fund for the Fight against Certain Forms of Criminality.

## MALTA

Confiscation within criminal proceedings in Malta is regulated by the Criminal Code (Chapter 9 of the Laws of Malta) and is allowed only as part of criminal proceedings. Confiscation outside criminal proceedings is not an option. Maltese law provides for property confiscation only.

There are no legal provisions on the **management of seized assets** with the purpose of optimising their value or minimising their deterioration before the final confiscation order.

According to the existing provisions on the **disposal of confiscated assets** in the Criminal Code, all property is confiscated in favour of the Government of Malta, and the Registrar of the Criminal Court is responsible for its disposal. The Government as owner has the discretion to apply various disposal options, although there are no particular legal provisions which regulate these actions. The options applied are the following: sale to the public (*subbasta*), transfer to institutions or authorities (e.g. a confiscated vehicle is assigned to the police force), social re-use, destruction (chapter 9, art. 679), rent (e.g. the real estate property of a landlord is confiscated in favour of the Government, so that the tenants now pay rent to the Government).

## NETHERLANDS

In the Netherlands, within criminal proceedings a conviction is normally the necessary prerequisite for confiscation.

Specific provisions exist on the **management of seized assets** to optimise their value/minimise their deterioration. In particular, under art. 117 of the Code of Criminal Procedure, seized objects cannot be alienated unless authorisation has been obtained. This authorisation may be given by the Public Prosecutor's Service as regards objects a) not suitable for storage; b) whose storage costs bear no relation to their value; c) which can be replaced and the counter value of which can easily be determined. A major role is played by the Criminal Assets Deprivation Bureau of the Prosecution Service (BOOM).<sup>63</sup> The seizure is signalled automatically to BOOM, which takes all the necessary precautions as rapidly as possible.

The key factors hampering the timely and successful management of seized assets can be summed up as follows: 1) registration of seized assets is not always up to date or complete; 2) the valuation of property/real estate is not always correct (or it may be that a previous valuation is no longer realistic).

The **key legal acts** disciplining the disposal of confiscated assets in the country are the following:

- the Code of Criminal Procedure: art. 574, paragraph 1 (on the manner of recovery/disposal); art. 577b, paragraph 2 (on victims);
- the Code of Civil Procedure: arts. 439-474 (on movable goods/assets); arts. 475-479a (on claims); arts. 502-529 (on real estate/immovable property);
- the Criminal Code: art. 36e, paragraph 6 (stating that awarded claims of victims will be deducted from the confiscation order).

These acts envisage the three following **disposal options**:

- *sale to the general public*: this option applies both to vehicles etc. (movable goods) (under arts. 517 and 519 of the Code of Civil Procedure) and to real estate (under arts. 462 and 463 of the same Code);
- *restitution to victims, in value form*: this option is disciplined under art. 36e(8) of the Criminal Code and under art. 577b(2) of the Code of Criminal Procedure;
- *destruction*: for assets not suitable for storage or whose storage costs are not in reasonable proportion to the value of the property, as foreseen by art. 117 of the Code of Criminal Procedure.

The **key institutions** involved in the disposal phase are the following:

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<sup>63</sup> Bureau Ontnemingswetgeving Openbaar Ministerie (BOOM).

- The Public Prosecution Service:<sup>64</sup> execution of property confiscation orders.
- the Criminal Assets Deprivation Bureau of the Prosecution Service (financial investigation; seizure of criminal assets; (nationwide) administration of prejudgement seizures; expertise centre; ARO);
- criminal courts: orders measures to force payment of value confiscation orders. Also Civil Courts in the case of execution disputes;
- The Dutch National Police Services Agency (KLPD):<sup>65</sup> destruction of confiscated drugs/weapons etc. (in cases of property confiscation);
- The Service for State Property, which is part of the Ministry of Finance<sup>66</sup> (destroys, stores or sells goods seized by Justice/other official investigation authorities);
- the Central Fine Collection Agency (CJIB):<sup>67</sup> national collection/recovery of confiscation orders, i.e. it is the only actor involved in the execution of value confiscation orders; central authority under FD 2006/783/JHA);
- bailiffs<sup>68</sup> (officials in charge, in civil law, of property recovery if there is a claim by a creditor; they intervene in the execution of confiscation if the order to pay is not respected by the convicted person);
- Ministry of Security and Justice, Department of International Legal Assistance in Criminal Matters (authority for non-EU members and EU-member states that have not yet implemented FD 2006/783/JHA);
- notaries (involved in the forced sales of properties).

Regarding the **workflow** of *property confiscation*: when a confiscation order is final, the public prosecutor executes it. Confiscated money is transferred to the public treasury. Confiscated property e.g. weapons, drugs etc. is destroyed by the KLPD. Confiscated property, e.g. cars or computers, may be destroyed or sold by the Service for State Property. Regarding the workflow of *value confiscation*: when a confiscation order is final, the public prosecutor sends it to the CJIB. Two options are then available: 1) if assets have previously been seized, the CJIB realizes these assets (via sale or taking possession of a bank account), and then sends an order to pay to the convicted person for the remaining amount. If s/he does not pay, a reminder is sent, and if the payment is again not made, dedicated officials are in charge of recovering the amount from among his/her assets via their sale; 2) in cases where there has not been a previous seizure, the same workflow occurs as under 1), without the steps regarding seizure.

Specific provisions, i.e. arts. 70 and 76 of the Criminal Code, discipline the **timing** of the disposal phase. They envisage completion of the execution within a time frame equal to the statute of limitations for a given offence, plus one third. In fact, confiscation orders regarding movable assets are executed immediately with their sale. The disposal of real estate takes some more time.

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<sup>64</sup> Openbaar Ministerie.

<sup>65</sup> Korps Landelijke Politie Diensten (KLPD).

<sup>66</sup> Domeinen Roerende Zaken.

<sup>67</sup> Centraal Justitieel Incassobureau (CJIB).

<sup>68</sup> Deurwaarders.



Some problems arise in **existing practices**. Firstly, in some cases confiscation orders contain outdated or no (not enough) information about the property. Moreover, in many cases not enough property has been previously seized to cover the amount of the confiscation order, and it is very difficult to recover additional assets. As a result, the types of assets usually difficult to dispose of are those not previously seized, when the convicted person does not have other assets, or when these are abroad. The types of assets usually easy to dispose of are money and bank accounts; as well as real estate and movable goods. There are no problems in dealing with real estate property under joint ownership. No major problems arise in relation to properties with mortgages, even though sometimes only minimal revenue is obtained. The disposal of such assets is not problematic because the Dutch law envisages a clear procedure supervised by a notary. To improve the overall effectiveness of the disposal phase, and in particular interagency cooperation (i.e. cooperation among all relevant actors) – which now works efficiently – a project called '*Programma Afpakken*' has been launched to promote dialogue among all actors involved and to share problems.

If a case involves **mutual recognition of a foreign confiscation order**, the confiscated assets are repatriated from the Netherlands to the requesting Member State in accordance with art. 16 FD 2006/783/JHA, which has been implemented in the *Act on Recognition of Criminal Sanctions of 2008*. The CJIB is the central authority for receiving and sending requests for mutual recognition. In practice, no significant problems arise in these cases, although it is difficult to make a definitive assessment since the cases have been few in recent years (the country has sent out many more requests than it has received).

In general, the actors involved in the disposal phase can rely on sufficient **human and material resources**. Specific **training** is given to CJIB officials, amongst others, via the *Training and Study Centre for the Judiciary*.

## POLAND

In Poland, proceeds of crime confiscation is possible only in criminal proceedings following a conviction, and it is regulated by the Criminal Code.

**Management of seized and confiscated assets** is regulated by the Criminal Code and the Criminal Procedure Code. Assets are seized within either the preparatory proceedings or judicial proceedings (arts. 291 and 292 Criminal Code). If the accused is convicted by the Court, the assets are managed by the Judicial Enforcement Officer. Art. 232 of the Criminal Procedure Code states that material objects which are perishable or whose storage would entail unreasonable expenses or excessive hardship or would significantly impair the value of the objects, may be sold without an auction by an appropriate trading unit. Seized assets are managed by the Court or by the state prosecutor if

the seizure takes place in the preparatory proceedings. Such a seizure determines the scope of the security and the manner in which the assets are secured. It should be pointed out that the security is cancelled if a not-guilty verdict is rendered. If the accused is found guilty, the Court manages the assets in accordance with the Civil Procedure Code. The main factor hampering successful management is the lack of legal provisions in the Criminal Procedure Code concerning time limits for the disposal of assets.

**Legislation** governing the disposal of confiscated assets includes the Criminal Code, the Executive Criminal Code and the Code of Civil Procedure. The Executive Criminal Code provides that disposal of confiscated assets is based on the Code of Civil Procedure. Arts. 758 to 1088 of the Civil Procedure Code state that the judicial enforcement officer is responsible for the disposal of confiscated assets. The existing disposal options are:

- *sale to the general public* (art. 25 Executive Criminal Code): real estate and movables can be auctioned. Anyone can participate in such auctions. This is the usual method of disposal;
- *transfer to state institutions or local authorities* (art. 45(6) Criminal Code): property-related benefits covered by the forfeiture or its equivalent become the property of the Treasury when the judgement enters into force. Thus property may be transferred by the Treasury to other state institutions;
- *social re-use* by state institutions and local authorities (art. 52 Criminal Code);
- *social re-use by NGOs*: for some crime types the court is obliged to impose monetary sanctions, whose value is then transferred to NGOs. Such crimes are traffic accident offences, bodily harm, etc. (arts. 47-49 Criminal Code);
- *restitution to victims* (art. 46 Criminal Code);
- *destruction*: for counterfeit goods, drugs, etc.

The **key actors** involved in the disposal of confiscated assets are the following:

- prosecution service: requests forfeiture;
- court: rules on the requested forfeiture;
- Judicial Enforcement Officer: in charge of disposal;
- Revenue office: in charge of disposal.

The Judicial Enforcement Officer auctions the assets. In some cases, assets may be sold outside an auction. When the State Treasury is the beneficiary of the measures, the execution is carried out by the Revenue Office. There are no legal provisions regarding the **timing** of the disposal phase. In most cases it takes up to a year to dispose of the assets.

In regard to **existing practices**, the assets that are most often confiscated are cash, cars and real estate properties. A lack of legal provisions for the disposal of confiscated assets hampers rapid disposal. Interagency cooperation works quite well, but the above-mentioned lack of legal

provisions is conducive to problems in the management of confiscated assets.

Poland has already implemented Council Framework Decision 2006/783/JHA on the **mutual recognition of foreign confiscation orders**. Disposal in such cases is disciplined by art. 589(l) of the Criminal Procedure Code, which states that incoming freezing orders are sent to the locally competent court or the prosecutor.

No specific data are available on the adequacy of **human and material resources**.

## PORTUGAL

In Portugal, a criminal conviction is always the necessary prerequisite for confiscation. Seizure of assets to be confiscated is provided by the Code of Criminal Procedure, art. 178 to 186. Specific provisions exist on the **management of seized assets** to optimise their value/minimise their deterioration before they are confiscated. In particular, law no. 45/2011 – that established the Portuguese ARO, i.e. GRA – states that management of seized property must be ensured by the Office of Asset Management (GAB),<sup>69</sup> which the act has appointed as the Asset Management Office. These provisions are very new, and in fact neither the ARO nor the AMO are operative yet. For the time being, seized assets are managed on the initiative of the public prosecutor, who may ask the judge:

- to sell a given asset (having a commercial value); in this case, if the judge agrees, s/he will appoint a person to conduct the sale or will ask a public officer within the prosecution service to do so;
- to give perishable assets (e.g. clothes, food, counterfeited goods with removed brands) to social institutions;
- to keep the assets, when they are real property. Immovable property is administered by a receiver appointed by the judge to prevent a decrease in its value.

Regarding money, this is kept in a bank account. While bonds are more difficult to administer, a decision to sell (or not) is taken by the judge on the advice of a receiver. Cars are destroyed or sold by the General Directory of the State Property (within the Financial Ministry). A variety of problems arise. Prosecutors and judges are not yet aware of the need to manage assets; furthermore, the official entities that deal with seized assets do not have the means to take good care of them. Consequently, assets typically depreciate.

The key **legal acts** disciplining the disposal of confiscated assets are the following:

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<sup>69</sup> Gabinete de Administração de Bens.

- *sale of vehicles* (art. 10 law decree 31/1985), when they are not in good enough condition to be used by the official entities;
- *transfer of vehicles to police/central administration* (art. 7 law decree 31/1985), when they are in good condition;
- *transfer* to schools, public institutes, etc. for social re-use (vehicles) (art. 7 law decree 31/1985);
- *restitution to victims*;
- *destruction* of hazardous and perishable goods (art. 185 Code of Criminal Procedure).

Finally, art. 17 of law no. 45/2011 states that the income generated by the management of property recovered or confiscated to the state shall revert as follows: a) 50 % to the Modernization of Justice Fund; b) 50 % to the IGFJ, I.P.

The **key actors** involved in the disposal phase are the following:

- criminal court: issues the confiscation order;
- official/court agent: executes the decision;
- General Directory of the State Property: executes confiscation orders concerning cars.

The normal **procedure** is as follows (it applies to all goods): the official/court agent takes the actions necessary to sell or to deliver the confiscated goods to the beneficiaries. In particular, the sale is made by the court agent or by a private seller under prosecutor surveillance. For vehicles, the judiciary authority informs the General Directory of the State Property (Direção-Geral do Património do Estado) as soon as the vehicle is seized; if this entity states that the vehicle is of interest to the State, they check if there is a public body with a request. If so, the vehicle is examined to determine if it suits the needs of the requesting body. If not, the sale is announced in a major newspaper and is made to the best offer submitted.

There are no specific provisions in regard to the **timing** of the disposal phase. In fact, when the prosecutor asks the judge to sell or to deliver an asset at the end of the proceedings, this is done within a few weeks; otherwise, the procedure may take months or even years. In most cases the delay depends on the fact that the actors involved do not regard rapid disposal of the assets as a priority.

In regard to **existing practices**, in most cases the assets are not in the best condition, and it is therefore very difficult to find buyers. Jewels and other valuable goods (watches, rings, etc.), as well as vehicles in good condition, are usually easy to dispose of. Assets usually difficult to dispose of include assets with decreased prices or low-priced ones, and, nowadays, high-value real estate. When the sale of low-priced or decreased-price goods is not successful, they can be destroyed or given to charitable institutions; while real estate can be sold to the best offer. One of the main problems that may arise in this process of disposal (sale) is the possibility that the private agent charged by the judge/prosecutor with the sale conducts it in order to obtain a private

profit. There are some pending proceedings in this regard. Problems also arise in relation to real estate under joint ownership, as well as to properties with mortgages, because of the protection given to *bona fide* third parties. But the main problems occur in relation to assets subject to a “conditional transfer of property”: that is, when the property is transferred to the buyer only after payment of the entire price, in the case of fractional payment.

Some provisions contained in the ARO Act (chapter III) will provide some solutions to these problems in the near future. The most important one is that the AMO (GAB) will be competent to decide when and how to sell the assets. In fact, it can decide to make the sale before the final decision (except for real estate). Furthermore, the GAB has been given powers to manage seized assets to prevent their devaluation, which is very important in the case of cars and other special assets such as corporations, shares, etc.

Portugal has implemented Council Framework Decision 2006/783/JHA on the **mutual recognition of confiscation orders**. A 50/50 split applies in these cases, unless the value of the assets is less than 10,000 €. The court where the assets are placed is competent for recognition. No particular obstacles arise in practice.

As regards **resources**, currently not operative is any agency dealing specifically with the disposal of confiscated assets. As a consequence, there is no dedicated staff. The agencies involved are not given any *ad hoc* **training** in disposal procedures. In the near future, with the establishment of the GAB, things will hopefully change.

## ROMANIA

Currently, Romania has criminal confiscation regulated by the Criminal Code. Confiscation is possible also in administrative proceedings leading to civil seizure (Law 115/1996 for the declaration and control of assets of the officials, magistrates, of persons holding management and control positions and of public officials, and Law 176/2010 regarding integrity in exercising public function).

Legal provisions exist on the **management of seized assets** to optimise their value/minimise their deterioration before they are confiscated. These are contained in Law no. 28/2012, which amended two legislative acts: the Government Ordinance (G.O.) no. 14/2007 and the Criminal Procedure Code. Pursuant to the amendments to the Criminal Procedure Code, during the criminal trial, before a final decision is rendered, the prosecutor or the court that has adopted seizure may order the valorisation of seized mobile assets. This may happen on the request of the assets' owner or if his/her consent is given. If there is no such consent, valorisation may be executed in specific cases like significant value reduction over the first year, assets that require disproportionate

expenditure in comparison to their value, flammable or oil products, and livestock. The law also stipulates special provisions on the sale of seized vehicles whose owners cannot be identified. Similar measures exist for administrative confiscation. In cases of civil confiscation, precautionary measures cannot be imposed. This constitutes a problem.

The key **legal acts** on disposal are the following: G.O. no. 14/2007 regulating the procedure and conditions for the disposal of assets taken over and transformed into state private property in accordance with the law as amended and supplemented; G.O. no. 731/2007 approving the methodological norms for applying the G.O. no. 14/2007; Law no. 381/2004 regarding financial measures in the field of the prevention and combating of illicit drug trafficking and abuse; Order of the Minister of Public Finance no. 1071/2004 regarding the special stamping of spirits; Law no. 571/2003 regarding the Fiscal Code; Law no. 344/2005 on certain measures regarding the protection of intellectual property rights during customs procedures. The following disposal options are available:

- *sale to the general public*: any type of property may be sold, except goods such as rugs, toxic or radioactive substances, etc.;
- *transfer to state institutions or local authorities*: subject to such transfer are goods of special status such as, for example, medicines and medical equipment, toxic substances, nuclear/radioactive materials, cultural heritage, currency, weapons, ammunition/military items, cars, boats, IT equipment, office items, repair and maintenance materials;
- *social re-use through transfer to state institutions, local authorities and NGOs*: this applies to assets of any type (except for the goods of special status listed above). Assets can be transferred to nurseries, educational bodies, libraries, orphanages and childcare centres, homes for the elderly, medical and social care units, disabled persons, churches, the Red Cross National Society of Romania, as well as individuals who have suffered from natural disasters;
- *destruction*: this applies to processed tobacco, goods that cannot be sold, expired food products, goods whose value is lower than the disposal cost, goods infringing intellectual property rights.

The **key actors** involved in the disposal of confiscated assets are the following:

- Ministry of Public Finance through the Directorates General of Public Finance of the counties or of Bucharest, as well as district Public Finance Administration Offices (disposal authority);
- National Office for Crime Prevention and Cooperation for Criminal Assets Recovery (Asset Recovery Office) (keeps track of the execution of confiscation orders);
- National Anti-Drug Agency (keeps track of court confiscation orders regarding drug-related convictions);
- Ministry of Foreign Affairs (disposal authority for assets outside Romania);
- various Committees with specific roles in different phases of the disposal process: the Commission for evaluation of assets; the Commission for

the destruction of assets; the Inter-ministerial Commission for the distribution of assets transferred to other entities.

Specific provisions exist in regard to the **timing** of the disposal phase. According to the data provided by the National Agency for Fiscal Administration, the average time elapsing in 2011 between the disposal order and the actual disposal was 103.87 days, which is well under the 180-day limit prescribed by law.

**Existing practices** demonstrate that food products and electronics are easy to dispose of. Food undergoes a simplified disposal procedure to ensure that its shelf life does not expire. Precious metals and stones are the most difficult to dispose of due to the complex transfer and disposal procedures. They have to undergo expert evaluation; and the pool of eligible buyers is scant because a limited number of individuals and legal entities are authorised to trade such items. A factor that hampers timely completion of the disposal phase is the length of criminal trials. This causes the depreciation of seized property, so that when it is finally confiscated, it must be disposed of at a very low price.

Romania has transposed FD 2006/783/JHA on **mutual recognition of foreign confiscation orders**. Confiscation orders coming from another EU Member State are sent to the competent court, which decides whether or not to enforce them. If the court decides to enforce a confiscation order, the workflow for disposing of confiscated assets is regulated by the domestic legislation described above. However, there are few such cases, so that it is not possible to assess the implementation of such provisions.

Human **resources** at the National Office for Crime Prevention and Cooperation with EU Asset Recovery Offices are considered insufficient to handle the workload. The Romanian Asset Recovery Office was established in 2011 and is currently further developing its structure. In the National Anti-Drug Agency, there are two employees within the Drug Supply Monitoring Service that keep track of confiscated assets from drug and precursor offences. National Agency for Fiscal Administration personnel are also insufficient at central level to deal with the statistics and coordinate the enforcement of confiscation orders. There was regular **training** of specialised personnel until 2008, when budgetary cuts limited this activity to expert advice by phone or e-mail. The Romanian ARO has put in place a training programme on asset recovery which includes best practices on asset management.

## SLOVAKIA

The main regulation governing property confiscation within criminal proceedings is the Criminal Code. The option of seizing assets outside criminal proceedings is regulated by Act no. 101/2010 Coll. on the Proof of Origin of Funds. Under this Act, the financial police investigates

whether property owned by a person/company corresponds to legal income, and the court can seize the property value corresponding to the difference between the legal income and the value of the property owned.

The **management of seized and confiscated property** is regulated by Act No. 278/1993 on Administration of State Property. Property is administered by a temporary trustee, which is a district office based in the capital of the region on whose territory the property has been seized. The district office is part of the state administration and reports to the Department of Public Administration at the Ministry of Interior, which guides, coordinates and supervises district offices' activities. There are no provisions to prevent the deterioration of property or to maximize its value.

The key **legal acts** governing the disposal of confiscated assets are: Act no. 278/1993 Coll. on the Administration of State Property (tender obligation for state or state-funded bodies; procedures for the sale of state assets; procedures for the lease of state assets; procedures for the handling of unusable assets); Act no. 101/2010. The existing disposal options include:

- *sale* of goods through public auction;
- *transfer* of ownership or use of the goods for free;
- *lending (for free or for a fee)*: the former is often applied with respect to state organisations, municipal or regional self-governments, public institutions or non-profit organisations;
- *liquidation*: this applies when goods are appraised as unfit for further use or could not be disposed of in any of the ways described above.

There is no central body responsible for managing and coordinating the entire disposal process; this significantly complicates the effective handling of forfeited property. The **actors** involved in the disposal of confiscated assets are the following:

- Slovak Police Force: performs confiscation of criminal assets in compliance with art. 21 of the Police Force Act. There are no police units specifically charged with confiscation;
- Prosecutor's Office;
- courts: order confiscation;
- Ministry of the Interior: administers criminal assets that have become state property as a result of seizure or forfeiture in criminal proceedings.

The standard **workflow** starts with a court decision on forfeiture of property or a pecuniary amount. The Government becomes the owner of the assets, unless the court rules otherwise based on an international convention or treaty that is legally binding for the Slovak Republic. After the ruling takes effect, the property is taken over by representatives of the applicable district office and entered into the registration system. Once the property is registered, it is appraised and submitted to a commission,



which decides on its further disposal (i.e. re-use or liquidation). If the property is reusable, the commission issues a proposal regarding its further use. The final decision is made by the district office's head clerk, who usually respects the commission's proposal. As a rule, the property must first be offered to state organisations that could effectively use it to perform their duties within the particular region. As far as real estate is concerned, the interested party must demonstrate that it needs the surplus property to perform its duties and must pledge to use it as such for at least five years. The pre-emptive right of state organisations does not apply to movable property whose value does not exceed 10,000 €.

Should no state organisation show interest in the surplus property, the district office holds a public tender or an electronic auction to sell it; the property is transferred to the bidder who offers the highest price. This procedure is not used with respect to immovable property intended for the purpose of providing social care, health care or education; in these cases, district offices are not obliged to hold an auction. The district office may also decide to donate movable property to non-profit organisations operating in the fields of health care, social assistance, humanitarian care, protection of cultural values or education. The basic condition for such a transfer is that the transferee must perform specified activities for at least one year. Movable property may also be donated to municipal or regional self-governments, as well as to humanitarian aid abroad.

The State Property Administration Act does not stipulate any **timing** for the issue of decisions on further use of forfeited property; the average time that elapses from the issue of a court decision to the transfer of the property to new owners/users is approximately one year. The Act only sets an obligation on the new owners/users to handle the property without unnecessary delays in the most appropriate and economical manner.

**Existing practices** show that, since there are no jurisdiction disputes throughout the entire process of seizure, confiscation and disposal, there are no problems in terms of interagency cooperation. Although civil society subjects are among potential recipients of confiscated criminal assets, they do not participate in any way in decision-making processes regarding their disposal. This is because confiscated property is forfeited to the state and its further disposal is decided by state administration bodies that do not involve external subjects in their decision-making. The key problems depend on the type of property to be disposed of: there are objects, equipment or vehicles which are very difficult to re-use because of their obsolescence or depreciation. Some difficulties are caused by large volumes of movable property (e.g. thousands of cigarette packages or thousands of bottles of alcohol) because the entities involved have limited financial and human resources for handling their disposal. Another source of difficulties is the requirement that criminal assets must be liquidated by authorised personnel.

Slovakia has not yet implemented *Council Framework Decision 2006/783/JHA* on the **mutual recognition of foreign confiscation orders**.

There are no reported problems related to human or material **resources** earmarked for the administration of state property. One of the rather isolated problems identified was liquidation of unusable goods by properly trained personnel. There are no special **training** programmes specifically dealing with the handling of seized and forfeited property; there are only general training programmes aimed at proper enforcement of the State Property Administration Act.

## SLOVENIA

Slovenia applies conviction-based confiscation regulated by the Criminal Code (enacted in 2008; amended in 2008 and 2011), and non conviction-based confiscation under the Forfeiture of Assets of Illegal Origin Act (ZOPNI), which has been in force since May 2012.

With respect to **management of seized assets** in cases of conviction-based confiscation, the Criminal Procedure Act (CPA) provides that the court which ordered the storage of seized items or property equivalent to the value of the proceeds must take very rapid action. If the storage of the seized items entails disproportionate costs, or if the value of the property or items is decreasing, the court may order the property to be sold, destroyed or donated for public use. Regulations on the procedures for the storage, management and sale of property of illegal origin in cases of non conviction-based confiscation were adopted on the basis of the ZOPNI. This regulates the storage, management and sale of confiscated property depending on the type of property.

The key **legal acts** dealing with disposal of confiscated assets are these: the CPA, the ZOPNI, Regulation regarding records in the field of confiscation of property of illegal origin, Regulation on the procedure for the management of seized items, assets and securities, and Regulation on the procedures for storage, management and sale of assets of illegal origin. The following disposal options are envisaged:

- *sale to the general public*: the CPA states that the money obtained from the sale of objects shall be transferred to the budget. Art. 40 of the ZOPNI states that the general rule for disposal of forfeited assets is sale;
- *transfer to state institutions or local authorities*: pursuant to art. 13 of RPMSIAS such transfer of assets to state organisations is an option if they can show that they need the assets for their activities;
- *social re-use*: according to the same provision, assets may be transferred to NGOs if sale is not possible or if the costs of the sale would exceed the value of the property, or if the organisations show that they need the property for their activities;
- *destruction*: art. 38(2) of the ZOPNI states that if the secure storage or management is associated with disproportionate costs, or if the value of assets or objects decreases, the state prosecutor may request the court to order the assets to be destroyed.

The Enforcement and Securing of Civil Claims Act contains legal provisions dealing with the disposal of properties with mortgages (or subject to other executive procedures) or the disposal of real estate under joint ownership. Art. 30 of the ZOPNI states that the forfeiture of assets of illegal origin shall have no impact on the rights to this property enjoyed by third parties unless, during the acquisition of such rights, they were aware or should have been aware of the illegal origin of the assets. The matter is not specifically regulated in the CPA. However, the CPA states that the Enforcement and Securing of Civil Claims Act should be applied unless otherwise provided.

The **key actors** involved in the disposal of confiscated assets are the following:

- prosecution service: requests seizure and confiscation of assets;
- court (under the ZOPNI) and investigative judge (under the CPA): issue a decision on seizure;
- court, state organisations, NGOs, executor, external contractors: store seized assets;
- court: rules on the type of disposal of assets;
- court, executor: auction confiscated assets;
- commission appointed by the Minister of Justice for the area of the district court (judges, state prosecutors, representatives of Ministry of Interior Affairs): supervises the auction.

Moreover, art. 37 of the ZOPNI specifies that the secure storage and management of temporarily secured, temporarily forfeited and permanently forfeited assets of illegal origin shall be the responsibility of the following bodies:

- Capital Asset Management Agency of the Republic of Slovenia: for equity securities under the act governing the financial instruments market and equity holdings in companies;
- Ministry of Finance: for other financial assets;
- Customs service: for movable property;
- Farmland and Forest Fund of the Republic of Slovenia: for agricultural areas and forests;
- Public Real Estate Fund of the Republic of Slovenia: for other real estate.

There are no specific provisions disciplining the **timing** of the disposal phase. There are time limitations for the financial investigation procedure according to the ZOPNI, but none solely for the management of confiscated property. Limitations for seizure of supposedly illegal property however exist. For criminal confiscation the CPA defines rather specific, but overall long, deadlines and also the ZOPNI separately defines seizure.

**Existing practices** show that cooperation among the numerous authorities involved does not function well. Even the safekeeping of the temporarily seized property is scattered across too many authorities and procedures. In practical terms, it is easy to maintain the value of precious metals, stones and real estate. The greatest difficulties are encountered with the

sale of vehicles, mobile phones, and other movable property. There are also problems with mortgaged/co-owned property.

Regarding the **recognition of foreign confiscation orders**, if a foreign criminal court issues a confiscation order to be executed in Slovenia, it is regulated under the Act on cooperation in criminal matters between the EU members. If the other country is not an EU member, the usual rules on international cooperation in criminal matters apply (agreements or the CPA's general regulation). If a foreign civil court issues a confiscation order to be executed in Slovenia, the Enforcement and Securing of Civil Claims Act applies.

Human and material **resources and training** are among the main factors impairing the effectiveness of management and disposal of confiscated property in Slovenia. There is no system for certified education or training in the law enforcement and criminal justice system as a whole. Expertise on the subject is lacking.

## SPAIN

In Spain, with very limited exceptions (e.g. the person is exempt from criminal liability or criminal liability is extinguished), confiscation is a penalty following criminal conviction.

Regarding the **management of seized assets**, specific legal provisions exist to optimise their value/minimise their deterioration, in particular via the advanced sale of the assets. According to article 367 quater of the Criminal Procedure Act, the assets can be sold before final confiscation: a) when they are perishable; b) when the owner abandons them; c) when the costs of maintenance and storage exceed their value; d) when their preservation may be dangerous to health or safety, or may result in a significant decrease in value, or seriously affect normal use and operation; e) if they substantially depreciate over time. The key critical factor hampering the timely and successful management of seized assets is the lack of an asset management office.

Asset search is carried out by judicial police groups responsible for investigations, who report "in good time and in an appropriate manner" to the Judicial Authority about the property/assets of individuals and companies involved in the investigations. Nevertheless, a heavy workload often makes it difficult for judges to handle this kind of information.

The **legal acts** disciplining disposal of confiscated assets are:

- Art. 127.5 of the 1995 Criminal Code (as amended by 5/2010 Act): assets not deriving from drug trafficking and money laundering from drug trafficking are to be sold;
- Fund of Confiscated Assets 17/2003 Act: assets deriving from drug trafficking and money laundering from drug trafficking are to be sold,

and the profits from their sale go a state-owned fund. The fund then distributes the money among the beneficiaries.

The following **disposal options** are envisaged:

- *sale to the general public*, which is the main disposal option, applicable to the proceeds from any crime (with the sole exception of drug trafficking and drug trafficking-related money laundering);
- *social re-use (for the proceeds from drug trafficking and drug trafficking-related money laundering)*: proceeds from such crimes are sold and the relative profits go to the Fund established by the 17/2003 Act. According to article 2 of the Act, this money is then devoted to: drug prevention programmes, assistance and social reintegration of drug addicts; the intensification and improvement of the prevention, investigation, prosecution and punishment of drug trafficking offences; international cooperation in the field. According to article 3, the following entities may be beneficiaries of the fund: law enforcement agencies and prosecution offices with counter-narcotics responsibilities; NGOs and non-profit organisations working in the substance abuse field; regional and local governments and authorities; government delegation for the National Plan on Drugs; international organisations and institutions.

The **key actors** involved in the disposal phase are the following:

- criminal courts, which issue the final confiscation order;
- court clerks, who direct the entire disposal phase;
- the National Plan on Drugs, which, in drug trafficking and money laundering cases, sells the assets and distributes the money among the beneficiaries.

The **workflows** are as follows. In cases of assets not deriving from drug trafficking and money laundering, following the final judgment by the court, a court clerk orders the sale of the assets, auctions them and deposits the money in the Treasury (or delivers it to the beneficiary indicated in the judgment). For assets from drug trafficking and money laundering, the court sends the judgment and all data on confiscated assets to the *Government Delegation for the National Plan on Drugs*, where the *Coordinating Bureau for Allocation*<sup>70</sup> decides on the sale of the property and the distribution of money among beneficiaries. There is no legal provision regarding the **timing** of the disposal phase.

In regard to **existing practices**, real assets are usually easy to dispose of. They are sold at auction. The real estate register contains all the relevant data, so that no particular problems arise. Assets usually difficult to dispose of are movable assets. These are also more difficult to locate if they have not been seized previously. Also problematic is the disposal of certain industrial or agricultural properties, since it is difficult to keep them operating, also to guarantee occupational levels.

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<sup>70</sup> Mesa de Coordinación de Adjudicaciones.

If a case involves **recognition of a foreign confiscation order**, confiscated assets are repatriated to the requesting Member State based on a 50/50 split (if the amount obtained from the execution of the confiscation order is above \$ 10,000). The workflow is as follows: the judge orders enforcement of the confiscation order (if there is no cause for non-execution) and confiscates the assets or the equivalent value. The procedure is then the same as if a Spanish court had decided the confiscation, so that the assets are sold at auction by the court clerk. In practice, the same problems as in domestic affairs arise.

Regarding available **resources**, there is no centralised body. Hence everything depends on the competent court. Regarding **training**, there is no specialised programme.

## SWEDEN

Sweden applies conviction-based criminal confiscation, which is regulated by the Criminal Code. Section 5(c), Chapter 36 of the Criminal Code provides for confiscation of proceeds of crime or their monetary equivalent from a third person who profited from the crime or the entrepreneur who derived financial advantages from it.

Chapter 26 of the Code of Judicial Procedure disciplines the **management of seized assets**. If a person is reasonably suspected of an offence and if there is reasonable cause to foresee that s/he may remove property in an attempt to evade the obligation to pay the value of the forfeited property which can be assumed will be placed upon him/her because of the offence, the court may order seizure of so much of the suspect's property that the claim may be assumed to be secured on execution. The court issues such orders upon request by the investigation leader, the prosecutor. The investigation leader or the prosecutor may take movable property into custody while waiting for the court's seizure order. If delay entails risks, a police officer may take such action but must promptly report the measure to the investigation leader/prosecutor, who must immediately determine if the property shall remain in custody. Seized property can be sold if its value falls rapidly or requires care that is too expensive. Protective preliminary sale may be decided by the Enforcement Authority provided that the property is not real estate. If it is real estate, the Enforcement Authority is obliged to consult the owner. If the decision of the Enforcement Authority to sell is contrary to the opinion of the owner, s/he can appeal that decision before the court.

The key critical factors hampering the timely and successful management of seized property are the following: difficulties in determining whether the property is falling in value due to lack of knowledge about specific assets, and prolonged investigation and court proceedings. In many instances the defendant requests the sale of seized property to avoid storage costs or mortgage-related issues.

The **legal act** regulating the disposal of confiscated assets is the Enforcement Code, which provides for the following disposal options:

- *sale to the general public*: the sale of movable property is regulated by Chapters 8 to 11 of the Enforcement Act. Real estate sale is regulated by Chapters 8 and 12 of the Enforcement Act. Real estate, company stocks, vehicles, etc. may be sold through an auction. The auction is organised by the Enforcement Service or its assignee. Chapter 12 of the Enforcement Act contains special provisions dealing with the sale of mortgaged property and property under joint ownership. The Joint Ownership Act (1904) also contains provisions dealing with property under joint ownership. According to these acts, the co-owner of the property pays the market value for it. If the property is indivisible, it is subject to sale. Movable property may be sold privately if it is likely to yield a greater purchase price and such sale is also otherwise suitable for the purpose. A private sale may not be held if the property is subject to a maritime/aviation mortgage right, or if uncertainty prevails concerning this, and it is also not known who is claiming such mortgage right or where that person's domicile is;
- *restitution to victims*: Chapters 8, 9 and 12 of the Enforcement Code contain provisions dealing with restitution of damages to crime victims. According to the Enforcement Act, the Enforcement Authority directly transfers restitution funds to victims;
- *destruction*: all types of assets may be subject to destruction pursuant to Chapter 27 of the Code of Judicial Procedure. If there is no buyer for the property, or if the sale would be offensive to the public, property is destroyed.

The **key actors** involved in disposal phase are:

- National and regional police: investigate and locate assets;
- prosecution service: requests asset seizure;
- court: rules on the request for seizure and forfeiture;
- Enforcement Authority: seizes and sells assets.

The common **workflow** for disposal of confiscated assets is rather simple: after confiscation, the property is put up for sale to the general public and the funds are transferred to the state or to private claimants.

Regarding the **timing** of the procedures, that for movable property usually takes between 2 and 4 months (vehicles) from the issue of the forfeiture order to its sale. For real estate this period is at least 3 months. For other property it lasts 1-2 months.

The **existing practices** show that information flow is critical for the smooth disposal of forfeited funds and property. It is essential that all relevant information is communicated to the Enforcement Agency. It is also important that information from executing team to the sale team inside the Enforcement Authority is consistent and timely. To improve this aspect of interagency cooperation, the Justice Department has recently issued an order for closer cooperation among the police, the Economic Crimes Bureau and the Prosecution Service, which has resulted in

establishment of the National Function for Proceeds of Crime. The latter acts as advisor to the different authorities when it comes to the handling and seizure of assets.

In most cases, disposal cannot take place through public auctions. Public auctions prove to be an effective mechanism for real estate and vehicles; but this mechanism is not suitable for all assets. For example, shares and bonds are sold through the financial institutions, and the proceeds are transferred to the Enforcement Authority. Because Sweden applies value confiscation as the leading principle, it has a practice related to mortgaged property which warrants especial attention. If the value of the real estate does not cover both the mortgage and the cost of the sale, no freezing measure is imposed.

Sweden does not seem to encounter problems in the disposal of jointly-owned property and mortgaged real estate. The only critical points concern instances of tenant owner's rights. Issues may also arise due to the type of assets or due to legal restrictions relative to specific assets like perishables and excisable goods.

The Swedish Mutual Recognition Act concerning **mutual recognition and execution of foreign confiscation decisions** within the EU is based on Framework Decision 2006/783/JHA. The application for execution of a foreign order is made by the foreign authority to the competent Swedish authority which is part of the Enforcement Agency. The competent authority prepares a decision of execution based on the application/affidavit from the applicant. The case is handled like other cases by the competent Enforcement Authority. When the case is finished, the competent authority returns the application to the applying authority. Problems in such cases arise from transfer of property between relatives. Another potential issue concerns the above-described practice of non-enforcement in relation to certain mortgaged property.

Human and material **resources** seem to be sufficient, although they would bear improvement with respect to their efficient utilisation. There is no specific **training** curriculum on the disposal of confiscated assets.

## UNITED KINGDOM

Confiscation of proceeds from crime is regulated by the Proceeds of Crime Act 2002 (POCA). Confiscation can be made either a) in criminal proceedings, normally following a conviction or b) in civil recovery proceedings. The system is predominantly value based.

Regarding the **management of seized assets**, there are certain provisions in the POCA aimed at optimising assets value/minimise their deterioration. Section 45 allows the seizure of property subject to a restraint to prevent its removal from England and Wales. Section 49 also allows management receivers to control assets. A receiver is appointed when the assets



are of such a nature that they require active management and the defendant cannot manage the assets him/herself (e.g. is in custody/is not trustworthy). The court may confer on the receiver the following powers: power to take possession of the property; power to manage or otherwise deal with the property (which includes selling the property or any part of it/interest in it); power to start, carry on, or defend any legal proceedings in respect of the property; power to realise so much of the property as is necessary to meet the receiver's remuneration/expenses. The key problem is that the cost of management receivers often outweighs what is recovered. Similar issues of costs, but also of time and complexity, arise in civil cases: through civil courts, there is no fast track procedure or a dedicated court for such cases.

The **key legal act** regulating the disposal of confiscated assets is the POCA, as well as Treasury rules.<sup>71</sup> The key disposal options envisaged are the following:

- *incentivisation schemes to state institutions*: cash from payment of confiscation orders (including those issued in the civil process) is returned to the state. It is then divided using the following agreed formula (which is still divisive and causes conflict between agencies), based on the Home Office's Asset Recovery Incentive Scheme:
  - 50 % is retained by central government and used by the Home Office to support its Police funds;
  - 18.75 % is given to the body that has investigated the case;
  - 18.75 % is given to the Crown Prosecution Service;
  - 12.5 % is given to the Courts Service;<sup>72</sup>
- *incentivisation schemes to local authorities & NGOs*: local councils have investigators for certain criminal activities not investigated by the police. They pass the information to the police, and on the basis of a prior written agreement, will have a share of the money from the payment of confiscation orders which varies from case to case; moreover, other local agencies such as the Police can use their funds for local benefit if they choose to do so;
- *social re-use (Scotland)*: recovered criminal assets are invested in the 'CashBack for Communities' programme, i.e. in community programmes, facilities and activities largely for young people at risk of turning to crime/anti-social behaviour (<http://www.scotland.gov.uk/Topics/Justice/public-safety/17141/cashback>);
- *restitution to victims*: compensation orders can be made from confiscation orders.

The **key institutions** involved in the disposal phase are the following:

- Crown Prosecution Service (for the enforcement of more serious cases);

<sup>71</sup> Other pieces of regulation refer to asset forfeiture (e.g. Misuse of Drugs Act 1971, for items used in the commission of a drug trafficking offence; Powers of Criminal Courts Sentencing Act 2000, for non drug-related matters; Sexual Offences Act 2003, for land vehicles, boats or aircrafts used in trafficking for the purposes of sexual exploitation).

<sup>72</sup> Ian Davidson (2011), Use of recovered Criminal Assets – a comparative study between the English and Scottish Models, unpublished paper.

- HM Courts and Tribunal Service (for the enforcement of bulk, low-value cases).

Regarding the **timing** of the disposal phase, considering that the system is value based, there are legal 'time to pay' limits with penalties for non-payment that involve imprisonment. This has some effect, but not as much as one would expect. A study has suggested that on average 22-24 months elapse from the court order to enforcement.

As regards **existing practices**, there are some critical factors hampering the successful completion of the disposal phase. Because the system is value based, when assets are hidden by the criminal (especially overseas, in countries with which there are no reciprocal arrangements), their recovery is almost impossible. In general, lack of co-operation by the offender is always a problem. Interagency cooperation works fairly well, because there are long-established relationships between criminal justice partners and a number of formal working groups designed to resolve problems and develop understanding of shared problems. The types of assets usually easy to dispose of are those in possession of the defendant and those restrained. Conversely, the types of assets usually difficult to dispose of are mainly real estate, owing to third party interests (especially spouse/children making claims) or mortgages (during the course of the process there is the constant requirement to repay the mortgage). These issues can be mitigated by the better use of restraint powers, as well as by some local arrangements (not yet consistent and which could be improved) where matrimonial issues are dealt with by the same court as asset disposal.

The United Kingdom has not yet implemented Council Framework Decision 2006/783/JHA on the **mutual recognition of foreign confiscation orders**.

Available **resources** seem to be sufficient. However, insolvency practitioners cannot take over debt because there are legislative barriers to HMCTS doing so. This is an important weakness in the system. Officers receive **training**, but its 'depth' is not clear. It seems to be not as detailed or carefully constructed as it is for financial investigators.

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