

23 August 2017

English only

## Open-ended Intergovernmental Working Group on Asset Recovery

Vienna, 24 and 25 August 2017

Item 5 of the provisional agenda\*

**Forum for discussions on capacity-building  
and technical assistance**

### Study prepared by the Secretariat on effective management and disposal of seized and confiscated assets

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\* [CAC/COSP/WG.2/2017/1](#).



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## I. INTRODUCTION

### A. BACKGROUND TO THE STUDY

The Conference of the States Parties to the United Nations Convention against Corruption, (**the Convention**) at its fifth session held in Panama City, Panama, in November 2013 adopted resolution 5/3<sup>1</sup> on facilitating international cooperation in asset recovery. Resolution 5/3, *inter alia*, “encourages States parties and the United Nations Office on Drugs and Crime (UNODC) to share experience on the management, use and disposal of frozen, seized and confiscated assets, and to identify best practices as necessary, building upon existing resources that address the administration of seized assets, and to consider developing non-binding guidelines on this issue”. At the 6<sup>th</sup> session held in St. Petersburg in November 2015<sup>2</sup>, this mandate was renewed with the adoption of resolution 6/3 on fostering effective asset recovery.<sup>3</sup> Resolution 6/3 “encourages States parties and the UNODC to continue sharing experience and building knowledge on the management, use and disposal of frozen, seized, confiscated and recovered assets, and to identify good practices as necessary, building upon existing resources that address the administration of seized and confiscated assets, including with a view to contribute to sustainable development”.<sup>4</sup>

### B. PREPARATION OF THE COMPILATION AND METHODOLOGY EMPLOYED

In carrying out the above-mentioned mandate, in early 2014 UNODC began to work with *Regione* Calabria, Italy, in the field of management, use and disposal of seized and confiscated assets. In April 2014 an Expert Working Group Meeting was convened in *Reggio* Calabria consisting of 72 experts from 35 countries and seven international organisations with experience and expertise in the area of management, use and disposal of frozen, seized and confiscated assets. The initiative was aimed at identifying good practices with a view to developing relevant tools and guidelines on the issue of administration of seized and confiscated assets, both at the domestic level and within the context of international asset recovery cases.

The meeting produced a set of findings and recommendations on how to advance the work of the international community in the areas of: (i) international cooperation in identifying, seizing and confiscating criminal assets, particularly those of Mafia-based criminal organizations; (ii) domestic management, use and disposal of seized and confiscated assets; and (iii) management of returned assets in asset recovery cases.

The meeting recognized that approaches countries had taken to creating systems for the management and disposal of seized and confiscated assets at the domestic level were so diverse that it was not appropriate at that stage to pursue the development of guidelines on the matter. As regards the return of assets recovered at the international level it was resolved that guidelines would be produced for countries to which assets are returned on topics such as general policy considerations, on monitoring, use, identification of beneficiaries or victims in light of the type of crime. However further

<sup>1</sup> <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session5-resolutions.html>.

<sup>2</sup> <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session6-resolutions.html>.

<sup>3</sup> “Encourages States parties and the United Nations Office on Drugs and Crime to continue sharing experience and building knowledge on the management, use and disposal of frozen, seized, confiscated and recovered assets, and to identify good practices as necessary, building upon existing resources that address the administration of seized and confiscated assets, including with a view to contribute to sustainable development.” (para. 16).

<sup>4</sup> Conference of the States Parties to the United Nations Convention against Corruption, Resolution 6/3 “Fostering asset recovery”, paragraph 16. Available at: [https://www.unodc.org/documents/treaties/UNCAC/COSP/session6/Report\\_COSP\\_VI\\_advance\\_copy.pdf](https://www.unodc.org/documents/treaties/UNCAC/COSP/session6/Report_COSP_VI_advance_copy.pdf).

discussion was needed on how to define victims (individuals, broader public) and a policy study/survey on experience with consultation processes would need to be undertaken.

Building on the outcome of this workshop in Calabria, in Vienna from 7 to 9 September 2015, UNODC conducted an international expert group meeting which brought together 35 experts representing 19 countries and three international organisations with experience and expertise on the topic of “Effective management and disposal of seized or frozen and confiscated assets”. The focus was exclusively on domestic systems.

Based on the discussions at this meeting and in line with the mandate in Resolution 6/3, UNODC embarked on elaborating this study with a view to identifying important issues with which countries are confronted when designing their legal and institutional frameworks and building operational capacities for the management and disposal of seized and confiscated assets. The study to a large extent addresses the themes discussed at the expert group meeting and incorporates written contributions provided by the experts that attended the Expert Working Group Meeting. A draft of the study was shared with the experts and feedback was incorporated into a final version, which then underwent a peer review organized by UNODC as a second step of quality control.

The aim of the study is to help those directly tasked with developing legal and policy frameworks as well as those responsible for the day to day management of seized and confiscated assets to learn from the experiences of others and avoiding and/or managing some of the risks and challenges involved. Where it is possible to discern emerging trends these are highlighted.

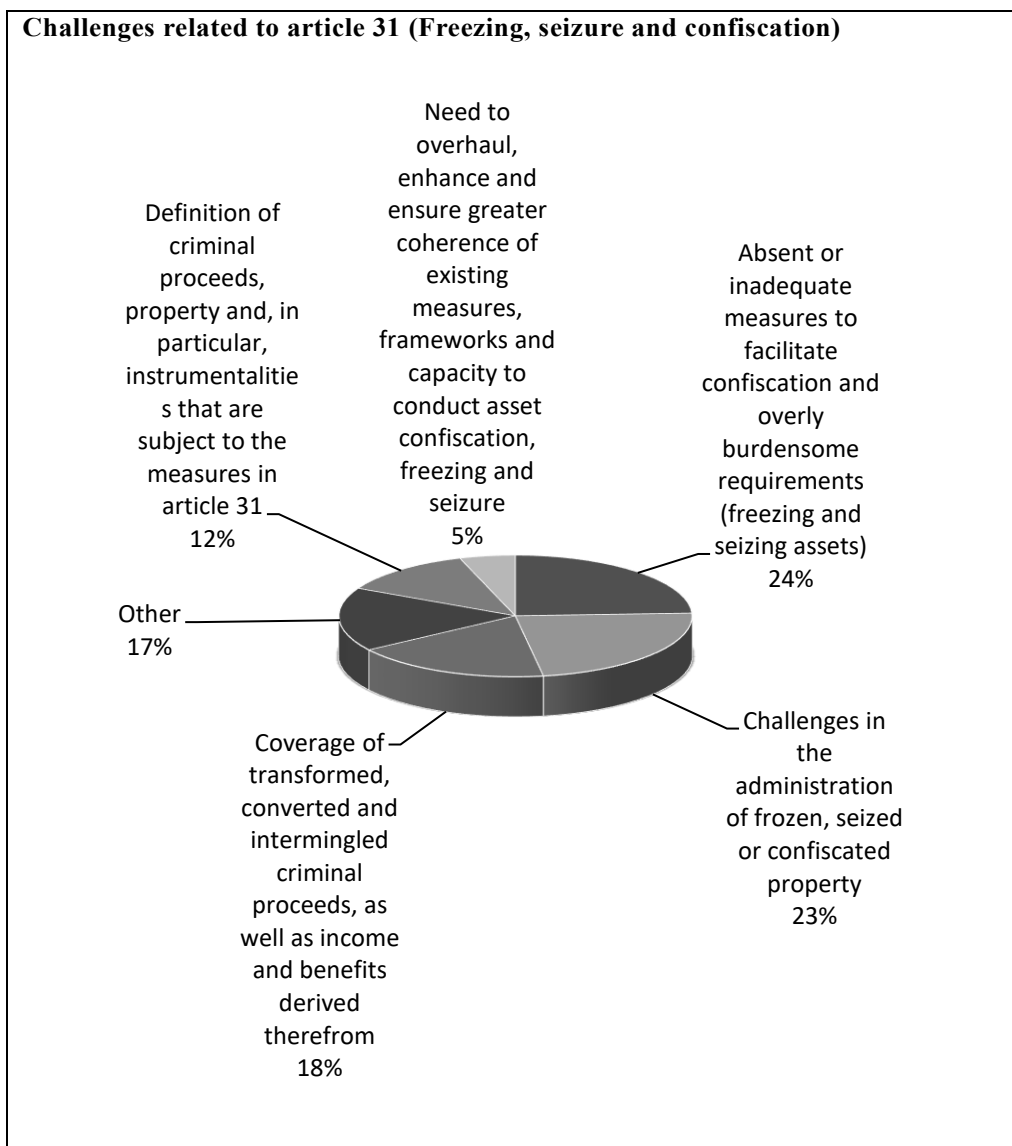
The remainder of this chapter addresses regional and international developments on the topic of management and disposal of seized and confiscated assets; the evolution of asset recovery policy and finally key considerations in establishing institutional infrastructure to manage and dispose of seized and confiscated assets. The balance of the chapters addresses the mechanisms employed during the interim management phase; considerations relating to the disposal of finally confiscated property is then addressed and the study concludes with institutional arrangements adopted by States to manage and dispose of illicit assets.

## **C. DEVELOPMENTS AT THE INTERNATIONAL LEVEL**

### **1. United Nations Convention against Corruption**

Article 31(3) of the Convention requires States Parties to adopt, in accordance with their domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered by the Convention.

The Mechanism for Reviewing the Implementation of the Convention revealed that several State Parties face particular challenges with the implementation of article 31 of the Convention and among these challenges the administration of frozen, seized or confiscated property featured most prominently (23 per cent of all challenges identified). The main issues in this context appear to include the absence of a body tasked with the management and disposal of seized and confiscated assets and the lack of an effective legal framework governing the administration of seized and confiscated assets.



The joint [UNODC/World Bank Stolen Asset Recovery Initiative \(StAR\)](#) has developed a wide range of tools and guides for policy makers and practitioners aimed to help address some of these challenges.<sup>5</sup> The following publications address the topic of management and disposal of seized and confiscated property: *A good practice guide for non-conviction-based asset forfeiture* (2009); *Towards a global architecture for asset recovery* (2010); *The Asset Recovery Handbook* (2011); *Barriers to Asset Recovery*, (2011). *The Management of Returned Assets* (2009) addresses the recovery and return of illicit assets between jurisdictions.<sup>6</sup>

Following the adoption of the Convention several international organisations and regional bodies have made recommendations and issued guidance on the management and disposal of seized and confiscated property.

## 2. G8 Guidelines

The G8 states issued a guide on *Best Practices for the Administration of Seized Assets* (2005)<sup>7</sup> which identified overarching principles to be observed in the administration

<sup>5</sup> All these products are available at: <http://www.track.unodc.org/assetrecovery/Pages/Star.aspx>

<sup>6</sup> [https://www.unodc.org/documents/corruption/Publications/StAR/StAR\\_Publication\\_-\\_ManagementReturnedAssets.pdf](https://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_ManagementReturnedAssets.pdf).

<sup>7</sup> [http://www.coe.int/t/dghl/monitoring/moneyval/web\\_ressources/G8\\_BPAssetManagement.pdf](http://www.coe.int/t/dghl/monitoring/moneyval/web_ressources/G8_BPAssetManagement.pdf).

process, particularly during the seizure phase when a final confiscation determination is still pending. These include that:

- Law enforcement objectives behind asset recovery should remain paramount, but good fiscal decisions are also important;
- Proper planning must take place before assuming responsibility for management of seized assets;
- Administration mechanisms should be efficient and cost-effective;
- States must ensure that strong controls with respect to the administration of seized assets are put in place;
- Transparency in the management of seized assets is critical, such as by means of an annual examination of the asset management authority by independent auditors, including the examination and certification of financial records, which are made public;
- Accountability can be enhanced by putting in place IT systems to track and manage inventory and costs.

The following elements in the system for administration of seized assets in some G8 Member States were identified:

- the express designation of a competent national authority responsible for all aspects of the custody and management of seized assets;
- the use of asset managers in particularly complex situations, and
- the establishment of a dedicated fund for the deposit of seized and confiscated/forfeited assets.

### 3. The Financial Action Task Force (FATF) Guidance

A FATF guide on *Best Practices on Confiscation (Recommendations 4 and 38) and a Framework for On-going Work on Asset Recovery* (2012) under the heading *Management of Frozen, Seized and Confiscated Property*<sup>8</sup> identified the following options as the best methods of managing seized assets:

- ✓ competent authorities;
- ✓ contractors;
- ✓ a court-appointed manager; or
- ✓ the person who holds the property subject to appropriate restrictions on use and sale.

The following characteristics of an asset management framework was proposed:

#### **FATF: Characteristics of an Asset Management Framework**

(a) There is a framework for managing or overseeing the management of frozen, seized and confiscated property. This should include designated authority(ies) who are responsible for managing (or overseeing management of) such property. It should also include legal authority to preserve and manage such property.

(b) There are sufficient resources in place to handle all aspects of asset management.

(c) Appropriate planning takes place prior to taking freezing or seizing action.

(d) There are measures in place to:

(i) properly care for and preserve as far as practicable such property;

<sup>8</sup> <http://www.fatf-gafi.org/media/fatf/documents/reports/>.

- (ii) deal with the individual's and third party rights;
- (iii) dispose of confiscated property;
- (iv) keep appropriate records; and
- (v) take responsibility for any damages to be paid, following legal action by an individual in respect of loss or damage to property.

(e) Those responsible for managing (or overseeing the management of) property have the capacity to provide immediate support and advice to law enforcement at all times in relation to freezing and seizure, including advising on and subsequently handling all practical issues in relation to freezing and seizure of property.

(f) Those responsible for managing the property have sufficient expertise to manage any type of property.

(g) There is statutory authority to permit a court to order a sale, including in cases where the property is perishable or rapidly depreciating.

(h) There is a mechanism to permit the sale of property with the consent of the owner.

(i) Property that is not suitable for public sale is destroyed. This includes any property: that is likely to be used for carrying out further criminal activity; for which ownership constitutes a criminal offence; that is counterfeit; or that is a threat to public safety.

(j) In the case of confiscated property, there are mechanisms to transfer title, as necessary, without undue complication and delay.

(k) To ensure transparency and assess the effectiveness of the system, there are mechanisms to: track frozen/seized property; assess its value at the time of freezing/seizure, and thereafter as appropriate; keep records of its ultimate disposition; and, in the case of a sale, keep records of the value realised.

#### 4. European Union (EU) Directives

At a regional level, the EU has issued several framework decisions and directives to harmonize and guide the establishment and further development of the relevant legal and institutional frameworks of its Member States. Article 1 of EU Framework Decision 2007/845/JHA adopted on 6 December 2007<sup>9</sup> concerning cooperation between Asset Recovery Offices (ARO's) of the Member States in the field of tracing and identification of proceeds of crime provides that:

*"Each Member State shall set up or designate a national Asset Recovery Office, for the purposes of the facilitation of the tracing and identification of proceeds of crime and other crime related property which may become the object of a freezing, seizure or confiscation order made by a competent judicial authority in the course of criminal or, as far as possible under the national law of the Member State concerned, civil proceedings."*

In their efforts to comply with this framework decision many EU Member States set up dedicated capacity to perform the following functions<sup>10</sup>:

- tracing criminal proceeds;

<sup>9</sup> <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32007D0845>.

<sup>10</sup> Commission of the European Communities, "Communication from the Commission to the European Parliament and the Council" advocates for some of these functions to be performed by the ARO, COM (2008) 766, p. 8.

- encouraging the use of asset recovery laws among investigators through improved coordination of law enforcement personnel,
- training police, investigating magistrates/judges and prosecutors in asset recovery law;
- influencing government policy; and
- coordinating international co-operation in asset recovery.

In several EU Member States these designated AROs were assigned the responsibility for managing seized and confiscated assets, at first assuming mainly a co-ordination function, rather than taking physical control of seized and confiscated property.

In some cases EU Member States designated existing structures to perform the functions envisaged by the framework decision. In the case of **Belgium** and the **Netherlands** the prosecuting authorities assumed responsibility for the functions designated in the framework decision. Other EU Member States set up entirely new national centralized offices, such as the National Agency for the Administration and the Destination of Seized and Confiscated Assets from Organized Crime (*Agenzia Nazionale per l'Amministrazione e la Destinazione del Beni Sequestrati e Confiscati alla Criminalità Organizzata*) established in **Italy** in 2010 and the Agency for the Recovery and Management of Seized and Confiscated Assets (*Agence de Gestion et de recouvrement des avoirs saisis et confisqués*, **AGRASC**) established in **France** in 2011.

With dedicated capacity in place to ensure more effective use of asset recovery laws at the domestic level and on improving co-operation between Member States, the number of assets subject to seizure and confiscation began to increase and place strain on existing institutional capacity to manage assets. The EU responded with Article 10(1) of Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the EU, which makes provision for even greater specialization in the area of the management of seized assets:

*“Member States shall take the necessary measures, for example by establishing centralised offices, a set of specialised offices or equivalent mechanisms, to ensure the adequate management of property frozen with a view to possible subsequent confiscation.”*

In line with the 2014 directive many more EU Member States have established institutions with specialist capacity to manage seized and confiscated assets. In October 2015, the Asset Recovery and Management Office (*Oficina de Recuperación y Gestión de Activos*) (**ORGA**) in **Spain** was set up within the Ministry of Justice. It is responsible *inter alia* for locating, retrieving, storing, and managing effects, property, instrumentalities and proceeds of crime. **Romania** also adopted a new law in 2015 setting up the National Agency for the Administration of Seized Assets. The new Agency took over the ARO functions previously held by the Ministry of Justice.

In the EU most Member States now have in place ARO's dedicated to supporting asset recovery more generally with increasing specialisation in the area of management of seized and confiscated assets.

## 5. Organization of American States (OAS)

The OAS in 2003 adopted model regulations concerning laundering offences connected to illicit drug trafficking and related offences. Article 7 of the model regulations dealt primarily with the disposition of forfeited property,<sup>11</sup> providing for a court or other competent authority, in accordance with the law to *inter alia*:

<sup>11</sup> OAS/CICAD, *Model regulations concerning laundering offenses connected to illicit drug trafficking and other serious offenses*, as amended in 2003. See also OAS/CICAD, Group of Experts for the Control of Money-Laundering, *Legal aspects in the establishment and development of entities specialized in the administration of seized and forfeited assets*, 2012 and *Self-Evaluation Guide for the forfeiture and administration of assets*, 2013. See also OAS



- retain them for official use, or transfer them to any government agency that participated directly or indirectly in their freezing, seizure, or forfeiture;
- sell them and transfer the proceeds from such sale to any government agency that participated directly or indirectly in their freezing, seizure, or forfeiture. It may also deposit the proceeds from the sale into a Special Fund to be used by the competent authorities in their fight against illicit traffic, prevention of the unlawful use of drugs, treatment, rehabilitation or social reintegration of those affected by its use;
- transfer the property, proceeds or instrumentalities, or the proceeds from their sale, to any private entity dedicated to the prevention of the unlawful use of drugs, treatment, rehabilitation or social reintegration of those affected by its use;
- facilitate the sharing of the objects of the forfeiture or the proceeds from their sale with the country or countries that assisted or participated in the investigation or legal proceedings that resulted in the objects being forfeited, on a basis commensurate with their participation;
- transfer the object of the forfeiture or the proceeds from its sale to intergovernmental bodies specializing in the fight against illicit traffic, prevention of the unlawful use of drugs, treatment, rehabilitation or social reintegration of those affected by its use; or
- promote and facilitate the creation of a national forfeiture fund to administer the objects of forfeiture and to authorize their use or allocation to support programs for the administration of justice, training and for the fight against illicit drug trafficking, its prevention and prosecution, as well as for social programs related to education, health and other purposes as determined by each government.

In 2008, the OAS, through the Inter-American Drug Abuse Control Commission (**CICAD**), developed the Seized and Forfeited Asset Management Project (known by its Spanish acronym **BIDAL**) aimed at providing OAS member states with technical assistance designed to improve their internal systems associated with asset investigation and the seizure, confiscation and management of assets derived from unlawful activities and organized crime.

At its 40<sup>th</sup> regular session in Washington in May 2010 CICAD adopted principle 45 of the *Hemispheric Drug Strategy* which envisages the creation or strengthening of national agencies responsible for the management and disposition of seized and forfeited assets in cases of illicit drug trafficking, money laundering and other related criminal offences. This aspect was restated as a priority within the Hemispheric Plan of Action on Drugs 2011-2015. Under goal 12 in the section on Control Measures<sup>12</sup> the following actions were proposed:

- Create or strengthen, in accordance with national legislation, competent national organizations for the administration of seized and/or forfeited assets and the disposition of forfeited assets.
- Promote specialized programs to improve systems for the administration of seized and forfeited assets.
- Strengthen technical capacities for the administration and disposition of assets related to drug trafficking and related crimes.”

In this regard BIDAL has produced a number of publications to support Member States. These include:

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*Hemispheric Drug Strategy* (paragraph 45) and its *Plan of Action 2011-2015* (objective 12).

<sup>12</sup> [http://www.cicad.oas.org/Main/Template.asp?File=/main/aboutcicad/basicdocuments/plan-action\\_eng.asp](http://www.cicad.oas.org/Main/Template.asp?File=/main/aboutcicad/basicdocuments/plan-action_eng.asp).

- Legal Aspects in the Establishment and Development of Entities Specialized in the Administration of Seized and Forfeited Assets;
- Mechanisms for sharing forfeited assets between countries;
- Guide for the Management of Seized Businesses; and
- Analysis of Systems for the Collection of Data on Seized and Forfeited Assets of Illicit Origin in the Member States of the OAS

In 2011 the OAS carried out a study on *Asset Management Systems in Latin America*<sup>13</sup> on the institutional arrangements in place for the management of seized and confiscated assets in the region. From the study it would appear that most Member States are moving towards establishing independent specialized asset management entities.

## D. EVOLUTION OF ASSET MANAGEMENT POLICY

### 1. Final Confiscation

The policy objectives to be achieved by asset recovery regimes have expanded over time. Asset recovery is first and foremost an important law enforcement tool aimed at achieving the broader ends of justice, accountability and the rule of law. It is a powerful deterrent measure as it removes the incentive to commit crime and can play a role in incapacitating the means by which criminals ply their trade. Whilst removing from the control of the perpetrator of crime the proceeds and instruments of crime remains the primary objective of asset recovery law, other objectives are gaining greater prominence.

Ensuring that the recovered proceeds of crime are applied to compensate individual victims and to support organizations and programs that cater for victims of crime is becoming an increasing focus of asset recovery practice. Social reuse of the proceeds and instruments of criminal activity for the benefit of communities that have suffered the negative effects of crime is also receiving greater priority. The aim of these programs is to restore confidence in the rule of law undermined by criminal conduct. More emphasis is being placed on using the proceeds of crime, particularly of corruption, to contribute to sustainable development.

Using the recovered proceeds to fund the asset recovery programme more generally, including funding asset management activities and law enforcement initiatives is also regarded as a legitimate objective of asset recovery. It has the symbolic value that the proceeds of crime are used to fight crime. With the proper safeguards in place, compensating law enforcement agencies for their contribution to the conclusion of asset recovery cases can encourage the expanded use of asset recovery laws.

Finally, ensuring that the asset recovery system is economically viable, at least self-funding, if not profitable and operates in a responsible, accountable and transparent manner is important in ensuring public confidence in and public support for the practise of asset recovery.

### 2. Interim Measures

The primary policy concern when dealing with criminal property prior to a final determination of the confiscation proceedings is to ensure that as much of the alleged instruments and proceeds of crime is available when a confiscation order is ultimately made. The interim phase is thus concerned with mitigating the risk that the alleged criminal property may be placed beyond the reach of law enforcement, lost, damaged,

<sup>13</sup> OAS, *Asset Management Systems in Latin America and Best Practices Document on Management of Seized and Forfeited Assets*, 2011:

[http://www.cicad.oas.org/lavado\\_activos/grupoexpertos/Decomiso%20y%20ED/Manual%20Biens%20Decomisados%20-%20BIDAL.pdf](http://www.cicad.oas.org/lavado_activos/grupoexpertos/Decomiso%20y%20ED/Manual%20Biens%20Decomisados%20-%20BIDAL.pdf).

destroyed or diminished in value in any other way, thereby frustrating the fulfilment of a confiscation order once one is made.

There may also be the risk that while the criminal trial or the confiscation proceedings wind their way through the court system, the property, unless taken into safe custody, will continue to be used in the criminal operations of its owner or that of a criminal enterprise. Interim measures may be needed to neutralize such use. In such cases the law enforcement objective of ensuring that the unlawful activity is discontinued will take precedence over considerations relating to costs.

These law enforcement considerations must however be balanced against the fact that liability of the asset to confiscation is still in dispute. A court may ultimately refuse to grant a confiscation order and the asset will then have to be returned to its lawful owner in the condition it was when it was first made subject to an interim order. While the lawful origin of the property is still subject to dispute, within reasonable limits, the lawful interests of the owner must be considered, as well as relevant third parties as regards the management and maintenance of the asset.

The substantive and procedural rights of the persons with interests in the property must therefore be protected during the interim phase. The following are among the protections typically afforded interested parties during the interim phase.

- ✓ providing for the terms of the interim measure to be communicated to the affected person as soon as possible after its execution;
- ✓ ensuring that the interim measure remains in force only for as long as it is necessary to preserve the property; and
- ✓ affording persons affected by the measure the opportunity to challenge it before a judicial authority.

The financial burden on the State of the cost of preserving assets, such as storage, valuation and maintenance costs, as well as the costs of compensation and damages claims arising from the depreciation in value of an asset while subject to an interim measure has the potential to bankrupt a nascent asset recovery programme. Failure to take adequate care of an asset to ensure that its economic value is preserved during this phase may well frustrate efforts to compensate victims for their loss and undermine efforts to repair the harm done by criminal conduct. It is therefore increasingly important to ensure that assets are preserved at minimum costs and that they yield maximum return when they are ultimately realized.

Attempts to mitigate the costs of interim management has led in many jurisdictions to increased reliance on measures that ensure retention of the asset under the custody and control of its owner subject to restrictions on use together with positive obligations to maintain its value; placing assets in the hands of third parties who can ensure the productive use of the asset, including the State and its institutions; and pre-confiscation sale of the asset.

Countries have designed a variety of measures to achieve these diverse policy objectives. These responses are explored in greater detail in the remaining chapters of the study.

## **E. CONSIDERATIONS IN THE ESTABLISHMENT OF CAPACITY TO MANAGE AND DISPOSE OF SEIZED AND CONFISCATED PROPERTY**

### **1. Scale of Asset Recovery Operations**

The stage of development of the asset recovery program in a country will impact on the institutional arrangements required. It will be less likely that an asset recovery programme in the early stages of development will require the establishment of a new organization dedicated exclusively to this function. An asset recovery program that has resulted in the seizure of a large number of assets and resulted in the confiscation

of significant sums of money may be able to justify the investment of significant capacity and resources to set up an entity dedicated exclusively to this function. In such cases a country will have built up experience in management and disposal of assets incrementally and these experiences will inform the establishment of the asset management institution. In **Romania**, the establishment of the Asset Recovery Office (ARO), within the Ministry of Justice in 2011 led to an increase of over 300% in the value of seized assets and over 400% in the value of confiscated assets in subsequent years. These developments prompted the adoption of a law setting up a specialized asset management office. **Canada** and **France** are examples of countries that have established self-standing specialized asset management entities to address the increase in seizure and confiscation orders.

## **2. Reliable Data on Assets subject to interim and final confiscation**

Maintaining accurate and reliable data on the number, value, location and state of seized assets as well as the value and ultimate destination of confiscated assets is an important first step towards effective management of seized and confiscated assets. Given the number of role-players involved in the asset recovery process, i.e. investigators, prosecutors, court personnel, etc. it is often hugely challenging to collate this information, particularly in countries where asset recovery capacity is dispersed over large areas and undertaken by a variety of institutions.

Establishing an accurate and reliable central database involves identifying the repositories of the information required, such as custodians of court orders and investigators or investigating magistrates or other bodies with physical custody of seized and confiscated property. Strict protocols on how the data is to be captured must be adopted and enforced and checks and balances must be put in place to verify the data inserted.

In **Brazil** an important step in the process of designing a system to manage seized and confiscated assets was the establishment of a centralised electronic database for capturing information about assets subject to restraint (freezing and seizure) and confiscation.

In **France** the asset management agency, *AGRASC*, devotes considerable resources to improving the information gathering process and ensuring the reliability of the information. Similarly in **Belgium** COSC maintains a central asset recovery database. The database is the main tool it uses to co-ordinate the asset management activities of a variety of role-players.

## **3. Functions of the Asset Management Office**

In addition to ensuring good record keeping about assets subject to seizure and confiscation orders, the next step typically is to identify all the functions the asset management capacity will be required to perform and then to conduct an audit of capacity and skill already available within existing (government) institutions. An evaluation of the strengths and weakness of existing capacity with strategies to address the weaknesses and build on the strengths will provide a solid foundation for deciding whether to establish new institutions or strengthen existing institutions to carry out the necessary functions. It is important that the capacity to manage assets can grow as the demand for such services expands, culminating either in a central agency that merely co-ordinates asset management functions or in the establishment of an independent, professional asset management entity when critical mass is reached.

The function of managing property on an interim basis pending the final determination of its fate differs from the function of disposing of the property once entitlement to it has been finally determined. During the interim management phase the competing interests in the property have to be carefully balanced, as at that stage, the property could either be returned to its owner or declared forfeited to the State. Interim measures to preserve the value of property of allegedly illicit origin must

therefore take account of the rights and interests of parties whose rights to and interest in the property has not yet been finally determined.

Once property is declared forfeited however, the key concern is compliance with the policy choices expressed in the legislation governing asset recovery and on executing the court's orders made in terms of that legislation. This usually entails recovering from the subject of the confiscation order the full extent of the property or benefit identified in the confiscation order and ensuring that the beneficiaries identified in the confiscation order receive the full benefit of assets allocated to them or the maximum value of the money judgment made in their favour, be they the State, individual victims, victim organizations or other non-governmental actors. It also includes monitoring beneficiaries to ensure that the property and funds allocated to them are being used for the purposes they were intended.

In countries like *Belgium*, the *Netherlands* and *Brazil* the interim management function is left in the hands of law enforcement organisations or judicial authorities (investigating judges or prosecutors) or outsourced to judicially appointed professionals. Government bodies traditionally responsible for the collection of criminal fines and the sale of government property deal with the property at the disposal stage. The primary role of the asset management office (AMO) is to co-ordinate the activities of the different role-players, primarily through the management of information about assets subject to seizure and confiscation orders (a central data-base). The AMO would only in limited circumstances take physical control of the assets.

In and *Mexico* the AMO deals primarily with assets under interim management. When assets are finally confiscated they are handed over to the entity designated in the court order, typically a designated fund destined for specific purposes. *Australia*, *Canada*, *France* and *New Zealand* have combined both interim management and final disposal functions under the same institution by putting in place the appropriate safeguards for each stage in the process.

As regards the management of finally confiscated property, countries typically choose to deposit the proceeds realised from confiscation orders into the General Revenue fund or to Special Funds designated to provide for specific purposes. Special Funds tend to require additional capacity to manage, distribute and monitor the allocation of funds in the account.

Management of the budget for interim management of assets and accounting for the utilisation of funds allocated to this purpose is a function typically performed by asset management offices.

The provision of storage facilities, valuation services, and managing disposal services such as auctioneering services are among the functions suited to centralised management in order to benefit from advantages to be obtained when procuring services in bulk.

#### 4. Location of the Asset Management Capacity

Some countries have opted to locate the Asset Management Office (AMO) within law enforcement. In EU countries like *Belgium* and the *Netherlands*, the ARO established to support asset tracing; enforcement of asset recovery orders across EU borders and to perform other asset management training and policy development functions, was also designated to undertake the functions of co-ordinating the management and disposal of seized and confiscated property. *Thailand* opted to locate the responsibility for management of seized and confiscated property within the Anti-Money Laundering Office, which was established as an independent law enforcement and regulatory agency under the supervision of the Ministry of Justice. In the *US* the Marshall's Service, an existing federal law enforcement entity is responsible for the asset management function and in *Brazil* the asset management responsibility remains with investigating judges who may appoint professional judicial managers to assist them.

Others, such as *New Zealand*, *Australia* and *Mexico* have sought to locate the capacity to deal with criminal property within an existing public sector entity, outside of law enforcement, but with experience in dealing with the management and disposal of assets. In the case of *New Zealand* and *Australia* that capacity was found in the body responsible for regulating insolvencies and liquidations and in *Mexico* it was found in a body tasked with managing the sale of public assets, including the privatization of State owned enterprises.

*Canada* and *France* have each created a new stand-alone entity to deal exclusively with management of seized and confiscated property derived from crime. Similarly, countries like *Colombia*, *Peru* and *Honduras* have opted to separate the asset management function from more conventional law enforcement functions and created a separate and independent capacity to deal exclusively with the management of assets.

Notwithstanding the institutional location adopted, most jurisdictions have found it necessary to rely to some extent on private sector actors to provide some of the specialized skill sets required to manage certain types of assets. There appear to be two main avenues: (1) the use of court-appointed asset managers who are often registered with the court and can on a case-by-case basis be appointed to handle the management and/or disposal of an asset, or (2) the use of subcontractors who are procured by the entity responsible for the management and disposal of assets. In several jurisdictions both options are available. The asset management capacity plays an important role in procuring private sector specialists, managing their contracts and monitoring the performance of their functions.

## **5. Availability of Resources and Cost Control Measures**

With many competing claims to public funds, securing adequate funding to support an asset management capacity is challenging for many countries. Countries have adopted a variety of strategies to fund the operations of asset management, with many striving to achieve self-funding status in order to reduce the financial burden on the State. The funding mechanisms are explored in more detail in Chapter 4 of the study.

It is important to pay adequate attention to pre-seizure planning and decision-making to ensure that seized assets do not turn into liabilities while under the control of the State. Measures to ensure that the costs associated with the interim management of seized assets, such as leaving assets under the control of the owner subject to strict control measures, pre-confiscation sale and productive use of assets should be provided for in the asset recovery law to ensure that the costs of managing the asset does not exceed the value of the asset upon realisation.

State liability for damages arising from the destruction or deterioration in value of seized assets in cases where a court declines to make a confiscation order is a further potential risk resulting from poor asset management which an asset management capacity must take steps to mitigate.

Unless resources are dedicated to ensuring that confiscation orders are enforced or collected, recoveries from such orders tend to be frustratingly low. Where a court orders that victims or communities are to benefit from such confiscation orders it is all the more critical that sufficient capacity is in place to collect these funds. Mechanisms to improve recovery of confiscation orders are considered in Chapter 3.

## **6. Transparency and Accountability**

The institutional arrangements put in place to manage and dispose of seized and confiscated assets must be able to withstand intense public scrutiny. If a decision is made to seek the removal of tainted property from the control of its owner, the mechanisms put in place to take care of such assets must be beyond reproach. Equally, confiscated property must be dealt with in accordance with the law. Reports that expose poor management of seized property or illustrate that confiscated property is

being dealt with contrary to a court order can seriously undermine the credibility of the asset recovery program as a whole.

Meticulous record keeping, the adoption of transparent procedures and compliance with the policies, procedures, court orders and laws that govern the asset management process are critical to ensuring transparency and accountability of the asset management system.

## **II. INTERIM MEASURES TO PRESERVE ASSETS OF ALLEGEDLY ILLICIT ORIGIN**

### **A. INTRODUCTION**

This chapter addresses measures that typically follow once an asset has been identified as liable to confiscation in accordance with domestic laws or a country's mutual legal assistance obligations. The focus is on the legal framework and institutional capacity countries have put in place to successfully manage frozen, seized and restrained assets of allegedly illicit origin during this interim phase.<sup>14</sup>

### **B. TYPES OF INTERIM MEASURES**

Countries have designed a variety of measures to achieve the diverse policy objectives that govern the interim management phase discussed in Chapter I.<sup>15</sup> The most common are:

- freezing orders that provide for restrictions to be placed on the use of the asset in the hands of the owner/possessor or in the hands of a third party such as a bank;
- seizure of the asset from the custody of the owner or possessor and its retention in the custody of law enforcement, a specialized asset management office (AMO) or a court appointed judicial manager;
- interim sale, in particular of perishable and depreciating assets, and the preservation of the proceeds of the sale;
- interim use by law enforcement, government agency or a third party;
- destruction of unsafe or hazardous property.

Each of these measures is discussed in more detail below. The trend is to find ever more creative ways to ease the burden and particularly the costs of managing assets pending determination of the confiscation proceedings whilst ensuring that the law enforcement objectives behind forfeiture are achieved and the rights of property owners are respected pending a final court decision.

#### **1. Seizure and Freezing orders**

##### **a. Terminology**

Article 2(f) of the Convention defines 'seizure' as "temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority". In this study a 'seizure measure' is one that ensures that custody and control of the asset is removed from the person or entity that held it at the time the seizure order is made. The asset is transferred to the custody and placed under the

<sup>14</sup> The asset recovery process commences with the identification and tracing of criminal property. This process is beyond the scope of this study. For a detailed discussion see the StAR Initiative (UNODC — World Bank), *Asset Recovery Handbook*, p. 75-76. Available at: [https://www.unodc.org/documents/corruption/Publications/StAR/StAR\\_Publication\\_-\\_Asset\\_Recovery\\_Handbook.pdf](https://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Asset_Recovery_Handbook.pdf).

<sup>15</sup> See Chapter I for a discussion of the relevant policy considerations.

control of a person or entity designated in the court order or in the law, which in most jurisdictions is either:

- the law enforcement agency that applied for the order such as the investigating or prosecuting authority;
- a specialized asset management office (AMO); or
- a court appointed receiver/judicial manager/trustee/*curator bonis* or other administrator.

The seized property remains the property of the person or entity that held an interest therein at the time of the seizure, and the designated person or entity who takes over possession, administration or management thereof must do so with due regard to the terms of the court order and the rights of the owner or possessor.

The Convention defines a ‘freezing order’ as a measure “temporarily prohibiting the transfer, conversion, disposition or movement of property”. For the purpose of this study ‘freezing’ refers to measures that permit the retention of the asset in the possession or under the control of the person or entity that held it prior to the issuing of the freezing order, be it the owner, possessor, agent of the owner or an independent third party holding the property on behalf of the owner, such as a bank. Law enforcement, the AMO or a court appointed trustee or manager is typically authorized to monitor compliance with the court order. Non-compliance with the court-imposed restrictions is usually a criminal offence.<sup>16</sup>

‘Restraint’ is used to refer to a variety of interim and management measures, depending on the jurisdiction. For example, in **Canada** the Seized Property Management Act distinguishes between restraint and seizure by providing for two types of interim orders. Physical seizure of moveable assets into the custody of the Seized Property Management Directorate (SPMD) takes place under a ‘management order’ and assets that cannot physically be seized by the SPMD, such as real estate, bank accounts and businesses are managed in terms of a ‘restraint management order’.

However in South Africa the term restraint is used to refer to an interim measure in which the asset is transferred to the custody and control of a court-appointed professional, referred to as a *curator bonis*. The term restraint is also used to describe a combination of measures, for example when the entire estate of a person is made subject to an interim management order requiring a mixture of freezing and seizure measures to preserve the value of the entire estate.

It is important to understand the key features of a particular interim measure and not rely solely on the label ascribed to it. In this Study ‘restraint’ is used to describe a combination of seizure and freezing orders.

#### b. Freezing versus Seizure

Many countries start out with seizure as the default interim measure, imposing freezing orders only if seizure is impossible or impractical. In the early stages of implementing an asset recovery program there is often much enthusiasm within the law enforcement community for removing suspected criminal property from the control of the owner or possessor. Before a country has had experience with the challenges presented by maintaining rapidly deteriorating assets or assets that require special management expertise, seizure of the asset often takes precedence. As the costs of maintaining seized assets mount and civil suits against the government

<sup>16</sup> In **Italy**, pursuant article 388 of the Criminal Code, non-compliance with restrictions in court orders concerning freezing and seizure of assets is punishable with a penalty of up to 3 years in detention. It is also a criminal offence to commit any acts intended to elude, destroy, damage or suppress the assets subjected to judicial seizure. In **South Africa**, section 75 of Act 121 of 1998 creates offences relating to misuse of information, failure to comply with order of court, and hindering a *curator bonis*, a police official or any other person in the exercise, performance or carrying out of his or her powers, functions or duties under the Act.



increase as a result of poor management of seized property, alternatives to seizure are more actively explored.

Most countries considered for the purpose of this study, however, provide for a choice between freezing and seizure orders, to suit the circumstances of each case. The key consideration is whether the asset will be available when a final confiscation order is made. Where this objective can be achieved by leaving the asset under the control of the owner, subject to certain restrictions on use, this is the preferred option, as a way of keeping costs to a minimum.

Another approach is to specify in the legislation or provide guidance in regulations the circumstances when seizure is to be avoided and when it is to be encouraged, particularly as a means to avoid seizure when its costs will far outweigh the value that may ultimately be realized from the sale of the asset. The **Romanian** Law provides for the National Agency for the Management of Seized Assets, the Romanian AMO, to be appointed as custodian of seized mobile assets worth more than EUR 15,000 at the time of the seizing order.<sup>17</sup> By implication this discourages the seizure and subsequent storage and maintenance of mobile assets worth less than EUR 15,000. **Sweden** is an example where the statute provides that if the value of real estate does not cover both the mortgage and the cost of the sale, no seizure measure should be imposed.<sup>18</sup>

#### c. Authority to Freeze or Seize

Most countries require judicial or a quasi-judicial institution independent of law enforcement such as prosecutors or investigating magistrates to authorize pre-confiscation measures, particularly seizure orders. In some jurisdictions the authority to prohibit dissipation or movement of property (a freezing order) is granted to law enforcement agencies<sup>19</sup> and even other non-judicial authorities. For example, in **Tanzania** the Attorney-General has the authority, if he or she has reason to believe that any person has illicitly received or acquired an advantage or property in relation to a corruption offence, to issue a notice directing the person not to transfer or dispose of the property specified in the notice.<sup>20</sup>

The key consideration during the interim phase is whether the asset will be available when a confiscation order is made.

In some cases it may be necessary to take swift action to prevent the dissipation of movable assets, such as cash and other legal tender, without the delay occasioned by first obtaining judicial approval. Financial Intelligence Units typically have the power to prohibit financial institutions from moving financial assets under their control under certain specified conditions and for a specified duration, without judicial intervention. In such cases, the freezing instruction is usually of a specified duration, such as a 5-day prohibition on movement of property, to permit authorities to obtain an interim order from the appropriate judicial authority. These measures are often of great assistance to investigative and prosecution bodies as they buy time to assemble the evidence needed to meet the requisite standard of proof in a court.

<sup>17</sup> Law no. 318 of 11 December 2015 on the setting up, organization and activity of the National Agency for the Management of Seized Assets (NAMS) and on amending and supplementing other legal regulations.

<sup>18</sup> Penal Code, chapter 36.

<sup>19</sup> StAR Initiative (UNODC — World Bank), *Asset Recovery Handbook*, Chapters 2 and 3. Available at: [https://www.unodc.org/documents/corruption/Publications/StAR/StAR\\_Publication\\_-\\_Asset\\_Recovery\\_Handbook.pdf](https://www.unodc.org/documents/corruption/Publications/StAR/StAR_Publication_-_Asset_Recovery_Handbook.pdf).

<sup>20</sup> Prevention and Combating of Corruption Act, No. 11/200.

Article 8(4) of EU Directive 2014/42/EU permits an initial freezing order by a competent authority other than a judicial authority, but requires that such orders be validated or reviewed by a judicial authority, if challenged. This approach balances the law enforcement requirement for speedy action with the due process rights of the owner of the asset.

While freezing orders are aimed to secure assets of allegedly illicit origin for subsequent confiscation, there are administrative freezing orders which are issued in execution of legal acts of the European Union (these administrative orders can refer either to EU Regulations imposing freezing measures which are directly applicable in EU Member States or to additional measures taken at the domestic level) against all assets of individuals or companies independently of their licit or illicit nature with the purpose of preventing access to such assets, their use or dissipation. Such measures are also foreseen by some countries (e.g. *Canada* and *Switzerland*<sup>21</sup>). In the case of the Arab countries in transition, such administrative freezing orders were used extensively to secure assets of the members of the former regimes and their closest associates.

These administrative asset freezes raise some legal issues, in particular as relates to their implications for the asset recovery efforts by countries seeking the recovery and return of such assets. They might not necessarily become aware of the assets frozen in execution of such legal acts. Furthermore, the EU legal acts do not require the authorities of the issuing country to start investigation into the origin of the assets, nor do they require EU member states to inform interested countries of any procedures initiated by the respective owners for the de-freezing of such assets.

d. Content of Freezing as opposed to Seizure Orders

Typically interim management measures give judicial officers a wide discretion to tailor appropriate orders to meet the exigencies of the cases before them. The *Tanzania* Proceeds of Crime Act, 256 (1991) for example provides for a court to order that the specified property shall not be disposed of, or otherwise dealt with, by any person “except in such manner and in such circumstances as are specified in the order”. Alternatively, a court may “if it is satisfied that the circumstances so require, direct that the property ...be taken into the custody and control of a trustee appointed for that purpose by the court” and “a restraining order against a person’s property may be granted subject to such conditions as the court thinks fit...”. The *United Kingdom* Proceeds of Crime Act 2002 similarly provides for a court to order that the property specified in the application shall not be disposed of, or otherwise dealt with, by any person “except in such manner and in such circumstances as are specified in the order” and a restraining order against a person’s property may be granted subject to “such conditions as the court thinks fit”.

It is therefore incumbent on the investigating and prosecuting bodies seeking an interim order to specify in the application for an interim order the kinds of prohibitions it requires be placed on the use of the asset as well as set out the powers that should be granted to the person or entity designated to take control and manage the asset.

Although laws that provide for freezing orders typically permit the imposition of restrictions of a prohibitory nature, such as a prohibition on sale or movement of the asset, some countries’ legal framework also permit the imposition of positive obligations on owners, such as compelling the owner to take out additional insurance on the asset or ensuring that loans secured against the property are serviced on the same basis as they were at the time of the freezing order.

In *Canada* a restraint management order may not only restrict any change in ownership, it may also set positive obligations the accused must fulfil in relation to

<sup>21</sup> Historically, in Switzerland administrative freezing orders were based directly on the Constitution. Currently they are adopted on the basis of the Foreign Illicit Assets Act or the Embargo Act.

the property such as paying property taxes, maintaining property in a good state of repair and paying utilities. A restraint management order also gives the Seized Property Management Directorate the authority to enter the property on 24 hours' notice to appraise the property or to inspect it to ensure that it is being maintained. The focus remains on the retention of the property in the custody of the owner but with greater emphasis on enforcing fulfilment of the obligations relating to the management of the property imposed on the owner in the court order.

Below are examples of the types of requests that may be included in an application for a freezing or seizure order typically sought in relation to particular classes of assets.

Type of Asset	Terms of a typical freezing order	Terms of a typical seizure order
Cash in a bank account <sup>22</sup>	Permit the funds to be retained by the financial institution under the same arrangements between bank and customer in place at the time of the order. Permit the financial institution to accept all incoming transfers. Prohibit the financial institution from transferring funds out of the bank account.	Require that the funds be transferred from the financial institution where the funds were held prior to seizure to a bank account controlled by a court appointed manager, the AMO or other designated government controlled fund.
Movables - cars, boats, planes	Direct that the movable asset be appraised to determine its condition and value. Direct that it be retained in the custody of the owner/ possessor. Direct the owner/possessor to maintain the movable asset in the state of repair it was in at the time of the freezing order and conduct maintenance in the ordinary course for an asset in a similar condition. Instruct the owner on how the asset may be used, e.g. prohibit its removal from a particular jurisdiction, require that insurance be put in place or maintained, require the asset to be made available for regular inspection and monitoring, etc.	Direct that the asset be removed from the custody and control of its owner and placed in a storage facility, such as a safety deposit box, a garage, hangar, dry dock or other storage facility managed by law enforcement, the AMO or independent court appointed professional. Alternatively, direct that a court appointed professional be appointed to take custody and control of the asset, maintain the asset in compliance with laws and regulations pertaining thereto.
Income generating Immovable Property/Real Estate	Prohibit the owner and property (deeds) registration authority from selling or further encumbering the property. Direct the owner to maintain the property in the state of repair it was in at the time of seizure, and to maintain insurance, mortgage,	Direct that a court-appointed professional take control of the management of the immovable property. Direct the court appointee to appraise the property, take over administration of lawful income generating

<sup>22</sup> In France for example, the law permits the seizure of money in bank accounts (deposit accounts only). The law authorizes the Agency for the Recovery and Management of Seized and Confiscated Assets (AGRASC), France's AMO, to transfer the funds to a bank account controlled by it. Funds in the account earn interest at 1 per cent per annum. Savings or other investment accounts can only be frozen or blocked, i.e. the funds are retained under interest rates that applied at the time of seizure.

	utilities and tax payments that were in place prior to freezing order. Permit the owner to continue to conduct any income generating activity on the property such as administration of a lease agreement, collect rentals, etc. subject to reporting requirements.	activity (e.g. collect rent, maintain the property) Ensure that mortgage payments, utilities, rates and taxes are paid (from other assets subject to interim management if necessary).
Businesses	Direct the managing director of the business to account on a regular basis and in specified ways for the running of the business. Prohibit disposition of the business itself or any major assets of the business, and require to obtain consent for entering into transactions outside the ordinary course of the business.	Provide for appointment of a receiver or judicial manager to operate the business. Direct the court appointee to ensure the business complies with the law, pays taxes, complies with health and safety or other regulatory requirements. Direct the court appointee to retain profit share due to owner as part of seized assets.
Shares or other securities	Retained in the custody of agent of the owner subject to court imposed restrictions.	Place in the custody of court appointee to manage portfolio within defined parameters, including the input of the owner.

Although the overriding consideration during the interim stage is the preservation of the value of the asset, rather than making it more profitable, in some cases the opportunity to increase the value of an asset arises. Whether the person or entity designated to manage the asset can be authorized to deal with the property, and in particular incur costs to increase its value or make it more profitable is an issue that practitioners are grappling with. Apart from ensuring that the legal authority to undertake such improvements is in place, a key consideration is cost. The *US*, *Canada* and *France*, each have in place a designated operating fund that can be used for covering such costs, although mainly for purposes of increasing the realization value of an asset after a confiscation has been made. In principle, these funds can be used during the interim phase, subject to provision being made for the Fund to be reimbursed if the asset is to be returned to the owner.

e. Cost of freezing versus seizure

Placing assets in the custody and under the control of the owner or possessor subject to restrictions as to use and maintenance is generally regarded as more cost effective than seizing the asset. The cost of storage, maintenance and security associated with seizing movable assets can be considerable. While the possibility of reducing the burden of storage and maintenance costs through freezing rather than seizure can be significant, there are cost implications to freezing. For example, staff have to be appointed to monitor compliance with court orders, ensuring *inter alia* that insurance on a vehicle is being maintained, rates, taxes and mortgage payments on real estate are kept up to date and assets are inspected from time to time to ensure that they are being preserved in an adequate state of repair.

To make freezing more attractive as an interim measure, *France* introduced a legislative amendment to make provision for the owner who retains custody of an

asset to bear the maintenance costs.<sup>23</sup> Even after a seizure order has been obtained, countries that monitor the cost effectiveness of the measure are able to take steps to control further expenditure by either returning the asset under strict conditions or applying to court for authority to sell the asset.

## 2. Interim or Interlocutory Sale

As the final determination of the fate of the asset has not yet been made, some jurisdictions forbid the sale of assets prior to confiscation or limit the sale to perishable goods only. As the costs of storing and maintaining deteriorating assets over long periods of time mount, more countries have sought to make provision for pre-confiscation sale of assets in defined scenarios. Attitudes to the sale of assets pending final confiscation are evolving to such an extent that many more countries now permit sale in ever increasing scenarios. In *Costa Rica* legislation permits the *Instituto Costarricense sobre Drogas*, the Costa Rican AMO, to sell, auction or perform an anticipated alienation of movable and immovable assets without further limitation or restriction, other than that the property must meet the requirements for seizure.<sup>24</sup>

The costs of management of a seized asset can very quickly exceed the value of the asset. To manage costs effectively the *Netherlands* introduced a central registration system that allows for swift action to be taken when costs exceed the value of the asset. In combination with an aggressive strategy of selling off assets pre-confiscation, the *Netherlands* was able to reduce the cost of management of movable seized and confiscated goods from € 23 million to € 9 million a year.

A number of regional initiatives in recent years have encouraged countries to provide for anticipated sale of assets. Article 10 of Directive 2014/42/EU of 3 April 2014 enjoins *EU Member States* to take measures to ensure the adequate management of property frozen with a view to possible subsequent confiscation by including the option to sell or transfer property where necessary. The *OAS* “Best Practices Document on the Management of Seized and Forfeited Assets” (2011) highlights anticipated sale as a good practice, in particular for perishable or rapidly depreciating assets. The *G8* Guide on Best Practices for the Administration of Seized Assets also recommends that pre-judgment sale for specifically wasting assets that are perishable, assets rapidly declining in value, such as vessels, aircraft and assets which are too burdensome to maintain.<sup>25</sup> These initiatives have resulted in a significant increase in the number of countries that now provide for pre-judgment sale of assets in their law.

<sup>23</sup> Art. 706.158 of the Code of Criminal Procedure provides the magistrate authorizing seizure without dispossession to designate the person to whom custody of the property is entrusted and who should ensure the maintenance and conservation, the appropriate cost being incumbent to the owner or holder of the asset.

<sup>24</sup> Law 8204 of Costa Rica.

<sup>25</sup> “G8 Best Practices for the Administration of Seized Assets” (April 27, 2005), General Principle 11.

The following criteria permitting pre-judgement sale have emerged from a survey of countries' systems reviewed for the purpose of this study:

a. Criteria for Sale

➤ Perishable assets

Most countries, including *Thailand*<sup>26</sup>, *Canada*<sup>27</sup>, *Czech Republic*<sup>28</sup>, *Peru*<sup>29</sup>, *Brazil*<sup>30</sup> and *Tanzania*<sup>31</sup> permit the interim sale of perishable goods, some of them applying the same criteria applicable to pre-trial sale of goods seized as evidence in a criminal trial. In *Costa Rica* the AMO may sell, donate or destroy perishable goods, fuel, building materials, scrap, essential chemicals and precursors and animals before a final judgment is delivered in the relevant criminal proceeding.<sup>32</sup> In *Honduras* perishable goods are defined as assets that will become unusable if not sold speedily.<sup>33</sup> *Colombian* law permits the AMO to alienate assets pre-judgment if they are perishable, consumable, deteriorating assets.<sup>34</sup>

➤ Rapidly depreciating property

*Canada* provides for the disposal of “rapidly depreciating property”.<sup>35</sup> There have however been disagreements in Canada about what the term means. Courts in one province regard vehicles as “rapidly depreciating” and in other provinces vehicles are not regarded as rapidly deteriorating and must be stored pending the conclusion of the trial. *Costa Rica* permits pre-confiscation sale of assets where there is a risk of depreciation, deterioration or rapid destruction. This category includes self-propelled assets (vehicles, boats and aircraft), as well as rapidly depreciating assets such as live animals, foodstuffs, etc.

In the *Czech Republic* seized assets that are rapidly lose value may be sold; further, assets can be sold when their storage or maintenance costs are disproportionate to the value of the asset or if the asset management requires special conditions that can only be met under disproportionate difficulties. In these circumstances, the law allows the sale of seized assets without approval of the owner.<sup>36</sup> In *Thailand* assets may be sold even if the risk of depreciation arises from negligence or improper management.<sup>37</sup> *Brazil* permits interim sale only in cases of considerable depreciation.<sup>38</sup>

➤ Storage or Maintenance Costs Disproportionate to Asset's value

In the *Netherlands*<sup>39</sup> and in *Honduras*<sup>40</sup>, if storage costs are disproportionate to the value of the asset, they may be sold pre-confiscation. In *Peru*<sup>41</sup> and *Costa Rica*, if the storage and preservation costs of seized assets are assessed as too expensive they may

<sup>26</sup> Anti-Money Laundering Act B.E. 2542 (1999).

<sup>27</sup> Seized Property Management Act, S.C. 1993.

<sup>28</sup> Amendment to Act No. 279/2003 Coll., i.e. Act No. 86/2015 Coll. effective from 1 June 2015.

<sup>29</sup> Legislative Decree No. 1104 of 19 April 2012.

<sup>30</sup> Code of Criminal Procedure, book 1, chapters IV and V.

<sup>31</sup> Proceeds of Crime Act (1991).

<sup>32</sup> Organized Crime Act.

<sup>33</sup> Asset Forfeiture Act, published through Decree no. 27-2010.

<sup>34</sup> Asset Forfeiture Code, created by Law 1708 of 2014 (Codigo de Extinción de Dominio).

<sup>35</sup> Seized Property Management Act, S.C. 1993.

<sup>36</sup> Amendment to Act No. 279/2003 Coll., i.e. Act No. 86/2015 Coll. effective from 1 June 2015.

<sup>37</sup> Anti-Money Laundering Act B.E. 2542 (1999).

<sup>38</sup> Code of Criminal Procedure, book 1, chapters IV and V.

<sup>39</sup> Code of Criminal Procedure, title IV, third section.

<sup>40</sup> Asset Forfeiture Act, published through Decree no. 27-2010.

<sup>41</sup> Legislative Decree No. 1104 of 19 April 2012.

be sold pre-confiscation. Similarly, in **Colombia** seized assets may be sold if their management will result in a negative cost-benefit balance.<sup>42</sup>

- *Assets too difficult to administer or its management requires special conditions and non-readily available expertise*

**Brazil** permits interim sale when assets are difficult to maintain.<sup>43</sup> The **Netherlands** sells goods not suitable for storage such as in the case of special machinery or motor vehicles.<sup>44</sup> In **Thailand** assets may be sold if they will cause an undue burden to the State because of their specific features.<sup>45</sup> Examples of burdensome assets are assets that risk being easily damaged or are dirty, smelly or disturbing or of an irritating nature; the asset is a heavy item and unsuitable for relocation; hazardous items (e.g. chemicals or inflammable objects); and assets that require storage in specific conditions to preserve its value or require special procedures. **Colombian** law permits sale or destruction of assets that could cause environmental damage.<sup>46</sup>

- *Goods that are easy to replace*

In the **Netherlands**<sup>47</sup> and **Belgium**<sup>48</sup> assets that are easily replaceable; whose replacement value is easily determined and whose seizure might cause depreciation, damage or disproportionate costs, can be sold.

- *To pay legal representation and expenses incurred in respect of other seized assets*

In **Australia** assets can be sold to pay a legal aid commission's costs.<sup>49</sup> In the **United Kingdom**<sup>50</sup>, **New Zealand**<sup>51</sup> and **Canada**<sup>52</sup> seized property can be sold to defray the cost of maintaining the value of other assets, such as paying mortgage and other costs.

- *When the owner has absconded*

In **Romania** the law makes special provision for the sale of seized vehicles whose owners cannot be identified.<sup>53</sup> In these cases, the prosecutor has to prove all conditions for selling seized vehicles, including the fact that it was not possible to identify the owner. The court decides based on the evidence presented; the decision may be challenged.

## b. Procedure

### i. Consent of Owner

Most jurisdictions permit interlocutory sale with the consent of the owner and that of the relevant agency responsible for enforcing the seizure order. If the consent of the owner is obtained, pre-seizure sale rarely requires any further judicial intervention, other than as a way of protecting the person or entity initially entrusted with management of the asset, if the owner is later dissatisfied with the terms of the sale.

<sup>42</sup> Asset Forfeiture Code, created by Law 1708 of 2014.

<sup>43</sup> Code of Criminal Procedure, book 1, chapters IV and V.

<sup>44</sup> Code of Criminal Procedure, title IV, third section.

<sup>45</sup> Anti-Money Laundering Act B.E. 2542 (1999).

<sup>46</sup> Asset Forfeiture Code, created by Law 1708 of 2014 (Codigo de Extinción de Dominio).

<sup>47</sup> Code of Criminal Procedure, title IV, third section.

<sup>48</sup> Law of 26 March 2003 (Wet houdende oprichting van een Centraal Orgaan voor de Inbeslagneming en de Verbeurdverklaring en houdende bepalingen inzake het waardevast beheer van in beslag genomen goederen en de uitvoering van bepaalde vermogenssancties); part of this law is incorporated in the Code of Criminal Procedure.

<sup>49</sup> Proceeds of Crime Act 2002 (Cth).

<sup>50</sup> Proceeds of Crime Act 2002.

<sup>51</sup> Criminal Proceeds (Recovery) Act 2009.

<sup>52</sup> Seized Property Management Act, S.C. 1993.

<sup>53</sup> Law no. 28/2012.

Owners are more likely to consent to sell where the legal framework clearly provides for pre-confiscation sale or where sound legal precedent authorizing sale in similar circumstances has already been established. Consent to sell tends to be more easily obtained when the owner is approached to sell by a third party independent of law enforcement, such as a trustee or management receiver, particularly during an on-going investigation.

Pre-confiscation sale is increasingly relied on to reduce the costs of interim management of seized assets.

ii. *Absence of Consent*

Most countries that allow for interim sale of assets without the consent of the owner require a court or other competent authority to authorize the sale. Where countries do vest the authority in other institutions such as the prosecuting authority, an AMO or other executive or administrative body, the owner usually has the right to challenge the decision in court.

In **New Zealand** an Official Assignee, an independent court appointed official, is authorized to sell property to preserve its value only with the consent of the court.<sup>54</sup> In **Australia** a seized asset can be subjected to anticipated sale if the Official Trustee is of the opinion that the property is likely to lose value, or that the cost of preserving the property is likely to exceed, or represent a significant portion of, the value of the property, or to pay for legal aid costs.<sup>55</sup> If the owner objects to the sale, the authority of the court is required to proceed with the sale.

In the **Czech Republic** the statute allows for the advance sale of seized assets without the approval of the owner under specific circumstances (see above).<sup>56</sup> However, if the owner so wishes he has the right to appeal the decision to sell assets. In **Belgium**, only the responsible magistrate can initiate the procedure to sell assets pre-confiscation.<sup>57</sup> The owner must be notified and has the right to appeal the decision. When the decision becomes final, Belgium's Central Office for Seizure and Confiscation, the AMO, can proceed with the sale of the asset. Similarly, in the **Netherlands**, the Public Prosecutor may authorize pre-confiscation sale by the Criminal Assets Deprivation Bureau (BOOM), subject to judicial approval if the owner objects.<sup>58</sup>

In other jurisdictions, pre-confiscation sale is permitted with less onerous procedural requirements. In **Colombia**, the court appointed administrator can decide on the sale of perishable goods without court intervention, although the early sale of real estate requires prior authorization from a committee which consists of a representative of the Presidency, a representative of the Ministry of Finance and Public Credit and a representative of the Ministry of Justice. The administrator – regularly the Society for

<sup>54</sup> Criminal Proceeds (Recovery) Act 2009. The 'Official Assignee Compliance Unit' is the competent agency, authorized to manage and dispose of seized assets in New Zealand. A court may, on application direct the Official Assignee (appointed to take control of property in terms of a restraining order) to sell restrained property (including, without limitation, a business) in order to preserve the value of the restrained property and may direct the Official Assignee to make mortgage payments or payments in respect of any other encumbrance from the restrained property.

<sup>55</sup> The "Official Trustee" is a corporate body entrusted by the Proceeds of Crime Act 2002 (Cth) to deal with restrained or confiscated property in accordance with the Act.

<sup>56</sup> Amendment to Act No. 279/2003 Coll., i.e. Act No. 86/2015 Coll. effective from 1 June 2015.

<sup>57</sup> Law of 26 March 2003 (Wet houdende oprichting van een Centraal Orgaan voor de Inbeslagneming en de Verbeurdverklaring en houdende bepalingen inzake het waardevast beheer van in beslag genomen goederen en de uitvoering van bepaalde vermogenssancties); part of this law is incorporated in the Code of Criminal Procedure.

<sup>58</sup> Code of Criminal Procedure, title IV, third section.



Special Assets (Sociedad de Activos Especiales, SAE) is the secretariat of this committee.<sup>59</sup> OABI, the AMO in **Honduras**, is permitted to sell certain types of assets pre-confiscation without judicial intervention under defined conditions.<sup>60</sup> The AMO must inform the General Prosecutor's Office of its decision within 24 hours of taking possession of the asset.

In **Costa Rica**, like Honduras, the *Instituto Costarricense sobre Drogas* (ICD), the AMO, does not require a judicial order to dispose of assets by sale or donation.<sup>61</sup> Once it has taken possession of property it is responsible for its management, including taking the decision to sell. It merely reports steps taken to the Judicial Authorities thereafter. The AMO must publicize all sales and donations. In **Peru**, the National Seized Property Commission (CONABI), the authority responsible for managing seized and confiscated assets, must submit any sale proposal for approval to its Management Council<sup>62</sup>, which is presided over by a representative from the Presidency of the Council of Ministers and is further comprised of representatives from several Ministries.<sup>63</sup> Decisions relating to the anticipated sale of assets requires a unanimous vote by the Management Council. While the courts officially declare seizure, CONABI deals with the sale/public auction thereof. CONABI is required to document any action taken together with the grounds for the decision.<sup>64</sup>

c. What happens to the proceeds of interim sale?

The G8 Guide on Best Practices for the Administration of Seized Assets (General Principle 11) recommends that the resulting proceeds of the interim sale should be secured pending a final determination.<sup>65</sup> Countries that allow for interim sale provide for the proceeds to be deposited into a bank account controlled by the court (as in the case of the **Czech Republic**)<sup>66</sup>; a consolidated judicial bank account (as in the case of the **Brazil**)<sup>67</sup>; an account managed by the AMO (as in the case of the **France**)<sup>68</sup> or a trust or escrow account in the name of the defendant operated by a court appointed trustee pending confiscation (as in the case of New Zealand and Australia).

In the **United States** the Marshal Service operates the Seized Assets Deposit Fund (SADF) into which all proceeds of interim sales are deposited.<sup>69</sup> Transfers out of the account are prohibited, unless directed by a court. In **Brazil** there is a prohibition on investing the proceeds of anticipated sale of seized assets.<sup>70</sup>

<sup>59</sup> Asset Forfeiture Code, created by Law 1708 of 2014 (Codigo de Extinción de Dominio), Law No. 1849 which modifies Law 1708, from 19 July 2017.

<sup>60</sup> Asset Forfeiture Act, published through Decree no. 27-2010.

<sup>61</sup> The functions and powers of the ICD are regulated by an internal Regulation (2012), available at: [http://www.icd.go.cr/portaled/images/docs/uid/informes/ReglamentoAutonomoICD\\_vigente.pdf](http://www.icd.go.cr/portaled/images/docs/uid/informes/ReglamentoAutonomoICD_vigente.pdf).

<sup>62</sup> CONABI was established by Legislative Decree No. 1104 of 19 April 2012.

<sup>63</sup> CONABI was conceived as a multisector body, and as such its Management Council is composed of representatives of different governmental powers and ministries: a representative from the Judiciary Power, a representative from the Office of Public Prosecutions, a representative from the Ministry of Justice and Human Rights, a representative from the Ministry of Interior, a representative from the Ministry of Economy and Finance, a representative from the Ministry of Defense and a representative from the State Council of Legal Defense. This allows the supervising body to have the necessary proficiency and knowledge to understand the multifaceted reality of asset management, and to take comprehensive decisions.

<sup>64</sup> Directive N. 01-2014-SUNARP/SN.

<sup>65</sup> G8 Best Practices for the Administration of Seized Assets" (April 27, 2005), General Principle 11.

<sup>66</sup> Act no. 219/2000 Coll.

<sup>67</sup> Code of Criminal Procedure, book 1, chapters IV and V.

<sup>68</sup> Law No. 2010-768 of 9 July 2010, which is incorporated in the Code of Criminal Procedure; Alienation of property takes place in accordance with articles 41-1 and 99-2 of the Code of Criminal Procedure.

<sup>69</sup> Comprehensive Crime Control Act of 1984.

<sup>70</sup> Code of Criminal Procedure, book 1, chapters IV and V.

If the law provides for the proceeds of the sale to be deposited into a bank account that will earn interest, the law should also determine who will receive the interest earned if no confiscation order is made and the property is returned to the owner. In **Belgium**, the proceeds of the sale are deposited into an account held in the name of the AMO (COSC) and the proceeds are reimbursed, together with interest earned, if no confiscation order is made.<sup>71</sup> Similarly in **Colombia** if the asset is to be returned to its owner, the sale price is returned in addition to any interest earned on it.<sup>72</sup> However in **France**, the proceeds are deposited into an account managed by the national AMO, if the asset is ordered to be returned, only the capital is returned and the interest earned is retained by the AMO to fund the operating expenses of AGRASC.<sup>73</sup>

d. Method of Sale and Costs

Sale is effected either by public auction or through private treaty. The principles that typically govern interim sale are: recovering maximum return on the sale at minimum cost and ease of disposal and ensuring that the process is transparently accounted for.

To ensure sold assets achieve the best possible return with minimum expenditure, Finshop (a division of the Patrimonial Services in the Treasury in **Belgium**.) manages pre-confiscation sales of seized movable property by following strict guidelines.<sup>74</sup> For Finshop, the first step in the process is to decide on the conditions of sale that will apply and to determine whether the sale will be by public auction online (eBay), through written offers or direct sales (from the shop). Finshop then undertakes appropriate publicity measures such as advertising on the website of FINSHOP/Patrimonial Services; mailing to interested parties and advertisement in local, national or specialized media. Finshop arranges inspection visits and is open to the public twice a month. Conditions for visits are also published in sales catalogues. Similarly, the **US** Marshall's Service undertakes marketing measures appropriate for the asset concerned. It conducts regular public auctions online and advertises in specialised publication when selling assets of interest to a specialised market.

Some jurisdictions make funds available to ensure the asset is sold at maximum value. This may entail effecting cosmetic improvements or incurring expenses for marketing and other sale strategies to achieve better returns. **Canada** has established a special fund from which expenses incurred from the sale can be defrayed. The **US** Treasury Asset Forfeiture Fund is the repository of forfeited currency and forfeited property sale proceeds and similarly serves as the operating fund from which specified programme expenditures such as asset management and disposition expenses are defrayed. Where funds are expended to improve the value of the asset, record must be kept of such expenses so that they can be deducted if the recovered proceeds are to be returned to the owner.

It is important that interim sale be handled transparently to avoid exposing the asset management capacity to unnecessary criticism either from the owner or from the public at large. This can be achieved by ensuring that the decision-making process resulting in the decision to sell and the method of sale are clearly defined and accessible to the public.

<sup>71</sup> Law of 26 March 2003 (Wet houdende oprichting van een Centraal Orgaan voor de Inbeslagneming en de Verbeurdverklaring en houdende bepalingen inzake het waardevast beheer van in beslag genomen goederen en de uitvoering van bepaalde vermogenssancties); part of this law is incorporated in the Code of Criminal Procedure.

<sup>72</sup> Asset Forfeiture Code, created by Law 1708 of 2014 (Codigo de Extinción de Dominio).

<sup>73</sup> Law No. 2010-768 of 9 July 2010, which is incorporated in the Code of Criminal Procedure; Alienation of property takes place in accordance with articles 41-1 and 99-2 of the Code of Criminal Procedure.

<sup>74</sup> See <http://www.finshop.belgium.be>.

e. Security in lieu of sale

In some countries an interested party can avert pre-confiscation sale by providing security against the return of the asset. The market value of the asset at the time of seizure will determine the value of the guarantee of payment. In the *Netherlands*, the owner or an interested party may transfer money (an amount equivalent to the value of the asset) or guarantee a payment method accepted by the Public Prosecution Service, to secure the release of the asset.<sup>75</sup> The measure is aimed at avoiding storage costs and extra charges for the sale of the asset. In *Australia* a court may revoke a restraining order that covers a suspect's property or exclude specified property from a restraining order if the suspect gives security that is satisfactory to the court to meet any liability that may be imposed on the suspect under the Proceeds of Crime Act 2002 or, in the case of a third party, if the third party gives an undertaking concerning the person's property that is satisfactory to the court.

### 3. Interim Use of Assets

The interim use of seized assets is a controversial measure because of the inherent risk of the asset deteriorating over time and depreciating in value as a result its use. There is also the concern that the fundamental rights of the owner could potentially be violated, particularly if a court orders the return of the asset. Most countries therefore do not permit the interim use of seized assets. However, where interim sale is not possible or legally permitted, interim use is a more productive way of dealing with seized assets.

Where interim use is permitted, countries mitigate concerns about assets deteriorating and losing value by requiring, as a condition of the temporary use of assets, that the recipient institution is required to provide an appropriate guarantee that the asset will be returned in a fit state. Were assets are to be returned to their lawful owner after the entity permitted to use the asset had invested in its improvement, the value of such investments in the asset can be recovered from the owner.

In *Costa Rica* the law provides that the Instituto Costarricense sobre Drogas may loan or donate for interim use seized assets to public interest entities, particularly those involved in the prevention or repression of drugs.<sup>76</sup> Ensuring the return of the assets in a reasonable condition has presented numerous challenges. To address these challenges, preventive and law enforcement institutions are required to provide for all-risk insurance and allocate a budget to cover potential damage not covered by the insurance taken out, before they can receive the asset. Where the asset has to be returned, the law provides for compensation for any damage or reduction in value. Given these challenges Costa Rica prefers interim sale over interim use as its preferred interim management mechanism.

Concerns have been raised about interim use of seized assets by law enforcement officers. The concern is that law enforcement personnel may become motivated to seize assets for the purpose of benefiting from their use rather than prioritizing the genuine law enforcement concerns of the community. This concern has led the G8 Lyon/Roma Criminal Legal Affairs Subgroup to recommend that unless there is a compelling purpose, for example, when the asset is to be used in furthering the investigation, seized assets should not be used during the interim phase by law enforcement personnel involved in seizure.<sup>77</sup> For these reasons there has been a move away from permitting interim use by institutions and actors tasked with investigation

<sup>75</sup> Section 118 A of the Dutch Code of Criminal Procedure: '1. The Public Prosecutor's Service order the return against surety of an object seized based on article 94a. 2. The surety implies the transfer of money by the party subject to the seizure or a third party, or in relation to a third party, as a guarantee for an amount and payment method accepted by the Public Prosecutor's Service'.

<sup>76</sup> The amendment of Art. 87 of the Law 8204 included in the Law N. 9074 of Costa Rica.

<sup>77</sup> "G8 Best Practices for the Administration of Seized Assets" (April 27, 2005), General Principle 10.

in favour of use by other government departments and by non-profit organizations for other social purposes.

In *Colombia* for assets to be used prior to final confiscation the assets must be productive, self-sustainable and generate employment.<sup>78</sup> To this end, the Code provides for three measures, “contracting”, “provisional destination”, and “provisional storage”. “Contracting” permits the manager of seized assets to enter into a contract which enables and contributes to the efficient management of assets.<sup>79</sup> An important requirement is the establishment of guarantees by the manager, which vary from case to case, in accordance with the nature of each agreement and the type of asset. Secondly, “provisional destination” measures are specifically designed for the use of assets by public entities, non-profit or legal persons.<sup>80</sup> The assets need to be covered by bank security or insurance cover against all risks. The provisional recipient will be liable for any loss, damage, destruction or deterioration of the received asset. The third measure refers to “provisional storage”, which is the appointment of a natural or legal person, who is required to satisfy the conditions necessary to manage a certain asset.<sup>81</sup> The eligibility for this kind of measure depends on the type of asset, the ability to manage, take care, keep custody of and ensure the assets continue to be productive and generators of employment. In this context, the rights and duties of the addressee and the manager are clearly defined. The latter has to inform the authorities responsible for the registration of property of the assignment. The addressee is incentivized to maximize the asset’s productivity. This measure foresees the payment of an established fee, which is granted to the addressee for managing assets and depends on the productivity of the asset under management.

In *Peru*, seized assets can only be assigned to public entities or non-profit private institutions on condition that the assets are used to contribute to the fight against organized crime or to conduct social prevention activities.<sup>82</sup> In addition, the use is granted only for a finite period of time corresponding with the duration of the legal proceedings. In the case of acquittal, CONABI (the AMO), requests the beneficiary organization to return the assigned asset. In the case of a conviction, CONABI will request the beneficiary organization to return the property in question in order to sell it through public auction. Organizations that enter into agreements for temporary use have to respect specific obligations related to the maintenance and safeguarding of the asset, i.e. ensuring no deterioration other than that caused by normal use or wear, respecting the use for which the asset was assigned, taking responsibility for any expenses and implementing conservation activities (such as improvement and modification works to prevent deterioration). During the period of assignment for temporary use, the responsible authorities have the right to implement monitoring activities, even without prior notice, in order to verify compliance with the above-mentioned obligations. In cases of non-compliance or in cases of loss, damage or deterioration of the asset, CONABI will initiate actions to investigate non-compliance by the beneficiary organization. If non-compliance is established, the Executive Secretariat of CONABI will formally notify the beneficiary organization to file within a fixed term the return of the asset; and if the deadline is not respected legal proceedings will commence.

#### 4. Destruction of Unsafe, Hazardous Property

Most countries make provision for the destruction of hazardous property or property that poses a threat to public safety. This includes property for which ownership constitutes a criminal offence, such as contraband and counterfeit goods. It may also include property that is likely to be used for carrying out further criminal activity, like

<sup>78</sup> Enshrined in the Law 1708 of 2014 entailing the new Asset Forfeiture Code.

<sup>79</sup> Regulated by article 94 of the Asset Forfeiture Code. See also Decree 2136 from 4 November 2015, Chapter 4 to 6.

<sup>80</sup> Regulated by article 96 of the Asset Forfeiture Code.

<sup>81</sup> Regulated by article 96 of the Asset Forfeiture Code.

<sup>82</sup> Legislative Decree No. 1104 of 19 April 2012.

a laboratory used to manufacture drugs. Property not suitable for public sale, such as obsolete electronic equipment.

It is important from a cost controlling perspective that the procedure for disposing of unsafe and hazardous property is speedy and efficient. The longer it takes to sell property that will ultimately be destroyed, the more money is wasted on storage and other maintenance costs. In **Belgium** everything that cannot be sold or recycled for practical or legal reasons (because it is fake, dangerous or illegal) is destroyed.<sup>83</sup> Finshop (the responsible division in the Treasury) recovers the cost of destruction from the law-enforcement entity seeking disposal of the property.

## 5. Abandoned Property

Abandoned property represents two types of challenges. On the one hand if a final confiscation order is granted years after it was seized on the basis that the owner has failed to contest the matter, storage and maintenance costs will have piled up with no prospect of recovering those costs from the sale of the property. The sooner the person or entity claiming ownership is identified or it is determined that the property is classified as unclaimed property, the sooner steps can be taken to dispose of the property before incurring unnecessary storage and maintenance costs. Equally, problems arise when a judicial officer orders that a seized asset be returned and no person or entity claims ownership of the property. Some States have put in place procedures for dealing with assets in cases where, after appropriate notice, a person fails to claim ownership over a certain asset within the established time limit.

In **Costa Rica**, the disposal of abandoned property is provided for after a certain period of time has elapsed since the seizure of the asset, and:

- it is impossible to establish the identity of the owner, perpetrator or accomplice; or
- the owner of the asset, perpetrator or accomplice has abandoned the assets; or
- after the completion of criminal proceedings or after the expiration of the ownership process, a claim of legal interest in the property has not been made; or
- once a judicial order of return has been issued and nobody has claimed the property within a specified time period.

In **Colombia**, the disposal of abandoned assets is regulated by the Asset Forfeiture Code. In cases where no person or entity has claimed ownership of the asset within three years for movable assets and five years for real estate, the administrator can commence a civil process to claim ownership thereof. The Code gives the administrator certain functions of the judiciary police, including the eviction of illegal occupants or trespassers through a swift administrative procedure. Cases of illegal occupancy of abandoned real estate has been identified as a particular challenge for asset management.

In **Honduras**, the management of abandoned assets is regulated as follows: if after thirty days from the issuance of a communication declaring the seizure of a certain asset, no person or entity has reclaimed ownership of that asset, the competent authority will declare such asset abandoned.<sup>84</sup> Upon such a declaration, the Office for the Administration of Seized Assets (Oficina Administradora de Bienes Incautados, OABI) proceeds by applying for a court order to allocate the abandoned property as provided for in the law.

<sup>83</sup> Law of 26 March 2003 (Wet houdende oprichting van een Centraal Orgaan voor de Inbeslagneming en de Verbeurdverklaring en houdende bepalingen inzake het waardevast beheer van in beslag genomen goederen en de uitvoering van bepaalde vermogenssancties); part of this law is incorporated in the Code of Criminal Procedure.

<sup>84</sup> Law on the Final Deprivation of Ownership of Illicit Property (2010).

## C. PROTECTION OF BONA FIDE THIRD PARTIES

Article 31(9) of UNCAC enjoins State's to ensure that confiscation measures do not prejudice the rights of *bona fide* third parties. The G8 Best Practices for the Administration of Seized Assets recommends that there should be mechanisms for those with a legal interest in seized property to apply to the court to modify a restraining order or seizure order to permit the release of the property subject to adequate controls, including mechanisms to inform potential *bona fide* third parties about the seizure or confiscation of an asset in which they might have a legitimate interest.

Historically third parties with an interest in restrained or seized property, were left with little option but to wait until the conclusion of the confiscation proceeding to see what would become of their interest. The trend is increasingly to provide the greatest protection possible to *bona fide* third parties.

Most countries' legislation set forth the rights of *bona fide* third parties in relation to property subject to a restraining order, including allowing a person to carry on a legitimate trade or business that would otherwise be subject to seizure or allowing tenants to continue to occupy commercial real estate. Several countries provide for expedited procedures for *bona fide* third parties (i.e., banks, vehicle financing companies, etc.) so that their interests can be acknowledged at an early stage of the confiscation proceedings. In this regard **Canadian** law permits legitimate third party lenders to exercise their ownership rights should the interested party fall behind or breach the mortgage contract in any way.<sup>85</sup> The SPMD, the Canadian AMO, plays an oversight role, ensuring that the property is sold for fair market value. Any proceeds of sale left over after the mortgage has been paid out, are remitted to SPMD pending the end of the court case.

In **South Africa** the rights of creditors with secured rights against seized assets are specifically protected.<sup>86</sup> In cases where an accused person's entire estate has been placed under restraint, unsecured creditors, particularly those who have suffered a direct loss as a result of the accused persons alleged criminal conduct, also have the right to approach a court during the interim phase to have their interests protected. If, however, there is doubt about whether a creditor is in fact *bona fide* and transacted at arm's length with the accused person, the determination of the creditor's claim is deferred for adjudication as part of the process of realizing assets after final confiscation.

In the **Dominican Republic** the law provides that any seizure of proceeds of crime shall be done without prejudice to the rights of *bona fide* third parties.<sup>87</sup> It provides that within 30 days of the seizure, the Public Ministry shall publish, once a week for three consecutive weeks, the seizure of assets in a newspaper of national circulation. This should allow individuals, who could potentially claim a legitimate interest in the seized asset, to enforce their rights. If this is the case, individuals need to prove they were not involved in the offence; they were not aware of the illegal use of the asset, or otherwise did not consent to it; and that they engaged in all possible measures to prevent the illicit use of the asset.

**Thailand** addresses the issue of *bona fide* third parties by providing third parties the right to establish their ownership vis à vis the Asset Management Division.<sup>88</sup> If third parties prove that they were not involved in any offence or that they have received the

<sup>85</sup> Seized Property Management Act, S.C. 1993.

<sup>86</sup> Prevention of Organised Crime Act, No. 121 of 1998.

<sup>87</sup> Act No. 72-02 (Against the Laundering of Assets Derived from the Illicit Trafficking of Drugs and Controlled Substances and Other Serious Offences).

<sup>88</sup> Act on Measures for the Suppression of Offenders in an Offense Relating to Narcotics, 1991, B.E. 2534, 19 September 1991.

asset without being aware of its illicit source, the Division shall not issue an initial freezing order.

However, during the interim stage it is not always possible or easy to distinguish legitimate third parties and those associated with the suspect and acting at his or her behest. When considering intervening or supporting a third party in protecting his or her interest in seized or restrained property, the following factors play a role.

- Did the third party take action to prevent the offence?
- Is the third party implicated in any other related offence?
- Does the third party have a legitimate interest in the property and have an arm's length relationship with the suspect?
- Did the third party act diligently according to the law in the creation of the interest in the asset?

There does not however appear to be consensus on how these concerns should be taken into account in practice at the interim stage when a full consideration of the issues are still to take place.

## D. PRESEIZURE PLANNING

Pre-seizure planning is the process of evaluating assets and confiscation scenarios prior to freezing or seizure. The potential for interim use or pre-seizure sale of the asset is also considered in this context. If a trustee or judicial manager is to be appointed, pre-seizure planning assists in framing the terms of the order sought and in identifying the skills required to manage the asset. If the asset is left in the custody of the owner, pre-seizure planning assists in devising the kind of restrictions that ought to be placed on the use of the asset as well as the measures needed to monitor compliance with such restrictions. If the asset is to be seized, pre-seizure planning will focus on determining the best way of avoiding high costs and manage liabilities as well as reputational risks. The objective is for law enforcement to fully assess the options available for securing the asset in a way so as to best preserve its value and to evaluate and mitigate the risks associated with the freezing or seizure of the asset, such as dissipation of the asset, overly burdensome costs, legal liabilities and reputational risks.

The *United States* Marshal Services, the AMO responsible for the custody and management of property under the Department of Justice's Asset Forfeiture Programme, defines pre-seizure planning as a process of "anticipating and making a collaborative, informed decision about what property was being seized for forfeiture, how and when it was to be seized and, most importantly, whether it should be seized or targeted for forfeiture at all". Being the first step of a complex process, pre-seizure planning is essential for the success of the subsequent steps, including for purposes of limiting future liability and judicial review and providing for an economically viable model. The degree and nature of pre-seizure planning will vary depending on the circumstances and complexity of each asset. For example, the pre-seizure planning required for routinely seized assets, such as vehicles or cash is minimal, while the analyses and formal planning required for the seizure of a group of operating businesses would require extensive research, evaluation and detailed discussion.

Countries increasingly acknowledge the importance of an early assessment of options for preserving assets as part of an efficient and cost-effective asset management system. Those with extensive asset management programmes and vast experience are particularly focused on getting this phase right. In several jurisdictions it appeared evident that an increased focus on pre-seizure planning was the result of dire and costly lessons learned. Despite the differences characterizing domestic systems, pre-seizure planning seems typically to address the issues outlined in the table below.

**Guiding questions in the context of pre-seizure planning**

1. What is being seized? Perform a basic assessment of the condition of the asset (for e.g. arrange to drive by immovable property to evaluate the state of repair and occupants and any observable challenges, such as security concerns, etc.).
2. Establish the location of the assets and evaluate transport, security, storage, maintenance (as well as the expected duration of maintenance requirements) and management requirements, including costs and resources to be invested if the asset is seized.
3. Determine who owns the asset. Conduct open source ownership/title investigations to identify owners (both nominal and beneficial owners) and other interests in the asset, including potential or existing liabilities against the property and interests of bona fide third parties.
4. Ascertain the most up-to-date value of the asset, including whether it has a particular value to the owner and whether it could easily be replaced if liquidated. Consider if the asset has a negative or marginal net equity at the time of seizure and assess if the asset is likely to depreciate to a negative or marginal value. Consider the value of the asset relative to the costs associated with seizure, avoid seizure of assets with a negative cost benefit ratio. Avoid seizing assets that are not worth maintaining or will represent a burden for the responsible agency.
5. What law enforcement benefits are to be derived from seizure? Are there possible alternatives to seizure?
6. Consider law enforcement resources available to take custody and effectively manage the asset?
7. What entity is best placed to take responsibility for managing the asset pending the confiscation decision. Should a judicial manager or trustee be appointed?
8. Will the asset require significant amounts of management resources and oversight, specialist expertise or considerable investment of funds? Can any potential monetary losses be mitigated by careful planning? What management and disposal problems are anticipated (e.g. logistical issues involving maintenance and management)
9. Consider methods of disposal of the asset should pre-confiscation sale be permitted and in cases where interim sale is not permitted consider alternatives to taking custody of the asset when seizure becomes too cumbersome and costly.
10. How and when will the asset be seized/forfeited? Do immediate steps need to be taken in order to secure the asset? Is immediate seizure necessary or will a freezing order be sufficient? Prepare a logistical plan for the day of seizure of the assets.

In some countries pre-seizure planning is regarded as so important it is expressly required in legislation or regulations. In **Canada** section 9(a) of the Seized Property Management Act provides for the AMO to offer consultative and other services to law enforcement agencies in relation to the seizure or restraint of any property. Legislation adopted in **Colombia** makes explicit reference to the importance of carrying out a cost-benefit analysis prior to obtaining a seizure order.<sup>89</sup>

In the **United States** formal pre-seizure planning discussions are required for several asset categories: residential/commercial real property and vacant land; businesses and other complex assets; large quantities of assets involving potential inventory and storage or security problems (e.g. multiple vehicles, high volumes of drug paraphernalia to be seized from multiple locations on the same day or inventory of ongoing businesses such as jewellery stores); assets that can create difficulties or

<sup>89</sup> Asset Forfeiture Code, created by Law 1708 of 2014 (Codigo de Extinción de Dominio).



unusual problems (e.g. animals, perishable items, leasehold agreements, intellectual property or valuable art and antiques); and assets located in foreign countries.<sup>90</sup>

Although **France** has a similar policy, the approach is not defined in the national legal system, but is part of the day-to-day work of AGRASC, the national AMO and the Criminal Asset Identification Platform (PIAC). At the investigation stage, PIAC centralizes, collects and cross-checks the information related to illicit assets, properties or financing flows. PIAC's work is mainly to anticipate matters that could arise upon seizure of assets and it therefore conducts a complete investigation of licit and illicit assets, particularly in cases of seizures in anticipation of a value based confiscation order. Once the assets are identified, the PIAC officers contact AGRASC to evaluate the opportunity/possibility of seizing them. AGRASC is also often consulted by judges on the viability or feasibility of seizures, especially in the case of immovable assets. In practice, after judicial decisions have been made, AGRASC provides information to magistrates to seek pragmatic approaches in cases in which seizures are unlikely to lead to the successful liquidation of the asset in the future.

## E. CONCLUSION

The following trends in dealing with property prior to a final confiscation judgment emerge from the practices of countries surveyed in the context of this study emerge:

- ✓ Most countries provide for a court or other judicial authority to authorise interim measures to ensure that the requirement of preserving the value of the property is balanced against the procedural rights of affected parties, usually at a lower standard of proof than applies to confiscation orders. Increasingly countries provide for an initial freezing order by a competent authority other than a judicial authority, particularly when there is a need for urgent action. Such orders however have to be validated or reviewed by a judicial authority, if challenged. This approach balances the law enforcement requirement for speedy action with the due process rights of the owner of the asset.
- ✓ Most national legislations provide for a choice between freezing and seizure orders, and for wide discretion for judicial officers to tailor appropriate orders to meet the exigencies of the cases before them.
- ✓ A number of countries have introduced, and increasingly use, value based forfeiture and related seizure provisions, to avoid some of the challenges otherwise potentially posed by the need to manage complex assets.
- ✓ Some countries have dedicated capacity to assist law enforcement with pre-seizure planning, particularly by ensuring access to advice and expertise to evaluate the costs and other risks and constraints attendant upon seizing assets. They have reported positive experience with the decision-making on the appropriate *interim* management measure, the preservation of the value of the alleged illicit property and the cost-effectiveness of the measure as a whole. .
- ✓ Where the law provides for assets to be left under the control of its owner, subject to certain restrictions on use, coupled with effective monitoring of compliance with the court order, freezing orders can be an effective way of keeping costs of *interim* management to a minimum.
- ✓ Most jurisdictions permit interlocutory sale with the consent of the owner and that of the relevant agency responsible for enforcing the seizure order. Cost considerations have increasingly compelled those making the decision to seek the seizure of assets to first actively obtain the consent of the owner to sell.
- ✓ As the costs of storing, safeguarding and maintaining the value of seized assets over long periods of time escalate, more and more countries make provision in the law for pre-confiscation sale of assets in defined circumstances even without the

<sup>90</sup> For information about the US Department of Justice Asset Forfeiture Program (DOJ AFP), see: <https://www.justice.gov/afp>.

consent of the owner, particularly in the case of perishable or rapidly depreciating assets, . A discernible trend in favour of pre-confiscation sale (or anticipated sale) as the preferred *interim* management measure to control costs is emerging.

✓ The *interim* use of assets is a controversial measure because of the inherent risk of depreciation in value and deterioration of the asset over time. Most countries, therefore, do not permit the *interim* use of assets. However where *interim* sale is not an option, *interim* use is often used to ensure the productive use of assets. Countries that do provide for *interim* use seek to mitigate the risk of depreciation by providing for guarantees of compensation or a damages claim if the asset has deteriorated as a result of *interim* use.

✓ There is a trend is to provide third parties with the greatest protection possible, already during the duration of the interim order. However, it is not always possible or easy to distinguish legitimate third parties from those associated with the suspect and acting at his or her behest. There seems to be no consensus on how these concerns should be taken into account.

### III. FINAL DISPOSAL OF CONFISCATED ASSETS

#### A. INTRODUCTION

This chapter is concerned with the final phase of the asset recovery process. The starting point is when a court or other competent authority orders the permanent deprivation of property and ends when the order is executed, i.e. when the property or proceeds reaches those beneficiaries designated in the confiscation order.

‘Confiscation order’ is the generic term used in this Study to describe a variety of measures, both conviction and non-conviction based, aimed at depriving owners or other interested parties of their interest in property that constitutes:

- (a) Proceeds of crime derived from offences or property the value of which corresponds to such proceeds;
- (b) Property, equipment or other instrumentalities used in or destined for use in offences.

“Extended confiscation” is applicable in situations where not only property associated with a specific crime is confiscated, but also additional property which the court is satisfied is derived from related criminal conduct. In such cases, the court, usually on the basis of circumstantial evidence concludes that property, although not derived from a particular offence, nevertheless is derived from unspecified crimes. For example, where evidence is adduced that the value of the property owned by the convicted person exceeds the value of property derived from the lawful income of that person, all the property that cannot be accounted for from legitimate sources is included in the extended confiscation order.<sup>91</sup>

The focus of this chapter is two-fold. The first part addresses the mechanisms countries have put in place to recover from the offender the full value of the confiscation order. The second part identifies the individuals and organizations countries typically designate as beneficiaries of confiscation orders.

#### B. RECOVERY FROM THE OFFENDER

##### 1. Value-based versus object based confiscation

Different procedures govern the execution of value-based as opposed to object-based confiscation orders. In a value-based confiscation order the convicted person is

<sup>91</sup> See EU directive Art. 5 of Directive 2014/42/EU.

ordered to pay an amount of money equivalent to the value of the criminal benefit derived. The order takes the form of a money judgment. Object-based confiscation orders condemn specified property as the proceeds (either direct or indirect proceeds) or instrumentality of crime.

Value based confiscation orders are usually regarded as a debt owed to the State executable in favour of the State. Even if the court order makes provision for the recovered proceeds to be paid to a victim or other beneficiary, the State will be responsible for the recovery process. Objects declared forfeit to the State become government property and can either be recorded as such in the government inventory or sold and the proceeds deposited into a government account, unless the court order specifies that the property be handed to the victim or other beneficiary. Again, it is the State, who is responsible for handing over the proceeds and instruments to the identified beneficiary.

## 2. Value-based Enforcement Procedures

Recovering the full extent of a value-based confiscation order, has proved to be notoriously difficult. This is particularly the case where the value of the order sought is based solely on the value of what the convicted person was found to have misappropriated and a realistic assessment of what can actually be recovered has not been done. It is important to, as far as possible, identify the assets in advance of the making of the order, so that the prospects of recovering against the order is on a more solid footing.

In the *United Kingdom*, default of payment of a value based confiscation order can result in an additional period of imprisonment being levied. The convicted person may however apply for a reduction in the value of the order if he or she can show that they have no other assets from which to pay.

If the convicted person refuses to pay or claims he or she has no assets from which to pay, apart from an additional period of imprisonment being levied, the following enforcement mechanism are typically available for the collection of unfulfilled value based confiscation orders.

- ✓ The confiscation order has the status of a civil judgment and the government becomes a judgment creditor. The debt can collect through ordinary civil law enforcement mechanisms, such as insolvency/bankruptcy proceedings; or
- ✓ Special realization procedures are provided for as part of the asset recovery law.

*South Africa* is an example of a country in which both options are available.<sup>92</sup> The asset recovery law provides that a confiscation order shall have the effect of a civil judgment payable to the State. The debt may be enforced through ordinary civil recovery proceedings, such as execution against the property of the defendant and sequestration proceedings, at the instance of the authority responsible for debt collection on behalf of the State (the State Attorney).

The law also makes provision for special realization proceedings in which a court, on application by the prosecutor, may order that property of the defendant be sold to satisfy the confiscation order, after affording all persons known to have any interest in the property concerned an opportunity to make representations to it.<sup>93</sup> All persons who have suffered damage to or loss of property or injury as a result of an offence to which the order relates and all persons likely to be directly affected by the confiscation order are given an opportunity to be heard before the property can be sold.

In *Belgium*, prior to the enactment of the law establishing Belgium's AMO, only about 70 % of all value-based confiscation orders were executed. When COSC was established new procedures were introduced to find and recover assets after a

<sup>92</sup> Prevention of Organised Crime Act, 1998.

<sup>93</sup> Prevention of Organised Crime Act, 1998.

confiscation order had been made. The execution of confiscation orders are dealt with by the Government Receiver and it takes place in the name of the Public Prosecutor. The Receiver of Estates has the power to execute a confiscation order and the Receiver of Criminal Fines has the power to execute criminal orders. Unlike freezing and confiscation proceedings, which happen within the context of criminal procedure, the execution of these orders happens by civil procedure.

To support the civil execution of confiscation orders, COSC may require all administrative services of the government, including the Financial Intelligence Processing Unit to provide it with information deemed useful for its investigations. If the information reveals assets held by the convicted person COSC may issue a written and reasoned requisition prohibiting the transfer of such assets for five working days. This power can only be invoked by COSC in the event that the information derived from the Receiver is inadequate to determine the solvency of the convicted person, or if indicative evidence exists to suggest that the convicted person is endeavouring to evade the enforcement of the confiscation court order.

COSC may undertake a penal execution investigation (PEI)<sup>94</sup> against the convicted person and against third parties who are deliberately cooperating with the convicted person to avoid the execution of the judgment. In cases where the criminal assets are concealed in the names of third parties (companies, family and friends), a PEI can be instituted, which includes tracing, identification, freezing/seizing of assets against which the payment of fines, confiscation and the costs of penal proceedings can be executed. Any assets received by COSC within the context of a PEI are transferred as soon as possible to the appropriate government receiver in the finance department for the execution of the outstanding fines, confiscation and procedure costs.

### 3. Enforcement of Object Based Confiscation Orders

Where an identified asset is declared forfeited to the government, whether it has already been seized or is subsequently seized, the executing authority is identified in the order. Typically the order directs a law enforcement official or entity; another public sector enforcement or collections agency; a court-appointed asset manager, such as a *curator bonis*, trustee, judicial manager, court broker or court administration clerk; or the country's designated AMO to take possession of the asset. The designated executing authority is directed to either sell the asset and retain the proceeds or, instead of converting the asset to cash, retain it in the form in which it was seized pending its allocation in most cases either for use by law enforcement or to another social purpose. The authority designated to takes the decision to either convert to cash or retain the asset in the form it was seized or confiscated and how the decision is taken varies from country to country.

In *France* confiscated moveable and immovable property vests in the State.<sup>95</sup> Before selling confiscated real estate AGRASC, the country's AMO, consults the State Property Administration to establish if the State is interested in obtaining the property free of charge. This option is however rarely exercised as State departments are usually only interested in acquiring office buildings whereas confiscated buildings tend to be primarily residential property. Movable assets can be assigned to law enforcement agencies, such as the police, gendarmerie or customs units performing judicial police activities. The law enforcement agency obtains authorization from the Ministry of Interior to request the Court to assign the movables to it. If no public sector entity requests the transfer of forfeited property, the property is disposed of in favour of non-state actors, either through sale by public tender or transfer to a selected beneficiary free of charge. If the assets are not gratuitously transferred or sold then other options are applied: public tender rental agreements or gratuitous use. Contracts for rent or gratuitous use are always for a fixed period of up to 8 years maximum.

<sup>94</sup> It was established by Law of 11/02/2014. It is part of the Belgian Code of Criminal Procedure.

<sup>95</sup> General Code of the Property of Public Persons.

In *Australia* the default position is that the Official Trustee, on behalf of the government, and as soon as practicable, must dispose of any property specified in the order that is not money.<sup>96</sup> The Official Trustee subsequently transfers any amounts received from the disposal and any property specified in the order that is cash to the Confiscated Assets Account, after deducting its remuneration and other costs and charges.

However the Minister or a senior Departmental officer in the Attorney-General's Department authorized by the Minister may direct that the property be otherwise dealt with, as specified in a direction. This may occur, for example, where the Minister determines that the property would best be dealt with by another organisation or where funds have been seized in a foreign country and, as part of the recognition of that country's assistance, part of the funds are allocated to that country.

## C. BENEFICIARIES OF CONFISCATION ORDERS

### 1. Payment to the State or the General Revenue Fund

In many countries, including *China*<sup>97</sup>, the default beneficiary of confiscation orders is the State. The income derived from confiscation orders is treated as government revenue<sup>98</sup> allocated to government programs in order to ensure, through the budget approval process, a fair, transparent and accountable way of allocating recovered proceeds.

Other countries take the view that if the recovered proceeds are simply turned over to the government revenue fund, the opportunity to demonstrate a direct link between asset recovery and the compensation of victims directly or indirectly through programs geared towards benefiting communities or individuals most affected by crime, is lost. Equally, the symbolic value of using the proceeds of crime to fight crime is lost if the proceeds are distributed through the general budgetary process.

Allocating recovered proceeds to the national revenue fund to meet general government priorities as opposed to permitting recovered proceeds to be allocated through a process that favours programmes that cater for crime prevention and social re-use are two equally compelling policy options. It is important that the policy choice is clearly articulated in the asset recovery law.

### 2. Payment to a Special/Dedicated Fund<sup>99</sup>

Many asset forfeiture laws make provision for the proceeds of confiscation orders to be paid into a specially designated asset recovery fund. The fund is usually established in the law; the persons responsible for making decisions with regard to the fund are identified; purposes for which the funds deposited into the Fund may be applied is also specified.

Where such a special fund is set up it is usually accompanied by infrastructure to manage and account for deposits received into the fund and transfers made from the fund. Mechanisms for the fair allocation of funds (especially if the legislation is silent on the kind of projects that proceeds may be applied to) must be developed. Oversight, transparency and reporting are critical to maintaining the integrity of the fund and accountability for its contents. Allegations of misuse or mismanagement can have devastating consequence for the future of the asset recovery programme.

<sup>96</sup> Proceeds of Crime Act 2002 Division 4 — Enforcement of Confiscation Orders.

<sup>97</sup> 1997 Criminal Law of the People's Republic of China, part One, chapter IV.

<sup>98</sup> According to the IMF *Government Finance Statistics Manual* (GFSM 2001) forfeitures and fines should be treated as government revenue.

<sup>99</sup> For a useful guide to the establishment of a special forfeiture fund see *Recovery of stolen assets, Best practices guide for non-conviction based forfeiture*. Initiative for the recovery of stolen assets. StAR Initiative. Theodore S. Greenberg, Linda M. Samuel, Wingate Grant, Larissa Gray, 2009, Washington, DC, Organizational Considerations and Asset Management at pp 90 to 94.

The *United States* operates one of the largest special asset forfeiture funds in the world.<sup>100</sup> The Comprehensive Crime Control Act of 1984 established the Department of Justice Assets Forfeiture Fund (JAFF)<sup>101</sup> to receive the proceeds of forfeitures pursuant to any law enforced or administered by the Department of Justice (DoJ), as well as the federal share of forfeitures under state, local and foreign law and the proceeds of investments of fund balances. All funds deposited into the JAFF are considered public money, i.e. funds belonging to the federal government.

The JAFF is managed by the DoJ's Asset Forfeiture Management Staff (AFMS) of the United States Federal Asset Forfeiture Program<sup>102</sup>. Forfeited funds can be used for forfeiture operations expenses (i.e. asset management and disposal, third-party interests, case-related expenses, training and printing, contracts to identify forfeitable assets, awards based on forfeiture,) and for general investigative expenses (i.e. awards for information, purchase of evidence, joint law enforcement operations). The DoJ retains a portion of the forfeited proceeds as overhead expenses, while the rest are shared with state and local law enforcement agencies which had assisted in the forfeiture process (based on the number of work hours). The JAFF is largely self-sustaining and relies minimally on appropriated funds from the national budget. Every year the JAFF is audited by an independent auditor and the DoJ annually reports to Congress on the status of the funds including on every confiscation valued at over \$1 million.

In *South Africa* the Criminal Assets Recovery Account was established to receive all money derived from the fulfilment of confiscation orders.<sup>103</sup> The POCA makes provision for the establishment of a high level Criminal Assets Recovery Committee consisting of the Ministers of Justice, Safety and Security, Finance and the National Director of Public Prosecutions to advise the Cabinet in connection with all aspects of forfeiture of property to the State.

The Committee may make recommendations to Cabinet with regard to a policy to be adopted concerning the realization of forfeited property, other than money, and the transfer of such property to the Account; the allocation of property and money from the account to specific law enforcement agencies or to any institution, organization or fund supporting victims of crime and make recommendations to Cabinet regarding the allocation of money for the administration of the Committee.

All amounts of money withdrawn, or property allocated, from the Account is considered a direct charge against the National Revenue Fund. When allocating property or money to a specific law enforcement agency or to an institution, organization or fund supporting victims of crime, the Cabinet must indicate the specific purpose for which that property or money is to be utilized. The Minister of Justice must cause all particulars of such allocation to be tabled in Parliament.

The Committee may not allocate property or money to an institution, organization or fund supporting victims unless an accounting officer is appointed to account for the acquisition, receipt, custody and disposal of all property so allocated and all payments made in respect of the purpose for which the allocation had been made. A Cabinet Committee may issue guidelines to accounting officers in connection with the systems of bookkeeping and accounting to be followed by them and must require separate accounting for money and property received from the fund. The Auditor-General must audit the books of accounts, accounting statements, financial statements and financial management of each law enforcement agency or institution, organization or fund to which property or money had been allocated in respect of that allocation.

<sup>100</sup> As of 30 September 2014, there were 21,117 assets in the JAFF, valued at \$2.2 billion.

<sup>101</sup> 28 U.S.C. §524(c).

<sup>102</sup> For more information on the Fund and how it is managed and audited see: <https://www.justice.gov/afp/fund#po>.

<sup>103</sup> Prevention of Organised Crime Act, 1998 (POCA).

An administrative capacity operating out of the Department of Justice called the Criminal Asset Recovery Unit was set up to implement the provisions relating to the Account. Setting up these extensive legislative mechanisms for the management and accountability of the Fund took a number of years and the first allocations were made five years into the establishment of the Fund. It also took that long to build up sufficient capital in the Fund to justify convening the cabinet committee to make the first allocations. Because of the auditing requirements, there have been fewer allocations to victim organizations than to law enforcement initiatives and administration costs of the asset recovery program.<sup>104</sup> The table below details the first allocation out of the Account in 2006.

Beneficiary	Allocation
South African Police Service	R33,7 million
National Prosecuting Authority	R31,8 million.
Department of Social Development	R3,3 million
South African Revenue Services	R5 million
In the same year R200 million was paid out directly to victims.	

In **Mexico** the proceeds from confiscated assets are used to reinforce the rule of law and the federal strategy to fight crime. The *Servicio de Administración y Enajenación de Bienes* (Asset Administration and Disposal Service, SAE - Spanish acronym) is the institution responsible for the management and disposal of seized and confiscated assets.<sup>105</sup> Given that Mexico has recently introduced a system that allows the early monetization of seized assets, SAE is entitled to sell them through auctions after confiscation. The Mexican law mandates that the proceeds from assets must be used mainly to compensate victims of abduction. The remainder is divided in equal shares among: 1) crime prevention activities, 2) the judiciary system, and 3) treatment of health problems related to drug dependence.

The scope of SAE's work goes beyond asset recovery and deals with management of State enterprises more generally. The asset recovery regime benefits from enhanced integrity requirements of the SAE. For example, the SAE has a Board of Governors that approves policies, rules and general programs; analyses and approves the Director General's quarterly reports; determines general guidelines for proper administration and disposal of assets; approves programs and budgets submitted by the General Director. SAE complies with all requests for information and makes public as much information as possible regarding assets, expenditures, salaries, forms, audits, evaluations, etc. The SAE is legally required to present an annual report to all of its transferors regarding the state of the transferred assets, the revenues from their sale, as well as the administration costs. It must also comply with the Mexican Federal standard of accountability by answering to all the observations by the Government Audit Office (legislative branch) as well as to the observations done by the Internal Control Office.

In **Australia**, the Official Trustee is designated in the law to, as soon as practicable after the order is made, dispose of any property specified in the order that is not

<sup>104</sup> The 2010/2011 annual report of the Account is available at:  
<http://www.justice.gov.za/reportfiles/other/cara-anr-2010-11.pdf>.

<sup>105</sup> Federal Law for the Administration and Disposition of Public Assets (Ley Federal para la Administración y Enajenación de Bienes del Sector Público).

money.<sup>106</sup> The Official Trustee must apply any amounts received from that disposal and any property specified in the order that is money to payment of its remuneration and other costs, charges and expenses incurred in connection with the disposal as well as costs associated with the management of restrained/seized property. The remainder of the funds must be credited to the Confiscated Assets Account (CAA).

Monies in the CAA can be used to fund crime prevention measures; law enforcement measures; measures relating to the treatment of drug addiction and diversionary measures relating to the illegal use of drugs. These payments are made through community and government run programmes. The Minister for Justice determines, on a discretionary basis, which programmes are to be allocated funds in line with the Government's priorities. Details of programmes to which funds are allocated are publicly available and the funding is subject to standard Government accounting and reporting requirements (where payment is to a Government entity) or the usual rules applying to Government grants (where payment is to a non-Government entity).

In **Brazil**, the proceeds of all confiscated assets in criminal proceedings are deposited into a special fund called the Penitentiary Fund established in 1994. The sole purpose of the Fund is to improve the penitentiary system. The proceeds of confiscated assets in drug cases are deposited in an Anti-Drug Fund managed by the National Anti-Drug Secretariat. The proceeds in the Anti-Drug Fund are invested in drug prevention or law enforcement projects on the basis of project applications submitted. Confiscated assets in money-laundering cases can be allocated to the Union or the States, depending on the jurisdiction over the predicate offence, to be used by the anti-money laundering authorities. **Brazil** is working on a draft regulatory decree to provide for the allocation of confiscated assets in the federal sphere. The draft decree provides for the creation of a committee of Ministers that would analyse and decide on the projects in which proceeds of confiscated assets should be invested and on the institutions that should benefit from such assets.

### 3. Payment to Law Enforcement Agencies

Funds for law enforcement ordinarily come from the general budget. Many jurisdictions, however, permit recovered proceeds to be allocated to investigative and prosecutorial projects, such as to purchase special equipment, provide training or to fund joint law enforcement projects, outside of the ordinary budgetary process. The purpose is to convey a symbolic message that criminals will have the fruits of their crimes used against them. The allocations are generally not intended to fund recurring law enforcement expenditure such as salaries.

There has been some criticism of the practice of allocating assets derived from asset recovery investigations directly to the law enforcement personnel involved in such investigations. Concerns of law enforcement officers improperly targeting individuals or property for personal or institutional gain have also surfaced. Countries feared that law enforcement inappropriately targeted assets to benefit itself rather than to achieve legitimate objectives, and have therefore imposed tighter controls on the allocation of confiscated funds to law enforcement. Policies have been created to avoid any direct link between assets seized and rewards provided to law enforcement.

The **United States** "equitable sharing" program for example is subject to extensive regulations and strict auditing controls that determine how funds are shared and limit how funds allocated to law enforcement can be spent, namely, only for limited law enforcement purposes and only in cases where there are no identifiable victims.

In **Canada** the Seized Property Management Directorate (SPMD) administers the Forfeited Property Sharing Regulations promulgated under the Seized Property Management Act. The regulations provide a formula used to share the net proceeds with provincial and foreign governments involved in asset recovery investigations. Under the regulation all of SPMD's costs (operational and overhead) are deducted, and the net proceeds are made available for sharing. Depending on the agency's

<sup>106</sup> Proceeds of Crime Act 2002 (Cth).



involvement in the investigation and trial, they could receive 10%, 50%, or 90% of the net proceeds. The federal government always receives a minimum of 10%.

In **Honduras** the decision to allocate forfeited funds to law enforcement is made by the National Council for Defense and Security (CNDS), a high-level government body. Subject to prior consideration of their needs and the submission of a plan describing the manner in which the assets will be used, the CNDS adopts a resolution that the property be donated to any of the following law enforcement entities: OABI (the asset management and disposal agency) for the fulfilment of its objectives; public education centres; the National Banking and Insurance Commission, the Financial Intelligence Unit; the National Directorate for Intelligence and Investigation, with particular attention to its special units; the Public Prosecution Service, for its special units responsible for combating organized crime; for projects to prevent and suppress drug trafficking or organized crime; the judiciary, with particular preference given to judicial bodies specializing in forfeiture and the fight against organized crime; the Ministry of Defense, specifically for the special units of the armed forces that combat criminal organizations; the Ministry of Security, for the purpose of assignment to the units involved in the investigation process; and any other body authorized by the CNDS.

#### 4. Covering costs of the Asset Recovery Program

The cost of establishing capacity to effectively manage seized and confiscated property and more generally meeting the aims of a country's asset recovery program can be significant. Without sufficient funds for personnel and infrastructure it can be very difficult to seize and confiscate assets at a scale sufficient to make a significant impact on crime. In countries where there is intense competition for resources from other equally compelling development priorities, ensuring that asset recovery capacity is or becomes self-funding can significantly boost implementation of an asset recovery program.

In **France**, AGRASC (the agency responsible for management and disposal of seized and confiscated property) has three main sources of self-financing<sup>107</sup>:

- ✓ a provision of the Finance Act allows AGRASC to retain an annual capped amount of 1.806 million euros from the proceeds of confiscated assets;
- ✓ interest earned on the funds deposited into the account opened with the *Caisse des dépôts et consignations* (CDC). All funds seized by law enforcement officers country-wide are deposited into this account together with money earned from pre-confiscation sales;
- ✓ the Domaine tax received by France Domaine in respect of confiscated assets that have been sold.

AGRASC is fully self-funded and its funding increases as its activity increases, by virtue of the second of its income streams, i.e. interest earned on seized cash and on the proceeds of pre-confiscation sales of seized property, and to a lesser extent the Domaine tax.

In **Canada**, the Seized Property Management Directorate (SPMD) recovers all its operational costs from the proceeds of the sale of forfeited property. According to the Forfeited Property Regulations, all SPMD's costs (both operational and overhead) are recovered and only the net proceeds of sale<sup>108</sup> are shared domestically and internationally with jurisdictions that were involved in the investigation.

Moreover, at the beginning of each fiscal year, SPMD draws upon an interest-free \$50,000,000 loan to fund SPMD operations and all its expenses are paid out of this account. This loan is then reimbursed throughout the year through the disposal of

<sup>107</sup> Articles 706-713 of the Code of Criminal Procedure

<sup>108</sup> The "net" proceeds of sale are calculated by subtracting the management and disposal costs from the proceeds of sale.

confiscated assets. At the end of the fiscal year the net proceeds, which are constituted of the revenues from disposals from which SPMD's operational and overhead expenses are subtracted, becomes available as prescribed by the Forfeited Property Sharing Regulations.<sup>109</sup> This greatly assists in providing the SPMD with a consistent funding base from which to fund its operations.

## 5. Victim Compensation

Several international instruments encourage States to prioritize the use of proceeds of crime to compensate victims of crime. Article 35 of UNCAC<sup>110</sup> and Article 25 of UNTOC<sup>111</sup> both provide for the return of recovered proceeds to prior legitimate owners and for compensating victims, as a priority over payment to the State.<sup>112</sup> Article 57 UNCAC foresees "in all other cases" (except for embezzlement, establishment of prior ownership and recognition of damages), to "give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime" (art. 57 para. 3 c).

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) requires that confiscated property be disposed of in accordance with the domestic law of the executing Party, and encourages payment of compensation to the victims of the crime.

The Directive 2012/42/EU requires that if, "[a]s a result of a criminal offence, victims have claims against the person who is subject to a confiscation measure", Member States must ensure that confiscation measures do not prevent such victims from seeking compensation for their claims.

A 2014 study analysing the laws and practices for the management and disposal of confiscated assets in the European Union found that all EU Member States have put

<sup>109</sup> In accordance with the Forfeited Property Sharing Regulations, following disposal of the confiscated asset, the amount available for sharing (proceeds of disposal less SPMD costs) is divided amongst the jurisdictions as follows: a) in cases where there is predominant provincial and municipal involvement: 90% to the province and 10 % to the Federal Government; b) in cases where there is significant provincial and municipal involvement: 50% to the province and 50 % to the Federal Government; and c) in cases where there is minimal provincial and municipal involvement: 10 % to the province and 90 % to the Federal Government. The "Forfeited Property Sharing Regulations" – SOR/ 95/ 76, are available at:

<http://laws-lois.justice.gc.ca/eng/regulations/sor-95-76/FullText.html>

<sup>110</sup> Article 35. Compensation for damage: Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation. See also UNCAC Article 57 para. 3(c).

<sup>111</sup> *Article 25. Assistance to and protection of victims*

1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.

2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.

3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence. See also UNTOC Article 14 para. 2.

<sup>112</sup> Article 53 allows a State Party to participate as a private litigant in the courts of another state to recover corruption proceeds as a plaintiff in its own action, as a claimant in a forfeiture proceeding, or as a victim for purposes of court-ordered restitution. For further information on the topic, see UNODC, Good Practices in Identifying the Victims of Corruption and Parameters for their Compensation, <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2016-August-25-26/V1604993e.pdf>.

in place mechanisms to ensure that victims of crime can be compensated.<sup>113</sup> Although the mechanisms differ greatly, it is common for jurisdictions to use confiscation mechanisms as a means to provide restitution to the victims of crime. Priority is given to victims over the general treasury or any special confiscation fund. If sufficient assets exist to satisfy a confiscation judgment and a restitution order, the confiscated assets are generally used to benefit the government only after the victims receive restitution.

**France** is a typical example of a victim compensation regime in the European Union.<sup>114</sup> In the context of a value-based confiscation order, a victim can participate as *partie civile* and claim compensation at any stage of the criminal proceeding. The court may order the perpetrator of the offence to pay the *partie civile* the sums it determines in compensation as well the costs incurred in pursuing the matter to the extent that those costs were not paid by the State.<sup>115</sup> The victim is entitled to receive compensation for the damage caused by the offence in preference to payment to the State,<sup>116</sup> even in the absence of a court decision on civil liability. It is often easier and more cost effective for victims to recover their losses through this process than it is to recover through civil proceedings.

AGRASC plays an important role ensuring that victims of crime are compensated. The table below reflects amounts paid in 2013 (exclusive of the General State Budget and the Drug Fund).

Purpose	Number	Amounts (in €)
Net restitutions	778	22 750 280.58
Transfer of funds seized on a life insurance contract	1	77 211 886.47
Public creditors 62	62	1 229 219.38
Civil claimants in criminal proceedings 51	51	1 117 456.72
Total	892	102 308 843.15

Similarly, in **Belgium**, compensation to victims is facilitated by the *partie civile* procedure in the context of a criminal trial.<sup>117</sup> The Ministry of Finance is charged with executing the court decision on behalf of the victim. The *partie civile* procedure is also available to foreign States and nationals who require compensation. The victim's claim must be made prior to conclusion of the confiscation hearing.

As part of the National Recovery Chain Programme in the **Netherlands**, the police, special investigation services, the Movable Property Agency (Ministry of Finance), the Public Prosecution Service and the Central Fine Collection Agency cooperate to recover criminal assets, and if successful, the recovery is first and foremost done in the interest of the victims of crime. If there are no victims involved, the proceeds will flow into the treasury.<sup>118</sup>

In **Australia** provision is made for a person to apply to a court for an exclusion order in the context of a confiscation hearing if the confiscation proceeding relates to

<sup>113</sup> A 2014 study by the Center for the Study of Democracy entitled Disposal of Confiscated Assets in the UE Member States, Laws and Practices commissioned by the European Commission DG Home Affairs p 20, under the 2010 ISEC Programme.

<sup>114</sup> In terms of Art 1382 of the Civil Code: "Any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred, to compensate it".<sup>[1]</sup> Art 475-1 (criminal court) and 375 CCP (assize court) of the Code of Criminal Procedure.

<sup>115</sup> Art 132-45 of the Penal Code - A trial court or a penalty enforcement judge may impose on the convicted person the duty to make good, in all or part, according to his ability to pay, the damage caused by the offence, even in the absence of a court decision on civil liability.

<sup>116</sup> Art 142 of the Code of Criminal Procedure.

<sup>117</sup> Articles 63-70 of the Code of Criminal Procedure.

<sup>118</sup> For more information about the National Recovery Chain Programme: [https://www.om.nl/publish/pages/43661/afpakken\\_corpbroch\\_eng\\_lr\\_def.pdf](https://www.om.nl/publish/pages/43661/afpakken_corpbroch_eng_lr_def.pdf).

property in which the person claims an interest.<sup>119</sup> The application must be made before the confiscation order is made. Once a confiscation order has been made the court may grant leave to apply for an exclusion order in certain circumstances.

An applicant for a compensation order must give written notice to the authority responsible for the confiscation application of both the application and the grounds on which the order is sought. The responsible authority must give the applicant notice of any grounds on which it proposes to contest the application. An application for a compensation order may not be heard until the responsible authority has had a reasonable opportunity to conduct examinations in relation to the application.

In the *United Kingdom*, a court making a confiscation order has discretion to decide whether or not to make an order, if a victim has, or intends to start civil proceedings in respect of loss, injury or damage sustained in respect of the criminal conduct.<sup>120</sup> All payments made in terms of a confiscation order, regardless of how it is enforced, go to the Treasury after liquidators and receivers have been paid their fees and compensation has been paid to victims.

In the *United States* once forfeited, the authority to distribute the property concerned to victims rests solely with the Attorney General, who in turn has delegated this authority to the chief of the Asset Forfeiture Money Laundering Section (AFMLS).<sup>121</sup> The chief of the AFMLS has the power to restore forfeited property to victims of a crime or take any other action to protect the rights of innocent persons which is in the interest of justice. In distributing the proceeds of forfeited assets priority is given to valid owners, lienholders, federal financial regulatory agencies, and victims (in that order). After losses to the above parties have been satisfied, any remaining proceeds can be shared with state and local law enforcement agencies.<sup>122</sup>

A victim may be granted remission of the forfeiture of property if the victim demonstrates that: a pecuniary loss of a specific amount has been directly caused by the offense that was the underlying basis for the confiscation order, and the loss is supported by documentary evidence including invoices and receipts; the pecuniary loss is the direct result of the illegal acts and is not the result of otherwise lawful acts that were committed in the course of the criminal offense; the victim did not knowingly contribute to, participate in, benefit from, or act in a wilfully blind manner towards the commission of the offense; the victim has not in fact been compensated for the wrongful loss of the property by the perpetrator or others; and the victim does not have recourse reasonably available to other assets from which to obtain compensation for the wrongful loss of the property.

In *Honduras* OABI may return property derived from illicit activities such as kidnapping, extortion and corruption to duly identified victims or the public institution concerned.<sup>123</sup> In such cases, the competent judicial authority shall specify in the ruling the amount or assets subject to restitution.

## 6. Social Re-use

Social reuse is particularly relevant to countries where criminal groups have become so entrenched in communities that law enforcement action against them is met with hostility, if not active resistance. This is often the case in communities where criminal elements, like the mafia in *Italy*, have significantly undermined the rule of law and confidence in law enforcement. Social re-use initiatives are aimed at making the confiscated property available to the affected communities in an effort to restore compliance with and confidence in the law.

<sup>119</sup> Proceeds of Crime Act 2002.

<sup>120</sup> Proceeds of Crime Act 2002.

<sup>121</sup> See Title 28, Code of Federal Regulations, part 9 (28 C.F.R. Part 9), at 28 C.F.R. § 9.1(b)(2).

<sup>122</sup> Pursuant to the Crime Victims' Rights Act (18 U.S.C. § 3771)

<sup>123</sup> Asset Forfeiture Act, published through Decree no. 27-2010

In some cases criminal groups have managed to infiltrate the legitimate economy to such an extent that entire communities find themselves dependent for their economic well-being on the continuation of enterprises controlled by organized crime. The aim of social reuse measures in this context is to demonstrate that restoring State control in these situations does not necessarily have to entail the destruction of the economic benefits for communities produced by the businesses controlled by organized crime. The economic revitalization of affected communities is prioritized to mitigate the damage done to society and to restore confidence in the capacity of government to support communities.

Within the EU, *Italy* has done much to promote the concept of social reuse of criminal property, particularly property recovered from the mafia.<sup>124</sup> It developed as a response to the very unique nature of the threat posed by mafia-type organizations to the communities subject to mafia control.<sup>125</sup> The law that originally introduced the concept had two interrelated purposes: on the one hand, the subtraction of resources from the economic power of criminals, which permits control of the territory to the detriment of the rule of law, and on the other hand the return of these resources to the community for institutional and social reuse: a form of restitution of stolen assets to the citizens that suffer the presence of crime in their territory.<sup>126</sup>

In the recent years there have been widespread non-conviction based recoveries associated with anti-mafia preventative measures in *Italy* and in 2014 the program is estimated to have netted assets worth 1 billion Euros. A single mafia-related seizure included 102 companies, 239 real estate and numerous movable properties.<sup>127</sup> The

<sup>124</sup> The Italian system of asset confiscation is based on a two-pronged approach:

“Extended” confiscation, i.e. not only of property associated with a specific crime, but also of additional property which the court determines constitutes the proceeds of other crimes, which can be ordered within a criminal proceeding, or as a consequence of a conviction for serious economic crimes, especially when organized crime is involved;

“Preventive” confiscation is ordered through separate (preventive) proceedings, where the “danger to society” of a person (namely the likelihood to commit crimes in the future) is established in light of the person’s previous lifestyle and convictions. The danger to society consists of three categories established by law ((Legislative Decree no. 159/11, Art. 1):

- those suspected of belonging to Mafia-related groups - this represents the most significant and substantial category;
- those living of illegal dealings or proceeds from criminal activity; and
- those suspected of having committed a set of serious organized crime-related offences.

The element of danger to society is not necessary in case the indicted person is acquitted because he/she was not found guilty “beyond any reasonable doubt”; if the proceedings have been terminated because the indicted person has died or the statute of limitations has been applied and; in cases where the criminal proceedings are ongoing).

According to article 416 bis of the Italian Penal Code, the phenomenon of the mafia organization is described as follows: The organization is of the mafia type when its components use intimidation, subjection and, consequentially, silence (omertà), to commit crimes, directly or indirectly acquire the management or the control of businesses, concessions, authorizations, public contracts and public services to obtain either unjust profits or advantages for themselves or other

Law No. 109 /96. Law 109 was used to supplement the legislation on confiscation of mafia associations introduced by Law “Rognoni- La Torre”, supporting the removal of assets illegally accumulated by the mafia and reassigning them for social purposes.

The “danger to society” is described in the three categories established by law.

Common grounds of the 2 type of confiscation:

- disproportion between the property owned by the suspect/convicted and his legal income
- the absence of feasible and legitimate justifications on the origins/sources of the goods

#### **Main features of the preventive confiscation process:**

- Even though the person might have already received a criminal conviction for a related offence, the competent tribunal has to ascertain the degree of danger posed by a person and, in particular, the high probability of being found guilty through a separate fact- based (and not suspicion-based) inquiry. Hence a previous conviction is not a fundamental requirement;

scale of the conviction and non-conviction based recoveries places an enormous burden on authorities responsible for the management and disposal of these assets. *Italy* has responded to this challenge by forging creative agreements across a range of constituencies, such as investigating judges, local municipalities, private sector organizations, financial institutions, judicial managers, etc. to ensure that the confiscated property can be successfully reintegrated in the service of victimized communities.

The following are some examples of social reuse initiatives from that demonstrate the utility of the concept:

- houses allocated for use to families that lost their homes following a flood; manors assigned to a municipality to host women in distress;
- assigning a building to house refugees and homeless people;
- assigning a sailing boat to the university of Tuscia and the Port Authorities to be used for most of the year for vocational training courses for the crew and the ship's cook, while in the summer it will be rented for cruises.

In the *United Kingdom*, the Asset Recovery Incentivisation Scheme foresees that a percentage of recovered assets is returned to the agencies which use the powers in the Proceeds of Crime Act. This money can then be used for either reinvestment in asset recovery projects or for community projects. The social use of funds received from the sale of confiscated criminal assets is in particular employed in *Scotland*. Recovered criminal assets are invested in facilities and activities for young people at risk of turning to crime/anti-social behaviour, as part of a program called 'Cashback for Communities'.<sup>128</sup>

In *Honduras* a partnership between OABI, the National Department of Social Intervention and the Government allowed for the loan of buildings to be used by the community through the "Casa Hotel", a system of hotel facilities for the temporary accommodation of e.g. displaced families, families affected by natural disasters, and families that had to flee because they had been targeted by organized criminal groups.

Some of the challenges to the effective social reuse based on the experiences of countries that have applied the concept include:

- ❖ developing an overarching strategy for allocating property, instead of deciding interventions on a case by case basis;
- ❖ developing policies for determining when to allocate confiscated property, particularly real estate, free of charge and when to charge reasonable rent or fee;
- ❖ simplifying the assets allocation procedure;
- ❖ developing capacity to evaluate the social or institutional credentials of potential beneficiaries of the seized and confiscated property;

- 
- Asset seizure is decided upon at the request of the public prosecution by a panel of three judges who belong to the tribunal;
  - After the asset seizure, all involved actors (the suspected person and third parties) may file a complaint before the Judges' Panel should they consider their rights breached;
  - In any case, a hearing is scheduled shortly after the seizure, and on that occasion (which, upon request, is public) cross-examination between the public prosecutor and third parties is ensured before the Judges' Panel; in this hearing a wide range of requests and evidence can be presented by the parties;
  - The Judges' Panel provides reasons for its decision similar to those provided in criminal proceedings;
  - The decision can be appealed against at the Court of Appeal based on both, issues of law as well as of facts. The decision of the Court of Appeal can be appealed before the Court of Cassation which decides through one of its criminal sections.

<sup>128</sup> For more information, see: <http://cashbackforcommunities.org/>.

- ❖ developing capacity to verify the use of the allocated seized assets as initially contemplated and to verify the proper use of funding allocated to citizens in charge of the assets, including securing support of local government officials to ensure that assets allocated for social re-use are in fact used for such purposes and ensuring redress when not;
- ❖ developing strategies for the efficient economic management of seized businesses, including strategies to access high-quality but affordable judicial managers to turn around seized companies to ensure their re-entry into the legitimate economy (i.e. overcoming the “cost of legality” such as providing legal contracts for workers, ensuring the health and safety of the work place, the payment of fiscal obligations, etc.);
- ❖ creating capacity to provide technical assistance to citizens in charge of the seized assets, including training courses to develop skills;
- ❖ maintaining the cooperation of the financial sector in efforts to re-direct assets for social reuse and facilitating the provision of financial resources to support re-use projects;
- ❖ maintaining the co-operation and support of civil society organizations in identifying possible beneficiaries of assets during the seizure and after final confiscation, organizing initiatives to raise awareness and train potential beneficiaries of seized and confiscated assets; and
- ❖ maintaining a database with information on the allocated assets relevant for their management, such as the neighbourhood where they are located, pictures to illustrate their condition, specific characteristics, the names of judicial administrators, delegated judges or law enforcement officials, etc.; and
- ❖ developing strategies to ensure that property allocated to social reuse can remain productive and economically viable.

## D. NO CONFISCATION ORDER IS MADE

In the event that the accused is acquitted or final confiscation order is not made, the property ordinarily must be returned as quickly as possible. However, before returning seized property to its owner when a court has declined to make a confiscation order, some countries, either formally or informally, permit government departments who have outstanding debts owed them by the owner, to recover those debts from the seized funds standing to the credit of the owner. This particularly applied to debts owed to the tax authorities owed unpaid taxes

In *Belgium* before returning restrained property COSC is required to first establish whether the beneficiary of the seized funds has any debts owing to the Belgian State, including debts owed in respect of social security contributions. The procedure is only available in cases where funds have been transferred to the COSC bank account during the interim stage.<sup>129</sup> COSC may, without further formalities place any sum due to be returned at the disposal of civil servants responsible for the collection of State debts owed by the beneficiary of the restrained cash. The owner may contest the allocation before a judge within a period of 30 days and COSC may not transfer the money to the recipient department until the judge determines the matter.

## E. CONCLUSION

The enforcement of confiscation orders presents its own challenges, particularly when the authority that obtained the confiscation order is not the same entity responsible

<sup>129</sup> This procedure was first introduced by art 2 in law of July 20, 2005 (date of coming into effect: 18-09-2005) (published on September 8, 2005). Amended by Law of 27-04-2007. It is article 16bis of the COSC law.

for its enforcement. The following trends emerge from a survey of practices employed to enforce confiscation orders and to distribute funds realised to the specified beneficiaries:

- ✓ Especially in value-based confiscation, where insufficient property has been restrained to satisfy a confiscation order, countries have provided for collection measures that either follow the general civil system, or special realization orders, to improve the enforcement..
- ✓ In the case of object-based confiscation orders, countries have had to adopt additional guidelines for determining whether to retain the asset for reallocation either to a government entity or non-governmental organization or to realize the asset and to allocate the proceeds to the entity designated in the court order.
- ✓ There are primarily two competing policy options for the disposal of confiscated assets: Allocating recovered proceeds to the national revenue fund to meet general government priorities, and permitting recovered proceeds to be allocated through a process that favours programs that cater for crime prevention and social re-use. Countries have articulated their policy choice generally in the legislation governing confiscation.
- ✓ Where countries have opted for the proceeds of confiscation orders to be paid into a specially designated asset recovery fund, the law usually specifies the purposes for which the funds are to be applied. Special funds typically require infrastructure to manage and account for deposits received into the fund and transfers made from the fund.
- ✓ Where legislation is silent on the purposes the recovered funds may be used for, it is even more important to put in place mechanisms to ensure the fair and transparent allocation of the funds. Oversight, transparency and auditing requirements are critical to maintaining the integrity of the Fund and accountability for its contents.
- ✓ Jurisdictions that permit recovered proceeds to be allocated to law enforcement projects, such as to purchase special equipment, provide training or to support the rule of law more generally, convey the symbolic message that criminals will have the fruits of their crimes used against them. Countries have imposed tighter controls on the allocation of confiscated funds to law enforcement to counter concerns that assets could be inappropriately targeted to benefit law enforcement rather than to achieve legitimate law enforcement objectives. . In this regard, policies have been put in place to avoid any direct link between assets seized and rewards provided to law enforcement.
- ✓ Many international instruments and domestic asset recovery laws prioritise the compensation of direct victims of crime with the proceeds recovered from the criminal. Again, countries have provided in the asset recovery law for mechanisms to identify victims and permit their participation in the asset recovery procedure.
- ✓ Under the overall premise of social re-use, some countries have opted to use the confiscated property or proceeds to restore communities uniquely affected by a particular crime. They have had to ensure that the infrastructure is in place to support, monitor and account for such projects.

## **IV. INSTITUTIONAL ARRANGEMENTS TO SUPPORT THE MANAGEMENT AND DISPOSAL OF SEIZED AND CONFISCATED ASSETS**

### **A. INTRODUCTION**

In order to cost-effectively preserve the value of seized assets, secure maximum return from the sale of confiscated property and ensure confiscation orders are enforced,



countries have developed a variety of institutional arrangements which are discussed in this chapter.

In the early stages of setting up an asset recovery program the focus tends to be on adopting the appropriate legislative framework, developing investigative and prosecutorial skills and capacities to apply the law and ensuring there is judicial acceptance of the law as a legitimate law enforcement tool. Existing law enforcement infrastructure in place to deal with property seized as evidence is used to accommodate seized assets awaiting a confiscation determination. Private law mechanisms in place to deal with the management of disputed property in the context of insolvency/bankruptcy and deceased estates, such as a court appointed trustee, receiver, *curator bonus* or judicial manager, are engaged to manage and dispose of seized and confiscated property. At the disposal stage, mechanisms in place for collecting criminal fines and public service entities with responsibility for disposing of surplus government property are relied on to enforce final confiscation orders. The realized proceeds are deposited into the government's general consolidated revenue fund.

The challenges of managing seized and confiscated property usually only begin to present themselves as more and more asset recovery cases are brought to court and the volume of assets seized and confiscated increase. Many of the jurisdictions that have relied on existing law enforcement and public service capacity to manage seized and confiscated property in the initial stages of implementing asset recovery laws have had to confront the following institutional challenges:

- The management and disposal of property are not conventional law enforcement functions. The increase in workload related to the administration and management of seized and confiscated assets places strain on traditional law enforcement responsibilities and functions of investigating and prosecuting crime.
- The experience, skill and competencies needed to manage assets and dispose of them in ways that ensure maximum return are not typically available within law enforcement.
- Police pounds and storage facilities are usually not geared to managing the volume and types of assets typically made subject to seizure orders.
- Keeping track of seized assets, keeping them secure and in a reasonable state of repair becomes more onerous as the volume of assets seized increases, placing strain on personnel and budgetary resources.
- The fees charged by private judicial managers such as receivers, trustees and curators *boni* or by private contractors, such as auctioneers, valuers, and private security companies often places considerable strain on the budget available for asset recovery.
- Contracting private sector professionals on a case-by-case basis makes it very difficult to exploit economies of scale for bulk services such as warehousing and standard contracts to procure repeat functions such as valuations and security.
- Opportunities to increase the revenue derived from confiscated property are often not exploited due to a lack of focus, specialist skill and resources.
- The trend towards making confiscated property available to compensate victims, support victim organizations and for social re-use by communities that have suffered harm as a result of criminal activity requires particularly the capacity to allocate assets in a transparent, fair, responsible and accountable manner to be put in place. These functions imply the availability of on-going capacity to monitor that the assets allocated are being used for the purpose intended.
- Difficulties with maintaining a reliable record of seized assets, their location, ownership and status in the asset recovery process arise. This can result in failure to take crucial steps in their management and disposal, exposing the authority to liability.

- The need to keep reliable data on the value of confiscated assets as compared to the costs expended on management and disposal of seized and confiscated assets becomes critical to enable the Government to evaluate the return on investment expended on asset recovery.
- Failing to account for seized and confiscated property in a transparent manner can undermine the legitimacy of the asset recovery system as whole.

In responding to these challenges countries have built up a rich reservoir of experience which is discussed below in three broad categories:

✓ Asset management offices with additional asset recovery enforcement functions located within law enforcement;

✓ Asset management offices located within public service entities with additional property management related functions; and

✓ Self-standing Asset management offices

*The range of functions the AMO will be required to perform will determine the appropriate institutional home for it.*

In very few countries, if any, is the designated asset management office able to perform asset management and disposal services in respect of each and every asset that requires storage, maintenance or disposal. Judicially appointed managers, receivers, trustee or curators are inevitably relied on to perform specialized services not available in the asset management office. Very often it makes more commercial sense to outsource certain functions and public or private sector providers may be procured to perform such functions more cost-effectively.

## 1. Specialized Asset Management Offices (AMO)

- a. Asset management offices with additional asset recovery enforcement functions located within law enforcement

In some countries the asset management office (AMO) in addition to performing asset management functions, is responsible for promoting asset recovery as a law enforcement tool more generally within the law enforcement community. For this reason countries like **Belgium**, the **Netherlands**, the **US** and **Thailand** have opted to locate the capacity within law enforcement.

In **Belgium** the Central Office for Seizure and Confiscation (**COSC**) was created in 2003 as an institution within the Public Prosecutor's Office to assist judicial authorities with seizure and confiscation.<sup>130</sup> It is the country's designated asset recovery office (ARO) set up in compliance with EU Directive 2007/845/JHA). As such and in addition to its role in the management of seized assets, COSC plays a role in training and providing advice to practitioners on existing and new developments in the asset recovery law; assists policy makers in developing the law and provides assistance with international co-operation in asset recovery. Moreover, COSC plays a role in asset tracing investigations after conviction to achieve the full realization of value-based confiscation orders.

The only management of seized assets COSC does in-house is the management of seized cash (e.g. intercepted cash transfers at the airport in cases of suspected money laundering) and the cash realized from interim sales. COSC may appoint experts to manage valuable assets or assets that require specialized skills. For the rest, COSC plays a role in coordinating the actions of key law enforcement officials, judicial

<sup>130</sup> Law of 26 March 2003 (Wet houdende oprichting van een Centraal Orgaan voor de Inbeslagneming en de Verbeurdverklaring en houdende bepalingen inzake het waardevast beheer van in beslag genomen goederen en de uitvoering van bepaalde vermogenssancties); part of this law is incorporated in the Code of Criminal Procedure.

authorities and public sector actors that remain responsible for the management and disposal of the assets under their control.

- ✓ All investigating magistrates and police officers, who remain responsible for asset management in the interim phase, must notify COSC of all asset seizures and the methods of storage or preservation of seized assets as well as any further decisions relating to the assets.
- ✓ Prosecutors, who are responsible for decisions on interim sale and destruction of seized assets and for obtaining confiscation orders, are equally obliged to notify COSC of such decisions and court orders.
- ✓ The Ministry of Finance and Ministry of Justice, responsible for enforcement of confiscation orders must notify COSC of all executions related to confiscated assets.
- ✓ The Patrimonial Services are responsible for carrying out the disposal activities such as sale, destruction, recycling and lending of confiscated property.

In this way COSC is able to maintain an accurate and up-to-date database of the status of assets subject to seizure, confiscation and execution. This information assists COSC in monitoring that assets don't remain under restraint for too long and are sold where possible.

To perform these functions COSC employs public prosecutors, liaison officers from the Police, staff from the Ministry of Finance, legal advisors, IT personnel and secretarial staff.

Similarly, in the *Netherlands*, the Criminal Assets Deprivation Bureau (*Bureau Ontnemingswetgeving Openbaar Ministerie*) (**BOOM**) is located within the Public Prosecution Service<sup>131</sup> and is the country's designated ARO. It too performs the typical function of an ARO in the EU such as asset tracing, providing expert knowledge and advice and serves as a contact point for international cooperation in asset recovery. In addition BOOM also prosecutes some of the more important non-conviction based asset recovery cases.

Although located within the Public Prosecution Service, the BOOM is a separate organization with dedicated personnel and its own institutional objectives and specific mandates. BOOM staff is comprised of public prosecutors, forensic accountants, civil and international advisors and asset tracers. Within BOOM a small dedicated team of asset managers, called the Asset Management Office (AMO), is responsible for managing assets subject to non-conviction based seizure orders. Other role-players have responsibility for enforcement of confiscation orders:

- ✓ The Public Prosecution Service executes property confiscation orders by transferring realized funds to the public treasury. Confiscated property, such as weapons and drugs, are destroyed by the Dutch National Police Services Agency (KLPD) and movables such as cars and computers may be destroyed or sold by the Service for State Property in the Ministry of Finance. The Service for State Property is also responsible for dealing with other excess government property.
- ✓ The Central Fine Collection Agency (CJIB) collects value based confiscation orders and other criminal fines.
- ✓ Bailiffs, officials usually involved in civil recovery of property, may intervene in the execution of confiscation orders on behalf of creditors of the convicted person.
- ✓ Notaries are involved in the forced sales of properties.

The *United States* Asset Forfeiture Programme was created within the US Department of Justice (**DoJ**) in 1984 when the legislature first passed the Comprehensive Crime Control Act, giving federal prosecutors new forfeiture provisions to combat crime.<sup>132</sup> The Asset Forfeiture and Money Laundering Section (**AFMLS**) of the DoJ was given

<sup>131</sup> Law of 14 August 2012 (Organisatieregeling Dienstonderdelen OM 2012).

<sup>132</sup> <https://www.justice.gov/criminal-afmls>.

the responsibility to lead the Programme by prosecuting and coordinating complex, multi-district, and international asset forfeiture investigations and cases; providing legal and policy assistance and training to federal, state, and local prosecutors and law enforcement personnel, as well as to foreign governments; assisting policymakers by developing and reviewing legislative, regulatory, and policy initiatives; and distributing forfeited funds and properties and deciding on victim claims for compensation from forfeited properties.

The Marshals Service, one of the law enforcement agencies of the federal government, is the primary custodian of property seized by federal law enforcement agencies nationwide.<sup>133</sup> It assists with pre-seizure planning and analysis, seizure operations, execution of court orders, litigation support and distribution of proceeds. As the US Federal Police service, the US Marshals Service is also responsible for providing *inter alia* federal judicial security; apprehending fugitives and non-compliant sex offenders; securing and transporting federal prisoners; executing federal court orders; and assuring the safety of endangered government witnesses and their families.

The Marshals Service manages various types of assets, including real estate, vehicles, commercial businesses, cash, financial instruments, jewellery, art, antiques, collectibles, vessels and aircraft. It operates federal warehousing facilities to store seized goods and maintains a list of contract private sector service providers it uses to sell assets in an efficient and cost-effective manner. The Marshals Service manages the distribution and equitable sharing of proceeds with state and local law enforcement agencies that participated in investigations leading to forfeiture as well as payments to victims of crime and innocent third parties and in some cases plays a role in making forfeited property available for social re-use.

The **Czech Republic** established a new department within the Ministry of the Interior on 1 January 2017. Its role is the management of assets seized by the Police, pre-confiscation sales and the long-term storage of seized assets. Sales of motor vehicles are realized through electronic auctions, and small assets are sold in a shop operated by the Center.<sup>134</sup>

In **Thailand** the Anti-Money Laundering Office (**AMLO**) was established as an independent law enforcement and regulatory agency under the supervision of the Ministry of Justice.<sup>135</sup> It operates under the direction of the Anti-Money Laundering Board, which is chaired by the Prime Minister or his delegate.

The AMLO is responsible for taking charge of anti-money laundering matters in Thailand. It has investigative powers and can refer matters to the Public Prosecutor to consider filing a petition with the court for a forfeiture order. Within the AMLO's structure, the Asset Management Division is tasked with maintaining a system for asset accounting, asset appraisal, storing and maintaining assets, turning them over to the Treasury, or return them to owners. It maintains a system for asset management, which involves permitting stakeholders to take assets into custody for their use, permitting the use of assets for the State's benefit, renting them out, appointing asset managers, selling assets in an auction under the anti-money laundering law and managing the Anti-Money Laundering Fund.

- b. Asset management offices located within public service entities with additional property management related functions

In view of the specialized and multi-dimensional skills required to efficiently manage and dispose of seized and confiscated assets, some countries, such as **New Zealand**, **Australia** and **Mexico** have opted to combine the management and disposal of seized and confiscated criminal property with other property management functions.

<sup>133</sup> <https://www.usmarshals.gov/assets/index.html>.

<sup>134</sup> The Center was established by Order of the Minister. No amendments to Act No. 279/2203 Coll. was required.

<sup>135</sup> Anti-Money Laundering Act, B.E. 2542.

In *New Zealand*, The Proceeds of Crime Act 1991 (POCA 1991) was the original conviction-based asset confiscation legislation that conferred on the Official Assignee for New Zealand (OANZ) the role of criminal asset recovery, management and disposal. That Act was repealed and replaced by the Criminal Proceeds (Recovery) Act 2009<sup>136</sup> (CPRA 2009) and new provisions in the Sentencing Act 2002 in December 2009<sup>137</sup>. The CPRA 2009 is designed to establish a regime for the forfeiture of property that has been derived directly or indirectly from a significant criminal offence without the need for a conviction, and the forfeiture of instruments of crime when a conviction has been entered. Most criminal proceeds cases have historically been drug-related.

The CPRA 2009 directs the OANZ to take into custody and control assets that are ordered to be restrained or forfeited by the Court. It also directs the OANZ to: dispose of confiscated assets (being both instruments of crime forfeited under the sentencing provisions of the Sentencing Act 2002 and assets confiscated under Asset Forfeiture Orders in civil cases); dispose of assets that have been restrained to meet a Profit Forfeiture Order (PFO) in civil cases; and enforce PFOs where assets do not meet the amount specified to be repaid by the respondent. In this regard, a small, dedicated unit has been established to carry out this function called the Criminal Proceeds Management Unit (CPMU). The CPMU provides inspection, administration, storage, protection, maintenance, transportation of moveable assets, valuation and appraisal functions. The CPMU also acts as receiver of rents and businesses; makes payment of certain costs relating to the preservation of assets; and acts as an independent agent to sell assets, as ordered to do so by the court. During the forfeiture phase, the CPMU disposes of the confiscated assets, usually by public auction; pays the proceeds into a Trust Account from where it will be paid to the Crown Consolidated Revenue Account; makes third party payments and covers other costs associated with the criminal and confiscation proceedings; returns assets when no order is made and pursues the recovery of unsatisfied forfeiture orders.

The CPMU is made up of a small team of case coordinators who are all appointed as Deputy Assignees and are all given delegated authority to act for the OANZ.<sup>138</sup> The team of full time staff is supported by a network of contracted providers for a range of services, including physically securing of assets in the field, logistics support and property maintenance.

In order to fulfil its functions, the CPMU, through the statutory authority of the OANZ, has been equipped with the necessary powers to search and seize property as well as to do anything reasonably necessary to ensure that assets are not at risk of damage, alteration, removal, or loss of value. Moreover, obstructing any person exercising a power or carrying out a duty under the Criminal Proceeds (Recovery) Act constitutes an offence.

In *Mexico* the Asset Administration and Disposal Service (*Servicio de Administración y Enajenación de Bienes, SAE*) is a decentralized body of the Federal Public Administration under the guidance of the Ministry of Finance with legal standing and its own budget.<sup>139</sup> In addition to the administration of seized and confiscated property, SAE is also responsible for divestiture of state owned entities, investment units, administration of illegal assets from foreign trade and management of portfolios and non-monetary assets from the Federal Treasury.

<sup>136</sup> Criminal Proceeds ( Recovery) Act 2009.

<sup>137</sup> <https://www.insolvency.govt.nz/support/about/criminal-proceeds-management/>.

<sup>138</sup> Criminal Proceeds (Recovery) Act 2009 and State Sector Act (1988).

<sup>139</sup> SAE was created in 2002 by the Federal Law on the Administration and Disposal of Public Sector Assets (*Ley Federal para la Administración y Enajenación de Bienes del Sector Público*). Other documents that regulate SAE's scope of action are: The Regulation to the Federal Law on the Administration and Disposal of Public Sector Assets (*Reglamento de la Ley Federal para la Administración y Enajenación de Bienes del Sector Público*) and the Organic Statute of SAE (*Estatuto Orgánico del Servicio de Administración y Enajenación de Bienes*).

c. Self-standing Asset management offices

An increasing number of countries such as *Canada* and *France* have elected to set up entirely new, self-standing specialized asset management offices focused exclusively on the management of seized and confiscated criminal property. This option is considered desirable particularly when the scale (number and value) of assets being recovered through the judicial process has increased to a level that will justify the expenditure setting up such an office will inevitably require.

A similar trend, particular in several South American countries, is to separate the function of managing and disposing of seized and confiscated assets from the more general asset recovery investigative and prosecutorial functions. The aim being to move away from what was perceived to be an excessive concentration of functions within the same institution and to establish instead a dedicated and specialist capacity to manage seized and confiscated assets located outside of law enforcement.

In *Canada* the Seized Property Management Directorate (**SPMD**), established in 1993, is located in the Ministry of Public Works and Government Services.<sup>140</sup> The SPMD was housed outside of law enforcement in order to alleviate the burden associated with asset management on law enforcement agencies, allowing them to focus on their mandate, i.e. criminal investigations. It was also envisaged that creating a capacity dedicated exclusively to asset management would ensure a higher level of professionalism in the management of seized and confiscated property.

The police through the Public Prosecution Services of Canada (**PPSC**) may request a judge to appoint the Minister of Public Works and Government Services to take control of, and to manage or otherwise deal with, property in accordance with the directions of the judge. A judge may also order that property forfeited to the State be disposed of by the SPMD, as directed by the Attorney General. In addition to managing assets, the SPMD provides advice on the financial viability of seizure, analysis and evaluation of the best method to protect and maintain the value of assets and evaluating the costs associated with asset management. SPMD may in turn appoint specialist managers to take care of assets that require special skill and expertise to manage.

**The role of SPMD staff**

- Provide advice to law enforcement agencies prior to seizure;
- Review all legal documents required for the management of assets (restraint orders and management orders);
- Daily interaction with police, Department of Justice and the Public Prosecution Service of Canada (PPSC) on status of cases, seized/restrained assets, claims, etc.;
- Day to day management of in-house and contracted private sector warehouse staff located across Canada;
- Liaise with Real Property Services (RPS) (e.g. for the set-up of SPMD-managed warehousing facilities);
- Establish contractual and inter-departmental/governmental arrangements, including the negotiation and set-up of memoranda of understanding with governmental organizations;
- Develop and maintains policies, operating instructions, and guidelines;
- Register incoming correspondence (e.g. legal documents, invoices, monies, negotiable instruments);
- Act as custodian of moveable assets and maintain a daily inventory;

<sup>140</sup> <http://www.tpsgc-pwgsc.gc.ca/app-acq/gbs-spm/index-eng.html>.

- Manage internal audits and monitor the implementation of the management action plan developed for each asset;
- Establish contracts for the delivery of asset management and other professional services such as valuations and specialized storage and maintenance arrangements;
- Support financial analysis of service delivery and operations;
- Process all financial transactions related to the management of assets;
- Monitor and reconcile all accounts required for the management of the program in accordance with legislation;
- Prepare and monitor operating budgets for the Directorate;
- Manage the costing system;
- Manage and maintain the Directorate's operating system (SPMIS), provide system support, coordinate and identify new system requirements;
- Complete financial review of operationally closed files, closing them and sharing proceeds with involved jurisdictions.

**France** created the Agency for the Recovery and Management of Seized and Confiscated Assets (*Agence de Gestion et de recouvrement des avoirs saisis et confisqués*) (**AGRASC**) in 2011 in response to newly enacted and expanded asset recovery laws. AGRASC functions under the supervision of both the Ministry of Justice and Freedoms and the Ministry of the Budget, Public Accounts and State Reform. Both the head of the Agency and the head of the Board of Administration were appointed from the judiciary and a Secretary General was appointed from the Ministry of the Budget. Staff members are drawn from the civil service (including court registrars) and members of the Gendarmerie. In its capacity as a public administrative body AGRASC has a public accountant.

AGRASC sees as its primary function providing technical and practical assistance and advice to members of the judiciary, the Public Prosecution Service, investigating magistrates, trial judges and investigators on the enforcement of asset recovery laws and in particular advising on the seizure of assets (including real estate, bank accounts, receivables, businesses, etc.).

AGRASC is not the only agency in France responsible for the management of seized and confiscated property, it only assumes this responsibility when entrusted with a management warrant issued by a judge in respect of property subject to a seizure order, confiscation order or protective measure. It assumes responsibility for pre-confiscation sale<sup>141</sup> and disposal of property when a court orders it to do so and it manages complex assets seized on the same basis. If AGRASC is appointed by the court to manage a business, it may appoint an interim receiver to do so under its control.

AGRASC has been granted the monopoly over all cash seizures (including cash in bank accounts)<sup>142</sup> and real estate<sup>143</sup> seized in criminal matters. AGRASC operates a bank account opened with the Caisse des Dépôts et Consignations (CDC) which

<sup>141</sup> Sale of chattels prior to judgment takes place in terms of Articles 41-5 and 99-2 of the Code of Criminal Procedure.

<sup>142</sup> In terms of a continued retention order issued by the Investigating Magistrate or the Freedom and Detention Judge (JLD) under Article 706-154 paragraph 1 of the Code of Criminal Procedure, bank accounts may be transferred to the Agency's account.

<sup>143</sup> Article 796- 151 of the Code of Criminal Procedure gives AGRASC the monopoly on registering, on behalf of the Public Prosecutor's Office, Investigating Magistrates and courts, all seizures of real estate carried out in criminal matters.

receives transfers of all seized cash, bank accounts and proceeds from the interim sale of assets it has been assigned to manage.

AGRASC is alerted by the Penalty Enforcement Departments of the Public Prosecutors' Offices to enforce confiscation orders dealing with real estate<sup>144</sup>. AGRASC sets the sale process in motion by giving a Power of Attorney to a Notary to proceed with the sale and takes charge of the management of the real estate asset until the sale is concluded. It is also responsible for returning assets if no confiscation order is made and makes payments to the State and to victims if a court makes a confiscation order.

In **Colombia** the Office of the Attorney-General was responsible for all asset recovery investigatory and accusatory procedures and the National Directorate of Narcotic Drugs (Dirección Nacional de Estupefacientes) was responsible for asset management. In 2011 evidence of serious corruption emerged and a decision was made to liquidate the Directorate and migrate the asset management functions to the Special Assets Corporation, J.S.C. (Sociedad de Activos Especiales S.A.S. (**SAE**)) under the Ministry of Finance and Public Credit. SAE is today responsible exclusively for management of seized and confiscated assets.<sup>145</sup>

In **Peru** the National Seized Property Commission (Comisión Nacional de Bienes Incautados, **CONABI**) was set up in 2012 as a body affiliated to the Presidency of the Council of Ministers.<sup>146</sup> It is a multi-sector body in charge of receiving, recording, classifying, keeping, safeguarding, preserving, managing, leasing, assigning on a temporary or definite basis, disposing of and selling in public auctions, any object, asset, effect and proceeds derived from the commission of offences against the State. CONABI is presided over by a Management Council comprised of representatives from the Judiciary, the Office of Public Prosecutions, and the Ministries of Justice and Human Rights, of the Interior, of the Economy and Finance, of Defence and a representative from the State Council of Legal Defence. The Council approves CONABI's guidelines, regulations and procedures, as well as its budget and internal organization.

In **Honduras**, concerns about a lack of independence led to the removal of the asset management functions from the prosecution authority.<sup>147</sup> The Office for the Administration of Seized Property (**OABI**) was established in 2004 by Decree as a specialized technical body under the General Prosecutor's Office responsible for the safeguarding, custody and administration of seized, confiscated or abandoned property entrusted to it by the competent authority.

OABI has its own legal personality with technical, administrative and financial autonomy. Since 2012 it resorts under the National Council for Defense and Security, a permanent constitutional structure at the highest level of decision-making. It is attached to the Office of the President. In addition to the administration of seized and confiscated property the Council is also responsible for directing, designing and monitoring general policies relating to security, national defense and intelligence and for designing strategies to prevent, combat, investigate and punish criminal conduct.

d. Asset Management Offices as Court appointed functionaries

**Canada, France, New Zealand** and **Australia** have opted to provide for the AMO entity to be appointed as receiver by the Court. In **Canada**, the Seized Property Management Act (**SPMA**) provides for a court to appoint the Minister of Public

<sup>144</sup> Real estate seized remains the responsibility of the owner subject to a warrant of a court to prevent depreciation.

<sup>145</sup> Asset Forfeiture Code, created by Law 1708 of 2014 (Codigo de Extinción de Dominio).

<sup>146</sup> CONABI was established by Legislative Decree No. 1104 of 19 April 2012.

<sup>147</sup> The purpose of the law was harmonize legislation relating to the administration of seized and confiscated property. Decree No. 51-2014 has since been updated by the new Act against Money-Laundering.



Works and Government Services (who in turn delegates the authority to the SPMD) as the custodian of seized and forfeited property.<sup>148</sup>

In *New Zealand* the Criminal Proceeds (Recovery) Act<sup>149</sup> provides for the appointment of the Official Assignee (OA) as the only agency in New Zealand authorized to manage and dispose of seized and confiscated assets<sup>150</sup>. In *Australia*, the Proceeds of Crime Act (POC Act) authorizes the Official Trustee to take custody and control of the property where a court deems it necessary.<sup>151</sup> The costs, charges and expenses incurred by the Official Trustee are governed by regulations.

In all three cases, i.e. New Zealand, Australia and Canada the law provides that the court-appointed asset manager is entitled to recover fees and disbursements in respect of the management of seized assets. All three entities in turn may sub-contract some of the functions to manage an asset, especially where unusual expertise is required.

## 2. Private Sector Actors and their roles

### a. Court-appointed asset managers

Some jurisdictions allow for the court to appoint a *curator bonis*, a trustee, receiver or judicial manager to take care of either an individual asset or the entire estate of a particular person. In common law countries like the *United Kingdom*, *South Africa*, and *Namibia* the appointment of receivers, trustees or *curators boni* is the primary mechanism provided for in the asset recovery law for managing seized assets. In other countries (mostly civil law countries) like *Italy*, *France* and *Belgium* judicial managers are appointed by a court or an investigating magistrate or judge to deal with particularly complex assets. The private sector practitioners who avail themselves to be appointed as trustees, *curators boni*, receivers or judicial managers are usually insolvency, bankruptcy or probate practitioners who take judicial appointments to manage insolvent or deceased estates. They are usually part of a legal framework that regulates their appointment criteria, fees and professional liability and are typically registered with the courts, the asset management office or a relevant Ministry

*The institutional forms countries have adopted have each been adapted to the specific needs and institutional realities of their domestic situations.*

<sup>148</sup> In order for the SPMD to expend resources on a file, the police, through the Public Prosecution Services of Canada (PPSC), applies to a judge of the Federal Court for either a Management Order in respect of a moveable asset that has been physically seized, or a Restraint/Management Order for assets that cannot be physically seized, such as (real property, bank accounts, businesses). At confiscation stage, the court orders the property be forfeited to the State, to be disposed of by the SPMD as the Attorney General directs or to otherwise deal with it in accordance with the law.

The RMO restricts any changes in ownership and describes certain conditions that the accused must fulfil (paying property taxes, maintaining property in a good state of repair, paying utilities etc.). The RMO gives SPMD the authority to enter the property on 24hrs notice to inspect/appraise and ensure the asset is being maintained.

<sup>149</sup> Sections 24, 25 and 26 of the Criminal Proceeds (Recovery) Act 2009.

<sup>150</sup> Sections 50, 55 and 70 of the Criminal Proceeds (Recovery) Act 2009 and Instrument Forfeiture Order under section 142 of the Sentencing Act 2002 makes provision for a court making a restraining order to appoint the OA to take custody and control of all property to which the order relates. The Act also provides for a court making a forfeiture order or direct that the property to which the order applies vests in the Crown and is placed in the custody and control of the OA. A profit forfeiture order is recoverable from the respondent by the OA on behalf of the Crown as a debt due to the Crown.

<sup>151</sup> 2002 (Cth) section.

In countries like the *United Kingdom*<sup>152</sup>, *South Africa*<sup>153</sup> and *Namibia*<sup>154</sup>, the law provides for the prosecutor to apply to court to appoint a receiver to either take care of the asset (a management receiver) or to dispose of the asset (an enforcement receiver). Although the appointment is initiated by the prosecutor, who will usually also recommend a person to be appointed as the receiver, once appointed, the receiver is an officer of the court and receives his or her powers in the court order or in terms of the law and reports to the court on steps taken in relation to the property. The trustee may even be separately represented at hearings, although usually only when there is a potential conflict between the receiver and the prosecutor.<sup>155</sup>

The advantage of appointing receivers is that professionals with appropriate skill and expertise can be appointed to address the requirements of a particular asset or confiscation order. The receiver has to be appropriately qualified, be of good standing, have professional insurance to indemnify him or her against civil claims and must be accredited to perform the functions of a receiver by the body that oversees or regulates trustees or receivers in the country.

Using receivers can help to ensure that illegal businesses are properly investigated by financially trained insolvency practitioners. They can assist in the identification of further assets, in the repatriation of assets hidden overseas and in the prompt settlement of unfulfilled confiscation orders. A further advantage is that the trustee, as an independent officer of the court, can receive compelled disclosures from an accused person without any risk of violating the right against self-incrimination. Where a court orders payment of living and legal expenses of the accused person, while his assets are under restraint, the curator is best placed to oversee this process objectively.

The biggest controversy relating to the appointment of receivers has been the issue of cost. If the remuneration and expenses of the receiver are likely to be in excess of the amount that is probably realized, a receiver should probably not be appointed in the first place. However it is often very difficult to predict the duration of a seizure order, in particular when a criminal conviction is prerequisite to the issuing of a final confiscation order. In such cases the costs of maintaining an asset, not to mention the professional fees of the manager, can escalate out of all proportion to what may ultimately be realized.

In *Namibia*, the account of the *curator* in the first ever appointment of a receiver under the Namibian POCA, threatened to bankrupt the newly established asset recovery capacity in its first year of operation.

Such developments have forced authorities in these countries to search for cost effective solutions. In the *United Kingdom* a panel of receivers has been appointed to act on behalf of the Crown Prosecution Service in a range of confiscation-related matters. The receiver's letters of appointment agrees the fees they charge and the terms and conditions under which they will work. These have been set out in a Framework Agreement. In *South Africa* similarly each court order appointing a curator is issued with a standard letter of engagement that consists of measures to control expenditure by the *curator bonis*.

In *Italy*, extensive use is made of court-appointed asset managers, the so-called *amministratori giudiziari* (judicial administrators), particularly to deal with assets made available for social re-use under the Anti-Mafia Legislation. It is estimated that out of approximately 900 court-appointed asset managers, 400 specifically deal with the management of seized and confiscated businesses. In Italy judicial managers must possess specialized skill to manage businesses and in addition need to ensure that the businesses can be operated sustainably without relying on unlawful conduct in its

<sup>152</sup> Proceeds of Crime Act 2002.

<sup>153</sup> Prevention of Organised Crime Act, No. 121 of 1998.

<sup>154</sup> Prevention of Organised Crime Act.

<sup>155</sup> Re G, Manning v G (No. 4) [2003] EWHC Admin 1732.

operations and they must avoid re-infiltration or re-appropriation of the business by criminal organizations.

b. Subcontractors

The management and disposal of seized and confiscated assets often entails the use of services provided by external private service providers, such as specialised storage, transportation and maintenance services. Unlike asset managers appointed by order of court, these services are procured directly by the court designated asset manager or asset management entity.

In **France**, AGRASC makes extensive use of subcontractors. It has entered into several partnership agreements with networks of professionals, on which it relies for specific purposes. Once AGRASC is entrusted by the court with a mandate to manage a particular asset, depending on the asset (nature, localization, value, etc.), it may contract one of partners listed below to undertake the management function.

**Partnership agreements signed by AGRASC with subcontractors for the sale of assets:**

- *Domaine auctioneers* (the National Property Disposal Office) for the sale of assets
- the High Council of Notaries
- the National Chamber of Court-accredited Auctioneers (“*commissaires-priseurs judiciaires*”) to sell movable assets
- National Chamber of Accredited Commodity Brokers (“*courtiers de marchandises assermentés*”) to sell movable assets
- the National Council of Receivers (CNAJMJ), specifically for the management of businesses
- the National Council of Judicial Officers (“*huissiers de justice*”) for the management of immovable assets, real estates and some other movable assets.

In **Canada**, generally, seized moveable assets are stored in SPMD warehouses located across the country. In smaller more remote locations, SPMD engages storage and maintenance services through the private sector. SPMD also uses the services of the private sector to sell assets particularly where conditions require it (e.g. a high-end car would be sent to a private auction that draws people looking for expensive vehicles). For real property, SPMD has many government requirements to satisfy prior to actually selling the property. First, the property must pass environmental assessment (many properties used in illicit drug production are contaminated by chemicals and/or mould). Secondly, the SPMD must consult with local aboriginal communities to determine if there is a historic treaty obligation surrounding the property. Only once all legal requirements are met the SPMD can proceed to engage the services of a private sector real estate broker to sell the property on its behalf.

In **New Zealand**, the team of full time staff of the Criminal Proceeds Management Unit is supported by a network of contracted providers for a range of tasks, including seizure of assets in the field, logistics support and property welfare. These contracts can be procured through a competitive tender process.

## B. FINANCIAL AND BUDGETARY CONSIDERATIONS

Managing seized and confiscated assets can be a costly business. Even if an asset does not require active maintenance to preserve its value, it usually still has to be stored in a safe place, data about its location, ownership and status in the process needs to be captured and routinely monitored to ensure that the court’s order is given effect to.

Even assets that are left in the custody of the owner/possessor require on-going monitoring to ensure that the conditions imposed by the court are complied with. At the other end of the spectrum, there are assets that may cost considerably more to maintain or to keep profitable, such as yachts, aircrafts and businesses.

These costs, including costs of accommodating the asset management entity and remunerating its staff, warehouse facilities for storage, a database to track assets and funds to secure specialist contractors must all be budgeted for when an AMO is established.

Often funds are needed to cover the maintenance of assets requiring specialised care or to effect basic improvements to dispose of an asset at a much more favourable rate. In addition to the legislation that needs to be in place to grant authority to effect such improvements, which are beyond what it would cost to merely preserve the value of the asset in the condition it was in when it was first seized, a budget also needs to be made available. Provision can be made in the statute for the costs to be recouped from the proceeds of the sale, but such outlay usually has to be funded before the proceeds are realized.

A budget is also needed to deal with litigation costs associated with the management of seized assets. This would include claims against practitioners associated with the management of seized assets and damages claims by owners in the event the assets are allegedly returned in a damaged state.

**Funding options:**

- Revenue allocations from the national budget;
- Proceeds from the sale of confiscated property;
- Interest and income earned from investments made with seized cash and the proceeds of pre-confiscation sale;<sup>156</sup>
- Fees earned from the management of productive assets;
- Fees earned by staff of the AMO for service rendered in the management and disposal of seized and confiscated assets.

While most countries aim to achieve a stage where the cost of operating a specialized AMO are absorbed by the revenues produced through the management and disposal of seized and confiscated funds, it can only be a longer term objective and only some countries have been able to achieve it.

Provision is made in the **French** law establishing AGRASC for it to be funded from three sources:<sup>157</sup>

- ✓ A provision of the Finance Act allows AGRASC to retain an annual capped amount of 1.806 million euros from the proceeds of confiscated assets;
- ✓ Interests earned on the account opened with the *Caisse des Dépôts et Consignations* (CDC) which is the account that centralizes all cash seized by law

<sup>156</sup> Some countries achieved very good results implementing in their legislations the possibility to make investments with the seized money in properly supervised financial institutions of the country. The financial income is used for the maintenance and preservation of the assets and in some cases to cover the operational costs of the asset management office. See in Mexico, Art. 89 of the Federal Law on the Administration and Disposal of Public Sector Assets (Ley Federal para Administración y Enajenación de Bienes del Sector Público), Art. 230 III, 245, 247 y 250 National Criminal Procedure Code (Código Nacional de Procedimientos Penales), Art. 182 Q, 182 N y 182 R Federal Criminal Procedure Law (Ley Federal de Procedimientos Penales), Art. 13 Federal Revenue Law (Ley Federal de Ingresos de la Federación).

<sup>157</sup> Articles 706-713 of the Criminal Code; Article 706-163 of the Criminal Procedure Code deals with the Agency's resources. Section I of Article 46 of Law No 2011-1977 of 28 December 2011.

enforcement, together with the proceeds of all pre-judgment sale of seized assets. This financing stream increases in line with the increased activity of the Agency;

✓ Part of the national tax collected by *Domaine* auctioneers (Property Disposal Office, a national public service entity AGRASC uses to sell movables).

AGRASC is therefore fully self-funded and its funding increases as its activity increases, by virtue mainly of the second of its income streams, i.e. interest earned on seized cash and on the proceeds of pre-confiscation sales of seized property.

The initial budget for AGRASC was drawn up on the basis of forecasts that were fairly speculative. On the revenue side, the return earned on the sale of confiscated property administered by the Agency, was initially very low. The shortfall was due mainly to the time lag between the Agency taking possession of seized property and a final confiscation order being made. Initial projections had to be drastically reduced and subsidies obtained to make up the shortfall. By 2013 (two years into its operation) AGRASC was fully self-funded. Today AGRASC is not only self-funded, it continues to pay millions of euros over to the Government Revenue Fund and to the Drug Fund.

Source of revenue	Amount (€) 2013	Amount (€) 2014
Interest on CDC account	3,600,000	5,000,000
Share of sales	1,806,000 (capped)	1,806,000
Dominial tax	130,000	300,000
Total revenue for 2013	5, 500,000	7,100,000

On the expenditure side AGRASC made provision in its first budget for staff expenditure. The main operating expenditures related to the management of seized and confiscated assets. The main provision in the budget is for litigation risks, which amounted to almost 40% of operating expenditure.

In *Canada*, the Seized Property Management Directorate (SPMD) recovers all its operational costs from the proceeds of the sale of forfeited property. According to the Forfeited Property Regulation, the share of proceeds is regulated in the following manner: all SPMD's costs (both operational and overhead) are deducted from the returns and subsequently the "net" proceeds of sale<sup>158</sup> are shared domestically and internationally with jurisdictions that were involved in the investigation.

The SPMD operates two bank accounts established by the Seized Property Management Act: the Seized Property Working Capital Account and the Seized Property Proceeds Account. The Seized Property *Working Capital Account* is used to pay for all expenses incurred, and advances made, to maintain and manage any seized or restrained property. At the beginning of each fiscal year, this account is credited with an interest-free \$50,000,000 loan to fund SPMD operations. The loan is reimbursed throughout the year from revenue earned from the disposal of confiscated assets. This mechanism provides SPMD with consistent cash flow with which to fund its operations.

The *Seized Property Proceeds Account* receives the net proceeds from the sale of properties forfeited to the State; fines imposed and funds received from the governments of foreign states pursuant to asset-sharing agreements. Operating expenses incurred in the context of the sale of assets, amounts paid to settle claims, repayments of the loan from the Ministry of Finance, negative interests accrued in the operation of the Seized Property Working Capital Account and costs related to the final distribution of returns to relevant authorities and jurisdictions are all paid out of the Seized Property Proceeds Account.

Both Funds are audited and reported on as part of the Annual Financial Statements of the Ministry of Public Works and Government Services. At the end of the fiscal year,

<sup>158</sup> The "net" proceeds of sale are calculated by subtracting the management and disposal costs from the proceeds of sale.

the net proceeds become available as prescribed by the Forfeited Property Sharing Regulations.<sup>159</sup>

In *Honduras* the Office on the Management of Seized and Confiscated Assets (**OABI**), aims to be entirely self-funded. Although it has not yet achieved this status, it comes close. It receives 450.000\$ of treasury funding per year, plus 10% of all confiscated proceeds and 40% of the fines imposed on financial institutions for failure to comply with anti-money-laundering measures. OABI can also lease or enter into other contracts to maintain the productivity and value of assets under its control. Income from those activities may be distributed in case of a final confiscation decision.

The *US* Federal Asset Forfeiture Program manages the Department of Justice (**DoJ**) Assets Forfeiture Fund (**JAFF**), established in 1984. The JAFF is a special fund receives the proceeds of confiscations and the proceeds of investments of Fund balances. All funds deposited into the JAFF are considered “public” monies, i.e. funds belonging to the federal Government. The monies deposited into the JAFF are available to cover all expenditures in support of the asset forfeiture program allowed under the Fund statute.<sup>160</sup>

Seized cash and proceeds of anticipated sales from seized property are deposited in the Seized Asset Deposit Fund (“SADF”). As the entitlement to the funds in the SADF are still under dispute, they are considered “non-public” monies and are not available for governmental purposes.

Forfeited funds could be used for “forfeiture operations expenses” (i.e. asset management and disposal, third-party interests, case-related expenses, training and printing, contracts to identify forfeitable assets, awards based on forfeiture) and for “general investigative expenses” (i.e. awards for information, purchase of evidence, joint law enforcement operations). The DoJ retains 20% of the forfeited proceeds as overhead expenses, while the rest are shared with state and local law enforcement agencies which had assisted in the forfeiture process (based on the number of work hours). This is done under strict auditing controls that limit how such funds can be spent, namely, only for limited law enforcement purposes.

Every year the JAFF is audited by an independent auditor and the DoJ annually reports to Congress on the status of the funds including on every confiscation valued at over \$1 million. The size of the JAFF has grown considerably over the past ten years. Annual net deposits increased from nearly \$580 million in 2005 to \$4.5 billion in 2014.

In *Mexico*, the *Servicio de Administración y Enajenación de Bienes* (Asset Administration and Disposal Service – **SAE**) receives funds from three sources: The first one is the federal budget, which is approved annually by the Chamber of Deputies (legislative branch) and includes fiscal resources to cover current operating expenses, such as personnel, materials and supplies, as well as to cover unexpected operational costs.

The second source of funding is SAE’s work when disposing assets under its administration. According to Article 13 of the Federal Income Law,<sup>161</sup> SAE may charge until 7 per cent over the proceeds of sale due to administrative and sale

<sup>159</sup> In accordance with the Forfeited Property Sharing Regulations, following disposal of the confiscated asset, the amount available for sharing (proceeds of disposal less SPMD costs) is divided amongst the jurisdictions as follows: a) in cases where there is predominant provincial and municipal involvement: 90% to the province and 10 % to the Federal Government; b) in cases where there is significant provincial and municipal involvement: 50% to the province and 50 % to the Federal Government; and c) in cases where there is minimal provincial and municipal involvement: 10 % to the province and 90 % to the Federal Government. The “Forfeited Property Sharing Regulations” – SOR/ 95/ 76, are available at: <http://laws-lois.justice.gc.ca/eng/regulations/sor-95-76/FullText.html>.

<sup>160</sup> As of 30 September 2014, there were 21,117 assets in the JAFF, valued at \$2.2 billion.

<sup>161</sup> Even though this law is enacted every year, Article 13 alludes, inter alia, to SAE’s funding.

expenses. In cases where seized assets are sold, SAE manages these revenues through accounts that earn interest. Once those accounts have a final legal status, SAE can deduct the percentage referred above and deposit the remainder into a fund that consists of disposals of property owned by the Federal Government, which is transferred to the Federal Treasury<sup>162</sup>.

Finally, as a third source of funding, SAR can lease assets and charge fees for this action.

The *New Zealand* AMO receives a funding allocation directly from the Government. In addition, the OA is entitled to recover all costs, charges and expenses properly incurred and may charge a fee for work undertaken.<sup>163</sup> All restrained, seized or forfeited funds are accounted for through a trust accounting system.

## C. ASSET REGISTRATION, DATABASES AND DATA MANAGEMENT

At the interim management stage keeping track of the costs incurred in the management and maintenance of seized assets to ensure that such costs do not exceed the value that may ultimately be recovered from realization of the asset is a concern for many countries. At the confiscation stage the effective execution of confiscation orders is often bedevilled by a lack of proper information management.

Accurate information about who is liable to pay in terms of the order, the amount that has to be recovered, the assets to which the order relates and accounting for any payments made in satisfaction of the order is necessary to effectively manage the execution process but also to enhance accountability of the system. As the State is often the default beneficiary of confiscation orders, the property to which the order relates must be subjected to government accounting and auditing requirements. Failure to ensure that victims are compensated and that assets made available for reuse are properly monitored can damage the credibility of the asset recovery program. Allegations of misuse and mismanagement will inevitably surface if serious attention is not given up front to this accounting function and may undermine the credibility of and confidence in the program.

Information management is particularly challenging when multiple law enforcement bodies and other government departments are involved in seizure and disposal processes and where asset management capacity is spread over a vast geographical area. Confiscation orders are usually obtained by prosecutors or investigating magistrates. These functionaries are however not typically the ones charged with enforcement of such orders after the court has made a final determination. Government entities charged with the collection of criminal fines are often given this responsibility. Co-ordination between the different role players becomes critical. In many countries central databases have been introduced to support the collection process.

In the early stages of developing asset management capacity countries have developed fairly rudimentary data capturing and data storage mechanisms. As the system matures, it becomes harder to maintain accurate record of all property subject to seizure and confiscation orders. The need to improve and develop ever more sophisticated capacity to maintain, access and keep the data reliable and secure increases.

In September 2014 the Seized and Forfeited Asset Management project (*BIDAL*) of the Organization of American States (*OAS*) undertook an analysis of systems for the collection of data on seized and forfeited assets of illicit origin in the member states

<sup>162</sup> Article 11 of the Federation Income Law.

<sup>163</sup> The fee currently provided for in the Regulations to the Act is remuneration of \$230 per hour or part of an hour.

of the OAS. The recommendations of the project are outlined in the Box below with some modifications<sup>164</sup>.

**Recommendations of the BIDAL Project of the OAS:**

1. Information should be collected by a centralized agency.
2. Information should be collected in a centralized structured database.
3. All of the agencies involved in phases of the process related to seized and forfeited assets (investigation, seizure, custody, administration and disposal agencies) should provide information on their activities to be collected in the centralized database.
4. The information should be updated by specialized personnel. The ability to change information in the database should be granted only to authorized personnel.
5. Information should be collected in a customized database.
6. The information should cover all of the phases of the process related to seized and forfeited assets (investigation, seizure, custody, administration and disposal) and therefore be provided by the relevant agencies involved in each phase.
7. For each asset a description should be available.
8. The updated total number of assets, total number of assets by description and by category should be publicly available.
9. The physical location of the asset should be recorded specifying the country, state or region, city and address at the time of seizure.
10. The owner of the asset should be recorded specifying the name, national identification document number (or the date of birth if a national identification document is not available) and nationality if the owner is a natural person and the name, national identification number and address if the owner is a legal person.
11. A serial number should be attributed to each asset when they are taken into custody.
12. If the asset has a specific serial number (e.g. Serial numbers, vehicle registration plate etc.) this should be recorded when the asset is taken into custody.
13. The condition of the asset at the time of seizure should be recorded.
14. The value of the asset at time of seizure should be recorded in both local currency and US dollars. The valuation should be carried out by a specialized agent based on the market value of the asset.

In *France*, AGRASC created a unit (the registration department) composed of two staff members to manage its database. This tool was designed in-house and was formally validated by the National Committee for Data Processing and Civil Liberties (*CNIL*, the French Data Protection Supervisor), in November 2011 in order to comply with EU Directives on protection of personal information. The registration department registers more than 1000 files each month. The data is obtained from courts and verified by AGRASC staff to ensure accuracy of the information captured. In 2015 more than 45 000 files and more than 86 000 assets (of all kinds) were entered into the database, including information relating to their characteristics, case number, identification details, and the judicial file they were linked. However, as the number of seized assets increased, the database presented some limitations and a new database

<sup>164</sup> The full text of the report entitled Analysis of Systems for the Collection of Data on Seized and Forfeited Assets of Illicit Origin in the Member States of the OAS is available at <http://www.cicad.oas.org/>.



was expected to be launched in 2016, with the aim of improving statistics, facilitating the work of users and increasing the security process.

In **South Africa** a central database with basic information about seized assets and their ownership was developed and updated by staff in the Asset Forfeiture Unit (the Enforcement Section) in the Prosecuting Authority. The misspelling of names of people involved in cases or categories of assets became a major challenge for those capturing the data. To facilitate data entry, “drop-down lists” from which to choose the respective categories of assets were developed. To easily verify assets during audits and to prevent irregularities in their use and disposal, an electronic system with bar codes attached to all seized assets is now used.

In **Colombia** the country’s database ‘Matrix’ is managed and updated by personnel in the AMO. They catalogue the assets under categories, such as rural and urban, immovable, movable, vehicles, companies, and chemical substances. The inventory control was designed with support of the Prosecutor’s Office and contains basic identifying information on each asset, including photographic records, and the status of the assets in the judicial process. Due to the high volume of assets there are 35 people responsible for the management and update of the database. For transparency purposes all documents associated with the assets are scanned and kept within the AMO.

In the **United States** the Consolidated Asset Tracking System (**CATS**) that was launched in 1993 is maintained by the Asset Forfeiture Management Staff. The system was designed to track seized assets throughout the forfeiture life-cycle, which includes seizure, custody, notification, forfeiture, claims, petitions, equitable sharing, official use and disposal of assets seized by federal law enforcement agencies.

In **Brazil**, in the absence of a centralized AMO, the National Seized Assets database is maintained by the National Council of Justice (**CNJ**), which is the body in charge of the administrative, financial and functional control of the judiciary. The CNJ adopted a regulation requiring each judge in charge of a criminal proceeding in which a seizure occurs to record information about the assets under their control as soon as the seizure occurs and to update the information as necessary. Only assets with economic value must be registered. The database contains information about assets with economic value as well as assets that have no economic value. This tends to “pollute” the database. There are also challenges relating to the absence of standardized taxonomy, not all the data is recorded and the staff recording the assets are not adequately trained. Although by no means perfect, the database is an important tool for managing assets and providing information on the needs of the asset recovery system for purposes of planning improvements to the system.

In **Costa Rica** the national database is considered secure and is operated in line with the principles of transparency and efficiency. It is updated in accordance with guidelines that are consolidated in a dedicated handbook. The national database was developed using freely available software.

In **Peru**, CONABI used a portion of its institutional budget to commission Phase One [of Three] of a property management computer platform to consolidate the National Registry of Seized Property (**RENABI**) as a reliable reference source to share data among the state institutions that collaborate with CONABI in the fight against organized crime. In 2015 at an award ceremony organized by “Ciudadanos al Día” (Updated Citizens), a private non-profit association, in collaboration with the Ombudsman Office, Universidad del Pacifico and Grupo El Comercio awarded Good Public Management Practices Certification to the “**Seized Property Management System**” within the Internal Management Systems category. The main purpose of standardizing the information on property managed by CONABI as recorded in the RENABI was to make available a real-time information and reference system to provide for more efficient management of seized property.

## D. SKILL AND CAPACITY REQUIREMENTS

The same type of capacities, functions and expertise of the Asset Management Capacity are regularly required regardless of the type of asset management system in place.

*a. Asset inspection, appraisal and valuation expertise or services:* Valuations often require specialist expertise that come at a price and it is often the case that the more specialized the asset, the higher the costs of the appraisal. If at face value the asset is damaged or in a derelict state it is important to carefully consider incurring such costs. Staff employed by a specialist or dedicated AMO will become skilled at making the appropriate assessments as regards expenditure on valuations and may even develop in-house expertise to conduct valuations using readily accessible tools such as vehicle valuation guides. Policies and regulations guiding such decisions can be developed once the AMO has gained experience in performing this function.

*b. Inventory and record keeping:* Keeping detailed records of the nature, condition, location, value, ownership, stage in the confiscation process and other significant features of seized, restrained and realized property greatly facilitates efficient management of seized assets. An AMO can intervene to release the asset to the owner, sell or take other action if the cost of managing the asset begins to exceed the value of the asset. Centralized record keeping and monitoring of seized assets across agencies has enabled the AMO's in the *Netherlands* and *Belgium* to significantly reduce the costs of interim management of assets. Many countries tend to look for a pre-packaged database that will solve all of its data-management problems. However, countries that operate with a well-functioning accurate and up to date data-base are clear that no such solution exists. The skills of an experienced developer in discussion and co-operation with all the parties who will be required to provide data into the system is needed so that the design takes into account realities of that particular country. Those who will manage the database on behalf of their principals will need to inform the developer of their expectations and the kinds of reports they would require the system to generate. While the original developer will not need to be retained throughout, sufficiently skilled IT personnel will need to be retained on a more permanent basis to manage the system on a day to day basis.

*c. Storage and transportation facilities* for particular types of movable assets, such as safety deposit boxes for high-end valuables; a garage or pound for vehicles; a hangar for aircraft and dry dock facilities for vessels. These facilities can be procured on an asset-by-asset basis and storage capacity can be increased as the asset recovery programme expands. Only once the program has expanded significantly does it make sense to begin acquiring dedicated storage facilities in order to benefit from economies of scale. However it may never make financial sense to procure certain types of storage facilities, such as securing hangar space on a permanent basis if the prospect of regularly seizing aircraft is minimal. In the early days of an asset management program facilities used by law enforcement agencies, investigative judges or court support staff to store evidence pending its use at trial can be utilized for interim management purposes. Care should however be taken to ensure that such facilities are suitable to ensure preservation of the value of the assets.

*d. Procuring specialist skill* to manage complex assets (management receivers, trustees and judicial managers); auctioneers, estate agents, valuers and other service providers to assist or advise on disposal practices, marketing and advertising services, etc. The processes for procuring these services are usually set out in government public procurement laws and policies. They have to be complied with unless and until special procedures are designed for asset management cases. More mature asset management programmes have been able to devise procurement procedures tailored to the needs of a criminal asset management. Procuring and managing outside contractors and disposal services are features of interim management programs and have to be addressed as part of the asset management process regardless of the type of asset management system a country adopts. Emerging asset management programmes can very often procure these services from within government, relying

on others to deal with the complex procurement requirements, until enough assets are being seized, restrained or confiscated to justify tailored processes for the asset management system.

*e. Budget* Interim management of assets will require a budget that can be accessed from the very outset. If the law provides for the establishment of an asset recovery fund into which the proceeds of confiscated property will be deposited and from which the asset management program is to be funded, it will take time before such funds are able to sustain a developing asset recovery programme. Management of assets is seldom budgeted for in the early stages, the expectation being that the agency responsible for asset recovery, the police, prosecution or judiciary will be in a position to fund the programme. Until sufficient funds are set aside, or resources are committed to setting up effective organizational infrastructure to support asset management, the asset recovery program will be constrained.

Allocating recovered proceeds to the national revenue fund to meet general government priorities is usually more cost effective than permitting recovered proceeds to be allocated through a process that favours programs that cater for crime prevention and social re-use. Special funds typically require infrastructure to be set up to manage and account for deposits received into the fund and transfers made from the fund. Where the asset recovery law is silent on the purposes the recovered funds may be used for, mechanisms must be put in place to ensure the fair and transparent allocation of the funds. Oversight, transparency and auditing requirements are critical to maintaining the integrity of the Fund and accountability for its contents.

It is important that the AMO keeps track of the costs expended on asset management and that these costs are publicly available to increase transparency and accountability of the system.

*f. Pre-seizure advice* Before approaching a judicial authority with a request for permission to seize a particular asset, particularly in the case of complex assets, pre-seizure planning is important. To support effective pre-seizure planning, the AMO should have the capacity to provide advice and support to law enforcement officials on questions relating to the costs of storage, maintenance, security and disposal of the asset.

In the case of productive assets, such as rental earned from real estate or operating businesses, the asset management office needs to have the capacity to take law enforcement officials through a planning process that identifies the risks and advise on mitigation measures. The OAS has produced a Guide for the Management of Seized Businesses that provides guidance with regard to questions that need to be considered before seizing a business. The AMO's in *France*, the *US* and *Canada* place great emphasis on advertising this service among law enforcement officials.

## E. CONCLUSION

The institutional responses to the management and disposal of seized and confiscated property have varied greatly from country to country. The following broad categories emerge from a review of the approaches adopted by countries participating in this study:

- ✓ Some countries have opted to locate their asset management capacity within law enforcement, combining the functions of managing seized and confiscated property with other law enforcement functions.
- ✓ Others have sought to locate the capacity to deal with criminal property within an existing public sector entity with experience in dealing with the management and disposal of assets, particularly entities tasked with regulating insolvencies or bankruptcies.
- ✓ A further group of countries have elected to create a new stand-alone entity to deal exclusively with management of seized and confiscated property derived from

crime. Opting to separate the asset management function from more conventional law enforcement functions.

Most jurisdictions have found it necessary to rely on private sector actors to provide some of the specialized skill sets required to store and manage certain types of assets either by means of:

- the use of court-appointed asset managers, or
- the use of sub-contractors procured by the AMO to provide a range of services.

Regardless of the location of the asset management capacity, the costs of management and disposal of seized and confiscated assets can be a major challenge for governments, particularly for countries with other pressing budgetary priorities. Countries have selected from a range of funding options to reduce the burden on the State. Several countries have provided in the asset recovery legislation for the asset recovery capacity to be funded from the recovered proceeds. Many countries share the objective for these bodies to become self-funding over time, and some have achieved self-funded status within a short period of operation.

Key among the functions an asset management capacity will be required to perform are record keeping about assets under restraint and of confiscated property. An electronic database to improve information management is often the first priority of an asset management capacity because it allows for a proper understanding of the requirements of the system making it easier to plan effectively to meet these needs. It is often the starting point for designing any asset management system.

## **V. INTERNATIONAL CO-OPERATION AND THE RETURN OF STOLEN ASSETaS**

The focus of this compilation is on arrangements (both legislative and institutional) to deal with management and disposal of seized and confiscated property derived from crime at the *domestic* level. The transfer or return of property of illicit origin in terms of a country's mutual legal assistance obligations are not specifically addressed in this study. A well-functioning domestic asset management and disposal capacity should however be able to meet the country's international obligations to provide asset management and disposal assistance to other jurisdictions when requested to do so –either by preserving and managing assets before returning them to other jurisdictions, or by disposing of assets returned to it by other jurisdictions

The management and disposal of returned assets will be part of a separate, although related study by UNODC. Several of the aspects covered in this compilation on domestic asset management, will guide the efforts to develop good practices on the management of returned assets, as well as asset return itself.

At the same time, while some of the measures listed in the compilation may be well suited for domestic application, they may raise concerns in the context of international cooperation in asset recovery cases.

One of the issues that require additional consideration in this context relate to the costs incurred in the management of seized assets. Article 57, paragraph 4 of the Convention provides for the requested State involved in an asset recovery cases to deduct “reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property”. Reasonable expenses cover those costs and expenses which national authorities might realistically have incurred and not unspecified charges, such as a finder's fee. Countries are encouraged to consult on likely expenses and to agree on how these will be met.<sup>165</sup> This may be done between two countries on a case by case basis or in terms of a bilateral or multi-lateral agreement. It will be critical to successful return of

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<sup>165</sup> United Nations Convention against Corruption, *Legislative Guide for the Implementation of the United Nations Convention against Corruption*, p. 266, para. 788.

confiscated property to consult early on questions such as pre-confiscation sale or use or how costs of interim seizure can be kept to a minimum without compromising the availability of the asset for confiscation.

The deduction of expenses is distinct from compensating a country for its contribution to the investigation and prosecution of an asset recovery case from the proceeds recovered whereas the deduction of expenses is about reimbursing a country for actual expenses incurred in the management and disposal process, such as the cost of storage, maintenance or transfer of property. Separating the asset management function from the investigation and prosecution functions can facilitate calculating the expenses incurred in management and disposal as opposed to the contribution of law enforcement to the asset recovery process for purposes of asset sharing. While this is provided for in UNTOC and several other United Nations Conventions<sup>166</sup>, UNCAC does not specifically refer to asset sharing. However, agreements concluded under article 57 paragraph 5 may include such compensation.

The return of stolen assets also raises a series of policy questions about how to use the returned funds to support development goals and how to keep the public informed about their use.<sup>167</sup> The Convention, which recognizes the return of assets as a fundamental principle, provides the following framework for the return and disposal of assets:

Article 57 paragraph 3 requires that the requested State Party shall: (a) In the case of embezzlement of public funds or of laundering of embezzled public funds ... return the confiscated property to the requesting State Party; (b) In the case of proceeds of any other offence covered by this Convention ... return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property ...; and (c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.” Paragraph 5 of Article 57 further states that “Where appropriate, States Parties may also give special consideration to concluding agreements or mutually acceptable arrangements, on a case-by case basis, for the final disposal of confiscated property.”

In addition to the special agreements or arrangements referred to in Article 57(5), the individuals and entities designated as beneficiaries of confiscated property at the domestic level are typically identified in domestic legislation. Consequently, strengthening domestic policy, legal frameworks and institutional capacity to manage and dispose of seized and confiscated property may in the long term obviate the need for *ad hoc* special agreements and arrangements between States.

The experience gained on Article 57 of the Convention establishes that proceeds of embezzlement of public funds should be returned upon confiscation to the country of origin, whereas for the proceeds of other offences, a differentiating regime has been adopted taking into account damages, prior ownership and victims. A practise is emerging in which the returned funds are made available to benefit communities

<sup>166</sup> United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 25 May 1988, article 5(5)(b)(ii); International Convention for the Suppression of the Financing of Terrorism, 9 December 1999, article 8 (3); United Nations Convention against Transnational Organized Crime, 15 November 2000, article 14 (3). Different from the United Nations Convention against Corruption, the United Nations Convention against Transnational Organized Crime (UNTOC) establishes the principle of asset sharing and the restitution to victims. Based on UNTOC, UNODC developed a model agreement on international asset sharing which was endorsed by the UN Crime Commission in May 2005 and by the UN General Assembly in December 2005. This model on sharing confiscated proceeds of crime can be used by countries to strengthen international cooperation in the confiscation and disposal of illicit proceeds.

<sup>167</sup> An analytical framework for addressing the distinct policy questions and practical considerations are addressed in a StAR Publication entitled “Management of Returned Assets: Policy Considerations”.

adversely affected by the initial corruption.<sup>168</sup> This process, similarly to the social reuse experience described above in the case of Italy, can have a considerable impact to restore faith in the criminal justice system and the government as a whole.

These and other aspects related to the management and disposal of recovered and returned assets, including in support of sustainable development will form part of the work UNODC is planning to conduct towards developing good practices on asset return. This work is based on target 16.4 of the Sustainable Development Goals to strengthen the recovery and return of stolen assets and the mandate by the Addis Ababa Action Agenda encouraging the international community “to develop good practices on asset return”.

The work will focus on international asset recovery cases, although the management of assets confiscated in domestic cases will be addressed insofar as it provides the legal and institutional framework for international returns. Based on these cases the aim is to develop a directory of cases, as well as a set of good practices which would capture effective approaches and provide options for informed decisions on what special considerations should be applied when (a) managing assets pending return, (b) negotiating agreements for returning assets; and (c) considering the final disposal of returned assets.

## VI. CONCLUSION

The current study presents the experience of 64 countries on the effective management and disposal of seized and confiscated assets. It captures experience from all geographical regions, different legal systems and countries of different levels of development. Despite the diversity among these countries, some trends and common experiences emerge. Without attempt of being exhaustive, the following areas would lend themselves especially to a further discussion on the identification of good practices:

(1) With regard to the administration of assets prior to a final confiscation judgment:

- ✓ The possibility of non-judicial authorities issuing urgent freezing orders;
- ✓ Flexible legislation offering a choice between freezing and seizure orders, and providing wide discretion to tailor appropriate orders to a specific case;
- ✓ Dedicating sufficient capacity to pre-seizure planning, particularly to evaluate the costs and risks of restraining assets;
- ✓ Freezing orders that leave the asset under control of the owner and pose restrictions on its use;
- ✓ Pre-confiscation (or anticipated) sale with the consent of the owner and that of the agency responsible for enforcing the seizure order;
- ✓ Pre-confiscation (or anticipated) sale without the consent of the owner in defined circumstances, in accordance with the principles of national legislation;
- ✓ Mechanisms for the protection of third parties already during the duration of the interim order.

No common trend could yet be established with a view to the pre-confiscation (or *interim*) use of the asset – mostly combined with guarantees, a compensation or a damages claim in case of deterioration of the assets due to the *interim* use.

<sup>168</sup> The Bota Project in Kazakhstan is one example of this kind of social reuse project. BOTA Foundation, a partnership of Kazakh civil society organizations and the governments of *Kazakhstan, the United States, and Switzerland*, managed the return of more than \$115 million of disputed assets to Kazakhstan to improve the lives of vulnerable children and youth suffering from poverty in Kazakhstan.

Further, a wide set of different approaches has been reported for the possible distinction between legitimate third parties and those associated with the suspect. The identification of good practices and guidelines in these areas would require further systematization and discussion of the available diverse approaches.

(2) With regard to the enforcement of confiscation orders and the disposal of confiscated assets:

- ✓ Especially in value-based confiscation, legislation that provides for realization measures that go beyond civil collection;
- ✓ For object-based confiscation, legislation or guidelines that establishes criteria whether to retain or to sell an asset;
- ✓ A clear articulation in the legislation expressing the fundamental policy choice for the disposal of confiscated assets: allocating them to the national revenue fund, or to specific programmes or a special fund;
- ✓ If proceeds of confiscation orders are to be paid into a special fund: adoption of specific rules for its use, infrastructure, management, oversight, transparency and auditing requirements;
- ✓ If confiscated proceeds are used for law enforcement projects: adoption of tight controls and clear policies to avoid direct links between seized assets and rewards provided to law enforcement, to avoid wrong incentives;
- ✓ If confiscated proceeds are applied for social re-use in affected communities: establishment of infrastructure to support, monitor and account for such projects.

Priorities for the use of confiscated assets include funding the asset recovery office, compensating victims and social re-use. Solutions depend on the specific needs of communities and societies in which these assets are confiscated. Rather than good practices, policy considerations could be extracted from the available country experience in the next step to inform decisions and identify the required infrastructure and capacity for each solution.

(3) With regard to the institutional structure, the following broad categories emerged and criteria should be further discussed to allow countries to make informed policy choices:

- ✓ asset management capacity within law enforcement;
- ✓ asset management capacity within an existing public sector entity, which has experience in dealing with the management and disposal of assets;
- ✓ a stand-alone entity for the management of seized and confiscated property.

Further discussions on possible good practices could cover the following areas:

- ✓ The use of private sector actors (court-appointed asset managers or sub-contractors);
- ✓ Systems that allow asset recovery offices and asset management offices to achieve a self-funded status;
- ✓ Electronic databases to improve information management on restrained and confiscated property.