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Fighting organised crime by facilitating the confiscation of illegal assets

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Mart van de VEN, Netherlands, Alliance of Liberals and Democrats for Europe

Summary

The Committee on Legal Affairs and Human Rights notes with deep concern that organised criminals make hundreds of billions of euros in criminal profits every year. Such power threatens the social contract between the citizens and the State on which all free societies are based.

Confiscation of illegal assets has multiple benefits: it makes crime less financially rewarding, saps the power bestowed on criminals by their wealth, deprives them of "seed money" and generates resources to compensate victims. But it is often prevented by the heavy burden of proof placed on the competent authorities and by ineffective international co-operation.

Several member States have already passed specific legislation to facilitate the confiscation of illegal assets. Such measures were found to be compatible with human rights, including the presumption of innocence and the protection of property.

Provided sufficient safeguards exist, in particular effective judicial review, the committee strongly supports non-conviction-based confiscation as an efficient means to tackle the fast-growing financial power of organised crime, in defence of democracy and the rule of law.

The committee concludes by making concrete recommendations to promote non-conviction-based confiscation in line with good practices found in different countries, including necessary safeguards and practical measures to promote international co-operation in this field.

1. Reference to committee: Doc. 14171, Reference 4254 of 25 November 2016.

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A. Draft resolution[2]

1. The Parliamentary Assembly notes with deep concern that according to World Bank and European Union estimates organised criminals make hundreds of billions of euros in criminal profits every year. The illegal assets accumulated by criminals over time enable them to bribe and put pressure on politicians, law-enforcement officials and witnesses and to distort entire markets, by distorting and even eliminating competition. Such power threatens the stability of even the most solid democracies and the social contract between the citizens and the State on which all free societies are based.

2. Confiscation of illegal assets has multiple benefits: it makes crime less financially rewarding, saps the power bestowed on criminals by their wealth, deprives them of "seed money" needed for future crimes and generates resources to compensate victims and rebuild communities damaged by crime.

3. The Assembly notes that confiscation of criminal assets is often prevented by an unreasonably heavy burden of proof placed on the competent national authorities and by ineffective co-operation between the authorities in different countries in tracking, freezing and confiscating criminal assets across borders.

4. It further notes that Ireland, Italy, the Netherlands and the United Kingdom have passed specific legislation to facilitate the confiscation of illegal assets, in particular by reducing the authorities' burden of proof regarding the criminal origin of unexplained wealth, through the use of factual presumptions or even, under certain conditions, a *de facto* reversal of the burden of proof.

5. Such measures (also referred to as non-conviction-based confiscation, civil forfeiture, confiscation i*n rem* or unexplained wealth orders) have successfully withstood scrutiny by the highest courts of the countries concerned and also by the European Court of Human Rights. They were found to be compatible with human rights, including the presumption of innocence and the right to peaceful enjoyment of one's possessions.

6. Provided sufficient safeguards exist, in particular full judicial review of any confiscatory measures by independent and impartial courts, the Assembly strongly supports non-conviction-based confiscation or similar measures as the most realistic way for States to tackle the enormous and inexorably growing financial power of organised crime, in order to defend democracy and the rule of law.

7. Effective international co-operation in tracking, freezing and confiscating criminal assets depends on an appropriate legal framework that ensures sufficient harmonisation of procedures whilst allowing for different national approaches, without discrimination.

8. Relevant international instruments include the 1959 European Convention on Mutual Assistance in Criminal Matters (ETS No. 30) and its two additional protocols (ETS Nos. 99 and 182), the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (ETS No. 141), the 2005 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) and several United Nations instruments (including the 1988 Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, the 2000 Convention against Transnational Organised Crime and the 2003 Convention against Corruption). Not all of these, however, have been ratified by all Council of Europe member States and other States having a special status with the Council of Europe or its Parliamentary Assembly. This state of affairs creates loopholes, through which organised criminals continue to escape confiscation of their illegal assets.

9. The Assembly therefore invites all member States of the Council of Europe and other States having a special status with the Council of Europe to:

9.1. provide for non-conviction-based confiscation in their national laws, as well as the possibility of equivalent value confiscation and taxation of criminal gains, whilst establishing appropriate safeguards, and adopt successfully tested good practices, including:

9.1.1. allowing for full judicial review, by an independent and impartial tribunal, within a reasonable time, of any decision to freeze or confiscate illegal assets;

9.1.2. granting compensation to persons whose assets were frozen or confiscated erroneously;

9.1.3. providing for legal aid for judicial review and compensation proceedings for persons who cannot afford a legal representative;

2. Draft resolution adopted unanimously by the committee on 24 January 2018.

9.1.4. creating a specialised body to deal with the freezing and confiscation of illegal assets, with a professional, multidisciplinary staff having access to relevant information held by law-enforcement bodies (in particular the police and customs) and the tax and social welfare authorities;

9.1.5. ensuring that the specialised body administers frozen assets in such a way as to preserve their value until they are definitively confiscated, and to dispose of confiscated assets in such a way as to maximise the benefit for society as a whole and to avoid inappropriate incentives;

9.1.6. allowing this specialised body to use special investigative tools, such as access to financial information held by other public bodies, undercover operations, and real-time monitoring of bank accounts;

9.1.7. regularly informing the general public of both operations successfully carried out and problems encountered;

9.2. promote international co-operation in this field by taking expeditious action and co-operating with each other to the widest extent possible for the purposes of investigations and proceedings aiming at the confiscation of instrumentalities and proceeds of crime, in particular by:

9.2.1. signing and ratifying all international legal instruments facilitating tracking, freezing and confiscating illegal assets (paragraph 8);

9.2.2. applying these instruments in a co-operative, non-bureaucratic way, placing a special emphasis on spontaneous exchanges of information, without insisting on reciprocity and without excluding or otherwise placing at a disadvantage those States that have already introduced non-conviction-based confiscation regimes;

9.2.3. promoting international networks of competent professionals, such as the CARIN (Camden Asset Recovery Inter-Agency Network) and the ARO (Asset Recovery Offices) platform or other relevant fora;

9.2.4. setting up and using more frequently joint investigation teams, such as those set up with the assistance of Eurojust and Europol, and by promoting more frequent involvement of non-member States of the European Union in such teams;

9.2.5. making special investigative techniques available also in cross-border investigations;

9.2.6. defining clear rules for the sharing of successfully confiscated assets among the countries involved.

B. Explanatory memorandum by Mr Mart van de Ven, rapporteur

1. Introduction

1. Put simply, the purpose of this report is to help ensure that crime does not pay. Huge accumulated (and still accumulating) profits from crime empower criminals. The criminals' resources enable them to bribe and put pressure on politicians, law-enforcement officials and witnesses and to distort entire markets by distorting and even eliminating competition. Such power threatens the stability of even the most solid of our democracies and the social contract on which our societies are based: the people pay taxes and contributions and in return the State provides for security and social protection. Confiscating these ill-gotten gains has multiple benefits: first, criminals are generally in business for the money. If they lose it, and the lavish life-style that comes with the money, crime loses much of its allure. Second, confiscation of criminal assets saps the power bestowed on criminals by their riches. Third, profits from one crime are often needed as "seed money" for the next. Breaking the financing cycle is therefore good crime prevention. Last but not least, the confiscated criminal assets can be put to good use to compensate victims and rebuild communities destroyed by crime, in a way reasserting the social contract broken by the criminals.

2. As indicated in the motion for a resolution underlying this report,[3] organised criminals and criminal organisations have illegally accumulated huge assets – sometimes larger than the gross domestic product (GDP) of many countries. Estimates by the United Nations place the *annual* total amount of criminal profits at about US$2.1 trillion in 2009 (or 3.6% of global GDP in the same year).[4] In Italy alone, annual organised crime revenues were estimated at €150 billion in 2011. For the United Kingdom, the estimate for 2006 was £15 billion. According to the United Nations, the global drug trade alone generated US$321 billion in 2005 in illegal profits. The Council of Europe places revenue from trafficking in human beings at US$42.5 billion annually. The global profits from counterfeit goods were estimated at up to US$250 billion per year by the Organisation for Economic Co-operation and Development (OECD). The main illicit markets in the European Union – drugs and fraud – alone generate about €110 billion per year – approximately 1% of GDP.[5] The accumulation of these amounts over 5, 10 or 20 years generates almost unimaginable wealth – such is the financial "firepower" of organised criminal groups worldwide that the resources available to all but the largest States look insignificant in comparison. As the motion for a resolution underlying this report rightly stresses, such wealth under the control of crime groups and corrupt individuals threatens democracy and the rule of law as we know them, everywhere.

3. In comparison with the huge profits generated by crime, the criminal assets actually confiscated by member States look modest, if not insignificant. For example, in the United Kingdom in 2006 £125 million were recovered by the State. In 2009, confiscated assets for example amounted to €185 million in France, £154 million in the United Kingdom, €50 million in the Netherlands – this figure has increased to €402 million in 2016:[6] and €281 million in Germany.[7] According to Europol, European Union agencies freeze an estimated €2.4 billion worth of criminal assets on average each year, out of a total value of illicit crime markets of €110 billion. A report published by Europol's Criminal Assets Bureau in 2016[8] indicates that while around €2.4 billion (2.2% of the estimated total) was provisionally seized annually, only about half of this was ultimately

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3. On 25 November 2016, the Parliamentary Assembly transmitted the motion for a resolution "Fighting organised crime by facilitating the confiscation of illegal assets" to the Committee on Legal Affairs and Human Rights for report. At its meeting on 23 January 2017, the committee appointed Mr Mart van de Ven (Netherlands, ALDE) as rapporteur. On 18 May 2017 (Belgrade): the committee held a hearing with Mr Maurice Kempen, Ministry of Security and Justice, The Hague, and Mr Kevin McMeel, Criminal Assets Bureau, Dublin; on 6-7 September 2017, the rapporteur undertook a fact-finding mission to Dublin. On 13 November 2017, the committee held an exchange of views with Mr Pedro Perez Enciso (Senior Prosecutor, CARIN network, Spain) on aspects of international co-operation.

4. The United Nations Office on Drugs and Crime (UNODC) conducted a study to determine the magnitude of illicit funds generated by drug trafficking and organised crimes and to investigate to what extent these funds are laundered. The report estimates that in 2009, criminal proceeds amounted to 3.6% of global GDP, with 2.7% (or US$1.6 trillion) being laundered.

5. See Savona Ernesto U. and Riccardi Michele (eds.), 2015, "From illegal markets to legitimate businesses: the portfolio of organized crime in Europe", Final Report of project OCP – organised crime portfolio (www.ocportfolio.eu), p. 7.

6. See *NL Times*, 19 January 2017, "Dutch prosecutor seized 402 million from criminals last year"; this represents a threefold increase over 2015, which can be largely attributed to a settlement between the Prosecutor and the telecom company Vimpelcom, which accepted a €268 million payment to the Netherlands.

7. Figures quoted from the European Commission communiqué "Confiscation and asset recovery: better tools to fight crime", 12 March 2012.

8. EUROPOL, Does crime still pay? Criminal asset recovery in the EU, Survey of Statistical Information 2010-2014.

confiscated. Europol noted that "the amount of money currently being recovered in the European Union is only a small proportion of the estimated criminal proceeds: 98.9% of estimated criminal profits are not confiscated and remain at the disposal of criminals". In other words, crime still pays – a lot.

4. New measures are therefore urgently needed to facilitate confiscation of illegal assets. Several countries have already passed relevant laws and a number of international instruments have been adopted in order to fight organised crime, corruption and money laundering more effectively. At the international level, the World Bank and the European Union have taken important initiatives to improve international co-operation in this field. In the present report, I intend to examine the main results of work already done in this field and identify good practices that the Assembly should recommend to all member States of the Council of Europe, and beyond.

2. Examples of member States' efforts to facilitate confiscation of instruments or products of crime by reversing the burden of proof

5. Several countries, including member States of the Council of Europe, have passed measures to facilitate the confiscation of instruments or products of crime, by facilitating or even reversing the burden of proof as to the criminal origins of an asset. I should like to briefly present the solutions developed in this respect by Ireland, Italy, the Netherlands and the United Kingdom.

2.1. Ireland

6. In Ireland, two laws introduced the reversal of the burden of proof for confiscation purposes: the Proceeds of Crime Act (PoCA) and the Criminal Asset Bureau (CAB) Act (both adopted in 1996, in the context of a spike in organised crime in Ireland). Whilst PoCA provides for the legal basis for the State to attack proceeds of crime, the CAB Act sets up the institutional framework ensuring the PoCA's implementation. The introduction of a civil forfeiture regime including a reversal of the burden of proof, without the need for a criminal conviction, was seen as marking a transition from "reactive" conviction-based confiscation to a "proactive" crime control strategy, as a response to the serious threat organised crime poses to society. The constitutionality of PoCA was challenged on a number of grounds, but it was upheld by the Irish courts.[9] In addition to the civil forfeiture regime, Ireland also has a conviction-based regime for forfeiture of proceeds derived from drug- and terrorism-related offences under the Criminal Justice Act. A lower standard of proof (balance of probabilities rather than beyond reasonable doubt) applies for the link between an asset and the crime in question. When there is sufficient evidence for a criminal conviction, the conviction-based forfeiture regime is given preference.

7. The implementation of the PoCA is the task of the CAB, a multidisciplinary agency with officials seconded from the police and the tax and social welfare authorities, who pool their access to all relevant information available to their home institutions. The objective of the CAB is "to identify assets, wherever situated, or persons who derive or are suspected to derive, directly or indirectly, from criminal conduct, to take appropriate action to deprive those persons of such assets in whole or in part and to carry out any investigation or preparatory work in relation to any proceedings under Act" (Preamble of the CAB Act). The Revenue Services have been explicitly enabled to share tax information with the CAB (Disclosure of Certain Information for Taxation and other Purposes Act of 1996). The PoCA also authorises the CAB to ensure that the proceeds of criminal or suspected criminal activity are subject to taxation. Some of the best-known crime figures in Ireland were successfully targeted in this way, and also deprived of social welfare benefits.[10] In order to effectively carry out these tasks, the CAB has been granted strong investigative powers, including that to search, seize and detain any property if there are reasonable grounds for suspicion (Section 14 CAB Act).

8. The "proceeds of crime" under PoCA are defined to "include any property obtained or received at any time, whether before or after the passing of the legislation, by or as a result of or in connection with criminal conduct" (PoCA, Part 2 Section 3.*a*). "Criminal conduct" is defined to include any offence that has taken place inside the State, or that would constitute an offence if it occurred in the State, or an offence against the law of that State or if the property resulting from that offence is situated within the State. The inclusion of proceeds from offences committed outside the jurisdiction that were at any time held in Ireland was added by a 2005 amendment of the PoCA after the Irish courts had found such legislative intent lacking in the original PoCA.

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9. See Comparative Evaluation of Unexplained Wealth Orders, prepared for the U.S. Department of Justice, National Institute of Justice, Final Report, 31 October 2011, by Booz/Allen/Hamilton (henceforth: "Comparative Evaluation"), p. 122.
10. Ibid., p. 132.

9. The civil forfeiture procedure has three stages: first, an application for an interim order is addressed to the High Court by an officer of the CAB. The CAB must show by the civil standard of proof – balance of probabilities – that 1) a person is in possession or control of property, 2) that this property constitutes directly or indirectly the proceeds of crime and 3) that its value is greater than €13 000. If the court is satisfied that there are reasonable grounds to believe that the property in question is the proceeds of crime, it will issue an interim order prohibiting the respondent from disposing of or otherwise dealing with the property during 21 days. If such an order is improperly made, the State can be ordered to pay compensation.

10. The second phase is the interlocutory (or restraining) order. The CAB must provide evidence to the court as for an interim order (above). If the court is satisfied that there are reasonable grounds to believe that the property is proceeds of crime, it grants an interlocutory order *unless the respondent provides evidence proving that the property does not constitute the proceeds of crime.* Unless successfully appealed (or the parties have agreed otherwise), the interlocutory order remains in effect for seven years. During this period, a receiver may be appointed to administer the property and the court may issue an order, on application by the respondent or his or her dependants, to cover reasonable living (and legal) expenses from the restrained property.

11. The third phase of the Irish civil forfeiture procedure is the disposal order, ordering the final confiscation of property. The law has two safeguards to protect the assets of innocent persons: 1) the court must give an opportunity to every person claiming to own part of the property to tender sufficient evidence to satisfy the court that the property should not be confiscated; and 2) the court has the discretion not to issue a disposal order if there is a "risk of serious injustice". The final decision will transfer the title to the Irish State.

12. The Irish model has been considered a real success, also at the European and international level. The Council of Europe's Group of States against Corruption (GRECO) stated that it was "impressed by the civil forfeiture scheme which has provided the Criminal Asset Bureau with effective tools to identify and seize proceeds of crime".[11] According to representatives of the CAB, many organised criminals moved their activities outside of Ireland, especially during the first five years of the PoCA's implementation, resulting in a significant reduction of crime rates in Ireland. It would appear that the success of the Irish system is largely due to the strong role of the CAB. The CAB initially targeted well-known criminals and crime bosses who had accumulated large amounts of property with no apparent legitimate sources of income, but against whom there was insufficient evidence for a criminal conviction. The criminal groups responded by relocating their operations to neighbouring countries (in particular the Netherlands and Spain).[12] Later, the CAB also pursued small and middle-ranking criminals having a significant impact on the community: confiscated properties included high-end cars owned by drug dealers so that "mothers would be able to point to their growing children and say that crime does not pay". The statistical data published by the CAB show that the CAB initiated an average of 10 cases per year (between 1988 and 2009), most of which eventually led to successful forfeiture of assets to the State. The assets recovered by the CAB substantially exceed the resources received from the parliament, the largest amounts of funds having been recovered by the CAB's taxation powers.

13. The success of PoCA is attributed to the CAB's excellent multidisciplinary teams, bringing together the powers of, the information available to and personnel from three different government agencies. The CAB's total staff is about 60-80 employees, who enjoy an excellent reputation of professionalism and probity. The High Court also appoints a judge to work on forfeiture cases for a period of at least two years, assisted by a special registrar. This is considered as an important factor contributing to the high success rate of civil procedure proceedings, together with the careful selection and preparation of the cases by the CAB.

14. As summed up in the previously mentioned Comparative Evaluation,[13] the strengths of the Irish PoCA are: i) it is a comprehensive forfeiture law that enables the CAB to forfeit proceeds derived from any criminal conduct; ii) it does not have a requirement of a predicate offence, it is sufficient for the State to show that there are reasonable grounds to believe that the respondent has been engaged in unlawful activity; iii) it reverses the burden of proof onto the respondent to show the legitimacy of his or her assets; and iv) it provides for a discovery order, whereby a court can order the respondent to disclose any assets he or she owns or controls and their source.

15. The Irish civil forfeiture system has been challenged before the Supreme Court. The reversal of the burden of proof onto the respondent has been termed a violation of the presumption of innocence and the "discovery order" as a violation of the privilege against self-incrimination. Also, the admissibility of a statement

11. GRECO, Second Evaluation Round, Evaluation Report on Ireland, 2005.
12. "Comparative Evaluation", pp. 132/133.
13. See footnote 9 above.

by an authorised officer that there are reasonable grounds to believe that the respondent owns or controls property that is proceeds of crime as evidence ("belief evidence"), the provisions safeguarding the anonymity of CAB members and of witnesses on whom the CAB relies and more generally the CAB's wide access to the investigative resources of several powerful State bodies has been criticised as jeopardising the "equality of arms" principle and opening up the possibility of abuse of these powers. Finally, PoCA was also challenged as a violation of Article 40.3 of the Irish Constitution as not protecting private property from an unjust attack.

16. But the Supreme Court found that the requirement placed on the State to first make a *prima facie* case of the property being proceeds of crime before the burden is placed on the respondent to prove that the property is legitimate, and the prohibition to use the information disclosed following a discovery order for purposes of criminal prosecution[14] provide sufficient protection of the respondent's constitutional rights. The Supreme Court also pointed out that in civil forfeiture proceedings, no one is pronounced guilty, or tried for the commission of a specific offence, which is why criminal law principles such as the presumption of innocence are not applicable. Regarding the protection of private property, the Court held that whilst civil forfeiture admittedly affects the property rights of the respondent, it does not rise to the level of an "unjust attack" considering that the State must first show that the property constituted the proceeds of crime. The Court also held that the right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the possession of assets illegally acquired; and the erosion of the protection of private property must be balanced against the public interest.[15]

17. These positive findings were facilitated by the fact that, in practice, the CAB and the High Court proceed very cautiously: an application for an interim or interlocutory order presents a comprehensive overview of the respondent's lifestyle (income and expenditure analysis prepared by forensic accountants) and presents reasonable grounds to suspect that the respondent has been involved in criminal conduct. All the evidence is presented to the court when an application is made, and its credibility can be challenged by the respondent, including by cross-examining the witnesses, before it is determined by the court. During the first 14 years of implementation of the PoCA, there have never been any accusations or media reports of potential abuses of the Act.[16]

18. As a result, the Irish Supreme Court, whilst recognising the PoCA's broad nature, has justified it as a measured and proportionate response to crime and the threat it poses to society.

2.2. Italy

19. Italy is one of the first countries to enact confiscation measures as a tool to attack the financial power of organised crime and confiscate the profit acquired from criminal enterprises. The measures in question shift the burden of proof to the property owner to justify the legitimacy of the property; they do not require prior conviction; and all assets for which lawful origin cannot be justified can be seized and subsequently forfeited. Italian law distinguishes between "extra judicial" (non-conviction-based) property-related or preventive measures and conviction-based "judicial" confiscation orders imposed in the course of criminal proceedings.

20. For preventive (administrative) measures, introduced for the first time in 1956 as "personal preventive measures"[17] and extended to include confiscation of assets of suspected mafia members by the Rodogne-La Torre Act of 1982, the mere suspicion that a person was a member of a mafia-type organisation was sufficient at first. Following criticism that such measures took on a more and more penal character, evidentiary requirements were made more stringent. Currently, two conditions are required for seizure: 1) assets must be directly or indirectly at the disposal of the suspect; and 2) there must be a discrepancy between the suspect's wealth and his or her income or there must be sufficient evidence that the assets are the proceeds of crime or the use thereof. The suspect is required to present sufficient evidence to justify that his or her assets are not the proceeds of crime.

21. For conviction-based confiscation (Article 240 of the Criminal Code), the first requirement is the imposition of a conviction for a criminal offence, with the standards of evidence of regular criminal proceedings ("beyond reasonable doubt"). Under Article 12-5 of Law No. 356 (1992), those convicted of an offence associated with the mafia (including drug offences, organised crime and money laundering) are required to demonstrate the lawful source of their income and property. If they are unable to do so, they may be

14. "Comparative Evaluation", p. 145.
15. Ibid., p. 147.
16. Ibid., p. 141.
17. *Misure di prevenzione personale,* providing for five categories of preventive measures (formal notice, repatriation, prohibition of residence in certain municipalities or provinces, withdrawal of licences or concessions) against five categories of criminal behaviour (vagabonding, trafficking, drug trafficking, prostitution, illegal gambling).

imprisoned for up to five years *and* the forfeiture of part or all of their assets is compulsory. This paragraph – which in fact operates a reversal of the burden of proof even for the imposition of a criminal sanction, up to five years in prison – was found unconstitutional in 1994 (as violating the presumption of innocence). It was replaced by the adoption of Article 12-6 in the same year. The new text makes forfeiture compulsory in case of conviction for certain crimes (delinquent mafia-type association, extortion, kidnapping for ransom, loan sharking and money laundering). In addition, the property must be disproportionate to the assets stated in the tax declaration and the income made from (legal) economic activities. There is no need to establish a causal link between the assets to be confiscated and a specific offence.[18]

22. Whilst these rules appear to be quite strong, the results in terms of number and value of confiscated assets seem to be meagre. Confiscation measures have reached peaks between 1982 and 1985 and between 1992 and 1994 – i.e. after the adoption of the Rodogne-La Torre Act in 1982 (paragraph 20 above) and after the enactment of Article 12-5 and the murder of two famous anti-mafia judges (Falcone and Borselino). The new Article 12-6 replacing Article 12-5 was used so sparingly by the courts that confiscated assets reached only 3% of those confiscated under the previous law that had been declared unconstitutional.[19]

2.3. The Netherlands

23. The Dutch confiscation regime is mainly conviction-based, with some civil forfeiture elements in certain circumstances (reversal of the burden of proof and confiscation of proceeds of crime without the need to link them to a particular offence)

24. An act of parliament (nicknamed the "strip them Act") was passed in 1993 in order to deprive those involved in criminal offences of the economic advantage or financial benefits of their crimes. Article 36e of the Dutch Criminal Code distinguishes between two types of confiscation, namely "Ordinary Confiscation"[20] and "Special Confiscation".[21] The former is an additional sanction when a defendant has been convicted of any criminal offence; the latter allows the court to order payment of a sum of money to the State when the defendant has made illegal profits from 1) the offence for which he was convicted, 2) from similar offences when there is "sufficient evidence" to assume that they were also committed by the defendant, or 3) from other offences, if it is shown[22] that either the offence for which the defendant has been sentenced[23] or other serious offences have in one way or another resulted in the convicted offender obtaining unlawful gains.

25. Most importantly, in order to assess the profits made by the defendant from "other offences" than those for which the person was convicted, the courts may use abstract methods of calculation which include elements of reversal of the burden of proof. The court first determines whether the increase in the defendant's assets over a period of six years can be explained on the basis of legal sources of income. If the defendant cannot provide satisfactory evidence to prove legal origin, the court may assume that the unexplained increase of assets was derived from illegal activities.[24] In order to establish whether illegal assets have been obtained, a "special criminal financial investigation" may be conducted. In such an investigation, special investigative powers (surveillance, searches, etc.) may be deployed. Importantly, again, with the above-mentioned provisions on "special confiscation", Dutch law allows for "value confiscation", meaning that the defendant can be ordered to pay a sum of money equivalent to the (calculated) value of the proceeds of crime. Confiscation can also be enforced against third parties, if they knew or should have reasonably suspected that the assets they obtained represent the proceeds of crime.

26. To facilitate the implementation of the confiscation law, the Netherlands have set up, within the regional prosecutors offices, specialist units (initially called the "Prosecution Service Criminal Asset Deprivation Bureau"' (Dutch acronym: BOOM)). These units make their special expertise available to local prosecutors for tracking criminal assets and they are entrusted with administering and disposing of seized assets.

27. A new trend, since a legislative reform adopted in 2012, is to assess suspected proceeds of crime for purposes of income tax. This allows for the use of the considerable expertise and investigative resources of the tax authorities and confiscation of a large portion of such proceeds, taking into account top tax rates and applicable penalties for failure to declare.

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18. "Comparative Evaluation", p. 52.
19. Ibid., p. 53.
20. Article 33 in conjunction with Article 33a of the Criminal Code (object-based: "verbeurdverklaring").
21. Article 36e Criminal Code (value-based confiscation: "ontneming van wederrechtelijk verkregen voordeel").
22. On the basis of the "balance of probabilities".
23. Which should be an offence for which a "fifth category fine" (over €78 000) could be imposed.
24. "Comparative Evaluation", pp. 54/55.

28. In the same way as prosecution of crimes themselves, seizure of assets is discretionary in the Netherlands. It is even subject to transactions and settlements between the prosecution and the defendant. This is true also outside of criminal proceedings, which the settlement can then serve to avoid (such cases could be seen as non-conviction-based forfeiture). Seizure of assets is reportedly extensively applied in the Netherlands, in particular in organised crime cases.

2.4. United Kingdom

29. The United Kingdom's Proceeds of Crime Act of 2002 (POCA) foresees four different procedures for the confiscation of proceeds or instruments of crime, namely: 1) conviction-based confiscation; 2) civil asset recovery; 3) taxation of gains suspected of being derived from crime and; 4) confiscation by police of cash suspected of being the proceeds of crime.

30. Conviction-based confiscation under Chapter 2 of POCA can be initiated by the public prosecutor or *ex officio* by the court after the defendant has been convicted of a crime, according to the normal rules on burden of proof ("beyond reasonable doubt", to be established by the prosecution). After conviction, the court must first establish whether the defendant has benefited from the crime; if so, the court must determine whether he or she has a "criminal lifestyle", for which one of the following three conditions must be fulfilled: first, the offence must have been committed over a period of at least six months and the benefit derived must exceed £5 000; second, the defendant's conduct from which he/she benefited must form part of a course of criminal activity (e.g. conviction for three or more offences); and third, the defendant is convicted for offences unlikely to be committed only once (e.g. human trafficking, money laundering, drug and arms trafficking). In order to facilitate confiscation, POCA foresees the following "statutory assumptions": that any property transferred to the defendant over the past six years is assumed to derive from crime; and that any property transferred to or obtained by the defendant is considered to be free of any interest (of innocent third parties) – unless the court considers this will give rise to a serious injustice, or unless the defendant can prove that the assumptions are incorrect. If the court finds that the criminal lifestyle standard is not met, it can still calculate the profit gained from the particular offence, for which the defendant was convicted, in which case the prosecutor must prove beyond reasonable doubt the causal link between that offence and the benefit derived from it.

31. Whether or not the "statutory assumptions" following a finding of a "criminal lifestyle" constitute a reversal of the burden of proof is disputed. GRECO concluded in its 2004 evaluation report on the United Kingdom that this is the case, whereas representatives of the competent authorities of the United Kingdom themselves consider this as a mere application of the civil standard of proof (balance of probabilities).[25]

32. Non-conviction-based forfeiture (civil recovery) under Part V of POCA empowers the Serious Organised Crime Agency (SOCA) to apply to the High Court for the confiscation of property obtained through unlawful conduct for offences committed in the United Kingdom, in the following cases: where there is not sufficient evidence to pursue criminal charges or no criminal charges are made due to public interest; conviction-based confiscation proceedings have failed, or the defendant is beyond reach (dead, or abroad with no reasonable prospect of extradition); the recoverable property must be worth at least £10 000 and must have been obtained within the last 12 years, and recovery of the property must have a "significant local impact on communities"; and critically, there must be evidence for criminal conduct of the defendant by the civil law standard (balance of probabilities). The SOCA has considerable investigative powers (including search and seizure, account monitoring and, in particular, "disclosure" orders to ask any person to produce documents, provide information or answer questions related to an investigation). In sum, the burden of proof is on the SOCA to prove (but only on the "balance of probability" standard) that the property in question is recoverable and was obtained through unlawful conduct. It is not necessary to prove that the particular property was derived from a specific crime, or type of crime. The respondent has the burden to prove a lawful source of the property or otherwise rebut the allegation that the property is recoverable.

33. Cash forfeiture under POCA is intended to deprive criminals of the proceeds of crime in the most direct way; evaluation reports show that success rates vary depending on the level of training received by police forces in different regions.

34. Taxation of the proceeds of crime under POCA was introduced as an alternative to civil recovery. If there are reasonable grounds to believe that income or accrued profits are a result of a person's criminal conduct, SOCA can assess them for taxation purposes. No evidence is needed that the profit was derived from a specific crime, or that the source of income can be identified. Inland Revenue, the national tax authority, has lent staff to SOCA to enhance sharing of information and experience.

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25. "Comparative Evaluation", p. 43.

35. Altogether, the effectiveness of the measures under the POCA has been disappointing. The procedures take too much time and run into many legal challenges. For example, for 2004-2005, out of £15 million seized, only £5.6 million was finally confiscated. Nevertheless, the courts rejected legal challenges related to lack of proportionality, violation of the presumption of innocence and of the double jeopardy rule. They confirmed that civil recovery is by nature not a criminal, but a civil procedure and is merely intended to recover property obtained through unlawful conduct and not to penalise any person. It therefore does not trigger legal protections applicable to criminal proceedings. Safeguards intended to ensure that POCA respects the standards of the European Convention on Human Rights (ETS No. 5) include the provision of legal aid to ensure that all respondents have legal representation and to provide for compensation in cases of judgments wrongfully authorising confiscation.

3. International efforts to facilitate confiscation of criminal assets

36. National efforts to crack down on criminal wealth, some of which we have seen above, tend to produce declining results as the criminal networks become more sophisticated and better at hiding their assets, especially abroad. National measures must therefore be supplemented by international efforts. Such efforts have been made at international level (United Nations, World Bank,[26] FATF) and at European level (Council of Europe and European Union). To date, these efforts have produced some good results, but there is still a lot of scope for improvement. In particular, as our expert Mr Perez Enciso explained during the exchange of views on 13 November 2017, the legal framework is still deficient, not least because many countries have still not signed up to the relevant conventions, and numerous practical problems persist related to the differences between national confiscation regimes, overly burdensome bureaucratic and reciprocity requirements, difficulties in accessing information or using special investigative tools across national borders, and often still a lack of trust between the competent authorities even among European Union and Council of Europe member States.

3.1. Relevant United Nations and Council of Europe conventions

37. The 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances[27] is the first international legal instrument combating crime that gives a key role to the confiscation of the proceeds of criminal activity. In its Preamble, the Convention recognises the danger that the large profits and wealth generated by illicit traffic "penetrate, contaminate and corrupt the structures of government, legitimate commercial and financial business and society at all its levels" and, for the first time, explicitly calls on States to consider reversing the burden of proof as to the illicit origin of suspect assets (Article 5.7).

38. The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, as updated by the 2005 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) calls on all States Parties to adopt measures to enable them to confiscate the instruments and proceeds of crime. In its Article 3.4, the 2005 Convention indicates that States Parties "shall" adopt measures to "require that … an offender demonstrates the origin of alleged proceeds or property liable to confiscation". This constitutes another positive ("shall") reference to the reversal of the burden of proof as a means to facilitate confiscation of suspect assets.

39. The 2000 United Nations Convention against Transnational Organized Crime[28] and the 2003 United Nations Convention against Corruption invite States to take further measures to enable the confiscation of instrumentalities and proceeds of crime from offences covered by these conventions. Article 12.7 of the 2000 UN Convention and Article 31.8 of the 2003 UN Convention refer to the possibility of reversal of burden of proof, in the same terms as the above-mentioned 1988 UN Convention.

3.2. EU efforts aimed at facilitating forfeiture

40. In terms of EU legislation, the most important text is the 2014 EU Directive on the freezing and confiscation of instrumentalities and proceeds of crime. The directive promotes conviction-based confiscation as a general rule, with a limited number of exceptions for non-conviction-based confiscation. It introduces

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26. The World Bank, in the framework of its "Stolen Assets Recovery (StAR) Initiative" has developed valuable tools, including a series of detailed publications to guide policy makers and practitioners.
27. https://www.unodc.org/pdf/convention_1988_en.pdf.
28. https://www.unodc.org/unodc/en/treaties/CTOC/index.html.

minimum standards for all relevant issues that were to be implemented by EU member States by October 2016. The European Parliament and the Council have recognised a number of shortcomings and called on the European Commission to make new proposals on mutual recognition of freezing and confiscation orders and to analyse the feasibility of further harmonisation of member States' rules on confiscation, including non-conviction-based confiscation. Before the 2014 Directive, the Council adopted a number of Framework Decisions (2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, 2005/212/JHA on confiscation of crime-related proceeds, instrumentalities and property, 2006/783/JHA on the application of mutual recognition to confiscation orders, and 2007/845/JHA concerning co-operation between Asset Recovery Offices in the field of tracing and identification of proceeds from, or other property related to, crime).

41. In terms of practical assistance for co-operation among law-enforcement authorities, Eurojust plays an important role. Its Financial and Economic Crime (FEC) team is providing advice to national authorities relating to the implementation for example of the 2014 EU Directive and the Council's above-mentioned Framework Decisions and organises seminars for practitioners and other stakeholders to share information and best practices (e.g. the Eurojust seminar in Palermo in May 2012 on "Confiscation and Organised Crime: procedures and perspectives in international judicial cooperation" and the Eurojust strategic seminar and meeting of the Consultative Forum in December 2014 on "Towards greater cooperation in freezing and confiscation of the proceeds of crime: a practitioner's approach"). The FEC team also works closely with the Camden Assets Recovery Inter-agency Network (CARIN) and the Informal Platform of EU Asset Recovery Offices (AROs), which meet regularly in order to exchange information and co-operate on identification and tracking of criminal assets.

4. Compatibility of non-conviction-based/civil forfeiture-type confiscation regimes with the European Convention on Human Rights

42. Opponents of non-conviction-based/civil forfeiture-type confiscation regimes put into doubt their compatibility in particular with Article 6 of the European Convention on Human Rights (presumption of innocence, strict criminal law "beyond reasonable doubt" evidence requirements) and Article 1 of Protocol No. 1 to the Convention (ETS No. 9) (peaceful enjoyment of possessions).

43. The Court's case law on this matter is quite accommodating, to the point that a number of applications by persons whose assets were seized under such laws were rejected as inadmissible for being manifestly ill-founded.[29] Ever since a case from the 1970s (*Engel v. the Netherlands*[30]), the Court uses a number of "tests" to determine whether or not restrictive measures taken by the State have a criminal law character. Under these tests, civil or non-conviction-based forfeiture of criminal assets does not have such a character and therefore need not be subjected to strict criminal law evidentiary rules.[31]

44. Regarding the right to peaceful enjoyment of possessions (Article 1 of Protocol No. 1), the Court has granted member States a wide margin of appreciation in determining the necessary proportionality between the interference with the right to property and the general interest pursued by the interference. In *Arcuri v. Italy,*[32] the Court "points out that the impugned measure forms part of a crime-prevention policy; it considers that in implementing such a policy the legislature must have a wide margin of appreciation both with regard to the existence of a problem affecting the public interest which requires measures of control and the appropriate way to apply such measures. The Court further observes that in Italy the problem of organised crime has reached a very disturbing level. The enormous profits made by these organisations from their unlawful

29. See for example *Butler v. the United Kingdom*, Application No. 41661/98, decision as to admissibility, 27 June 2002; *Walsh v. United Kingdom*, Application No. 43384/05, Decision as to admissibility, 21 November 2006; *van Offeren v. The Netherlands*, Application No. 19581/04, Decision as to admissibility, 5 July 2005; *M. v. Italy*, Application No. 12386/86, Commission decision, 15 April 1991.

30. *Engel and others v. The Netherlands*, Applications Nos. 5100/71, 5701/71, 5102/71, 5354/72 and 5370/72, judgment of 8 June 1976 (the case is about disciplinary sanctions imposed on military men).

31. See *Phillips v. the United Kingdom*, Application No. 41087/98, judgment of 12 December 2001 and the decisions in footnote 28 above; by contrast, the Court found a violation of the presumption of innocence in *Geerings v. The Netherlands,* Application No. 3081/03, judgment of 1 March 2007. In this case, the applicant had actually been acquitted of the same crimes which the authorities presumed to be the source of the assets seized from him; a violation was also found in *Dinic v. Croatia,* Application No. 38359/13, judgment of 17 August 2016. In this case, the real property seized by the State was not even alleged to be derived from criminal activity, its seizure was merely meant to secure a possible future confiscation order for an amount for which the seizure of the property was considered as disproportionate by the Court.

32. Application No. 52024/99, Decision on admissibility of 5 July 2001.

activities give them a level of power which places in jeopardy the rule of law within the State. The means adopted to combat this economic power, particularly the confiscation measure complained of, may appear essential for the successful prosecution of the battle against the organisations in question (see the Raimondo judgment cited above, p. 17, paragraph 30, and the Commission decision in the *M. v. Italy* case cited above, p. 101). The Court cannot therefore underestimate the specific circumstances which prompted the action taken by the Italian legislature".

45. A Council of Europe expert, in a research paper she prepared for a joint European Union/Council of Europe project on criminal assets recovery in Serbia, concluded that "[t]he overarching consensus of both the national courts and the [European Court of Human Rights] is that civil forfeiture is compatible with human rights law".[33] Having looked at the cases myself, I would agree with this analysis. As long as forfeiture requires that the competent authority makes a reasonable case that the assets in question are the products or instruments of criminal activity and grants the target person the opportunity, in fair proceedings before an independent and impartial tribunal, to rebut the resulting factual presumption that the assets were indeed derived from criminal activities, forfeiture violates neither the presumption of innocence (Article 6 of the Convention) nor the protection of property rights (Article 1 of Protocol No. 1).

5. Conclusions and recommendations

46. We have seen that individual States and the international community, especially under the auspices of the European Union and the World Bank, have made and are still making[34] considerable efforts to facilitate the confiscation of criminal assets. But the scarce statistics available show that the results still leave a lot of room for improvement. Even within the European Union, which has made impressive progress in setting up comparable and compatible legal and institutional frameworks, practical obstacles for cross-border confiscations are still formidable – so formidable that authorities sometimes do not even try. According to the most recent estimates, 98.9% of estimated criminal profits are not confiscated and remain at the disposal of criminals.[35] This tends to produce a politically unacceptable result, namely that the law-enforcement bodies set up to trace and confiscate criminal assets mainly go after the "small fry" of local criminals, whilst sophisticated, internationally operating "big fish" get off the hook. Local criminal groups should certainly not be neglected, as their activities cause a lot of damage to communities and their highly visible luxurious "criminal lifestyle" – oftentimes enjoyed whilst collecting welfare benefits – is a provocation in the eyes of honest local citizens and taxpayers. But the fundamental threat to the rule of law and democracy posed by the massive financial resources accruing in the hands of transnational organised criminal groups urgently requires that the overwhelming majority of States that are not (yet) under the influence of these networks fully co-operate among themselves in order to seize a sizeable chunk of these criminal assets, year after year, so that the financial power of the criminals can be contained and even rolled back.

5.1. Possible improvements at national level: good practices to follow and lessons learnt

47. The countries, such as Ireland, Italy, the Netherlands and the United Kingdom, which have adopted legislation to facilitate confiscation of criminal assets by lowering or even, under certain conditions, reversing the burden of proof (or by establishing rebuttable factual presumptions) have had far more success in freezing and confiscating criminal assets than those which have maintained the need for the State to prove a link between the target's wealth and his or her criminal activities, or, as is still the case in some States, even between a particular crime and a particular asset targeted for confiscation.

48. The law should also allow for the recovery of assets on the basis of an "equivalent value confiscation" provision. This allows for the confiscation of the assessed value of the products of crime when illicit assets have been transformed or converted, or intermingled with property acquired from legitimate sources, when they were lawfully acquired by third parties, or when assets have simply disappeared. A related strategy, which has been applied with some success in the Netherlands, is to tax the profits from crime. As criminals seldom declare their profits, the taxes themselves, plus back interests and penalties can make quite a dent in their illicit gains.

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33. Arvinder Sanbei, "European Court on Human Rights jurisprudence and civil recovery of illicitly obtained assets (confiscation in rem)", ECU/CAR-02/2012 (p. 3).
34. See, most recently, the Opinion of the Committee on Legal Affairs for the Committee on Civil Liberties, Justice and Home Affairs on the proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders (COM(2016)0819 – C8-0002/2017 – 2016/0412(COD)) dated 26 November 2017.
35. Ibid., p. 3.

49. As we have seen, legislation helping to overcome these obstacles has passed the test of the highest national courts and, not least, that of the European Court of Human Rights. In order for confiscation to be compatible with human rights, the factual presumption of criminal origin must be based on solid evidence presented by the competent authorities at least up to a civil "balance of probabilities" standard, and the presumption must be rebuttable. Proceedings leading to confiscation must be fair and subject to scrutiny by an independent and impartial tribunal. If the tribunal finds that an asset freeze or confiscation was unlawful, it must also be able to grant compensation to the victim of such an error. Finally, in order to make the judicial remedy truly effective, legal aid should be available to putative victims of unlawful freezes or confiscations who cannot afford proper legal representation – a situation that may well be caused by the very asset freezes in dispute.

50. Other good practices I was able to observe included the establishment, in Ireland, of a multidisciplinary group – the Criminal Assets Bureau (CAB) – bringing together experts from the police, the customs and tax authorities and the social welfare offices. In this way, the CAB has rapid access to information available to different branches of government, whose representatives work together in a highly professional multidisciplinary team. The CAB enjoys excellent support among the Irish people also because it has succeeded in focusing on criminal groups generally loathed for the damage they have done to local communities and in avoiding unjust seizures.

51. Asset recovery offices must continually adapt their working methods to evolving avoidance strategies by criminal groups. In particular, they may need to move on from the confiscation of material goods (movables, such as cash, luxury cars, yachts, aircraft, or immovables such as villas, apartments, plots of land) to that of immaterial goods (in particular bank accounts of all types, investment portfolios, trusts, shell companies, shares in businesses, etc.). This requires more progress in the identification of the true owners (final beneficiaries) of the myriad of legal constructions carefully designed to obfuscate the true ownership situation. The ongoing work in this respect in the European Union[36] is therefore of particular importance and should be extended to more non-EU member States. Asset recovery offices should have at their disposal effective special investigative tools, such as access to financial information held by other public bodies, undercover operations, and real-time monitoring of bank accounts.

52. The specialised body set up in each jurisdiction should have the capacity to administer frozen assets in such a way as to preserve their value until they are definitively confiscated, and to dispose of confiscated assets so as to maximise the benefit for society as a whole. The practical difficulties in this respect should not be underestimated, but they are not insurmountable. For example, when threats by criminal groups deter private individuals from buying assets confiscated from them. Italy has shown the way – for example, large villas confiscated from mafia bosses have successfully been turned into orphanages or public conference centres. But continuous vigilance is necessary. A report published in November 2015 by the Washington D.C.- based libertarian Institute for Justice entitled "Policing for Profit"[37] describes a number of egregious cases of alleged abuses of civil forfeiture, mostly at State and local levels, especially where confiscated assets directly benefit the local police force. This report rightly recalls that perverse incentives – basically, conflict of interest situations – must be avoided and that effective legal remedies must be available to victims of purported abuses. But I do not agree with the authors' radical libertarian conclusion that civil forfeiture should be abolished altogether.

53. Last but not least, asset recovery offices should regularly inform the general public both of operations successfully carried out and of problems encountered. Detailed statistics should be kept and regularly published by asset recovery offices, notably on target persons and their affiliations, on the types of predicate offences and the categories and quantities of assets frozen or confiscated. This would help the competent authorities target operations more effectively and adjust priorities and tactics in good time.[38]

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36. See the interview by the European Commissioner for Justice, Vera Jourová, Brussels, 28 November 2017 (Agence Europe), on the proposed directive to reinforce the fight against money laundering. "We need public transparency for companies and trusts", the Commissioner told Agence Europe. This is particularly true of trusts that have economic activities, as they can be a "channel for money laundering", she said, stressing that "we cannot leave this channel open". At the Council, the United Kingdom, Ireland, Luxembourg, Cyprus and Malta oppose this. "The text has been taken hostage due to this blockage. We need to find a compromise. I am more in favour of finding a solution that is acceptable to all, but the negotiations cannot go on forever. Either we find a compromise, or we will have to outvote the countries that are blocking it and which are in a minority", Jourová stressed.

37. Dick M. Carpenter II, Lisa Knepper, Angela C. Erickson, Jennifer McDonald, "Policing for Profit, The Abuse of Civil Asset Forfeiture", 2nd edition, Institute for Justice, November 2015.

38. The lack of reliable data has been noted with regret by an important research project funded by the European Commission (Project OCP – From illegal markets to legitimate businesses: the portfolio of organised crime in Europe, footnote 5 above).

5.2. Possible improvements at international level – making cross-border co-operation more effective

54. Criminal organisations have responded to robust rules permitting confiscation of their assets in some countries by moving their assets abroad. It is therefore vital that law-enforcement authorities also co-operate across borders. Much has been done, again, primarily at EU level, in order to promote international co-operation in this field. For obvious reasons, such co-operation must urgently be extended to non-EU member States.

55. An excellent avenue is the promotion of international networks of competent officials, such as the CARIN (Camden Asset Recovery Inter-Agency Network) and the ARO (Asset Recovery Offices) platform or other relevant fora. CARIN is an informal network of contacts and a co-operative group dealing with all aspects of confiscating the proceeds of crime. Its network includes practitioners from 53 jurisdictions and nine international organisations.[39] It has established itself as a centre of expertise in this field, promoting the exchange of information and good practices, and makes recommendations to international bodies such as the European Commission and the Financial Action Task Force (FATF); it also advises other appropriate authorities and facilitates training in all aspects of confiscating the proceeds of crime, recommending that all States set up asset recovery offices. Within the European Union, the ARO platform[40] encourages co-operation between relevant bodies within the European Union and a number of relevant third States (including the United States, Israel, Serbia, the Russian Federation and Turkey). Similar platforms and structures exist in other parts of the world, as strongly encouraged by the World Bank-led "Stolen Assets Recovery (StAR) Initiative".[41] It is obvious that when competent officials get to know each other better, they can develop mutual trust, which is a key ingredient of successful co-operation. They can also assist each other in overcoming bureaucratic obstacles, react rapidly and waive formal reciprocity requirements as appropriate. I tend to agree with our expert, Mr Perez Enciso, that spontaneous exchange of information is crucial, beyond the usual "self-serving" information sharing when a State's authorities need feedback from a foreign authority in order to further their own investigation. As our expert explained, a "great dose of generosity" is needed to stop criminal organisations taking advantage of the weak flow of information between competent judicial authorities across national borders.

56. International co-operation should also not be dependent on whether or not the requested State has the same confiscation regime as the requesting one (i.e. criminal or civil forfeiture, conviction-based or not), as long as the minimum requirements regarding fairness of proceedings and judicial review are fulfilled. This can be presumed for member States of the Council of Europe, provided they properly implement the European Convention on Human Rights.

57. Competent authorities should set up and use more frequently joint investigation teams such as those being currently set up with the assistance of Eurojust and Europol. Such teams should also involve non-member States of the European Union more often.[42] Joint investigation teams should include asset recovery among their objectives and involve financial investigators as part of the team. A legal framework for this already exists, namely the (2001) Second Additional Protocol to the Council of Europe's (1959) European Convention on Mutual Assistance in Criminal Matters (ETS Nos. 182 and 30).[43]

58. Special investigative techniques such as access to financial information,[44] undercover operations (including the possibility for undercover agents to open and use bank accounts), and real-time monitoring of bank accounts should be available also in cross-border investigations.

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39. See list at http://carin-network.org/members.
40. See Commission report on "Asset Recovery Offices": an important tool to go after criminals' money, 12 April 2011.
41. See footnote 26 above.
42. See EU Council Framework Decision of 13 June 2002 on joint investigation teams and the EU Convention on Mutual Assistance in Criminal Matters of 29 May 2000 (available at: https://www.ejn-crimjust.europa.eu/ejn/libcategories.aspx?Id=32); according to Eurojust's 2016 Annual Report, Eurojust supported 148 joint investigation teams in 2016 (an increase of 23% over 2015), but only 14 joint investigation teams involved third States.
43. In particular Articles 20 and 6 (Protocol available at https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008155e).
44. In this context, Mr Perez Enciso recommended a tool recently implemented by Spain, the so-called "financial products file", which allows judicial authorities and law-enforcement agencies to have access to updated information on all financial products held by a suspect.

59. Last but not least, clear rules should be defined for the sharing of successfully confiscated assets among the countries involved. Amounts above a certain threshold (for example €10 000), which may be kept by the executing State, should be shared fairly between the requesting and the executing State. In my view, unless a special agreement is reached in advance depending on who has to carry the bulk of the investigative burden, a 50/50 distribution would seem to be reasonable.[45]

60. These possible improvements, at both national and international levels, are reflected in the operative part of the draft resolution. It will then be up to us as members of our own national parliaments to pick up the ball and promote these improvements in our own countries. Let us be clear that human rights are not an obstacle for progress in this field, quite the contrary: checking the power of organised crime by tackling its financial foundations is a positive step, needed to protect human rights, the rule of law and democracy as we know them.

45. For the EU Regulation currently under discussion (see footnote 34 above**),** the Commission proposes a 50/50 split between the requesting and the executing State, whereas the European Parliament's Committee on Legal Affairs considers that 70% of the amount shall be transferred by the executing State to the requesting State (which issued the confiscation order).