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to: Working Party on Substantive Criminal Law  
No. Cion prop.: 7641/12 DROIPEN 29 COPEN 57 CODEC 656  
Subject : Proposal for a Directive of the European Parliament and of the Council on the freezing and confiscation of the proceeds of crime in the European Union-  
Compilation of replies to questionnaire

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By note of 22 June 2012 <sup>1</sup>, the Presidency issued a questionnaire in order to obtain more extensive information on the current legal definitions and practical application of non-conviction based confiscation in the Member States.

The replies received to the questionnaire are set out in the Annex to this note.

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<sup>1</sup> 11771/12 DROIPEN 87 COPEN 151 CODEC 1752.

COMPILATION OF REPLIES TO QUESTIONNAIRE 11771/12

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## BELGIUM

### Questions 1-4:

The confiscation of proceeds of crime and instrumentalities is, under Belgian law, a **penalty** ordered by a judge or court as a result of a conviction of the accused for a crime. The Belgian law provides moreover for certain specific provisions to supplement the above-mentioned principle. Confiscation may be utilized in particular situations as a security measure, in order to safeguard the public safety by preventing the circulation of dangerous or illicit goods (such as weapons). The Belgian legislations entails furthermore specific provisions for confiscation in case the offender is a minor or a mentally ill person. The ‘system of non-conviction based confiscation’ as such is however alien to the Belgian legal system.

### Question 5:

The Belgian delegation maintains a **principled opposition** to the obligatory introduction of a system for non-conviction based confiscation (hereafter NCBC). In conformity with article 54(1)(c) of the UN Convention against Corruption, we subscribe to the idea that each Member States should, in accordance with its domestic law, consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases, without rendering the system compensatory.

The existing Belgian legal regime is considered sufficiently balanced to overcome situations in which the person concerned would be death, (permanent) ill or fugitive. The illness or escape of the suspected or accused person would not hamper the prosecution, nor the conviction *in absentia* – which entails a specific right of recourse – and subsequently confiscation. The added value of a NCBC-system in these cases has therefore not been demonstrated. The decease of the person concerned leads to the cancellation of the prosecution, as a result of which conviction and subsequently confiscation will no longer be possible. The beneficiaries can not be held liable, unless if they were aware of the illicit origin of the goods, whereby they can be prosecuted for laundering.

The implementation of a NCBC-system into Belgian law would imply a significant review of the national substantive criminal code (*FR: Code Pénal - NL: Strafwetboek*) and the national procedural criminal code (*FR: Code d'Instruction Criminelle - NL: Wetboek van Strafvordering*), as well as the existing Special Laws, which all apply the 'penalty-principle'.

**Question 6:**

Confiscation is, under Belgian Law, inseparable from the verdict of guilty of a person. It is currently not possible to recognise and execute non-conviction based confiscation orders issued by another Member State, regardless of the nature of the proceedings. Taken into account the different national approaches concerning this topic, the Belgian delegation supports the idea to further develop this line of thought, in order to effectively tackle organised criminal activities within the European Union.

## **BULGARIA**

### **1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

Yes. On the 3 May 2012 the Bulgarian parliament adopted the *Law on forfeiture in favor of the State of illegally acquired property* (prom. State Gazette Nr. 38 from 18.05.2012 r., in force since 19.11.2012 !)

The new law contains rules regarding non-conviction based confiscation (NCB). The main changes introduced through this new Law are:

- shortening of the statute of limitation period from 25 years to 15 years;
- threshold of the asset value that falls within the notion of "significant value" which exceeds 250 000 Leva (BG currency) and which shall be treated as a prerequisite for confiscation of the respective estate, if the legal sources for its acquirement have not been proven;
- introducing the civil procedure approach when threshold exceeds 250 000, then a civil court decision would suffice (thus no need for the penal proceeding anymore);
- administrative offences will also be precondition to start a forfeiture procedure;
- introducing a new institution, that is the Inter-institutional Council for Managing of the Sequestered Assets (ICMSA).

The Bulgarian Criminal/Illegal Assets Forfeiture Commission is entitled to act upon signals of citizens. The other major change introduced by this new law concerns the nature of the asset which could be subject to forfeiture civil procedures. The Commission should be entitled to persecute assets acquired from illegal, and not only from criminal activities. This increases significantly the application field of the law including in it some offences of administrative and not only criminal nature, e.g. conflict of interests or discrepancy between tax declaration and real income. However, it should be noted, that this new law applies only to property and not to instrumentalities of a given crime.

### **2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

The action to confiscate is directed towards the assets (in rem proceedings).

With regard to the link to the criminal proceedings:

Since 19.11.2012 the Commission under the recently adopted law will be entitled to launch the forfeiture proceedings immediately after a person has been indicted for crime from which it may be presumed that he has benefited (the list of the crimes is contained in art. 22, para. 1). Thus, it will be no longer necessary for the Commission to wait the end of the three - instance procedure engaged before the criminal courts. Moreover, forfeiture proceedings could be launched if the person has not been indicted for a crime, because there has been refusal for launching criminal proceedings or the criminal proceedings have been discontinued due to: amnesty, statute of limitation, continued consciousness disorder, death or transfer of the criminal proceedings in another state (art. 22, para. 2). Furthermore, proceedings should be launched also where the criminal proceedings have been broken off (interrupted) and the person can not be indicted, because of one of the following reasons: 1/ after committing the crime the person has fallen into a consciousness disorder of short duration or has other heavy illness; 2/ immunity; 3/ the address of the person is not known and it can not be found (art. 22, para. 3).

**3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

The confiscation (forfeiture) procedures should always take place before a civil court.

**4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

The recently adopted Bulgarian legislation on NCB confiscation prescribes for specific requirements, which should be met in order the forfeiture proceedings to be launched. Some of them have already been listed in the answer under question 2 (illness, amnesty, death, unknown address, immunity, transfer of proceedings etc.).

Other important prerequisites for those proceedings are, that:

1) the assets should be of "significant value", which means that they must exceed 250 000 BGN (approx. 125 000 Euro) in case of a committed crime and 150 000 BGN (approx. 75 000 Euro) in case of an administrative offence (See the Additional provisions, point 7 and art. 24, para. 1);

2) the examination period is 15 years, counted backwards since the date of the launch of the examination (art. 27, para. 3).

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction can you indicate the potential legal obstacles to their introduction in your country?**

The Bulgarian domestic legal order allows it for the proceeds of crime to be confiscated without a criminal conviction.

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- **whose system requires a link to criminal proceedings**
- **whose system applies civil forfeiture procedures.**

Non conviction based confiscation orders issued by another Member State could be recognised in Bulgaria only if they have been issued by a criminal court. Otherwise, there are no means under the current Bulgarian law such decisions of foreign authorities to be recognised and executed in Bulgaria. This regime results to a significant degree from the provisions of Framework decision 2006/783/JHA, that has been transposed in the *Law on recognition, execution and transmission the criminal confiscation or civil forfeiture decisions and decisions for imposing the financial penalties*. According to recital 8 and article 1 of the cited FD its purpose is the mutual recognition amongst the Member States of confiscation orders issued by a court competent in criminal matters. Furthermore the FD in its article 7, para.5 gives the MS the possibility to derogate through declaration the recognition of confiscation orders issued under the extended powers of confiscation and in its article 8, para. 2, letter “g” provides for a refusal ground in the same case. All these provisions hamper the mutual recognition amongst the MS of the European union and there is a need of creation of a new more efficient legal instrument on mutual recognition or redrafting of the existing EU legal framework in this field.

## EXPLANATORY NOTES TO THE ACT ON FORFEITURE TO THE EXCHEQUER OF UNLAWFULLY ACQUIRED ASSETS

The Act addresses a number of shortcomings with respect to the effective confiscation of illicit profits and makes an important step forward in establishing in Bulgaria regulations, which are not provided for at EU level:

1. *It introduces the extended confiscation*, in which a criminal conviction is followed by the confiscation not only of assets associated with the specific crime, but of additional assets which the court determines are the proceeds of other, unspecified crimes;
2. *It provides the necessary legal ground for non-conviction-based confiscation*, in which civil procedure applies to recover illicit assets;
3. *It puts in place appropriate mechanisms* to ensure that assets in danger of being hidden or transferred out of the jurisdiction are able to be immediately frozen/seized while the request for judicial freezing/seizure is pending; and
4. *It provides procedures for third party confiscation*

The Act introduces a new institute in the Bulgarian legal system: the **institute of civil forfeiture of unlawfully acquired assets**. The Act contains the following general provisions and basic institutes:

- The proceeding under the Act is conducted notwithstanding the criminal or administrative penalty proceeding against the person under examination and/or the persons closely linked with that person. The proceeding targets specified assets and has as an objective to identify the means and the sources for the acquisition of these assets. An enforceable sentence of conviction is not a condition precedent for the forfeiture of assets.
- Legitimate occasion: criminal prosecution undertaken against a particular person (Article 22 (1)), or where it is not possible to conduct the criminal prosecution (Article 22 (2) and (3)), as well as an administrative violation ascertained (Article 24)). **The requirement to have these formal prerequisites is intended to restrict the number of persons who could come within the scope of the law.**
- Apportionment of the burden of proof: the State, acting through the Forfeiture Commission, establishes a significant lack of correspondence (BGN 250,000) in the assets of the natural person under examination, which raises the presumption that particular assets have been acquired unlawfully. **The presumption is rebuttable.** The persons under examination must prove the legitimate nature of the assets.
- A proceeding for imposition of injunctions on the assets and for forfeiture to the Exchequer, which is conducted before a civil court according to the procedure established by the Code of Civil Procedure.



- The Act seeks justice through imposition of restrictions on ownership, which are applied to the extent necessary. This is an admissible restriction of the right to own property and its inviolability according to Article 1 of Protocol No. 1 to the European Convention on Human Rights: “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”
- A principle of proportionality is introduced (Article 4), according to which the Commission and the court can determine, upon the commencement, conduct and determination of the result of the proceeding, whether the restrictions on ownership would accomplish the objective of the Act. In both cases, the result of this determination is a reasoned decision or judgment which is subject to judicial review. Therefore, the objective of the law is not to confiscate any assets whatsoever from any person whatsoever but to counter organised crime, attacking its economic foundations.

The Act does not provide a definition of ‘unlawfully acquired assets’ but specifies them:

- By delineating its subject matter even in Article 1 as any assets “for the acquisition of which a legitimate source has not been identified”. The legislator adopted the understanding that it is not possible to list exhaustively the legitimate sources for the acquisition of assets, which also makes it impossible to specify the manners of unlawful acquisition. Any legal definitions to this effect would have a restrictive impact on citizens’ economic activity.
- The legitimate sources are evident from the provision of Article 28, which covers the scope of the examination by the Commission authorities. These are: the customary and extraordinary income of natural and legal persons, credits, revenue from transformation of assets (where the assets are lawfully acquired) etc. This listing is not exhaustive because all means of proof under the Code of Civil Procedure are available to the person under examination in order to satisfy the Commission as well as the court that his or her means and, ultimately, the assets are from a legitimate source.

The scope of the assets which can become subject of examination and forfeiture is thus *narrowed to assets generated by criminal activity and administrative violations. This indicates that the Act does not target the assets of ordinary citizens.*

## THE COMMISSION

**The Act provides for the establishment of a specialised body to identify unlawfully acquired assets. This is the Commission for Forfeiture of Unlawfully Acquired Assets, which has local units and authorities. The name of the Commission may mislead one to assume that it is the body which confiscates the assets, but it merely identifies the assets, whereas the forfeiture is effected by judgment of a civil court:**

- **The Commission is a specialised State body** – a collective authority which consists of five members, including a Chairperson and a Deputy Chairperson.

- **Local entities:** Territorial directorates, located in the geographical jurisdictions of the six appellate courts, are local **units** of the Commission, and they are headed by directors and are assisted in their operation by inspectors. Territorial bureaus with areas of operation designated in the Rules referred to in Article 20 may be established with the territorial directorates. The directors of territorial directorate and the inspectors at those directorates are **authorities of the Commission**.

- **Guarantees of independence and professionalism:**

- **Manner in which the Commission is constituted:** quotas of the various executive and legislative authorities: “The Chairperson of the Commission shall be appointed by the Prime Minister. The Deputy Chairperson and two of the members shall be elected by the National Assembly, and one of the members shall be appointed by the President of the Republic” and

- **Publicity of the election of the members** of the National Assembly quota (Article 7): *nominations for members of the Commission who are elected by the National Assembly are put forward by the parliamentary groups.* The National Assembly may not elect to the Commission more than one member nominated by one and the same parliamentary group. The nominations for a Deputy Chairperson and for members from the quota of the National Assembly must be laid before the National Assembly not earlier than three months and not later than two months prior to the expiry of the term of office of the Commission and must be published on the Internet site of the National Assembly. The National Assembly conducts a hearing of the nominated candidates who satisfy the requirements of the Act and elects separately a Deputy Chairperson and two members of the Commission.

- **General oversight** by the National Assembly of the activity of the Commission (Article 14).

- **Single term of office:** five years.

- **Requirements for education, experience, incompatibility of the members of the Commission and its authorities, remuneration of the members of the Commission etc.**

The Act regulates the terms and procedure for forfeiture to the Exchequer of unlawfully acquired assets.

### **THE CONDITIONS FOR FORFEITURE FALL INTO SEVERAL GROUPS:**

**1. Legitimate occasion:** commission of a criminal offence or an administrative violation within the meaning of Article 24:

*1.1 A criminal offence from the catalogue of the offences exhaustively listed under Article 22 (1), which cover murder, serious intentional offences against the person, serious intentional offences against citizens’ and State property, sexual offences, organised crime group, terrorism, kidnapping, blackmail, trafficking in human beings, trafficking in narcotics, aggravated fraud, including fraud affecting EU funds and computer fraud, cross-border smuggling, money laundering, offences against the banking, tax, financial and currency system, serious official malfeasance, manufacture of and trade in weapons;*

*1.2 An enforceable written statement ascertaining an **administrative violation** of a nature to generate a benefit, provided the benefit is to an amount exceeding BGN 150,000 at the time of its acquisition and the benefit cannot be forfeited according to another procedure;*

*1.3 Impossibility to conduct criminal prosecution in the hypotheticals specified in Article 22 (2) and (3).*

2. **Purpose of the examination:** to establish the nature of the assets of the person under examination. If a **significant** lack of correspondence in the assets of the person under examination is established as a result of the examination, **these assets are presumed to have been acquired unlawfully** (Article 21). “Significant lack of correspondence” is an extent of the lack of correspondence between the assets and the net income which exceeds BGN 250,000 for the entire period under examination, and “net income” is income, revenue or sources of financing net of the amount of the customary and extraordinary expenses incurred by the person under examination and his or her family members (Item 7 and Item 5 of § 1 of the Supplementary Provision).
3. **Subject of examination:** the assets of the person under examination, or persons closely linked with him or her, other third parties, including legal persons. The idea is to trace the assets despite the dispositions for the purpose of its concealment:
  - 3.1 assets which were transferred to persons closely linked with the person under examination during the period under examination (Article 65). This includes assets which are subject to inheritance up to the portion received by the heir (Article 71).
  - 3.2 assets which were transferred during the period under examination through onerous transactions to *mala fide* third parties (natural or legal persons) (Article 67 and Article 68).
  - 3.3 assets transformed into other assets.
4. The assets for the acquisition of which a legitimate source has not been identified are forfeited. These are the assets for which a significant lack of correspondence has been established.

### **FORFEITURE PROCEDURE:**

#### **1. Procedure under the Act:**

- 1.1 First (preliminary) stage: an examination carried out without the participation of the person under examination (*ex parte* proceeding) in order to surprise and forestall disposition of the items of property.
- 1.2 Second stage: the forfeiture proceeding proper, which commences by a motion for an injunction and forfeiture submitted to the general civil courts and according to the procedure established by the Code of Civil Procedure.

#### **2. Examination:**

- 2.1 **Competent authority:** the territorial directorate concerned, **mandatorily commences** by an act of the director of the territorial directorate **after being apprised or at the discretion of the directorate itself (acting *sua sponte*)**.
- 2.2 Depending on the legitimate occasion, **the territorial directorate is apprised by means of:**
  - **A notification by the prosecutor to the effect that a person has been constituted as an accused of the commission of a criminal offence from the list under Article 22 (1);**
  - **A notification by the prosecutor to the effect that** institution of a criminal proceeding has been refused or a criminal proceeding in progress has been terminated on any of the grounds covered under Article 22 (2) (ensuing amnesty, lapse of the period of prescription provided for in the law, lapsing of the actor in a sustained mental derangement which precludes sanity, death of the actor, admission of a transfer of a criminal proceeding in respect of the person to another State);

- **A notification by the prosecutor to the effect** that the criminal proceeding in connection with an offence covered under Article 22 (1) has been suspended and the person cannot be constituted as an accused party because: after commission of the offence, the person has lapsed in a short-term mental derangement which precludes sanity or suffers from another grave disease; the person enjoys immunity or his or her address is unknown and he or she cannot be found;
- **A notification by the Ministry of Justice to the Commission** of each case of a criminal proceeding instituted in another State or of an enforceable sentence passed by a foreign court on a Bulgarian citizen for criminal offences equivalent to the offences covered under Article 22 (1);
- **A notification by the Supreme Cassation Prosecution Office and the Ministry of Justice to the Commission** upon transfer of a criminal proceeding;
- **A notification by the administrative sanctioning authority**, where there is an enforceable written statement against a person in connection with an administrative violation.

2.3 **The territorial directorate acts *sua sponte*** (an examination commences at the discretion of the territorial directorate) **after notification by:**

- state and municipal bodies or officials who, in the line of duty, have become aware of the acquisition of a benefit from an administrative violation to a value exceeding BGN 150,000;
- citizens.

3. Upon conduct of the examination, the Commission **interacts** with other State bodies: the prosecuting magistracy, the administrative sanctioning authorities, the Ministry of Interior, the State Agency for National Security, the tax and customs administration, the courts, the banks, in order to identify the source of the assets of the person under examination (so as to prepare a comprehensive profile of the economic activity of the person under examination).

4. **Timeframes within the Commission and its authorities must act:**

4.1 **One year**, extendable by up to six months by a decision of the Commission, for conduct of the examination (Article 27 (1) and (2)).

4.2 **Three months** after imposition of the precautionary measures for bringing an action for forfeiture (Article 74 (1)). Within that time limit: one month after the imposition of the precautionary measure for the person under examination to submit a written declaration (Article 57 (1)); one month for the director of the territorial directorate to submit a report to the Commission after considering the objections of the person under examination (Article 61 (1)); and one month for the Commission to adopt a decision on bringing an action for forfeiture (Article 61 (2)). This time limit is peremptive (Article 74 (4)).

5. **Time span of the examination:** fifteen years, reckoned backwards from the date of its commencement (Article 27 (3)).

6. **Prescription period:** fifteen years as from the moment of acquisition of the assets (Article 73).

## DEFENCE OF PERSON UNDER EXAMINATION:

1. **Legitimate occasion for commencement of the examination before the Commission: commences solely in** the cases expressly listed in the Act (Articles 22, 23 and 24).

2. A motion for the imposition of precautionary measures is submitted to the court only after sufficient data have been collected by the examination raising a reasonable presumption that the assets have been acquired unlawfully – Article 37.

3. The court grants an injunction if the motion is supported by sufficient evidence. If the court is not satisfied with the quality of the evidence collected, the court does not grant an injunction – Article 38.

### 4. **Participation of the person under examination:**

- **Initial point:** after imposition of the precautionary measures (Article 60 (1)). But at an earlier point, too, after adoption of a decision by the Commission on bringing an action for precautionary measures. This decision is appealable according to the procedure established by the Administrative Procedure Code (Article 11 (5)).

- The Commission affords the person under examination an opportunity to familiarise himself or herself with all materials concerning him or her and allows this person a period of one month to lodge objections and to present evidence.

- An opportunity to use defence by counsel as from the same moment (Article 60 (4)).

- Completing the declaration is not obligatory.

- The explanations given by the person under examination and the declarations submitted under Articles 57 and 58 may not justify the initiation of criminal prosecution against that person, nor can they be used as evidence in support of a criminal charge.

After imposition of the precautionary measures by the court: remedies under the Code of Civil Procedure (appealability of the precautionary measures by the person under examination and by the third parties).

**Possibility**, in the cases of *urgent need*, to approach the court with a petition to authorise the effecting of a payment or other steps disposing of the assets whereupon an injunction has been imposed (Article 40).

**After an action for forfeiture of the assets is brought:** a possibility to invoke all evidence admissible under the Code of Civil Procedure to prove a lawful origin of the assets (Article 77). Where proving by means of a written document is required, conclusions adverse to the respondent may not be made if it is proved that the document has been lost or destroyed not through the fault of the party (Article 77 (5)).

**The case is examined according to the procedure established by the Code of Civil Procedure.**

## DEFENCE OF THIRD PARTIES

1. Persons who have commenced a proceeding against the assets subject to the examination enjoy a **preemptive right** to satisfaction (Article 55).
2. **The proceeding is public** (after imposition of the injunctions) **and third parties have an opportunity to participate, including by representing counsel:**
  - they are invited to submit declarations on the assets subject to examination (Article 58);
  - **they are notified** of the precautionary measures and can appeal them (Article 38 (4));
  - **the institution of the asset forfeiture case is made public by a notice in the *State Gazette*, and the third parties are allowed a period of three months** to present their claims to the assets (Article 76 (1)).
3. Any person, who has sustained detriment as a result of legally non-conforming acts, actions or omissions by the authorities or by the officials under this Act, committed in the course of, or in connection with, the execution of the powers or in the line of duty of these authorities and officials, may bring an action for compensation against the State under the terms and according to the procedure established by the Act on the Liability of the State and the Municipalities for Detriment (Article 91). A provision is also made for an amendment to this effect of the Act on the Liability of the State and the Municipalities for Detriment (§ 9 of the Transitional and Final Provisions).

## MANAGEMENT OF FORFEITED ASSETS BY THE STATE

An Interdepartmental Board for Management of Forfeited Assets is established (Article 87) as a collective authority which consists of deputy ministers designated by the Minister of Justice, the Minister of Finance, the Minister of Economy, Energy and Tourism, the Minister of Labour and Social Policy, and the Minister of Regional Development and Public Works. The Board is chaired by a Deputy Minister of Finance.

## FORFEITURE TO THE EXCHEQUER OF UNLAWFULLY ACQUIRED ASSETS ACT

### Chapter One GENERAL PROVISIONS

**Article 1.** (1) This Act regulates the terms and procedure for forfeiture to the Exchequer of unlawfully acquired assets.

(2) Any assets for the acquisition of which a legitimate source has not been identified shall be treated as assets referred to in Paragraph (1).

**Article 2.** The proceeding under this Act shall be conducted notwithstanding the criminal or administrative penalty proceeding against the person under examination and/or the persons closely linked therewith.

**Article 3.** (1) This Act shall have as an objective to protect the interests of society and to restore the sense of justice in citizens by preventing and limiting the possibilities for unlawful acquisition of assets and disposition thereof.

(2) To accomplish the objective referred to in Paragraph (1), restrictions may be imposed on ownership while respecting the right to defence of the persons affected and preventing a risk of injustice.

**Article 4.** The restrictions on ownership provided for in this Act shall be applied to the extent necessary to accomplish the objective of this Act.

## **Chapter Two**

### **AUTHORITIES IDENTIFYING UNLAWFULLY ACQUIRED ASSETS**

**Article 5.** (1) The Commission for Forfeiture of Unlawfully Acquired Assets, hereinafter referred to as “the Commission”, shall be an independent specialised standing State body.

(2) The Commission shall be a legal person with a head office in Sofia and shall be a first-level spending unit.

(3) The operation of the Commission shall be assisted by an administration.

(4) The territorial directorates, located in the geographical jurisdictions of the appellate courts, shall be local units of the Commission which shall be headed by directors and shall be assisted in the operation thereof by inspectors. Territorial bureaus with areas of operation designated in the Rules referred to in Article 20 herein may be established with the territorial directorates.

**Article 6.** (1) The Commission shall be a collective authority which shall consist of five members, including a Chairperson and a Deputy Chairperson.

(2) The Chairperson of the Commission shall be a person who has graduated in Law from a higher educational establishment and who has at least twelve years of relevant experience. The Deputy Chairperson and the members of the Commission shall be persons who have graduated in Law or in Economics from a higher educational establishment and who have at least five years of relevant experience.

(3) The Chairperson of the Commission shall be appointed by the Prime Minister. The Deputy Chairperson and two of the members shall be elected by the National Assembly, and one of the members shall be appointed by the President of the Republic.

(4) The National Assembly may not elect to the Commission more than one member nominated by one and the same parliamentary group.

(5) The term of office of the Commission shall be five years and shall commence as from the day of election or, respectively, appointment of the full complement thereof.

**Article 7.** (1) The nominations for a Deputy Chairperson and for members from the quota of the National Assembly shall be laid before the National Assembly not earlier than three months and not later than two months prior to the expiry of the term of office of the Commission and shall be published on the Internet site of the National Assembly.

(2) The competent committee of the National Assembly shall conduct a hearing of the nominated candidates who satisfy the requirements of this Act and shall lay before the National Assembly a report summarising the results of the said hearing.

(3) The National Assembly shall elect separately a Deputy Chairperson and two members of the Commission.

**Article 8.** (1) Eligibility for membership of the Commission shall be limited to legally capable Bulgarian citizens who:

1. have not been convicted of a premeditated indictable criminal offence, regardless of whether rehabilitated;

2. have not been released from criminal responsibility for a premeditated indictable criminal offence with imposition of an administrative sanction;

3. have not been disqualified from holding a particular public office or from practising a particular occupation or activity;

4. have been cleared for access to information classified as “Top Secret”.

(2) No member of the Commission shall be entitled to hold office for two successive terms.

(3) A member of the Commission may not:

1. hold office in State or municipal bodies;

2. pursue commercial activity or be a partner, a managing director or a member of supervisory, management or control bodies of any commercial corporation, co-operative, State-owned enterprise or not-for-profit legal entity;

3. receive remuneration for pursuit of activities under contract or under a civil-service relationship with any State or public organisation, with any commercial corporation, co-operative or not-for-profit legal entity, natural person or sole trader, except for scientific research and teaching or for exercise of copyright;

4. practise a liberal profession or any other gainful occupation;

5. be a member of any political party or coalition, of any organisation pursuing political goals, engage in political activity or engage in any activities which affect the independence thereof.

(4) If an elected or appointed member of the Commission, as the case may be, is incompatible under Paragraph (3), the said member must take the necessary steps for elimination of the incompatibility within one month after the election or appointment, as the case may be.

**Article 9.** (1) The legal relationship with a member of the Commission shall be terminated prior to the expiry of the term of office of the said member by the relevant authority upon:

1. death;

2. tendering of a resignation;

3. objective inability to execute the duties thereof for a period exceeding six months;

4. conviction of a premeditated indictable criminal offence or release from criminal responsibility for a premeditated indictable criminal offence with imposition of an administrative sanction;

5. incompatibility under Article 8 (3) herein, unless the necessary steps for the elimination of the incompatibility within one month after the election or appointment, as the case may be;

6. serious breach or systematic dereliction of the official duties;

7. entry into effect of an act whereby a conflict of interest is ascertained under the Conflict of Interest Prevention and Ascertainment Act;

8. attainment of the age of 65 years;

9. withdrawal of the clearance for access to information classified as “Top Secret”.



(2) Upon occurrence of any circumstances referred to in Paragraph (1), the electing or appointing authority, as the case may be, shall be notified for the conduct of a new election or appointment, as the case may be.

(3) Upon the release from office of a member of the Commission prior to the expiry of the term of office thereof, the electing or the appointing authority, as the case may be, shall elect or appoint, as the case may be, a new member within one month after any such release to serve the remainder of the term of office of the released member.

**Article 10.** (1) The Chairperson of the Commission shall receive a basic monthly remuneration to an amount equivalent to 85 per cent of the basic monthly remuneration of the Chairperson of the National Assembly.

(2) The Deputy Chairperson shall receive a basic monthly remuneration to an amount equivalent to 80 per cent of the remuneration of the Chairperson of the Commission.

(3) The rest of the members of the Commission shall receive a basic monthly remuneration to an amount equivalent to 75 per cent of the remuneration of the Chairperson of the Commission.

(4) The members of the Commission shall not be entitled to additional cash incentives.

**Article 11.** (1) The Commission shall adopt decisions on:

1. institution of a proceeding under this Act; any such proceeding shall include submission to the court of a motion for imposition of precautionary measures and of an action for forfeiture to the Exchequer of unlawfully acquired assets;

2. termination of the examination under Article 27 herein or on extension of the time limit for the said examination;

3. refusal to institute a proceeding under this Act;

4. termination of the proceeding under this Act;

5. conclusion of a settlement under Article 79 herein;

6. appointment of the directors of territorial directorate and, upon nomination by the said directors, of the inspectors at the said directorates, as well as on a modification and termination of the employment relationships therewith;

7. exercise of other powers provided for in this Act.

(2) The decisions of the Commission shall be adopted by a majority of more than one-half of all members and shall have to be reasoned. The reasons shall state the facts, the evidence on the basis of which the facts have been established, as well as the legal conclusions drawn.

(3) The reasoned refusals of the Commission referred to in Item 3 of Paragraph (1) shall be published forthwith on the Internet site of the Commission in compliance with the requirements of the Personal Data Protection Act and of the Classified Information Protection Act.

(4) Minutes of proceedings shall be taken at the meetings of the Commission.

(5) The decisions shall be appealable according to the procedure established by the Administrative Procedure Code. An appellate review of a decision shall not stay the enforcement thereof.

**Article 12.** (1) The Chairperson of the Commission shall:

1. represent the Commission;

2. organise and direct the operation thereof;

3. schedule and preside over the meetings;

4. control and be responsible for the implementation of the budget;

5. issue penalty decrees on violations committed under this Act;

6. conclude, modify and terminate the employment relationships with the employees of the administration.

(2) The Deputy Chairperson of the Commission shall assist the Chairperson and shall deputise therefore in his or her absence.

**Article 13.** (1) The directors of territorial directorate and the inspectors thereat shall be authorities of the Commission.

(2) Eligibility for appointment as directors at the territorial directorates shall be limited to persons who have graduated in Law or in Economics from a higher educational establishment and have at least five years of relevant experience and who satisfy the requirements for occupation of the position under Article 8 (1) herein, as well as the requirements for incompatibility under Article 8 (3) herein after conduct of a competition.

(3) Eligibility for appointment as inspectors at the territorial directorates shall be limited to persons who have graduated in Law or in Economics from a higher educational establishment, who satisfy the requirements for incompatibility under Article 8 (3) herein after conduct of a competition.

**Article 14.** (1) The National Assembly shall exercise parliamentary oversight of the activity of the Commission.

(2) The members of the Commission shall be obligated to appear, upon invitation, at the National Assembly and to provide the information requested.

**Article 15.** (1) Annually, not later than the 31st day of March, the Commission shall present a report on the activity thereof at the National Assembly.

(2) The report shall furthermore be provided to the President of the Republic and to the Council of Ministers and shall be published on the Internet site of the Commission.

**Article 16.** (1) The information that has come to the knowledge of the members of the Commission, of the directors and of the inspectors at the territorial directorates, as well as of the employees in the administration, in the course of or in connection with the execution of the duties thereof shall constitute an official secret.

(2) Upon assumption of office, the persons referred to in Paragraph (1) shall sign a declaration pledging not to make public the information while holding office and after the release thereof.

(3) The members of the Commission, the directors of territorial directorate and the employees in the administration shall sign a declaration of private interests and a declaration of a private interest on a particular occasion.

**Article 17.** The members of the Commission and the directors of territorial directorate shall not incur pecuniary liability for any detriment inflicted upon the exercise of the powers assigned thereto under this Act except where the detriment has ensued from a premeditated indictable criminal offence.

**Article 18.** The members of the Commission, the directors of territorial directorate and the inspectors shall be provided with accident insurance and life assurance in the course of, or in connection with, the execution of the official duties thereof for the account of the executive budget.

**Article 19.** (1) The length of employment service of the members of the Commission and of the directors and the inspectors at the territorial directorates, as well as of the persons in the administration holding a position for which graduation in Law from a higher educational establishment and licensed competence to practise law are required, shall count as legal service record.

(2) The length of employment service of the persons referred to in Paragraph (1) holding a position for which graduation in Economics from a higher educational establishment is required, shall count as relevant experience in the public sector.

**Article 20.** (1) The organisation and operation of the Commission and of the administration thereof shall be regulated by Rules.

(2) The Rules shall be adopted by the Commission and shall be promulgated in the *State Gazette*.

### **Chapter Three**

#### **IDENTIFICATION OF UNLAWFULLY ACQUIRED ASSETS**

**Article 21.** (1) The Commission shall institute a proceeding under this Act where a reasonable presumption can be raised that particular assets have been acquired unlawfully.

(2) A reasonable presumption shall be warranted by the establishment, after an examination, of a significant lack of correspondence in the assets of the person under examination.

**Article 22.** (1) The examination referred to in Article 21 (2) herein shall commence by an act of the director of the territorial directorate concerned where a person has been constituted as an accused of a criminal offence under:

1. Article 108a (1) to (3) and Article 109 (3);
2. Items 7 and 10 of Article 116 (1);
3. Article 142;
4. Articles 155, 156, Article 158a (2) and Article 159 (5);
5. Articles 159a to 159d;
6. Article 196a;
7. Article 199;
8. Articles 201 to 203;
9. Article 208 (3), (4) and (5);
10. Article 209 (1) and (2), Articles 210 and 211, Article 212 (3), (4) and (5) and Article 212a;
11. Articles 213a to 214;
12. Items 1 and 3 of Article 215 (2);
13. Article 219 (3) and (4), Article 220 (2) and Article 225c (1) and (2);
14. Articles 227c (2);
15. Articles 233 (1) and (2), Article 234 (2), Articles 234a, 234b and Article 235 (1) to (5);
16. Articles 242 to 242a;
17. Articles 243 to 246, Article 248a (5), Articles 249 to 252;
18. Article 253, Article 253a (1) and (2), Articles 254b (2), Articles 255 to 256, Article 259 and Article 260 (1);
19. Article 280;
20. Articles 282, 283 and 283a;
21. Articles 301 to 305a, Articles 307c and 307d;
22. Article 308 (2) and (3) and Article 310 (1);
23. Article 321 (1) to (3) and (6), Article 321a (1) and (2) and Article 327 (1) to (3);
24. Article 337 (1) to (4), Article 339 (2) and Item 4 of Article 346 (2), Article 346 (3) and (6);

25. Article 354a (1) to (4), Article 354b (4) to (6) and Article 354c (1) to (3) of the Penal Code.

(2) The examination shall furthermore commence where a person has not been constituted as an accused of a criminal offence covered under Paragraph (1) by reason of a refusal to institute a criminal proceeding or a termination of a criminal proceeding in progress because:

1. an amnesty has ensued;
2. the period of prescription, provided for in the law, has lapsed;
3. after commission of the offence the actor has lapsed in a sustained mental derangement which precludes sanity;
4. the actor has died;
5. in respect of the person, a transfer of a criminal proceeding to another State has been admitted.

(3) The examination shall furthermore commence where the criminal proceeding in connection with any criminal offence covered under Paragraph (1) has been suspended and the person cannot be constituted as an accused because:

1. after commission of the offence the said person has lapsed in a short-term mental derangement which precludes sanity or suffers from another grave disease;
2. the said person enjoys immunity;
3. the address of the said person is unknown and he or she cannot be found.

**Article 23.** An examination under Article 21 (2) herein shall furthermore commence where an act of a foreign court concerning any of the criminal offences covered under Article 22 (1) herein or an administrative violation referred to in Article 24 (1) herein has been recognised according to Bulgarian legislation.

**Article 24.** (1) The examination under Article 21 (2) herein shall commence by an act of the director of the territorial directorate concerned acting on the basis of a notification by the administrative sanctioning authority, where there is an enforceable written statement against a person in connection with an administrative violation of a nature to generate a benefit, provided the said benefit is to an amount exceeding BGN 150,000 at the time of acquisition thereof and the said benefit cannot be forfeited according to another procedure.

(2) Any notification referred to in Paragraph (1) shall contain information on:

1. the person whereupon an administrative sanction has been imposed by an enforceable written statement;;
2. the administrative violation;
3. the assets of the person, if data about the said assets are available.

(3) The State and municipal bodies or the officials who, in the line of duty, have become aware of the acquisition of a benefit from an administrative violation to a value exceeding BGN 150,000 at the time of acquisition thereof which cannot be forfeited according to another procedure, shall be obligated to notify forthwith the director of the territorial directorate concerned and to dispatch thereto the materials under the case file.

(4) Citizens who have become aware of any circumstances referred to in Paragraph (3) may notify the Commission of the said circumstances.

**Article 25.** (1) In the cases covered under Article 22 herein, the examination shall commence acting on the basis of a notification by the prosecutor to the director of the territorial directorate concerned.

(2) Any notification referred to in Paragraph (1) shall contain information on:

1. the person in respect of whom the relevant ground under Article 22 herein applies;

2. the criminal offence of which the person has been constituted as an accused;

3. the assets of the person, if data about the said assets are available.

(3) The Ministry of Justice shall notify the Commission of each case of a criminal proceeding instituted in another State or of an enforceable sentence passed by a foreign court on a Bulgarian citizen for criminal offences equivalent to the offences covered under Article 22 (1) herein.

(4) The Supreme Cassation Prosecution Office and the Ministry of Justice shall notify the Commission upon transfer of a criminal proceeding.

**Article 26.** The examination before the Commission may not be instituted acting on an anonymous alert.

**Article 27.** (1) The examination under Article 21 (2) herein shall continue for up to one year.

(2) The Commission may extend the time limit referred to in Paragraph (1) on a single occasion by six months.

(3) The examination shall cover a period of fifteen years reckoned backwards from the date of commencement thereof.

(4) On the basis of the results of the examination, within one month after the completion thereof the director of the territorial directorate concerned shall prepare a reasoned report to the Commission with a conclusion on:

1. extension of the time limit for the examination;

2. termination of the examination;

3. institution of a proceeding under this Act.

#### **Chapter Four**

#### **POWERS OF COMMISSION AUTHORITIES UPON CONDUCT OF EXAMINATION**

**Article 28.** In respect of the period under examination, referred to in Article 27 (3) herein, the authorities referred to in Article 13 (1) herein shall collect information on:

1. the assets, the location thereof, the value and the legal grounds for the acquisition thereof;

2. the fair market value of the assets at the time of acquisition;

3. the fair market value thereof at the time of the examination;

4. transformation of the assets;

5. the revenue and costs of ordinary activities and the extraordinary revenue and costs of the legal person;

6. the customary and extraordinary income and maintenance expenses of the natural person and of the family members thereof;

7. the paid pecuniary obligations at public law to the State and the municipalities;

8. the transactions in the assets of the legal person;

9. the transactions in the assets of the person under examination and of the family members thereof;

10. the trips abroad of the person under examination and of the family members thereof, as well as of the persons who represent the legal person;

11. the injunctions and charges imposed on the assets, as well as the liabilities assumed;

12. any other circumstances relevant to clarifying the origin of the assets, the manner of acquisition and of transformation thereof.

**Article 29.** The Commission and the directors of territorial directorate may approach the court with a motion for lifting of bank secrecy, of the trade secret under Article 35 (1) of the Markets in Financial Instruments Act and disclosure of the information covered under Article 133 (2) of the Public Offering of Securities Act, where this is necessary for accomplishment of the objective of this Act.

## **Chapter Five INTERACTION WITH OTHER STATE BODIES**

**Article 30.** (1) For accomplishment of the objective of the Act, the authorities referred to in Article 13 (1) herein, the prosecuting magistracy, the Ministry of Interior, the authorities of the State Agency for National Security, the revenue authorities and the authorities of the National Customs Agency, each acting within the competence vested therein, shall carry out an examination of the sources of acquisition of the assets.

(2) The procedure and the timeframe for implementation of interaction shall be established by a joint instruction of the Commission, the Chairperson of the State Agency for National Security, the Minister of Interior, the Minister of Finance and the Prosecutor General.

**Article 30.** The prosecutors who are assigned to supervise pre-trial proceedings in connection with a criminal offence covered under Article 22 (1) herein shall forthwith notify the director of the territorial directorate concerned of:

1. the pre-trial proceedings instituted in connection with criminal offences covered under Article 22 (1) herein;
2. the warrants whereby institution of a criminal proceeding is refused or a criminal proceeding in progress is suspended or terminated, as well as the warrants whereby a suspended criminal proceeding in connection with a criminal offence covered under Article 21 (1) herein is resumed, on the grounds specified in Article 22 (2) and (3) herein;
3. the submission of an indictment to the court;
4. the precautionary measures imposed on the assets of the accused.

**Article 32.** The directors of territorial directorate may approach the competent revenue authorities with a request to disclose entire tax and social-insurance information on the persons under examination.

**Article 33.** The directors of territorial directorate shall provide the authorities of the National Revenue Agency with information on the assets forfeited to the Exchequer and on the location of the said assets.

**Article 34.** (1) Upon the execution of the powers vested therein under this Act, the authorities referred to in Article 13 (1) herein may request assistance and information from the State and municipal bodies, the merchants, the credit institutions, as well as from other legal persons, from natural persons, from notaries and enforcement agents.

(2) The authorities and the persons referred to in Paragraph (1) shall be obligated to provide the information within one month after being requested to do so with the exception of information which is provided according to a special procedure.

(3) Classified information shall be exchanged in accordance with the Classified Information Protection Act.

(4) Personal data shall be processed in accordance with the Personal Data Protection Act.

**Article 35.** The authorities referred to in Article 13 (1) herein shall draw up a memorandum on each step performed under this Act, unless the step performed has been attested by another document.

**Article 36.** Any persons, who in the course of or in connection with the execution of the official duties thereof have learnt information about an examination in progress, shall not be at liberty to make public the said information.

## **Chapter Six**

### **PRECAUTIONARY MEASURES AND FORFEITURE TO THE EXCHEQUER OF UNLAWFULLY ACQUIRED ASSETS**

#### **Section I**

#### **Precautionary Measures**

**Article 37.** (1) The Commission shall adopt a decision on submission to the court of a motion for an injunction securing a future action for forfeiture of assets on the basis of a report by the director of the territorial directorate concerned where sufficient data have been collected by the examination raising a reasonable presumption that the said assets have been acquired unlawfully.

(2) The decision referred to in Paragraph (1) shall specify the charges and injunctions imposed on the assets theretofore.

(3) The Commission shall submit a motion for an injunction securing a future action for forfeiture of unlawfully acquired assets to the district court exercising jurisdiction over the permanent address of the [natural] person or over the registered office of the legal person, as the case may be. Where a corporeal immovable is incorporated into the assets, the motion shall be submitted to the district court exercising jurisdiction over the *situs* of the said corporeal immovable, and where several corporeal immovables are incorporated into the assets, the motion shall be submitted to the district court exercising jurisdiction over the *situs* of the immovable of the highest tax assessed value.

(4) The Commission may not move for the imposition of precautionary measures on the assets of a natural person which is not subject to coercive enforcement according to Article 444 of the Code of Civil Procedure or on any funds of a legal person and of a sole trader intended for payment of labour remunerations and social insurance contributions for the staff solely if charged on a separate analytical account.

(5) Where sufficient data are not available to raise a reasonable presumption that the assets have been acquired unlawfully, the Commission shall adopt a decision on a refusal to institute a proceeding under this Act and termination of the examination or shall adopt a decision on a return of the case file for the collection of additional data.

**Article 38.** (1) The court shall pronounce forthwith by a ruling granting or refusing the imposition of a precautionary measure.

(2) An injunction securing the action shall be granted where:

1. exercise of the rights arising from the judgment on forfeiture of the assets would be impossible or impeded without such injunction, and
2. the motion is supported by sufficient evidence on the basis of which a reasonable presumption can be raised that the person owns or controls any unlawfully acquired assets.

(3) The ruling granting the imposition of a precautionary measure shall be subject to immediate enforcement.

(4) The ruling of the court securing the action by an injunction shall be appealable by means of an interlocutory appeal within seven days. The period shall begin to run, in respect of the petitioner, as from the date of service of the said ruling, and in respect of the respondent, as from the date of service of the communication of the precautionary measure imposed by the enforcement agent, by the Registry Service or by the court.

(5) Acting on a motion by the Commission, separate injunctive orders shall be issued on the basis of the ruling of the court for the movable things and for the corporeal immovables respecting the *ratione loci* competence of the enforcement agent.

**Article 39.** (1) The court may impose the precautionary measures covered under Article 397 (1) of the Code of Civil Procedure.

(2) The precautionary measures shall extend to the interest, as well as to other civil fruits derived from the assets whereupon the said measures have been imposed.

(3) The court may grant several types of precautionary measures up to the amount of the cost of action.

(4) Acting on a motion by the Commission or by the director of the territorial directorate concerned, the court may order the sealing of premises, plant and means of transport where there is a risk of the assets kept therein being squandered, destroyed, concealed or disposed of.

**Article 40.** (1) After the ruling imposing precautionary measures becomes enforceable, acting on the basis of a reasoned petition by the interested party or on a motion by the Commission, the court may authorise the effecting of a payment or of other steps disposing of the assets whereupon an injunction has been imposed in the cases of urgent need.

(2) The court shall pronounce forthwith by a ruling which shall be appealable.

(3) The striking of the preventive attachment, the lifting of the garnishment, as well as the revocation of the other precautionary measures, shall be effected on the basis of the enforceable ruling of the court.

**Article 41.** (1) The precautionary measures shall be enforced acting by assignment from the Commission by the competent recording magistrate and by the enforcement agents respecting the *ratione loci* competence as defined in Article 427 (1) of the Civil Procedure Code.

(2) A preventive attachment shall be recorded and a garnishment shall be imposed forthwith.

(3) No stamp duty shall be collected on the steps for enforcement of the precautionary measures.

**Article 42.** (1) Imposition of preventive attachment on a corporeal immovable shall be effected at the request of the authorities referred to in Article 13 (1) herein by means of recording of the injunctive order on a direction by the competent recording magistrate.

(2) The recording magistrate shall dispatch a communication of the recording effected to the owner of the assets whereupon the preventive attachment has been imposed.

(3) A special pledge of a commercial undertaking wherein the corporeal immovable referred to in Paragraph (1) is incorporated, which has been recorded after the preventive attachment, shall be inopposable to the State.

**Article 43.** (1) Garnishment of a movable thing shall be imposed forthwith acting at the request of the authorities referred to in Article 13 (1) herein by means of dispatch of a communication by the enforcement agent to the respondent under the injunction.

(2) The garnishment shall be considered imposed as from the time of receipt of the garnishment communication.



(3) Acting at the request of the authorities referred to in Article 13 (1) herein, the enforcement agent shall take an inventory, shall conduct an appraisal and shall deliver the corporeal thing for safekeeping to the respondent under the injunction or to a third party or shall seize the thing and shall deliver the said thing for safekeeping to the authorities referred to in Article 13 (1) herein. A garnishment mark (sticker) may be affixed to the corporeal thing.

(4) Where the corporeal things are owned by a commercial corporation, the enforcement agent shall dispatch a communication on the garnishment imposed to the Special Pledges Registry as well.

**Article 44.** (1) Upon garnishment of a ship or another water-craft, the enforcement agent shall dispatch a communication to the Maritime Administration Executive Agency for recording of the garnishment in the relevant registers.

(2) Upon garnishment of a means of transport, a communication shall be dispatched to the authorities of the Ministry of Interior.

(3) Upon garnishment of a civil aircraft, the enforcement agent shall dispatch a communication to the Directorate General of Civil Aviation Administration for recording in the register of civil aircraft.

(4) Upon registration of agricultural or forestry machinery subject to registration according to the procedure established by the Agricultural and Forestry Machinery Registration and Control Act, the enforcement agent shall dispatch a communication to the Control and Technical Inspectorate with the Ministry of Agriculture and Food.

**Article 45.** (1) The garnishment under Article 44 herein shall be considered imposed as from the date of receipt of the garnishment communication by the authorities responsible for the relevant registers.

(2) A communication of the garnishment imposed shall be dispatched to the respondent under the injunction after the garnishment communication is served upon the official with the relevant register.

(3) Any alteration of the registration of the means and machinery specified in Article 44 herein shall be inadmissible before lifting of the garnishment.

(4) The enforcement agent may approach the authorities of the Ministry of Interior with a request for suspension from operation of a motor vehicle whereupon garnishment has been imposed for a period not exceeding three months.

**Article 46.** (1) Garnishment of receivables which the respondent under the injunction is owed by a natural or legal person shall be imposed by the enforcement agent by means of dispatch of a garnishment communication to the garnishee and to the bank wherewith the said garnishee holds accounts.

(2) The garnishment shall be considered imposed as from the date and hour of receipt of the garnishment communication by the garnishee or by the bank wherewith the said garnishee has opened bank accounts.

(3) A communication of the garnishment imposed shall be dispatched to the respondent under the injunction after the garnishment communication is served upon the garnishee.

(4) Where the garnished receivable is secured by a pledge, the pledgee shall be ordered to surrender the corporeal thing pledged to the enforcement agent who shall deliver the said thing for safekeeping to a person designated by the authority referred to in Article 13 (1) herein.

(5) Where the garnished receivable is secured by a mortgage, the garnishment shall be noted in the relevant book at the Registry Service.

(6) Where a writ of execution has been issued for the receivables referred to in Paragraph (1), the enforcement agent shall seize the said writ from the person who holds it and shall deliver the said writ for safekeeping to the authority referred to in Article 13 (1) herein.

(7) The extinctive prescription for the receivable shall cease to run as from the time of receipt of the garnishment communication by the garnishee.

**Article 47.** (1) In the cases referred to in Article 46 (6) herein, the authorities referred to in Article 13 (1) herein shall have the right to move that the collection of the receivable be awarded to the Commission and that a separate enforcement case be instituted against the person who is the debtor under the writ of execution.

(2) The sums collected under the enforcement case shall be transferred by the enforcement agent to an account of the Commission.

**Article 48.** (1) Imposition of garnishment on funds in national or foreign currency shall be effected by means of taking an inventory, seizing and depositing the said funds on a special bank account of the Commission. In translating the exchange rate of the foreign currency, the exchange rate of the Bulgarian National Bank for the relevant currency as at the date of the inventory shall apply.

(2) Imposition of garnishment on all types of bank accounts of the respondent under the injunction in national or foreign currency shall be effected by means of dispatch of the garnishment communication to the bank.

(3) Garnishment may furthermore be imposed on all types of corporeal things deposited in safe-deposit vaults or boxes, as well as on sums provided for escrow management by the respondent under the injunction.

(4) The garnishment under Paragraphs (2) and (3) shall be considered imposed as from the time of receipt of the garnishment communication by the bank. A communication of the garnishment imposed shall be dispatched to the respondent under the injunction after receipt of the communication by the bank.

(5) The server shall record the hour and date of receipt. Where the communication has been dispatched by post, the competent official shall record the hour and date of receipt.

**Article 49.** (1) Imposition of garnishment on physical securities shall be effected by means of taking an inventory at the nominal value thereof and seizure of the said securities by the enforcement agent.

(2) Upon imposition of garnishment on physical registered shares or bonds, the enforcement agent shall notify the commercial corporation. The garnishment shall take effect in respect of the commercial corporation as from the receipt of the garnishment communication.

(3) The enforcement agent shall deliver the physical securities for safekeeping at a bank, the said delivery being attested by a memorandum.

**Article 50.** (1) Imposition of garnishment on dematerialised securities shall be effected by means of dispatch of a garnishment communication to the Central Depository, simultaneously notifying the commercial corporation.

(2) The garnishment shall have effect as from the time of service of the garnishment communication upon the Central Depository.

(3) The Central Depository shall forthwith notify the relevant regulated market of the garnishment imposed.

(4) Within three days after receipt of the garnishment communication, the Central Depository shall be obligated to provide the enforcement agent with information on the securities owned by the respondent under the injunction and on the other garnishments imposed under other claims.

(5) The enforcement agent shall notify the authorities referred to in Article 13 (1) herein of the information received under Paragraph (4).

**Article 51.** (1) Imposition of garnishment on government securities shall be effected by means of dispatch of a garnishment communication to the Central Depository or to the Bulgarian National Bank as a sub-depositary, and to foreign institutions whereat government securities accounts are registered.

(2) The garnishment shall be considered imposed as from the date of receipt of the garnishment communication by the person who keeps a register of the government securities.

(3) Within three days after receipt of the garnishment communication, the person who keeps a register of government securities shall be obligated to provide the enforcement agent with information on the securities owned by the respondent under the injunction and on the garnishments imposed under other claims.

(4) The enforcement agent shall notify the authorities referred to in Article 13 (1) herein of the information received under Paragraph (3).

**Article 52.** (1) Garnishment of securities shall extend to all property rights conferred by the security.

(2) Any disposition of the securities after receipt of the garnishment communication shall have no effect in respect of the State.

**Article 53.** (1) Garnishment of a participating interest in a commercial corporation shall be imposed by means of dispatch of a garnishment communication by the enforcement agent to the Registry Agency.

(2) The garnishment shall be recorded according to the procedure applicable to the recording of a pledge of a participating interest in a commercial corporation and shall be considered imposed as from the recording thereof in the Commercial Register. The Registry Agency shall notify the commercial corporation of the garnishment recorded.

**Article 54.** The transfer of the right of ownership, the creation and transfer of real rights and the creation of real charges in respect of a corporeal immovable under preventive attachment, as well as the disposition of garnished movable things, securities, participating interests and receivables, effected after the time as from which the preventive attachment or the garnishment are considered imposed, shall have no effect in respect of the State.

**Article 55.** (1) Upon commencement of coercive enforcement according to the procedure established by the Code of Civil Procedure, the Tax and Social-Insurance Procedure Code and by the Special Pledges Act against any assets and receivables whereupon precautionary measures have been imposed according to the procedure established by this Act, the enforcement authority shall forthwith notify the Commission and shall dispatch a duplicate copy of the act in pursuance of which the enforcement is carried out. The Commission may approach the court with a motion to revoke the precautionary measures and to replace the said measures by another equivalent injunction.

(2) Any assets and receivables, whereupon precautionary measures have been imposed or whereagainst coercive enforcement has commenced according to the procedure established by the Tax and Social-Insurance Procedure Code prior to the imposition of the precautionary measures according to the procedure established by this Act, shall be realised by a public enforcement agent according to the procedure established by the Tax and Social-Insurance Procedure Code until the judgment on forfeiture of the assets to the Exchequer becomes enforceable. Prior to the commencement of coercive enforcement according to the procedure established by the Tax and Social-Insurance Procedure Code, the public enforcement agent shall notify the Commission and shall dispatch a duplicate copy of the act in pursuance of which the enforcement is carried out. The Commission may approach the court with a motion to revoke the precautionary measures or to replace the said measures by another equivalent injunction.

**Article 56.** The provisions of the Code of Civil Procedure shall apply to any matters unregulated in this Section.

## **Section II**

### **Steps after Imposition of Precautionary Measures**

**Article 57.** (1) After imposition of the precautionary measures, the authorities referred to in Article 13 (1) herein shall invite the natural person under examination to present a written declaration on:

1. the corporeal immovables and motor vehicles, ships and aircraft, limited real rights to corporeal immovables, cash deposits, securities, works of art, movable archaeological property, participating interests in commercial corporations, receivables, patents, trademarks and industrial designs, as well as other assets owned by the said person and by the family members thereof;
2. a list of the bank accounts held by the said person and by the family members thereof in Bulgaria and abroad;
3. the sources of means and the grounds for acquisition of the assets and for maintenance of the family of the said person;
4. any transactions in corporeal immovables, movable things, participating interests and shares in commercial corporations, transfer of an undertaking or other commercial or legal transactions in assets of the person and of the family member thereof effected during the period under examination, as well as the sources of means for effecting the said transactions;
5. any obligations to third parties;
6. a balance of the cash at hand as at the initial date of the period under examination;
7. other circumstances related to the assets of the person under examination.

(2) Where the person under examination is deceased, the legal and testamentary heirs thereof who have accepted the succession shall be invited to present the declaration referred to in Paragraph (1). Where the succession is not accepted, the authorities referred to in Article 13 (1) herein shall enter a motion under Article 51 of the Succession Act.

(3) The person shall present the declaration within fourteen days after receipt of the communication or, if the said person is abroad, within one month.

(4) The standard form of the declaration shall be endorsed by a decision of the Commission and shall be published in the *State Gazette*.

**Article 58.** The authorities referred to in Article 13 (1) herein shall furthermore invite the following to present a declaration:

1. the third parties referred to in Articles 64, 65 and 67 herein;
2. the persons who represent, manage or control a legal person referred to in Article 66 (1) herein.

**Article 59.** Conclusions adverse to the person under examination and to the family members thereof may not be drawn upon a refusal to present a declaration.

**Article 60.** (1) After imposition of the precautionary measures, the Commission shall afford the person under examination an opportunity to participate in the proceeding.

(2) The authorities referred to in Article 13 (1) herein shall notify the person under examination, shall provide the said person with all materials concerning the said person so as to familiarise himself or herself therewith, and shall allow the said person a period of one month to lodge objections and to present evidence.

(3) Legal persons shall be represented before the Commission by the persons who represent the said legal persons by law or according to the rules of organisation thereof. Where no rule for representation exists, the legal person shall be represented by two members of the management thereof.

(4) In the proceeding before the Commission, the person under examination may be represented by a lawyer or by another person according to the procedure established by the Code of Civil Procedure who holds a written authorisation.

(5) The explanations given by the person under examination and the declarations submitted under Articles 57 and 58 herein may not be grounds for the initiation of criminal prosecution against the said person, nor may be used as evidence in support of a criminal charge.

**Article 61.** (1) After considering the objections of the person under examination and collecting the evidence specified thereby, the director of the territorial directorate concerned shall submit a reasoned report to the Commission within one month. The said report shall state:

1. the type and value of the assets acquired;
2. the existence or the non-existence of a significant lack of correspondence in the assets of the person under examination;
3. evidence that the third parties knew or presumed that the assets have been acquired unlawfully;
4. evidence of the existence or non-existence of any charges or of other injunctions imposed on the assets;
5. other evidence whereon the motion is based;
6. final conclusion.

(2) Within one month after submission of the report referred to in Paragraph (1), the Commission shall adopt a decision on:

1. termination of the proceeding under the case file, if the evidence collected does not establish or cannot raise a reasonable presumption that the assets have been acquired unlawfully;
2. bringing an action for forfeiture to the Exchequer of unlawfully acquired assets.

### **Section III Forfeitable Assets**

**Article 62.** Unlawfully acquired assets shall be forfeited to the Exchequer according to the procedure established by this Act.

**Article 63.** (1) Where it is not possible to forfeit self-contained assets referred to in Article 62 herein, the money equivalent thereof, determined at a market price at the time of bringing the action for forfeiture, shall be forfeited.

(2) The assets referred to in Article 62 here shall include:

1. the personal assets of the person under examination;
2. the assets acquired jointly by the two spouses or by the *de facto* cohabitantes;
3. the assets of the children who have not attained majority, and
4. the assets of the spouse of the person under examination, regardless of the regime of property relations chosen by the spouses;
5. the assets of the *de facto* cohabitee with the person under examination.

**Article 64.** Any transactions effected in unlawfully acquired assets shall be ineffective in respect of the State and the consideration given under any such transactions shall be forfeitable where the said transactions are:

1. gratuitous transactions with natural or legal persons;
2. onerous transactions with third parties, if the said parties knew or could have presumed that the assets have been acquired unlawfully or if the said parties acquired the assets for the purpose of concealing the unlawful origin thereof or the actual rights related thereto.

**Article 65.** Forfeitability shall furthermore apply to any unlawfully acquired assets which the person has transferred during the period under examination to a spouse, to a *de facto* cohabitee with the person, to a former spouse, to any lineal relatives up to any degree of consanguinity, to any collateral relatives up to the fourth degree of consanguinity, and to any affines up to the second degree of affinity.

**Article 66.** (1) Forfeitability shall apply to any assets which the person under examination has transferred or contributed as a cash asset or a non-cash asset to the capital of a legal person if the persons who manage or control the said legal person knew or, judging from the circumstances, could have presumed that the said assets have been acquired unlawfully.

(2) Forfeitability shall furthermore apply to any assets unlawfully acquired by a legal person which is controlled by the person under examination or by the persons closely linked therewith, whether independently or jointly.

(3) The assets shall furthermore be forfeited upon succession in title of the legal person.

**Article 67.** Forfeitability shall furthermore apply to any assets which have been acquired by a third party for the account of the person under examination in order to evade the forfeiture of the said assets or to conceal the origin of, or the actual rights to, the said assets.

**Article 68.** Until otherwise proven, any movable things and funds found on the person of the person under examination, in the dwelling thereof or on other premises, means of transport, strong boxes or safes, whether owned or rented thereby, shall also be considered movable things and funds belonging to the person under examination.

**Article 69.** (1) The unlawfully acquired assets shall be appraised according to the actual value thereof as at the time of acquisition or alienation thereof.

(2) If it is established that the price stated in the document attesting ownership is not the actually agreed price or that the document attesting ownership does not state a price, the assets shall be appraised as at the time of acquisition or alienation thereof as follows:

1. the corporeal immovables and the limited real rights thereto: at fair market value;
2. the foreign currency and the precious metals: at the central exchange rate of the Bulgarian National Bank;

3. the securities: at fair market value;
4. the means of transport: at fair market value;
5. the rest of the movable things and rights: at fair market value;
6. undertakings or participating interests in commercial corporations or co-operatives: at fair market value, and where such value cannot be determined, according to accounting data.

**Article 70.** In the cases where any unlawfully acquired assets have been transformed, in part or in whole, into other assets, forfeitability shall apply to the assets so transformed.

**Article 71.** Any unlawfully acquired assets shall furthermore be forfeited by legal or testamentary heirs up to the portion received thereby.

**Article 72.** In case the assets are unavailable or have been alienated, the money equivalent thereof shall be forfeited.

**Article 73.** (1) The rights of the State under this Act shall be extinguished upon the lapse of a fifteen-year period of prescription.

(2) The prescription shall begin to run as from the date of acquisition of the assets.

#### **Section IV**

#### **Proceeding before Court for Forfeiture to the Exchequer of Unlawfully Acquired Assets**

**Article 74.** (1) The Commission shall bring an action for forfeiture to the Exchequer of unlawfully acquired assets before the district court within whose geographical jurisdiction the permanent address of the person under examination is located within three months after imposition of the precautionary measures.

(2) Where the assets incorporate, *inter alia*, a corporeal immovable, the action shall be brought before the district court exercising jurisdiction over the *situs* of the immovable, and in the cases where the assets incorporate more than one corporeal immovable, the action shall be brought before the district court exercising jurisdiction over the *situs* of the immovable of the highest tax assessed value.

(3) The statement of action and the enforceable judgment shall be subject to recording in the Property Register of the Registry Agency.

(4) Acting *ex officio* or on a motion by the interested parties, the court shall revoke the precautionary measures imposed on the assets if the Commission fails to present evidence that it has brought the action within the statutory time limit.

**Article 75.** (1) An action for performance shall be brought against the person under examination and the persons referred to in Articles 64, 65, 66, 67 and 71 herein for forfeiture to the Exchequer of unlawfully acquired assets.

(2) The Commission shall bring actions against third parties for establishment of the circumstance that the assets have been acquired unlawfully and for declaration of the ineffectiveness of legal transactions.

(3) Upon submission of the statement of action, the Commission shall not remit stamp duty.

**Article 76.** (1) The district court shall institute a case and shall publish in the *State Gazette* a notice stating: the number of the case; particulars of the motion entered; an inventory of the assets, indication as to the time limit within which the interested parties may present the claims thereof to the assets, as well as the date for which the first hearing is scheduled, which may not be earlier than three months after the publication of the notice.

(2) The person under examination and the persons referred to in Articles 64, 65, 66, 67 and 71 herein shall be constituted as respondents in the proceeding.

**Article 77.** (1) The court shall examine the case sitting in public session.

(2) The Commission shall be represented by the Chairperson or by an employee possessing licensed competence to practise law who has been authorised by the Chairperson.

(3) All evidence admissible under the Code of Civil Procedure shall be presented in the proceeding.

(4) In the proceeding before the court, the Commission shall present evidence of:

1. the type and value of the assets acquired during the period under examination;
2. the circumstances under Articles 22, 23 and 24 herein;
3. the existence of a significant lack of correspondence in the assets of the person under examination;
4. the circumstances that the third parties knew or could have presumed that the assets have been acquired unlawfully;
5. other circumstances relevant to clarifying the origin of the assets and the manner of acquisition thereof;
6. the existence of any charges and injunctions on the assets other than those imposed under this Act.

(5) Where proving by means of a written document is required, conclusions adverse to the respondent may not be made if it is proved that the document has been lost or destroyed not through the fault of the party.

**Article 78.** (1) After conclusion of the examination of the case, the court shall pronounce by judgment which shall be appealable according to the standard procedure.

(2) By the judgment, the court shall award stamp duty and the costs incurred depending on the outcome of the case.

**Article 79.** (1) In the proceeding under this Act, the parties may conclude a settlement whereby not less than 75 per cent of the assets or the money equivalent thereof would be forfeited.

(2) Any such settlement shall be approved by the court if it is not contrary to the law and to good morals.

(3) The settlement shall have the consequences of an enforceable judgment as from the day of approval thereof and shall be non-rescindable.

(4) The stamp duty on the proceeding shall be determined on the sum for which the settlement has been reached and shall be borne by the parties in equal shares.

(5) The costs of the proceeding shall be awarded against the parties as incurred.

**Article 80.** The provisions of the Code of Civil Procedure shall apply to any matters unregulated in this Section.



**Chapter Seven**  
**MANAGEMENT OF ASSETS WHEREUPON PRECAUTIONARY MEASURES HAVE**  
**BEEN IMPOSED. MANAGEMENT OF FORFEITED ASSETS**

**Section I**  
**Management of Assets under Injunction**

**Article 81.** (1) The assets whereupon an injunction has been imposed may be left for safekeeping with the person under examination or with the person who holds the assets at the time of imposition of the precautionary measures.

(2) On a motion by the Commission, the court shall appoint another person as a keeper of the assets and shall fix the remuneration thereof.

(3) The remuneration shall be remitted by the Commission.

(4) The keeper shall be selected in consideration of the person thereof, as well as in consideration of the nature of the corporeal thing and of the place where the said thing is located or will be stored.

(5) The corporeal thing shall be delivered for safekeeping against signed acknowledgment.

**Article 82.** (1) In addition to the obligations covered under Articles 469 to 471 of the Code of Civil Procedure, the person referred to in Article 81 herein shall furthermore be obligated to notify the Commission:

1. of any damage to the assets;
2. of any proceedings affecting the assets;
3. of any steps related to transfer or attachment of rights of third parties to the assets, presenting copies of the documents establishing the transfer or the creation of the rights;
4. of any steps related to a change in the identification of the immovable;
5. upon a risk of the assets being destroyed or damaged.

(2) The person referred to in Article 81 herein shall be obligated to afford the authorities referred to in Article 13 (1) herein access in order to check the condition of the assets.

(3) If the person under examination or the person who holds the assets at the time of imposition of the injunction fails to fulfil the obligations thereof, the Commission may approach the enforcement agent with a request to deliver the assets under injunction for safekeeping to another person.

(4) The costs incidental to the storage and maintenance of the assets under injunction shall be paid by the Commission.

**Article 83.** (1) Movable things of historical value shall be provided for safekeeping to the National Museum of History or to another museum.

(2) Movable things of scientific value shall be provided for safekeeping to the National Library, to the relevant institute of the Bulgarian Academy of Sciences, or to a university.

(3) Movable things of precious metals, precious stones and articles thereof shall be provided for safekeeping to the Bulgarian National Bank.

(4) Movable things of artistic, antiquarian or numismatic value shall be provided for safekeeping to the Ministry of Culture.

(5) Exotic animals and plants shall be provided to zoological gardens and other institutes.

(6) In the cases covered under Paragraphs (1) to (5), the costs incidental to the safekeeping and maintenance of the assets under injunction shall be paid by the Commission.

**Article 84.** (1) As an exception, the Commission may approach the court with a motion to authorise the sale of movable things which:

1. may be substantially diminished in value during the period of safekeeping and the preservation thereof requires disproportionate costs;

2. are perishable.

(2) The movable things referred to in Paragraph (1) shall be sold by the enforcement agent at an open-bidding auction which shall be conducted within seven days after receipt of the request or shall be left for sale by a merchant at a retail establishment, on a wholesale market or a commodity exchange designated by the Commission. The owner may enter the auction without restraint.

(3) The delivery of the corporeal thing shall be attested by a memorandum signed by the enforcement agent or by the merchant. The merchant shall receive a commission fee for the sale effected.

(4) Where no documents are available on sanitary control carried out, as well as where no data are available on origin, composition and expiry date, the sale shall be effected after authorisation by the Bulgarian Food Safety Agency and the authorities of the regional health inspectorates with the Ministry of Health.

(5) Animals belonging to the national genetic pool, plant-variety seeds and planting stock of a guaranteed origin shall be sold by the enforcement agent upon authorisation by the Minister of Agriculture and Food or by a person empowered thereby solely to other agricultural producers.

(6) The authorities referred to in Paragraphs (4) and (5) shall pronounce on the request within three days after the receipt thereof.

**Article 85.** The proceeds from the assets sold according to the procedure established by Article 84 herein shall be transferred by the enforcement agent to the special bank account of the Commission.

**Article 86.** (1) The Commission shall keep a register wherein the following shall be recorded:

1. the person whereagainst a proceeding has been instituted;

2. the assets whereupon an injunction has been imposed;

3. particulars of the owner and of the person who holds the assets at the time of imposition of the injunction, as well as of the keeper of the relevant assets;

4. other particulars which are necessary for identification of the assets whereupon an injunction has been imposed.

(2) The standard form of the register shall be endorsed by an order of the Chairperson of the Commission.

(3) Disposition of the immovables or burdening the said immovables by charges, or the assumption of any obligations whatsoever by the person under examination, which would lead to impediments to the satisfaction of the rights under the judgment on forfeiture to the Exchequer of unlawfully acquired assets, shall have no effect in respect of the State.

(4) The Commission shall issue certificates on the existence of precautionary measures imposed under this Act within seven days after the receipt of a request from the court, the enforcement agents, the authorities of the National Revenue Agency and from other State bodies.

## **Section II**

### **Management of Forfeited Assets**

**Article 87.** (1) There shall be established an Interdepartmental Board for Management of Forfeited Assets, hereinafter referred to as “the Board”.

(2) The Board shall be a collective authority which shall consist of deputy ministers designated by the Minister of Justice, the Minister of Finance, the Minister of Economy, Energy and Tourism, the Minister of Labour and Social Policy, and the Minister of Regional Development and Public Works.

(3) The Board shall be chaired by a Deputy Minister of Finance.

(4) The administration of the Ministry of Finance shall ensure the technical support for the operation of the Board.

**Article 88.** (1) On a monthly basis, the Commission shall notify the Board of the enforceable judgments on forfeiture to the Exchequer of unlawfully acquired assets.

(2) The Commission shall forthwith submit the enforceable judgments for recording at the competent registry services, in respect of the corporeal immovables, and to the competent structural units of the Ministry of Interior, in respect of the motor vehicles.

(3) The enforceable judgments on forfeiture, the writs of execution issued on the basis of the said judgments and all other documents required for the enforcement of the judgment on forfeiture shall be dispatched by the Commission to the Board within three days after the full set of documents comprising the case file has been procured.

(4) For the meetings of the Board, the Commission shall prepare a separate report on each particular case.

**Article 89.** (1) The Board shall propose to the Council of Ministers to allocate for management the assets forfeited according to the procedure established by this Act to public-financed organisations and municipalities for the performance of the functions thereof or to order the sale of the said assets.

(2) The Board shall meet at least once every two months and shall adopt decisions by a simple majority.

(3) Representatives of the National Association of Municipalities in the Republic of Bulgaria, of non-profit organisations, branch and professional organisations may be invited to the meetings of the Board.

(4) The Board shall endorse rules of organisation of the operation thereof.

**Article 90.** (1) The assets in respect of which a decision on sale has been made shall be sold by the National Revenue Agency according to the procedure established by the Tax and Social-Insurance Procedure Code.

(2) The Board shall dispatch to the National Revenue Agency the decision referred to in Paragraph (1) for execution within seven days after the adoption thereof together with the full set of documents comprising the case file referred to in Article 88 (3) herein.

(3) If after exhaustion of the methods of public sale according to the procedure established by the Tax and Social-Insurance Procedure Code the assets are not sold, the National Revenue Agency shall notify the Board in writing, returning the case file for making a subsequent decision on management and disposition of the assets.

(4) In the cases where assets have been allocated for management, the public-financed organisation or municipality concerned shall reimburse to the National Revenue Agency the costs incidental to the management, storage and arrangement of the sale of the said assets.

## **Chapter Eight LIABILITY**

**Article 91.** Any person, who has sustained detriment as a result of legally non-conforming acts, actions or omissions by the authorities and by the officials under this Act, committed in the course of, or in connection with, the execution of the powers or in the line of duty of the said authorities and officials, may bring an action for compensation against the State under the terms and according to the procedure established by the Act on the Liability of the State and the Municipalities for Detriment.

## **Chapter Nine INTERNATIONAL CO-OPERATION**

**Article 92.** The Commission for Forfeiture of Unlawfully Acquired Assets shall exchange information for the purposes of this Act with the competent authorities of other States and with international organisations on the basis of international instruments and international treaties which are in force for the Republic of Bulgaria.

## **Chapter Ten ADMINISTRATIVE PENALTY PROVISIONS**

**Article 93.** (1) Any official blameworthy of a breach of the obligation referred to in Article 34 herein shall be liable to a fine of BGN 1,000 or exceeding this amount but not exceeding BGN 5,000, unless the said breach constitutes a criminal offence.

(2) Where the breach under Article 34 herein has been committed by a commercial corporation, a bank or another credit institution, a pecuniary penalty of BGN 2,000 or exceeding this amount but not exceeding BGN 20,000 shall be imposed.

**Article 94.** (1) The written statements ascertaining the violations shall be drawn up by officials designated by the Chairperson of the Commission, and the penalty decrees shall be issued by the Chairperson of the Commission.

(2) The drawing up of the written statements, the issuing, the appeal against and the execution of the penalty decrees shall follow the procedure established by the Administrative Violations and Sanctions Act.

## **SUPPLEMENTARY PROVISION**

**§ 1.** Within the meaning of this Act:

1. "Assets" shall be money, assets of any type, whether tangible or intangible, movable or immovable things or limited real rights.

2. "Control of a legal person" shall apply where:

(a) a natural person holds, whether directly or indirectly, more than 50 per cent of the participating interests in, or of the capital of, the legal person and controls the said legal person, whether directly or indirectly;

(b) a natural person exercises control within the meaning of § 1c of the Supplementary Provisions of the Commerce Act;

(c) 50 per cent or more of the assets of a not-for-profit legal entity is managed or distributed to the benefit of a natural person;

(d) a not-for-profit legal entity has been established or operates to the benefit of a group of natural persons.

3. “Family members” shall be a spouse, the *de facto* cohabitee with the person under examination and the children who have not attained majority.

4. “Income” shall be: remuneration received by a person under an employment relationship and under a civil-service relationship, income from services provided through work done in person, income from practice of liberal professions, the net income from entrepreneurship, dividends and interest, other income from movable and immovable property, income from agricultural activity and retail trade, other income from betting in lotteries and on sports events, interest, licence royalties and commission fees, proceeds from the sale of assets, income from insurance, from litigation, bank credits and loans extended by natural persons, as well as any other income, revenue and sources of financing.

5. “Net income” shall be income, revenue or sources of financing net of the amount of the customary and extraordinary expenses incurred by the person under examination and the family members thereof.

6. “Customary expenses” shall be the expenses on maintenance of the person and of the family members thereof according to data provided by the National Statistical Institute.

7. “Significant lack of correspondence” shall be an extent of the lack of correspondence between the assets and the net income which exceeds BGN 250,000 for the entire period under examination.

8. “Transformation of assets” shall apply where, in consideration of a real right, another real right is acquired, in whole or in part, without the respective part being insignificant.

9. “Closely linked persons” shall be a spouse or a *de facto* cohabitee with the person under examination; a former husband wherewith the marriage has been terminated within five years prior to the commencement of the examination by the Commission; lineal relatives up to any degree of consanguinity; collateral relatives up to the fourth degree of consanguinity, and affines up to the second degree of affinity.

## TRANSITIONAL AND FINAL PROVISIONS

§ 2. The Act on Forfeiture to the Exchequer of Assets Acquired from Criminal Activity (promulgated in the *State Gazette* No. 19 of 2005; amended in Nos. 86 and 105 of 2005, Nos. 33 and 75 of 2006, Nos. 52, 59 and 109 of 2007, No. 16 of 2008, Nos. 12, 32 and 42 of 2009, Nos. 18 and 97 of 2010, Nos. 33 and 60 of 2011) is hereby superseded.

§ 3. (1) Within two months after the entry into force of this Act, the National Assembly shall elect and the President and the Prime Minister shall appoint members of the Commission for Forfeiture of Unlawfully Acquired Assets.

(2) The credentials of the members of the Commission for Establishing Property Acquired from Criminal Activity who are incumbent upon the entry into force of this Act shall be terminated upon the election or the appointment, as the case may be, of the members of the Commission for Forfeiture of Unlawfully Acquired Assets.

(3) The assets, liabilities, archives and the other rights and obligations of the Commission for Establishing Property Acquired from Criminal Activity shall pass to the Commission for Forfeiture of Unlawfully Acquired Assets.

(4) The Commission referred to in Paragraph (1) shall adopt the Rules referred to in Article 20 herein within one month after the determination of the composition thereof.

(5) The employment relationships of the employees of the Commission for Establishing Property Acquired from Criminal Activity shall be settled under the terms and according to the procedure established by Article 123 of the Labour Code.

§ 4. The authorities referred to in Article 13 (1) herein, who have been appointed prior to the entry into force of this Act, shall be obligated to take the action necessary for the elimination of incompatibility under Items 1, 3 and 5 of Article 8 (3) herein.

§ 5. Any examinations and proceedings for the forfeiture of assets acquired from criminal activity, which are not completed until the entry into force of this Act, shall be completed under the terms and according to the procedure established by the Act on Forfeiture to the Exchequer of Assets Acquired from Criminal Activity as hereby superseded.

§ 6. This Act shall furthermore apply to any assets acquired unlawfully prior to the entry into force of the said Act.

§ 7. Within six months after the entry into force of this Act, the National Revenue Agency shall deliver to the Interdepartmental Board for Management of Assets Forfeited to the Exchequer the case files of any assets which have been forfeited to the Exchequer according to the procedure established by the Act on Forfeiture to the Exchequer of Assets Acquired from Criminal Activity as hereby superseded and which have not been sold as at the date of entry into force of this Act, for making a decision under this Act.

§ 8. The instruction referred to in Article 30 (2) herein shall be adopted within three months after the entry into force of this Act.

§ 9. The Act on the Liability of the State and the Municipalities for Detriment (promulgated in the *State Gazette* No. 60 of 1988; amended in No. 59 of 1993, No. 12 of 1996, No. 67 of 1999, No. 92 of 2000, No. 105 of 2005, Nos. 33 and 33 of 2006, No. 43 of 2008 and No. 17 of 2009) shall be amended and supplemented as follows:

1. In Article 2:

(a) there shall be inserted a new Paragraph (2):

“(2) The State shall be liable for any detriment inflicted on citizens by judicial acts under the Act on Forfeiture to the Exchequer of Unlawfully Acquired Assets.”;

2. the existing Paragraph (2) shall be renumbered to become Paragraph (3).

2. There shall be inserted an Article 2a:

“Liability for Activity of Commission for  
Forfeiture of Unlawfully Acquired Assets

**Article 2a.** The State shall be liable for any detriment inflicted on citizens and legal persons as a result of legally non-conforming acts, actions or omissions by the authorities and by the officials under the Act on Forfeiture to the Exchequer of Unlawfully Acquired Assets, committed in the course of, or in connection with, the execution of the powers or in the line of duty or the said authorities and officials.”

§ 10. In Article 3 (2), Article 4a and Article 12 of the Measures against the Financing of Terrorism Act (promulgated in the *State Gazette* No. 16 of 2003; amended in No. 31 of 2003, No. 19 of 2005, No. 59 of 2006, Nos. 92 and 109 of 2007, Nos. 28 and 36 of 2008 and Nos. 33 and 57 of 2011), the words “the Commission for Establishing Property Acquired from Criminal Activity” shall be replaced by “the Commission for Forfeiture of Illegally Acquired Assets”.

**§ 11.** In Item 4 of Article 35 (6) of the Markets in Financial Instruments Act (promulgated in the *State Gazette* No. 52 of 2007; amended in No. 109 of 2007, No. 69 of 2008, Nos. 24, 93 and 95 of 2009, No. 43 of 2010, No. 77 of 2011, No. 21 of 2012), the words “the Commission for Establishing Property Acquired from Criminal Activity” shall be replaced by “the Commission for Forfeiture of Illegally Acquired Assets”.

**§ 12.** In Article 25 (2) of the Notaries and Notarial Practice Act (promulgated in the *State Gazette* No. 104 of 1996; amended in Nos. 117, 118 and 123 of 1997, No. 24 of 1998, No. 69 of 1999, No. 18 of 2003, Nos. 29 and 36 of 2004, Nos. 19 and 43 of 2005, Nos. 30, 39 and 41 of 2006, Nos. 59 and 64 of 2007, Nos. 50 and 69 of 2008, Nos. 42, 47 and 82 of 2009, No. 87 of 2010, Nos. 32, 41 and 82 of 2011), the words “the Act on Forfeiture to the Exchequer of Assets Acquired from Criminal Activity” shall be replaced by “the Act on Forfeiture to the Exchequer of Unlawfully Acquired Assets”.

**§ 13.** In Item 4 of Article 62 (6) of the Credit Institutions Act (promulgated in the *State Gazette* No. 59 of 2006; amended in No. 105 of 2006, Nos. 52, 59 and 109 of 2007, No. 69 of 2008, Nos. 23, 24, 44, 93 and 95 of 2009, Nos. 94 and 101 of 2010, Nos. 77 and 105 of 2011), the words “the Commission for Establishing Property Acquired from Criminal Activity” shall be replaced by “the Commission for Forfeiture of Illegally Acquired Assets”.

**§ 14.** In Item 3 of Article 74 (1) of the Tax and Social-Insurance Procedure Code (promulgated in the *State Gazette* No. 105 of 2005; amended in Nos. 30, 33, 34, 59, 63, 73, 80, 82, 86, 95 and 105 of 2006, Nos. 46, 52, 53, 57, 59, 108 and 109 of 2007, Nos. 36, 69 and 98 of 2008, Nos. 12, 32, 41 and 93 of 2009, Nos. 15, 94, 98, 100 and 101 of 2010, Nos. 14, 31, 77 and 99 of 2011 and No. 26 of 2012), the words “the Commission for Establishing Property Acquired from Criminal Activity” shall be replaced by “the Commission for Forfeiture of Illegally Acquired Assets and the directors of territorial directorate thereof”.

**§ 15.** In Article 2 (1) of the Public Disclosure of Senior Public Officials’ Financial Interests Act (promulgated in the *State Gazette* No. 38 of 2000; amended in Nos. 28 and 74 of 2002, No. 8 of 2003, No. 38 of 2004, No. 105 of 2005, Nos. 38 and 73 of 2006, No. 109 of 2007, Nos. 33, 69 and 94 of 2008, No. 93 of 2009, Nos. 18 and 62 of 2010), there shall be inserted an Items 26a:

“26a. the Chairperson, the Deputy Chairperson and the members of the Commission for Forfeiture of Unlawfully Acquired Assets;”.

**§ 16.** This Act shall enter into force six months after the promulgation thereof in the *State Gazette*.

This Act was passed by the 41st National Assembly on the 3rd day of May 2012 and the Official Seal of the National Assembly has been affixed thereto.

## CZECH REPUBLIC

### **1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

Yes. It is possible to impose a protective measure in criminal proceedings – a forfeiture of an item (instrumentalities or proceeds of crime) or an equivalent value under Sec. 101 and 102 of the CZ Criminal Code.

Wording of the relevant provisions of the CZ Criminal Code:

#### Section 101

##### Forfeiture of a thing or other asset value

(1) If the punishment of confiscation of a thing or other asset value referred to in Section 70 Subsection 1, was not imposed, the court may impose that such a thing or other asset value is forfeited

- a) if it belongs to an offender who may not be prosecuted or convicted,
- b) if it belongs to an offender, whose punishment was waived by the court, or
- c) if it threatens the safety of persons or property or society, or if there is a risk that it will be used to commit a crime.

(2) The court may impose the forfeiture of a thing or other asset value without satisfying the conditions referred to in Subsection 1 only if it is, even indirectly, the proceeds of a criminal offence, especially

- a) if the thing of other asset value was acquired by a criminal offence or as proceeds therefrom and if it does not belong to the offender,
- b) if the thing of other asset value is acquired by a person other than the offender, even if only in part, for a thing or other asset value that was acquired by a criminal offence or as proceeds therefrom, and the value of the thing or other asset value that was acquired by a criminal offence or as proceeds therefrom are not negligible in relation to the value of the acquired thing of other asset value, or
- c) if the thing of other asset value acquired by a person other than the offender, even if only in part, for a thing of other asset value that the offender, even if only in part, acquired for the thing of other asset value that was acquired by a criminal offence or as proceeds therefrom, and the value of the thing of other asset value that was acquired by a criminal offence or as proceeds therefrom are not negligible in relation to the value of the acquired thing of other asset value.

(3) If an offender or another person keeps an the thing of other asset value referred to in Subsection 1 or 2, that is contrary to another legal enactment, in relation to which it is possible to impose the forfeiture of the thing of other asset value, the court shall always impose this protective measure.



(4) The court may, instead of the forfeiture of the thing of other asset value, impose an obligation

- a) to modify the thing or other asset value, so that it can no longer be used for a socially dangerous purpose,
- b) to remove a certain device,
- c) to remove its label or make its modification, or
- d) to restrict the manipulation of the thing of other asset value, and it shall set a reasonable deadline for it.

(5) If an obligation that is set under Subsection 4 is not met within the set deadline, the court shall decide on the forfeiture of the thing of other asset value.

## Section 102

### Forfeiture of an equivalent value

If, prior to the forfeiture of a thing of other asset value which the court may impose under Section 101 Subsection 1 and 2, the person, to whom the thing or other asset value belongs, destroys, damages or otherwise depreciates, misappropriates, renders unusable, removes or exploits, in particular by consumption of such a thing or other asset value, or if he otherwise frustrates the forfeiture or he frustrates the sentence of confiscation of a thing or other asset value by a conduct violating the prohibition under Section 70 Subsection 4, or he frustrates the forfeiture of the thing or other asset value by a conduct violating the prohibition under Section 104 Subsection 2, the court may impose a forfeiture of an equivalent value up to an amount which corresponds to such thing or other asset value. The value of the thing or other asset value, which could be forfeited by the decision of the court, may be determined by an expert statement or expert opinion.

**2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

Yes, the forfeiture without a conviction still occurs in criminal proceedings. Moreover, it must be proved that:

- a specific act has been committed and constituted a criminal offence,
- a specific item or other value was derived from this criminal offence and
- it is not possible to prosecute or sentence an offender.

The burden of proof lies on the part of the State.

**3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

This forfeiture procedure takes place before a criminal court.

**4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

The forfeiture is applicable if it is not possible to prosecute or sentence an offender for these reasons:

- the criminal prosecution is statute-barred,
- the suspect enjoys immunity from prosecution - however, it depends of the real content of immunity, whether it covers also a person's property or not (i.e. privileges of diplomats and consuls).
- the suspect is under the age of criminal responsibility,
- the suspect has died or has been declared deceased,
- the accused was not criminally responsible at the time of the act (eg. mental illness),
- the safety of persons or assets, or another similar public interest requires the confiscation,
- pardon or amnesty,
- time bar of criminal prosecution,
- if the criminal prosecution is conditioned by the consent of a victim and the consent was not granted or was withdrawn (the fact whether something is or is not proceeds of crime, i.e. whether change in ownership has or has not occurred does not depend on the consideration of a victim).

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

As stated above, CZ legal order allows confiscation of proceeds and instrumentalities of crime, however, this type of confiscation is only applicable in criminal proceedings.

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- **whose system requires a link to criminal proceedings** – Yes, if it concerns confiscation in criminal proceedings, that is a situation when crime has been proved, however, it is not possible to prosecute or sentence an offender. In CZ the criminal proceedings needs to be held in connection with a particular act and has to follow inter alia the principle of presumption of innocence the duty to prove beyond reasonable doubts, and the burden of proof lies on a State. Unless respecting the above mentioned basic rules of criminal proceedings the confiscation order of other Member State may not be recognised.
- **whose system applies civil forfeiture procedures** – No.

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## DENMARK

- 1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

Section 76, subsection 5, of the Danish Criminal Code allows for confiscation of proceeds of crime or a sum equivalent to such proceeds without a criminal conviction if the person liable to confiscation dies. Furthermore, section 77a allows for confiscation of instrumentalities of crime without a criminal conviction if it is necessary for the prevention of further criminal offences. Please see the relevant provisions below. According to case law, confiscation is also possible when a person cannot be convicted due to young age or insanity at the time of the offence.

- 2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

Confiscation proceedings may be separate from criminal proceedings concerning a specific criminal offence, but they are criminal proceedings in nature. The action to confiscate proceeds of crime in section 76(5) is directed at the person, while the action to confiscate instrumentalities of crime in section 77a is directed at the object.

- 3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

Confiscation proceedings would always take place before a criminal court.

- 4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

Yes, please see question 1.

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

- 5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

The introduction of a wider access to non-conviction based confiscation would require that the Danish Criminal Code is amended.

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- **whose system requires a link to criminal proceedings**
- **whose system applies civil forfeiture procedures.**

In both cases an order issued by another Member State would not be executed without a court decision. To our knowledge, this has never been tried by the courts.

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**Please note that this is an unofficial translation of the Danish Criminal Code**

**75.-(1)** The proceeds gained from a criminal offence, or a sum equivalent to such proceeds may be confiscated in whole or in part. In cases without the necessary basis on which to establish the amount of such proceeds, a sum estimated to be equivalent to the proceeds may be confiscated.

**(2)** Where it is considered to be necessary to prevent further crime or otherwise required due to special circumstances, the following objects may be confiscated:

- 1) objects used or intended to be used in a criminal act;
- 2) objects produced by a criminal act; and
- 3) objects in respect of which a criminal offence has otherwise been committed.

**(3)** In place of confiscation of the objects referred to in subsection (2) above, a sum which is equivalent to their value or part of their value may be confiscated.

**(4)** In place of confiscation under subsection (2) above, arrangements concerning the objects may be decided upon for the purpose of preventing further crimes.

**(5)** When an association is dissolved by judgment, its capital, documents, records, etc. may be confiscated.

**76.-(1)** Proceeds may be confiscated under section 75(1) of this Act from any person to whom the proceeds of a crime have passed directly.

**(2)** The objects and sums referred to in section 75(2) and (3) of this Act may be confiscated from a person who is responsible for the offence and from someone on whose behalf he has acted.

**(3)** Specially protected rights in confiscated property shall only lapse upon a decision by the court in circumstances similar to those referred to in subsection (2) above.

**(4)** Where, after the criminal offence, one of the persons referred to in subsections (1) and (2) above has disposed of proceeds or of objects of the nature referred to in section 75(2) of this Act or of rights in these, the transferred property or its value may be confiscated from the acquirer if he knew that the transferred property was connected to the criminal act, if he displayed gross negligence in this respect or if the transfer to him was made as a gift.

**(5)** Where a person who is liable to have property confiscated under subsections (1)-(4) dies, his liability shall lapse. However, this shall not apply to confiscation under section 75(1) of this Act.

**76A.-(1)** Total or partial confiscation of property belonging to a person who is found guilty of a criminal offence may take place when

- 1) the offence committed is of a nature which may produce significant proceeds; and
- 2) according to the law, the act committed is punishable with imprisonment for six years or more or is a violation of controlled drugs legislation.

**(2)** Under conditions such as those mentioned in subsection (1) above, property acquired by the spouse or cohabitant of the offender may be fully or partly confiscated unless

- 1) the property was acquired more than five years prior to the criminal offence upon which the confiscation under subsection (1) is based; or
- 2) the marriage or cohabitation had not been commenced at the time of the acquisition.

**(3)** Under the conditions mentioned in subsection (1) above, property transferred to a legal person in which the offender has a controlling interest, alone or together with his closest relations, may be wholly or partly confiscated. The same provision shall apply if the offender in question receives a significant part of the revenues of the legal person. Confiscation may not take place if the property was transferred to the legal person more than five years prior to the criminal act upon which confiscation according to subsection (1) above would be based.

(4) Confiscation according to subsections (1)-(3) above may not take place if the offender shows that the property has most probably been acquired in a lawful way or with funds that have been lawfully acquired.

(5) In place of confiscation of certain items of property according to subsections (1)-(3) above, an amount corresponding to the value or part of the value of the property may be confiscated.

77.-(1) Where proceeds or property items are confiscated under section 75(1) or 76A of this Act, and a person is entitled to compensation on account of the offence committed, the confiscated property may be used in satisfaction of the claim for compensation.

(2) The same provision shall apply to objects and other property confiscated under section 75(2) and (3) of this Act, if so decided in the sentence.

(3) Where, in one of the situations referred to in subsections (1) and (2) above, the offender has paid compensation to the victim as prescribed by the sentence, the confiscated sum shall be reduced accordingly.

77A. In case there is concern that, due to their nature combined with other existing circumstances, certain objects may be used in a criminal act, they may be confiscated if this measure is viewed as necessary for the prevention of the criminal offence. Under the same conditions, other assets including money may be confiscated. Section 75(4) of this Act shall apply correspondingly.

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## GERMANY

**1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

Yes. Under German law there are so-called independent proceedings for obtaining an order (also referred to as “objective proceedings”), regulated in sections 76a of the Criminal Code (CC)<sup>2</sup>, 440 et seqq. of the Code of Criminal Procedure (CCP)<sup>3</sup>. This allows for the confiscation of instrumentalities and the forfeiture of proceeds to take place even where, for certain reasons, no conviction can be obtained.

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<sup>2</sup> **Section 76a [Independent orders]**

- (1) If for reasons of fact no person can be prosecuted or convicted of the offence, forfeiture or confiscation of the object or the monetary value or destruction must or may be independently ordered if the conditions under which the measure is prescribed or available otherwise are met.
- (2) Subsection (1) above shall, under the provisions of section 74(2) No 2, (3) and section 74d, apply if
  1. prosecution of the offence is barred by the statute of limitations; or
  2. for other reasons of law no person may be prosecuted and the law does not provide otherwise. Confiscation of instrumentalities or destruction must not be ordered in the absence of a request or authorisation to prosecute or a request by a foreign state.
- (3) Subsection (1) above shall apply if the court orders a discharge or if the proceedings are terminated pursuant to a provision allowing this in the discretion of either the public prosecution service or the court or with their mutual agreement.

<sup>3</sup> **Section 440 [Independent Confiscation Proceedings]**

- (1) The public prosecution office and the private prosecutor may file the application to order forfeiture or confiscation independently if this is admissible by virtue of a statute and the order is to be anticipated in view of the outcome of the investigations.
- (2) The object must be designated in the application. The facts substantiating the admissibility of the independent forfeiture or confiscation shall also be stated. Otherwise Section 200 shall apply *mutatis mutandis*.
- (3) Sections 431 to 436 and 439 shall apply *mutatis mutandis*.

**2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

A link to criminal proceedings is a mandatory requirement because independent proceedings for obtaining an order do presuppose the commission of a criminal offence notwithstanding the fact that prosecution or conviction of any specific person is not possible. This may happen when an individual offender cannot be identified, or when the identity of the offender is known but that person cannot be convicted for certain reasons. This correspondingly applies in cases where the court, in spite of finding the defendant guilty of committing a crime, dispenses with prosecution, or in cases where the court or the public prosecution office have dispensed with further prosecution of the criminal offence (e.g. when the offence was of only negligible significance): see section 76a subsection (3) CC.

The independent order can be made in completely separate proceedings relating solely to the asset in question (e.g. when the offender's identity is not known); this most probably corresponds to the conception of "*in rem*" proceedings. But it is also possible to switch over from subjective criminal proceedings to the objective, independent proceedings for obtaining an order. For instance, this might happen where criminal proceedings have been instituted against a certain person but where the defendant has to be acquitted for lack of criminal responsibility. So in these cases the proceedings for obtaining an order relate to the particular person concerned ("*in personam*").

**3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

Independent proceedings can take place only before a criminal court. Jurisdiction lies with the court that would have jurisdiction in the event of criminal prosecution of a particular person.



**4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

Under German law a distinction is drawn between **forfeiture** of proceeds on the one hand (section 73 CC4) and **confiscation** of objects generated by, or used or intended for use in, the commission or preparation of the offence concerned (i.e. instrumentalities), see section 74 CC5).

a) An independent **forfeiture** order presupposes that an unlawful act has been committed (it is not necessary that the offender has acted with guilt) and that the offender has acquired something from that offence. In principle, all the other preconditions for criminal liability must be fulfilled and so must all other procedural requirements. The major difference pertaining to other proceedings consists in there being a factual impediment preventing the personal prosecution of the offender. The grounds of impediment referred to here must leave substantive criminal liability for the offence in itself as much unaffected as procedural requirements for prosecution. This happens for instance when the offender's identity cannot be ascertained, when he has taken flight or when he is outside the country and cannot be reached.

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<sup>4</sup> **Section 73 [Conditions of forfeiture]**

- (1) If an unlawful act has been committed and the principal or a secondary participant has acquired proceeds from it or obtained anything in order to commit it, the court shall order the forfeiture of what was obtained. This shall not apply to the extent that the act has given rise to a claim of the victim the satisfaction of which would deprive the principal or secondary participant of the value of what has been obtained.
- (2) The order of forfeiture shall extend to benefits derived from what was obtained. It may also extend to objects which the principal or secondary participant has acquired by way of sale of the acquired object, as a replacement for its destruction, damage to or forcible loss of it or on the basis of a surrogate right.
- (3) If the principal or secondary participant acted for another and that person acquired anything thereby, the order of forfeiture under subsections (1) and (2) above shall be made against him.
- (4) The forfeiture of an object shall also be ordered if it is owned or subject to a right by a third party, who furnished it to support the act or with knowledge of the circumstances of the act.

<sup>5</sup> **Section 74 [Conditions of confiscation]**

- (1) If an intentional offence has been committed objects generated by or used or intended for use in its commission or preparation, the court may make a confiscation order.
- (2) A confiscation order shall not be admissible unless
  1. the principal or secondary participant owns or has a right to the objects at the time of the decision; or
  2. the objects, due to their nature and the circumstances, pose a danger to the general public or if there is reason to believe that they will be used for the commission of unlawful acts.
- (3) Under the provisions of subsection (2) No 2 above the confiscation of objects shall also be admissible if the offender acted without guilt.
  - (4) If confiscation is prescribed or permitted by a special provision apart from subsection (1) above, subsections (2) and (3) above shall apply mutatis mutandis.

The independent ordering of forfeiture is precluded, however, in cases where there are legal impediments to criminal prosecution. Such impediments might for instance consist in the defendant's permanent illness or in his continuing inability to stand trial, or the impediment might result from prescription or from an existing immunity. An independent order will be precluded also in the event of the offender's death, because the possibility of substantive prosecution expires upon death.

b) For an independent **confiscation** order in respect of the instrumentalities of crime, in general the same provisions do apply. But there has to be another distinction made as to whether the confiscation concerned is of a quasi-punitive nature (section 74 subsection [2], no. 1, CC) or of a protective nature (section 74 subsection [2], no. 2, subsection [3] CC).

aa) Where confiscation is of a quasi-punitive nature (i. e. cases where instrumentalities get confiscated regardless of their nature or potential dangerousness), a merely unlawful act is not sufficient; rather, it has to be determined that the offender has acted with guilt.

bb) Where on the other hand confiscation is of a protective nature (i. e. cases where the instrumentalities do not belong to the offender but are of a dangerous nature; see section 74 subsection [2], no. 2 CC) it is sufficient if the offence has been committed unlawfully. Unlike cases of forfeiture or cases of confiscation of a quasi-punitive nature, an independent confiscation order of a protective nature can be made also if there are legal grounds impeding the offender's prosecution, of which particular examples are *prescription*, the offender's *continuing inability to stand trial* or his *death*. Making this distinction is justified because protection of the general public necessitates ordering confiscation of dangerous instrumentalities – regardless of the actual possibility to prosecute the offender.

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

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**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- **whose system requires a link to criminal proceedings**
- **whose system applies civil forfeiture procedures**

If the decision has a link to criminal proceedings, the decision will be recognised.

Recognition of an order based on civil proceedings is not categorically precluded. The recognition does not depend on whether or not the proceedings are designated as “criminal” proceedings by the requesting State. It is rather essential how the foreign order is to be qualified under the law of the enforcing State (i. e. Germany) and that the order meets the standards set out therein.

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## GREECE

### 1<sup>ο</sup> ΕΡΩΤΗΜΑ

-**Άρθρο 76 παρ. 2 εδ. α΄ Π.Κ**, σύμφωνα με το οποίο αν από τα αντικείμενα που είναι προϊόντα κακουργήματος ή πλημμελήματος το οποίο πηγάζει από δόλο, καθώς και το τίμημά τους, και όσα αποκτήθηκαν με αυτά, επίσης και αντικείμενα που χρησίμευσαν ή προορίζονταν για την εκτέλεση τέτοιας πράξης προκύπτει κίνδυνος της δημόσιας τάξης, η δήμευσή τους επιβάλλεται υποχρεωτικά σε όποιον τα κατέχει, έστω και χωρίς την καταδίκη ορισμένου προσώπου για την πράξη που τελέστηκε.

- **Άρθρο 213 παρ.1.** στο οποίο προβλέπεται ότι η δήμευση των παραχαραγμένων ή κίβδηλων νομισμάτων και των μέσων, σκευών και εργαλείων του άρθρου 211 διατάσσεται και αν ακόμα δεν διωχθεί και καταδικασθεί ορισμένο πρόσωπο και ανεξάρτητα από το αν αυτά ανήκουν ή όχι στον αυτουργό ή το συναίτιο της παραχάραξης ή κίβδηλείας.

-**Άρθρο 218 παρ 4** στο οποίο προβλέπεται ότι το δικαστήριο μπορεί επίσης να διατάξει τη δήμευση των σκευών και εργαλείων, που χρησιμεύουν στο σκοπό τέλεσης του σχετικού αδικήματος(πλαστογραφία και κατάχρηση ενσήμων), και όταν δεν διώκεται ή δεν καταδικάζεται ορισμένο πρόσωπο.

-**Άρθρο 46 παρ. 3 του ν. 3691/2008** «για την πρόληψη και καταστολή της νομιμοποίησης εσόδων από εγκληματικές δραστηριότητες και της χρηματοδότησης της τρομοκρατίας:» στο οποίο προβλέπεται ότι δήμευση διατάσσεται για τα περιουσιακά στοιχεία που αποτελούν προϊόν βασικού αδικήματος ή των αδικημάτων του άρθρου 2 ή που αποκτήθηκαν αμέσως ή εμμέσως από προϊόν τέτοιων αδικημάτων ή για τα μέσα που χρησιμοποιήθηκαν ή προορίζονταν να χρησιμοποιηθούν προς τέλεση αυτών των αδικημάτων και όταν δεν ασκήθηκε δίωξη λόγω θανάτου του υπαιτίου ή η δίωξη που ασκήθηκε έπαυσε οριστικώς ή κηρύχθηκε απαράδεκτη.

### 2<sup>ο</sup> ΕΡΩΤΗΜΑ

A)Σε όλες τις ως άνω περιπτώσεις, η δήμευση διατάσσεται από το δικαστήριο που δίκασε την υπόθεση και ειδικότερα:

Στις περιπτώσεις του άρθρου 76 παρ. 2 εδ. α΄ Π.Κ, τη δήμευση διατάσσει, αν δεν προηγήθηκε καταδίκη ορισμένου προσώπου ή δεν μπορούσε να γίνει δίωξη, είτε το δικαστήριο που δίκασε την υπόθεση, είτε το δικαστήριο πλημμελειοδικών με πρόταση του εισαγγελέα. (Τόσο η θεωρία όσο και η νομολογία απαιτεί να αιτιολογείται ειδικά στην απόφαση σε τι συνίσταται ο κίνδυνος).

Στις περιπτώσεις του άρθρου 46 παρ. 3 του ν. 3691/2008, η δήμευση διατάσσεται με βούλευμα του δικαστικού συμβουλίου ή με απόφαση του δικαστηρίου, που παύει ή κηρύσσει απαράδεκτη την ποινική δίωξη και αν δεν ασκήθηκε δίωξη, με βούλευμα του κατά τόπον αρμόδιου συμβουλίου πλημμελειοδικών».

B) Στο ποινικό μας σύστημα η δήμευση έχει διφυή χαρακτήρα, δηλαδή άλλοτε διατάσσεται **in personam** και άλλοτε **in rem**.

Ειδικότερα:

-Σύμφωνα με το άρθρο 76 παρ.1 Π.Κ, «αντικείμενα που είναι προϊόντα κακουργήματος ή πλημμελήματος το οποίο πηγάζει από δόλο, καθώς και το τίμημά τους, και όσα αποκτήθηκαν με αυτά, επίσης και αντικείμενα που χρησίμευσαν ή προορίζονταν για την εκτέλεση τέτοιας πράξης μπορούν να δημευθούν αν αυτά ανήκουν στον αυτουργό ή σε κάποιον από τους συμμετόχους..».

Εν προκειμένω, η δήμευση έχει **προσωπικό χαρακτήρα**.

-Σύμφωνα με το άρθρο 76 παρ. 2 εδ. α΄ ΠΚ αν από τα αντικείμενα που είναι προϊόντα κακουργήματος ή πλημμελήματος το οποίο πηγάζει από δόλο, καθώς και το τίμημά τους, και όσα αποκτήθηκαν με αυτά, επίσης και αντικείμενα που χρησίμευσαν ή προορίζονταν για την εκτέλεση τέτοιας πράξης προκύπτει κίνδυνος της δημόσιας τάξης, επιβάλλεται δήμευσή τους υποχρεωτικά σε όποιον τα κατέχει, έστω και χωρίς την καταδίκη ορισμένου προσώπου για την πράξη που τελέστηκε.

Εν προκειμένω, πρόκειται για **δήμευση χωρίς ποινική καταδίκη** η οποία διατάσσεται **in rem** και μάλιστα υποχρεωτικά από το δικαστή. Σχετικές είναι και προβλέψεις του άρθρου 213 παρ.1ΠΚ, άρθρου 46 παρ. 3 του ν. 3691/2008, και του άρθρου 218 παρ 4 β ΠΚ.(δυνητική δήμευση)

### **3° ΕΡΩΤΗΜΑ**

Στο ελληνικό δίκαιο η δήμευση προϊόντων εγκλήματος ή μέσων τέλεσής του διατάσσεται **με απόφαση ποινικού δικαστηρίου** .

Δυνατότητα έγερσης αξίωσης ενώπιον πολιτικών δικαστηρίων προβλέπεται μόνο στο άρθρο 47 παρ. 1 του ν. 3691/2008, στο οποίο προβλέπεται ότι: «Το Δημόσιο μπορεί, ύστερα από γνωμοδότηση του Νομικού Συμβουλίου του Κράτους, να αξιώσει ενώπιον των αρμόδιων πολιτικών δικαστηρίων από τον αμετακλήτως καταδικασμένο σε ποινή καθείρξεως για αδίκημα των άρθρων 2 και 3 του παρόντος νόμου, κάθε άλλη περιουσία που αυτός έχει αποκτήσει από άλλο αδίκημα των άρθρων 2 και 3 έστω και αν δεν ασκήθηκε για το αδίκημα αυτό δίωξη, λόγω θανάτου του υπαιτίου, ή η δίωξη που ασκήθηκε έπαυσε οριστικά ή κηρύχθηκε απαράδεκτη».

#### **4° ΕΡΩΤΗΜΑ**

α) Στο ποινικό μας κώδικα η δήμευση χωρίς ποινική καταδίκη αποτελεί μέτρο ασφαλείας (**άρθρο 76 παρ. 2 ΠΚ**), και επιβάλλεται υποχρεωτικά σε περίπτωση που προκύπτει κίνδυνος για τη δημόσια τάξη και στρέφεται κατά οποιουδήποτε κατόχου των δημευόμενων προϊόντων ή εργαλείων του εγκλήματος. Σκοπός του μέτρου αυτού είναι η παρεμπόδιση της τελέσεως ή της επαναλήψεως ορισμένων αξιόποινων πράξεων και όχι η τιμώρηση ορισμένου προσώπου.

Απαραίτητη προϋπόθεση είναι να προκύπτει από τα δημευόμενα προϊόντα ή εργαλεία του εγκλήματος κίνδυνος για τη δημόσια τάξη. Ως κίνδυνος θεωρείται όχι μόνο η ισχυρή και βάσιμη πιθανότητα τελέσεως-επαναλήψεως αξιόποινης πράξης, αλλά και η ισχυρή και βάσιμη πιθανότητα προκλήσεως βλάβης εκ της κατοχής αυτών των πραγμάτων στη δημόσια υγεία, στην κοινή ειρήνη και ασφάλεια, στη δημόσια πίστη και εν γένει στην δημόσια ασφάλεια.

β) Επίσης, όπως προαναφέρθηκε, στην περίπτωση του **άρθρου 46 παρ. 3 του ν. 3691/2008**, προβλέπεται δήμευση χωρίς ποινική καταδίκη στις εξής περιπτώσεις: μη άσκησης ποινικής δίωξης λόγω θανάτου του υπαιτίου, οριστικής παύσης της δίωξης που ασκήθηκε, ή κήρυξης της ως απαράδεκτης.

γ) Τέλος, δυνατότητα δήμευσης χωρίς προηγούμενη καταδικαστική απόφαση προβλέπεται και σε ορισμένες περιπτώσεις εγκλημάτων σχετικά με το νόμισμα (**άρθρο 213 παρ.1.** στο οποίο προβλέπεται δήμευση των παραχαραγμένων ή κίβδηλων νομισμάτων και των μέσων, σκευών και εργαλείων του άρθρου 211 και **άρθρο 218 παρ 4** στο οποίο προβλέπεται δήμευση των σκευών και εργαλείων, που χρησιμεύουν στο σκοπό τέλεσης του αδικήματος της πλαστογραφίας και κατάχρησης ενσήμων).

#### **6° ΕΡΩΤΗΜΑ**

Η χώρα μας τάσσεται υπέρ της δυνατότητας αναγνώρισης αμετάκλητων καταδικαστικών αποφάσεων που επιβάλλονται από δικαστήριο άλλου κ-μ μετά από δίκη για ποινικό αδίκημα.

## SPAIN

- 1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

Yes, the Criminal Code allows for confiscation of the proceeds and instrumentalities of crime, for value confiscation and for extended confiscation (in this case, limited to terrorism and criminal organization). All of them are also possible without a criminal conviction, provided that criminal responsibility is no longer possible and if the illicit origin of the property can be demonstrated.

- 2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

No. The confiscation of property can only be done within criminal proceedings because it is an incidental consequence of the crime. However, the forfeiture action may be directed against the property when the criminal liability of the person responsible for the crime, for whatever reason, has been extinguished. In this case, the current owners of the property have to be brought to the criminal proceedings, so that they can defend themselves.

- 3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

NO, confiscation procedures can only take place before a criminal court.

- 4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.). Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.**

The requirement is that the person would be exempted from criminal responsibility or that criminal responsibility has been extinct (grounds for extinction: death of the convicted person, pardon, statute barred limitations regarding either the crime or the sanction). In any case, it is always necessary to prove the illicit origin of the property.

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

Even though our criminal justice system allows for non-conviction based confiscation, its extension to situations other than the ones described above would be very problematic, namely the permanent illness of the person, and all the situations foreseen in letter (b). If there is a serious risk that prosecution could be barred by statutory limitations when the person has fled or is ill, property could be subject to freezing until prosecution is again possible. If prosecution is in fact statute barred, confiscation would still be possible without a conviction, statutory limitations being a ground for the exemption of criminal responsibility.

Confiscation is linked to the criminal conviction as an accessory consequence of the criminal sanction and it would not be possible in cases where no conviction has yet been established, unless it is no longer possible to have a conviction.

So, confiscation of property without the existence of a criminal conviction is possible, for example, in the event of death of the accused person before the trial has started. In this case, the criminal responsibility would be extinct. If the illicit origin of the property is demonstrated, it could be seized without the existence of a criminal conviction by a judicial decision. However, the nature of the proceedings is criminal, so you have to demonstrate and prove the illicit origin of the good, without prejudice to the right of defence that corresponds to the new owners of the property, as would be the heirs. The same applies to the illness of the accused person that prevents him to stand trial. In case the accused person has fled, property can be freeze as a protective measure, and once the criminal liability is extinct due to the passage of time, it could then be confiscated.

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- whose system requires a link to criminal proceedings
- whose system applies civil forfeiture procedures.

Only confiscation orders issued in the context of criminal proceedings can be recognized in Spain. On the contrary, confiscation orders issued in civil forfeiture procedures cannot be executed in our national system.



## FRANCE

### **1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

La France n'a pas de dispositions permettant de confisquer le produit d'infraction(s) en l'absence de condamnation : la confiscation est une peine et est donc toujours accessoire à une décision de condamnation pénale<sup>6</sup>.

Toutefois, la France dispose d'une procédure qui permet, dans certains cas, de confisquer les biens ayant une origine illicite mais n'ayant pas de lien direct ou indirect avec les faits poursuivis, sur la base d'une condamnation relative à une infraction différente de celle qui a procuré ce « produit ».

Cette procédure correspond à la procédure que la convention de Palerme incite les États Parties à mettre en œuvre : l'article 12 § 7 de cette convention stipule que « *Les États Parties peuvent envisager d'exiger que l'auteur d'une infraction établisse l'origine licite du produit présumé du crime ou d'autres biens pouvant faire l'objet d'une confiscation, dans la mesure où cette exigence est conforme aux principes de leur droit interne et à la nature de la procédure judiciaire et des autres procédures* ».

L'article 321-6 du code pénal français dispose ainsi « *Le fait de ne pas pouvoir justifier de ressources correspondant à son train de vie ou de ne pas pouvoir justifier de l'origine d'un bien détenu, tout en étant en relations habituelles avec une ou plusieurs personnes qui soit se livrent à la commission de crimes ou de délits punis d'au moins cinq ans d'emprisonnement et procurant à celles-ci un profit direct ou indirect, soit sont les victimes d'une de ces infractions, est puni d'une peine de trois ans d'emprisonnement et de 75 000 Euros d'amende.*

*Est puni des mêmes peines le fait de faciliter la justification de ressources fictives pour des personnes se livrant à la commission de crimes ou de délits punis d'au moins cinq ans d'emprisonnement et procurant à celles-ci un profit direct ou indirect. »*

L'infraction définie aux articles 131-2 et 321-9 du code pénal français permet les confiscations et est aussi efficace que la procédure de confiscation sans condamnation.

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<sup>6</sup> Voir en particulier articles 131-10, 131-14, 131-16 et 131-21 du code pénal.

- 2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

La solution française repose sur l'existence d'une condamnation pénale et prévoit indirectement un lien avec les infractions constituant des crimes ou des délits punis d'au moins cinq ans d'emprisonnement.

- 3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

Cette procédure a lieu devant une juridiction pénale, puisque la solution retenue a été de créer une infraction de non justification de ressources correspondant à son train de vie ou de non justification de l'origine d'un bien détenu. La personne poursuivie dispose de toutes les garanties liées au caractère pénal de la procédure.

- 4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

La seule situation où la confiscation pénale n'est pas possible est le cas de décès de la personne dans la mesure où ce décès entraîne une extinction de l'action publique.

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

- 5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

- i. 1°) S'il fallait introduire des confiscations sur le fondement de procédures civiles, cela soulèverait des difficultés juridiques d'ordre constitutionnel liées notamment à notre conception de la protection du droit de propriété. Il s'agit d'une question de principe qui relève du gouvernement français. Dans ce cas, la confiscation ne serait cependant plus l'accessoire d'une condamnation pénale et ne relèverait pas, en conséquence, de la base juridique visée dans la directive (Articles 82, paragraphe 2, et 83, paragraphe 1 du Traité sur le fonctionnement de l'Union européenne).

ii. 2°) S'il fallait introduire des confiscations sans condamnation sur le fondement de procédures pénales, de telles confiscations sans condamnation sembleraient contraire à plusieurs principes fondamentaux du droit pénal (consacrés notamment par la CEDH, le Pacte international sur les droits civils et politiques, la Charte des droits fondamentaux), en l'espèce la présomption d'innocence, l'extinction de l'action publique en cas de décès, etc. Par ailleurs, en ce qui concerne la compétence de l'Union européenne, le Parlement européen et le Conseil « *peuvent établir des règles minimales relatives à la définition des infractions pénales et des sanctions dans des domaines de criminalité particulièrement grave revêtant une dimension transfrontière résultant du caractère ou des incidences de ces infractions ou d'un besoin particulier de les combattre sur des bases communes* » en application de l'article 83, paragraphe 1, du traité sur le fonctionnement de l'Union européenne. C'est d'ailleurs la raison pour laquelle, dans sa proposition, la Commission limite l'harmonisation des confiscations aux domaines de criminalité visés à cet article 83 (terrorisme, traite des êtres humains, exploitation sexuelle des femmes et des enfants, trafic illicite de drogues, blanchiment d'argent, corruption, contrefaçon de moyens de paiement, criminalité informatique et criminalité organisée, etc.). Les confiscations simples (article 3 du projet de directive) et les confiscations élargies de biens (article 4 du projet de directive) sont des peines principales ou des peines complémentaires et sont en conséquence des sanctions, qui relèvent de l'article 83 § 1 du TFUE. En revanche, les confiscations « sans condamnation » (article 5 du projet de directive) posent un problème de qualification (décision pénale ou décision civile), tout particulièrement en cas de biens détenus par des héritiers suite au décès de l'auteur de l'infraction, sauf lorsqu'il est possible de sanctionner le détenteur de ces biens sur le fondement du recel, du blanchiment ou de l'infraction de non justification de ressources ou de biens. Dès lors qu'il n'y a pas de condamnation, ces confiscations sans condamnation ne semblent pas relever de l'article 83, paragraphe 1 précité. La notion de confiscation sans condamnation reste ambiguë : le texte même de cette confiscation fait référence à une procédure « *qui, si le suspect ou l'accusé avaient été en mesure d'être jugés, aurait pu conduire à une condamnation pénale* » (article 5 du projet de directive) et parmi les garanties, il est souligné que « *la personne dont les biens sont concernés par la décision de confiscation est représentée par un avocat pendant toute [cette] procédure, afin que cette personne puisse exercer ses droits de la défense en ce qui concerne tant l'établissement de l'infraction pénale que la détermination des produits et instruments* ». Contrairement à la convention de Mérida<sup>7</sup>, ce type de confiscation implique un lien indirect avec une infraction. Et ne relève pas vraiment d'une procédure civile.

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<sup>7</sup> Cf. article 31 de la convention de Mérida.

Cette procédure semble inadaptée :

- iii. soit la personne est vivante (fuite, maladie, irresponsabilité) et rien de s'oppose à une condamnation in absentia. Cette situation est réversible (une personne en fuite peut être arrêtée, une personne malade revenir à une meilleure santé) ;
- iv. soit la personne est décédée et aucune procédure pénale ne peut plus être menée à bien dans le respect des droits fondamentaux.

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- **whose system requires a link to criminal proceedings**
- **whose system applies civil forfeiture procedures.**

La France est parfaitement en mesure de reconnaître des décisions prises, dans d'autres États (par exemple en Italie) sur le fondement de procédures qui n'existent pas en France (cf. Cass. Crim. 13/11/2003, n° 03-80.371, Bull. 2003 n° 213 p. 878 CRISAFULLI<sup>8</sup> et Cass. Civ. 2, 4/6/2009, 08-16.142, Bull. 2009, II, n° 143 SCI ZANORO<sup>9</sup>).

La Cour de cassation détermine la nature civile ou pénale de la confiscation non pas en fonction de la juridiction qui l'a prononcée ou de l'existence d'une déclaration de culpabilité, mais en fonction de ses conséquences sur le patrimoine de la personne mise en cause. Elle autorise ainsi l'exécution sur le territoire national d'une confiscation émanant d'une juridiction étrangère, même non pénale, dans la mesure où les conséquences juridiques de la décision sur le patrimoine de la personne mise en cause peuvent s'analyser en droit interne comme une confiscation pénale. La seule condition est donc que les indices permettant d'établir que le bien en cause est le produit d'une infraction soient considérés comme suffisants pour s'apparenter à une décision de nature pénale.

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<sup>8</sup> Il résulte de la Convention relative au blanchiment, au dépistage, à la saisie et à la confirmation des produits du crime, du 8 novembre 1990, applicable notamment dans les relations entre la France et l'Italie, qu'une partie ayant reçu de l'autre partie une demande de confiscation concernant des produits situés sur son territoire, est tenue de l'exécuter lorsque les conditions prévues par le texte conventionnel et la loi de l'État requis sont réunies.

<sup>9</sup> Pour l'application de l'article 15 de la loi n° 96-392 du 13 mai 1996, une cour d'appel, ayant relevé que la SCI propriétaire de l'immeuble objet de la mesure conservatoire, qui avait été créée pour l'acquisition de celui-ci, est détenue à 99 % par une société fiduciaire dont l'ayant droit économique est la personne poursuivie pour blanchiment, qui la contrôle et que la complexité des montages tendent à occulter tout lien visible entre elle et cette société, en déduit souverainement que la SCI ne pouvait ignorer l'origine frauduleuse de l'immeuble et fait ainsi ressortir que le requérant justifie d'une créance paraissant fondée en son principe, à hauteur du prix d'acquisition de l'immeuble, et que des circonstances en menacent le recouvrement.

## IRELAND

- 1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

Response:

Yes. The non-conviction based model for the confiscation of proceeds of crime was introduced into the Irish legal system through the provisions of the Proceeds of Crime Act, 1996. The non-conviction based model as provided for in Ireland is set out in doc. DROIPEN 71, COPEN 133, CODEC 1528.

[Note: The Irish model for non-conviction based confiscation is focused on the proceeds of crime. With regard to instrumentalities of crime, Ireland has in place a separate legislative measure under which it is possible to seize and confiscate cash (in particular circumstances) where a court is satisfied that it is intended for use in connection with criminal conduct (without conviction)].

- 2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

Response:

No link to criminal proceedings is required. The Irish non-conviction based model acts *in rem* on property that constitutes the proceeds of crime. It applies civil law rather than criminal law concepts.

- 3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

Response:

Not applicable – see question 2.

- 4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

Response:

Such requirements do not apply. In the non-conviction based model as set out in doc DROIPEN 71, COPEN 133, CODEC 1528, Ireland's Asset Recovery Office (the Criminal Assets Bureau) must satisfy the High Court (exercising civil jurisdiction) that, on the balance of probabilities, the specified property constitutes directly or indirectly the proceeds of crime. The High Court must be satisfied that there are reasonable grounds for the belief that the property in question is the proceeds of crime before the burden shifts to the respondent to show that the property was obtained legitimately. The Court may, when so satisfied, make an interim order over the property preventing anybody from dealing with it. In addition, the property must have a value of not less than €13,000.

- 5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

Response:

Not applicable.

- 6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- whose system requires a link to criminal proceedings
- whose system applies civil forfeiture procedures.

Response:

As Ireland has both conviction based and non-conviction based models in place, it would be possible, having regard to the particular circumstances, to give effect to both conviction based and non-conviction based orders from other jurisdictions.

## ITALY

### **1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

Yes. Italian laws provide for the possibility to confiscate proceeds for which there are reasons to believe that they are the result of illegal activities or the recycling thereof, also in the absence of a conviction for a specific offence, when they belong, directly or indirectly, to persons against whom there are grounded indications of belonging to an organised criminal association (of the mafia-type) or of having committed other offences specifically indicated by the law (such as trafficking in humans beings; illicit drug trafficking; crimes against public safety and other serious crimes).

The confiscation order is issued by a court [*tribunale*], after having given the party concerned - and any third party having an interest over the relevant assets – the opportunity to challenge the request for the confiscation order and the elements on which it is based. The confiscation order can be appealed against before the Court of Appeal [*Corte di Appello*] and challenged before the Court of Cassation [*Corte di Cassazione*] on grounds of law.

In brief, the assets can be confiscated:

1. in the presence of sufficient grounds for believing that the offences indicated by the law have been committed by the person holding the relevant assets;

and

2. if the assets:

- are the result of illegal activities; or
- are the result of the recycling of proceeds of illegal activities; or
- are disproportionate to the income of the person to whom they belong and such person is unable to prove their legal origin.

### **2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

The confiscation is totally independent from criminal proceedings and can be ordered regardless of the criminal prosecution of a person for a specific offence or of the outcome of the trial. Non-conviction based confiscation therefore can be ordered also when the person concerned has been acquitted of the offence charged.

**3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

Please, see answer no. 2. Italian law sets forth provisions concerning the relationship between measures taken in criminal proceedings and measures taken in non-conviction based confiscation proceedings.

**4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

No.

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

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**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- whose system requires a link to criminal proceedings
- whose system applies civil forfeiture procedures.

Yes, provided that the measure complies with the requirements provided by the national law.



## LATVIA

- 1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

Latvian legal system provides for the possibility of non-conviction based confiscation of proceeds of crime and it means that criminally obtained valuable, materials, and documents can be confiscated without a judgment of conviction (Chapter 59 of the Criminal Procedure Law of Latvia).

- 2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

The link to criminal proceedings in proceedings of non-conviction based confiscation is required.

The action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the asset (*in rem*).

- 3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

The confiscation procedures take place before a criminal court.

- 4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

Section 626, 629 and 630 of the Criminal Procedure Law of Latvia states as follows:

“Section 626. Reasons for Initiating Proceedings regarding Criminally Acquired Property

A person directing the proceedings has the right, in the interests of solving the financial matters, which have come about in pre-trial criminal proceedings, in timely manner and in the interests of the economy of proceedings, to separate the materials from a criminal case regarding criminally acquired property and to initiate proceedings, if the following conditions exist:

1) the totality of evidence provides a basis for believing that the property that has been seized or upon which an attachment has been imposed is of a criminal origin or related to a criminal offence;

2) due to objective reasons, the transferral of the criminal case to court is not possible in the near future (in a reasonable term), or such transferral may cause substantial unjustified expenses.

#### Section 629. Court Proceedings regarding Criminally Acquired Property

(1) Having received a decision on the initiation of proceedings regarding criminally acquired property, a judge shall:

- 1) determine the time and place of the court session;
- 2) summon the person directing the proceedings and a public prosecutor, if a decision has been taken by an investigator, as well as the persons referred to in Section 628 of this Law to the court session.

(2) A court session shall take place within 10 days after receipt of a decision of the person directing the proceedings to a court.

(3) The person directing the proceedings, a public prosecutor, others summoned and arrived persons, their representatives or defence counsels shall be heard and the submitted evidence examined in a court session.

(4) During a court session the persons involved in court proceedings have equal rights to submit recusations or requests, to submit evidence, to participate in inspection of evidence, to submit written explanations to the court, as well as to participate in examination of other matters, which have arisen during the court proceedings.

#### Section 630. Court Decision on Criminally Acquired Property

(1) In adjudicating materials regarding criminally acquired property, a court shall decide:

- 1) whether the property is related to a criminal offence or is of criminal origin;
- 2) whether there is information regarding the owner or lawful possessor of the property;
- 3) whether a person has lawful rights to the property;
- 4) actions with the criminally acquired property.

(2) If a court finds that the connection of property with a criminal offence has not been proven or the property is not of criminal origin, such court shall take a decision to terminate proceedings regarding the criminally acquired property.”

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

N/A

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- whose system requires a link to criminal proceedings

Latvian legal system provides for the possibility to recognise non-conviction based confiscation orders issued by another Member State.

Latvian Criminal Procedure Law provides for the possibility to recognise recognise and execute orders issued by foreign state allowing the confiscation of the proceeds of crime and instrumentalities, if in the order issued by a foreign state it is ascertained that confiscation of property is the object for committing a criminal offence or is the proceed of crime, regardless of whether or not criminal proceeding has been completed against a person (*in personam*) or a proceeds of crime or instrumentalities (*in rem*).

Request for criminal-legal assistance received from a foreign state for the confiscation of the proceeds of crime or instrumentalities, regardless of in what process (criminal procedure, civil procedure or other procedure) foreign state has made a judgement, in which it is ascertained that confiscation of property is the object for committing a criminal offence or is the proceed of crime, Latvia would assessed in accordance with the national legislation and on the basis of the international treaties concluded.

- whose system applies civil forfeiture procedures.

N/A

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## LITHUANIA

**1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

Yes.

Article 72, paragraphs 1-3 of Criminal Code of Lithuania (CC) declares:

1. Confiscation of property shall be the compulsory uncompensated taking into the ownership of the State of any form of property subject to confiscation *and held by the offender or other persons*.

2. Confiscation of property shall be applicable only in respect of the property used as an instrument or a means to commit a crime or as the result of the criminal act. Any form of property directly or indirectly obtained in relation to the criminal shall be deemed to constitute the result of the criminal act prohibited by the present Code.

3. The property held by the offender which is subject to compensation shall be confiscated *in all cases*.

It is important to notice that according to Lithuanian laws, confiscation of property is a penal sanction, not a penalty, therefore it is applied not only after convicting a person, but also while releasing a person from punishment or from criminal responsibility. Moreover, according to the Code of Criminal Proceedings (CCP) and court practice, confiscation of property could be applied while dismissing the pretrial investigation on the certain basis, non-rehabilitative ones.

**2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

According to the CC confiscation of property is a penal sanction which may be imposed on an adult person released from criminal liability on the grounds provided for in Chapter VI of CC (Release from criminal liability) or released from a penalty on the grounds provided for in Chapter X of CC (Suspension of a sentence and release from a penalty). Confiscation of property may also be imposed on juveniles and legal persons. Moreover, confiscation of property may be imposed in conjunction with a penalty. Thus confiscation of property is linked and possible only in criminal proceedings.

On the other hand, confiscation of property may be linked to those persons who are not related to the criminal case (confiscation from a third party).

Non-conviction based confiscation is directed *to the asset* which has to be confiscated (*in rem*). However, this could be inter-related to *in personam* as well (the third person has to know that the property is gained in a criminal way etc.)

**3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

Confiscation where a link to criminal proceedings is required according to the national laws of Lithuania is allowed before a criminal court.

**4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

Yes.

Article 94 of CCP declares that the question of assets which is important while investigating or handling the criminal offence must be settled after the criminal proceedings is dismissed or when the sentence is passed. When the process is dismissed because of such reasons as limitation of statute, age of criminal responsibility or death of offender the assets has to be confiscated if it meets the criteria foreseen in article 72 paragraph 2 of CC (confiscation of property shall be applicable only in respect of the property used as an instrument or a means to commit a crime or as the result of the criminal act. Any form of property directly or indirectly obtained in relation to the criminal shall be deemed to constitute the result of the criminal act prohibited by the Criminal Code).

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

The procedure is foreseen in the Article 94, paragraph 3 of CCP (the text is provided).

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

–

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- **whose system requires a link to criminal proceedings**

In these cases the provisions of European Convention on the International Validity of Criminal Judgement (The Hague, 28 May 1970) could be applied.

- **whose system applies civil forfeiture procedures**

In these cases there are no any instruments which would regulate the mutual recognition of decisions concerning the confiscation of property in systems of civil forfeiture procedures. In Lithuania we do not have practice how this kind of issue could be solved.

### **Relevant national provisions of Criminal Code of Lithuania:**

#### **72 straipsnis. Turto konfiskavimas**

1. Turto konfiskavimas yra priverstinis neatlygintinas konfiskuotino bet kokio pavidalo turto, esančio pas kaltininką ar kitus asmenis, paėmimas valstybės nuosavybėn.

2. Konfiskuotinu turtu laikomas šio kodekso uždraustos veikos įrankis, priemonė ar rezultatas. Šio kodekso uždraustos veikos rezultatu pripažįstamas tiesiogiai ar netiesiogiai iš jos gautas bet kokio pavidalo turtas.

3. Kaltininkui priklausantis konfiskuotinas turtas privalo būti konfiskuojamas visais atvejais.

4. Kitam fiziniam ar juridiniam asmeniui priklausantis konfiskuotinas turtas konfiskuojamas, nepaisant to, ar tas asmuo nuteistas už šio kodekso uždraustos veikos padarymą, ar ne, jeigu:

1) perleisdamas turtą kaltininkui ar kitiems asmenims, jis žinojo arba turėjo ir galėjo žinoti, kad šis turtas bus naudojamas šio kodekso uždraustai veikai daryti;

2) šis turtas jam buvo perleistas sudarius apsimestinį sandorį;

3) šis turtas jam buvo perleistas kaip kaltininko šeimos nariui ar artimajam giminaičiui;

4) šis turtas jam buvo perleistas kaip juridiniam asmeniui, kurio vadovas, valdymo organo narys arba dalyviai, valdantys ne mažiau kaip penkiasdešimt procentų juridinio asmens akcijų (pajaus, įnašų ir pan.), yra kaltininkas, jo šeimos nariai ar artimieji giminaičiai;

5) įgydamas šį turtą, jis arba juridiniame asmenyje vadovaujančias pareigas ėję ir teisę jam atstovauti, juridinio asmens vardu priimti sprendimus ar kontroliuoti juridinio asmens veiklą turėję asmenys žinojo arba turėjo ir galėjo žinoti, kad šis turtas yra šio kodekso uždraustos veikos įrankis, priemonė ar rezultatas.

5. Kai konfiskuotinas turtas yra paslėptas, suvartotas, priklauso tretiesiems asmenims ar jo negalima paimti dėl kitų priežasčių arba šį turtą konfiskuoti būtų netikslinga, teismas iš kaltininko ar kitų šio straipsnio 4 dalyje nurodytų asmenų išieško konfiskuotino turto vertę atitinkančią pinigų sumą.

6. Teismas, skirdamas turto konfiskavimą, turi nurodyti konfiskuojamus daiktus arba konfiskuojamo turto vertę pinigais.

## **Article 72. Confiscation of Property**

1. Confiscation of property shall be the compulsory uncompensated taking into the ownership of the State of any form of property subject to confiscation and held by the offender or other persons.

2. Confiscation of property shall be applicable only in respect of the property used as an instrument or a means to commit a crime or as the result of the criminal act. Any form of property directly or indirectly obtained in relation to the criminal shall be deemed to constitute the result of the criminal act prohibited by the present Code.

3. The property held by the offender which is subject to compensation shall be confiscated in all cases.

4. The property owned by other natural or legal persons subject to confiscation shall be confiscated regardless of whether or not that person has been convicted for committing a criminal act prohibited by the present Code, provided that:

1) when transferring the property to the offender or to other persons this person was aware or ought to have been and could have been aware that this property will be used to commit a criminal act prohibited by the present Code;

2) this property was transferred to the person by having concluded a fictitious transaction;

3) this property was transferred to the person as to a family member or a close relative of the offender;

4) this property was transferred to the person as to a legal entity in which the offender, or family members or close relatives of the offender hold the position of a manager, a member of the management body or a participant holding at least fifty per cent of the shares (shares, contributions and the like) of the legal entity;

5) when acquiring this property, the person or the persons who were holding managing positions in the legal entity and were entitled to represent the legal entity, to take decisions in the name of the legal entity or to control the activity of the legal entity were aware or ought to have been and could have been aware that this property constitutes an instrument, a means or the result of the criminal offence prohibited by the present Code.

5. Where the property subject to confiscation has been concealed, consumed, belongs to third parties or cannot be taken for other reasons, or it is not expedient to confiscate this property, a court shall recover from the offender or other persons indicated in paragraph 4 of the present Article a sum of money equivalent to the value of the property subject to confiscation.

6. When ordering confiscation of property, a court must specify the items subject to confiscation or the monetary value of property subject to confiscation.

## 72<sup>3</sup> straipsnis. Išplėstinis turto konfiskavimas

1. Išplėstinis turto konfiskavimas yra kaltininko turto ar jo dalies, neproporcingos kaltininko teisėtoms pajamoms, paėmimas valstybės nuosavybėn, kai yra pagrindas manyti, kad turtas gautas nusikalstamu būdu.

2. Išplėstinis turto konfiskavimas taikomas, kai yra visos šios sąlygos:

1) kaltininkas pripažintas padaręs apysunkį, sunkų arba labai sunkų tyčinį nusikaltimą, iš kurio jis turėjo ar galėjo turėti turtinės naudos;

2) kaltininkas turi šio kodekso uždraustos veikos padarymo metu, po jos padarymo arba per penkerius metus iki jos padarymo įgyto turto, kurio vertė neatitinka jo teisėtų pajamų, ir šis skirtumas viršija 250 MGL dydžio sumą, arba per šiame punkte nurodytą laikotarpį kitiems asmenims yra perleidęs tokio turto;

3) baudžiamojo proceso metu kaltininkas nepagrindžia šio turto įsigijimo teisėtumo.

3. Šio straipsnio 2 dalyje nurodytas konfiskuotinas turtas, perleistas kitam fiziniam ar juridiniam asmeniui, iš šio asmens konfiskuojamas, jeigu yra bent vienas iš šių pagrindų:

1) turtas perleistas sudarius apsimestinį sandorį;

2) turtas perleistas kaltininko šeimos nariams arba artimiesiems giminaičiams;

3) turtas perleistas juridiniam asmeniui, kurio vadovas, valdymo organo narys arba dalyviai, valdantys ne mažiau kaip penkiasdešimt procentų juridinio asmens akcijų (pajaus, įnašų ir pan.), yra kaltininkas, jo šeimos nariai ar artimieji giminaičiai;

4) asmuo, kuriam perleistas turtas, arba juridiniame asmenyje vadovaujančias pareigas ėję ir teisę jam atstovauti, juridinio asmens vardu priimti sprendimus ar kontroliuoti juridinio asmens veiklą turėję asmenys žinojo arba turėjo ir galėjo žinoti, kad šis turtas įgytas nusikalstamu būdu ar neteisėtomis kaltininko lėšomis.

4. Šiame straipsnyje numatytas išplėstinis turto konfiskavimas negali būti taikomas kaltininko ar trečiųjų asmenų turtui ar jo daliai, iš kurių pagal Lietuvos Respublikos tarptautines sutartis, Lietuvos Respublikos civilinio proceso kodekso, kitų įstatymų nuostatas negali būti išieškoma.

5. Kai konfiskuotinas visas turtas arba jo dalis yra paslėpta, suvartota, priklauso tretiesiems asmenims ar jo negalima paimti dėl kitų priežasčių arba šį turtą konfiskuoti būtų netikslinga, teismas iš kaltininko ar kitų šio straipsnio 3 dalyje nurodytų asmenų išieško konfiskuotino turto ar jo dalies vertę atitinkančią pinigų sumą.

6. Teismas, skirdamas išplėstinį turto konfiskavimą, turi nurodyti konfiskuojamus daiktus arba konfiskuojamo turto ar jo dalies vertę pinigais.



### **Article 72<sup>3</sup>. Extended Confiscation of Property**

1. Extended confiscation of property shall be taking into the ownership of a state of the offender's property or part thereof which is out of proportion to the offender's lawful income where there is evidence that the property has been acquired by criminal means.

2 Extended confiscation of property shall be applicable, where:

1) the offender is adjudged to have committed a less serious or serious or grave premeditated crime whereof he had or could have had pecuniary advantage;

2) the offender possesses property gained during the commission or after the commission or in the course of five years prior to the commission of the acts prohibited by this Code the value whereof is out of proportion to his lawful income and the difference exceeds 250 MSLs or transferred some of this property to other persons during the period indicated in this Paragraph;

3) in the course of criminal proceedings the offender fails to justify the lawfulness of acquiring the property.

3. The property subject to confiscation under Paragraph 2 of this Article transferred to other natural or legal persons shall be confiscated from these persons in the presence of at least one of these grounds:

1) the property was transferred having made an artificial transaction;

2) the property was transferred to the offender's family member or close relative;

3) the property was transferred to a legal person whose manager or member or participant of a management body holding at least fifty percent of the legal person's shares (share, contributions, etc.) is an offender or his family member or a close relative;

4) a person who was transferred the property or persons who held high managerial positions in a legal person with the right to represent the legal person, make decisions in its name and control its activities were aware or ought to have been aware or could have been aware that the property was acquired by criminal means or with the offender's unlawful proceeds.

4. Extended property confiscation provided for in this Article shall not be applicable to the offender's or third parties' property or part of this property, where they shall not be subject to recovery in accordance with the provisions of international agreements of the Republic of Lithuania, the Code of Criminal Procedure of the Republic of Lithuania or other laws.

5. Where the property or part of the property subject to confiscation has been concealed, consumed, belongs to third parties or cannot be taken for other reasons or the confiscation of this property would be inexpedient, a court shall recover from the offender or other persons indicated in Paragraphs 3 of this Article a sum of money equivalent to the value of the property or part of the property subject to confiscation.

6. When ordering extended confiscation of property, a court must specify the items subject to confiscation or the monetary value of the property or part of the property subject to confiscation.

### **Relevant national provisions of Code of Criminal Proceedings of Lithuania:**

**Baudžiamojo proceso kodekso 94 straipsnis. Priemonės, kurių imamas dėl daiktų, turinčių reikšmės nusikalstamai veikai tirti ir nagrinėti, nutraukiant procesą ir priimant nuosprendį**

1. Priimant nuosprendį ar nutraukiant procesą, daiktų, turinčių reikšmės nusikalstamai veikai tirti ir nagrinėti, klausimas išsprendžiamas taip:

1) Lietuvos Respublikos baudžiamojo kodekso 72 ir 72<sup>3</sup> straipsniuose nurodytas turtas konfiskuojamas;

<...>

2. Šio straipsnio 1 dalyje nurodytus sprendimus ikiteisminio tyrimo metu priima prokuroras ar ikiteisminio tyrimo teisėjas, nutraukiantys ikiteisminį tyrimą, vėlesnėse proceso stadijose – bylą nagrinėjantis teismas.

3. Jeigu nutraukiant ikiteisminį tyrimą turi būti išspręstas Lietuvos Respublikos baudžiamojo kodekso 72 ar 72<sup>3</sup> straipsnyje nurodyto turto konfiskavimo klausimas, ikiteisminis tyrimas nutraukiamas ikiteisminio tyrimo teisėjo sprendimu, kuriuo patvirtinamas prokuroro nutarimas nutraukti ikiteisminį tyrimą. Sprendžiant turto konfiskavimo arba išplėstinio turto konfiskavimo klausimą, rengiamas posėdis, į kurį turi būti kviečiamas prokuroras, asmuo, dėl kurio turto konfiskavimo priimtas nutarimas, šio asmens atstovas. Ikiteisminio tyrimo teisėjo sprendimu į posėdį gali būti kviečiami ir kiti asmenys. Prokuroro ir asmens, dėl kurio turto konfiskavimo priimtas nutarimas, atstovo dalyvavimas tokia posėdyje būtinas. Ikiteisminio tyrimo teisėjo sprendimas gali būti skundžiamas šio Kodekso X dalyje nustatyta tvarka.

## HUNGARY

**1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

Yes.

**2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

According to the national legislation, confiscation without a criminal conviction is a special procedural form in the criminal proceeding and it is regulated by the Act No. XIX of 1998 on the criminal proceedings (hereinafter as: CPA). This proceeding is an “*in rem procedure*”, since it targets the assets to be confiscated, not the person.

**3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

According to Section 569 of the CPA which regulates the confiscation without a criminal conviction:

*“Section 569 (1) Upon the motion of the prosecutor the court shall decide upon confiscation, confiscation of property or the transfer of any seized items into the ownership of the state if no criminal proceeding has been initiated against anyone or the criminal proceeding has been terminated, or it has been suspended due to the unknown location or mental disease of the defendant.*

*(2) The procedure shall be conducted by the court having competence to adjudicate the criminal offence; or, if such a court cannot be established, the court at which the prosecutor files the motion.”*

**4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.). Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.**

Please see the answer for question no. 3. To sum up, the special proceeding regulated in Section 569 of the CPA makes it possible that the court decides on confiscation or confiscation of property even in the absence of criminal proceeding (or if the criminal proceeding is terminated for example because the defendant died or if the proceeding has been suspended due to the unknown location or mental disease of the defendant.

It also has to be noted that pursuant to Section 331 (4) CPA, *“if the verdict of acquittal is based on the grounds for the preclusion or termination of punishability, the court may order confiscation or confiscation of property.”*

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

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**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- whose system requires a link to criminal proceedings
- whose system applies civil forfeiture procedures.

Regarding the fact that in Hungary non-conviction based confiscation is a special procedural form in the criminal proceeding, we can only imagine cooperation with those Member States whose system also requires a link to criminal proceeding.

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## AUSTRIA

- 1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

Yes

- 2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

In principle according to section 443 CCP the decision about forfeiture (section 20 PC), extended forfeiture (section 20 b PC) and confiscation (section 26 PC) shall be made in the (final) penal judgment. But if the results of the penal proceedings (neither by itself nor after taking of evidence, which do not significantly delay the judgment in the question of guilt and punishment) are insufficient to judge reliably the pecuniary sanctions, their determination may be reserved by an order for a separate decision (sections 445, 445a CCP).

Furthermore the precondition for forfeiture (section 20 PC), extended forfeiture (section 20 b PC) and confiscation (section 26 PC) can be achieved irrespective from a conviction or commitment to an institution listed in sections 21 to 23 PC. In such as case these proprietary orders can be issued in an independent (objective) proceeding due to a special application of the prosecutor. The action to confiscate is directed at the asset.

This objective proceeding is regulated by section 445 CCP, witch determines that, if there are reasons to suppose that the prerequisites for forfeiture, extended forfeiture or for confiscation are fulfilled, and if it is not possible to issue the order in a penal proceeding or in a proceeding on preventive measures involving deprivation of liberty, the public prosecutor has to make an independent application to order such pecuniary sanction.

On an application for forfeiture the competent court has to decide by judgment in an independent proceeding after public and oral trial; the competent court is the court which was or would have been competent for the trial and judgment of the underlying offence; but in absence of such competence the competent court is the court of first instance where the profits or property is located. The court of first instance decides through single judge. In case a court of lay assessors or a jury court has decided on the offence which shall be the basis for the order or has reserved the decision, its presiding judge is competent as single judge. On an application for confiscation the district court has to decide where the offence has been committed; but if this place is unknown or situated abroad the district court has to decide where the object is located.

**3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

The confiscation procedure can only take place before a criminal court.

**4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

See the answer to question 2.

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

\*\*\*

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- **whose system requires a link to criminal proceedings**

Yes

- **whose system applies civil forfeiture procedures.**

No

## Relevant provision of the Austrian Penal Code

### **Confiscation**

**Section 19a** (1) Objects the perpetrator used in order to commit an intentional criminal act, or that were designated by him/her to be used for committing this criminal act or which were produced by the criminal act, have to be confiscated if they were the property of the perpetrator at the time of the decision.

(2) Such objects need not be confiscated if their value is out of proportion regarding the importance of the criminal act or the suspicion against the perpetrator.

### **Forfeiture**

**Section 20** (1) The Court has to declare forfeited assets that were obtained for or by the commission of an act punishable by law.

(2) Forfeiture also refers to the use and substitute value of assets to be declared forfeited according to para. 1.

(3) As far as assets subject to forfeiture according to para. 1 or 2 have not been seized or sequestrated (sections 110 para. 1 n° 3, 115 para. 1 n° 3 StPO) the court has to declare an amount of money forfeited that corresponds to the assets obtained according to para. 1 and para. 2.

(4) If the extent of the assets to be declared forfeited cannot be established at all or only with disproportionate efforts, the court has to determine it according to its conviction.

### **Refraining from forfeiture**

**Section 20a** (1) Forfeiture against third persons according to section 20 para. 2 and para. 3 is excluded in so far as this person has obtained the assets unaware of the criminal act punishable by law.

(2) Forfeiture is also excluded

1. against third persons insofar as this person has acquired the assets for a consideration unaware of the criminal act punishable by law,

2. insofar as the person affected satisfies civil claims resulting from the act or has secured their satisfaction or

3. insofar as the effect of forfeiture can also be achieved by other legal measures.

(3) There is no forfeiture if the assets to be declared forfeited or the chance of being able to collect them is out of proportion to the procedural efforts forfeiture or the collection would require.

### **Extended forfeiture**

**Section 20b** (1) Assets at the disposal of a criminal organisation (section 278a) or a terrorist association (section 278b) or that are appropriated or collected as means for financing terrorism (section 278d) have to be declared forfeited.

(2) If a criminal act according to sections 165, 278, 278c, for the commission of which or by which the assets were obtained or such a crime has been committed, also such assets have to be declared forfeited that have been obtained in a time-related connection with such an act if it can be supposed that they derive from a criminal act and their legal origin cannot be proven satisfactorily.

(3) Section 20 para. 2 to para. 4 StGB apply accordingly.

### **Refraining from extended forfeiture**

**Section 20c** (1) Extended forfeiture according to section 20b para. 1 StGB is excluded insofar as there are legal claims regarding the assets affected by persons who do not participate in the criminal organisation or terrorist association or the financing of terrorism.

(2) Section 20a StGB applies accordingly.

### **Relevant provision of the Austrian Criminal Code of Procedure**

**Section 443** (1) As to forfeiture, extended forfeiture, confiscation and other pecuniary sanctions (liability for fines, forfeiture and value compensation) the decision shall be made in the penal judgement, save it is provided in this chapter in another way.

(2) If the results of the penal proceedings as such or after carrying out simple additional investigations are insufficient to judge reliably the pecuniary sanctions mentioned in para.1, their determination may be reserved by an order for a separate decision (sects. 445, 445a); apart from this case any further order regarding the assets and objects concerned is admissible.

(3) The decision on pecuniary sanctions is – save the case under sect. 445a – equal to the imposition of a penalty and may be appealed in favour and against the convicted or the other persons concerned by the decision (sects. 64, 444).



**Section 445** (1) If there are reasons to suppose that the prerequisites for forfeiture (sect. 20 of the Penal Code), for extended forfeiture (sect. 20b of the Penal Code) or for confiscation (sect. 26 of the Penal Code) are fulfilled, and if it is not possible to issue the order in a penal proceeding or in a proceeding on preventive measures involving deprivation of liberty, the public prosecutor has to make an independent application to order such pecuniary sanction.

(2) On an application for forfeiture or for extended forfeiture the competent court has to decide by judgement in an independent proceeding after public and oral trial; the competent court is the court which was or would have been competent for the trial and judgement of the underlying offence; but in absence of such competence the competent court is the court of first instance where the profits or property is located. The court of first instance decides through single judge. In case a court of lay assessors or a jury court has decided on the offence which shall be the basis for the order or has reserved the decision (sect. 443 para. 2), its presiding judge is competent as single judge.

(3) On an application for confiscation the district court has to decide where the offence has been committed; but if this place is unknown or situated abroad the district court has to decide where the object is located; the decision shall be made as a rule (sect. 445a ) by judgement in an independent proceeding after public and oral trial. The provisions regarding the trial before district courts as well as section 444 are applicable *mutatis mutandis*.

(4) By application of sects. 463 to 468 (sect. 489) *mutatis mutandis* the judgement may be appealed in favour and against the person concerned; section 444 para. 1 last sentence is applicable accordingly.

## POLAND

- 1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

PL answer:

No. Polish law does not provide a regular mechanism allowing for the confiscation of the proceeds of crime and instrumentalities of crime without a criminal conviction.

- 2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

PL answer:

See above.

- 3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

PL answer:

See above.

- 4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

PL answer:

See above.

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

PL answer:

The main obstacles are of constitutional nature. During the discussions held on the feasibility of introducing similar measure in Poland, the concern was raised that such an intrusive measure could breach the basic constitutional principles of the Polish legal order. Namely, the respect of property and presume of innocence were mentioned. The same principles are as well provided in the Articles 17(1) and 48(1) of the Charter of Fundamental Rights of the EU.

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- **whose system requires a link to criminal proceedings**

PL answer:

No. Polish system of recognising confiscation orders is in line with the FD 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. Poland made the declaration provided for in Article 7(5) of this FD, which confines a scope of mutual recognition in this field. Consequently, the non-conviction based confiscation does not fall under the scope of this instrument as implemented into the Polish law.

- **whose system applies civil forfeiture procedures.**

PL answer:

No. Polish system of recognising confiscation orders is in line with the FD 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders. Poland made the declaration provided for in Article 7(5) of this FD, which confines a scope of mutual recognition in this field. Consequently, the non-conviction based confiscation does not fall under the scope of this instrument as implemented into the Polish law.

## **NOTE**

As mentioned above, Poland does not have provisions allowing for the confiscation of the proceeds of crime and instrumentalities of crime without a criminal conviction. However, Article 412 of Polish Civil Code stipulates that the benefits rendered in an unfair order may be confiscated by the court. This mechanism is rarely used because of its specific construction and intrusive nature. It shall be noticed that it does not pertain strictly to the proceeds of crime, although it has some common features. It is wholly a civil law institution, separate from criminal proceedings and directed at the person (*in personam*).

Kodeks cywilny (The Civil Code) – *courtesy translation*

Artykuł. 412. Sąd może orzec przepadek świadczenia na rzecz Skarbu Państwa, jeżeli świadczenie to zostało świadomie spełnione w zamian za dokonanie czynu zabronionego przez ustawę lub w celu niegodziwym. (...)

Article 412. The court may impose the forfeiture of the benefit, if it has been intentionally rendered in exchange for committing the deed which is prohibited by law or in an unfair order. (...)

## PORTUGAL

**1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

Portugal has provisions allowing for the confiscation of the direct proceeds of crime and instrumentalities of crime without a criminal conviction.

**2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

In Portugal, confiscation of proceeds and instrumentalities of crime is ordered by a criminal court in the context of a criminal proceeding. The action to confiscate the proceeds of crime or instrumentalities without a criminal conviction doesn't make any distinction regarding whether is directed at the person or at the asset.

**3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

The confiscation procedures can only take place before criminal courts.

**4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

Non conviction based confiscation can be ordered by a court whenever it is not possible to determine who was committed the criminal act. However, confiscation takes place only when the objects that were used for the commission of a crime or intended to be used in the commission of a crime, or which have been produced thereof can, by virtue of their nature or of the circumstances of the case, endanger the safety of persons, the public morality or the public order or offer a serious risk to be used for the commission of new crimes.

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction can you indicate the potential legal obstacles to their introduction in your country?**

N/A

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- **whose system requires a link to criminal proceedings**
- **whose system applies civil forfeiture procedures.**

It is possible in our national system to recognize non-conviction based confiscation orders issued by another Member State whose system requires a link to criminal proceedings. On the contrary, we have serious doubts regarding the recognition if the Member State applies civil forfeiture procedures.

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## ROMANIA

- 1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

RO: No, except the confiscation measure applied by a court following a request of National Integrity Agency, in files regarding unjustified wealth of public officials. In RO, the confiscation is a safeguarding measure attached to a conviction issued by a criminal court.

- 2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

RO: please see previous answer.

- 3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

RO: The confiscation is ordered by the court only within the criminal file in which the conviction was pronounced.

- 4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

RO: In case of illness, confiscation may be ordered attached to the conviction. In the case of fugitives, these may be convicted *in absentia* and again the confiscation may be ordered by a court. In the case of death, the criminal trial stops, confiscation cannot be ordered, unless a sequester was applied during criminal investigation and the court has to decide upon the seized assets.

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction can you indicate the potential legal obstacles to their introduction in your country?**

RO: Please see previous answers. Confiscation is a safeguarding measure attached to a conviction. Only in cases of unjustified wealth, confiscation may be applied without a conviction. However, this area is a very comprehensive and complex issue, which overlaps also to the field of constitutional guarantees of fundamental rights and freedoms, particularly in the view of protection of the right to private property (according to article 44 (8) of the Romanian Constitution „Lawfully acquired wealth may not be confiscated. Lawfulness of acquirement shall be presumed.” and according to article 44 (9) „ Any goods intended for, used, or resulting from criminal offences or contraventions may be confiscated only under the terms laid down by the law”

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- **whose system requires a link to criminal proceedings**
- **whose system applies civil forfeiture procedures.**

RO: Currently, Law 302/2004 does not impede *expressis verbis* the enforcement of the so called non-conviction based confiscation orders, which have been issues abroad, which means that at least theoretically, this type of cooperation would be possible, upon the decision of the Romanian competent judicial authority. We do not have practice in this sense which would prove our interpretation (it depends on the competent judicial authority), since the confiscation requests are received in a very limited number.

It has to be underlined though that Romania does not have in its internal legal system provisions related to confiscation in rem in its classical sense. Despite that, our current legislation allows for the restitution of the proceeds of crime to the victim through a civil action (actio in restitution) should a special situation intervene. Such situations may entail death of the suspected/accused or if for example the Ministry Public decides that there are not met the conditions to consider the deed a crime, still the prejudice needs to be recovered (therefore the criminal prosecution acts cannot be therefore exercised). We are unaware of the degree to which this tool is actually used in practice.



## SLOVENIA

**1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

ANSWER: Yes. The **Confiscation of Assets of Illicit Origin Act (ZOPNI)** allows for confiscation of the proceeds of crime without criminal conviction. ZOPNI provides for confiscation in a civil procedure.

**2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (in personam) or at the asset (in rem)?**

ANSWER: In order to begin civil confiscation proceedings, "reasons for suspicion" have to be established (in pretrial or trial phase of criminal case) that a person owns illegal proceeds of crime of value that exceeds 50 000 euros. "Reasons for suspicion" is a legal standard in criminal law, in which probability is lower than in the probable cause standard.

Financial investigation is ordered and run by the state prosecutor.

An action is lodged at the civil court by the state prosecutor.

Action to confiscate the proceeds of crime without criminal conviction is directed at the assets (action *in personam*).

**3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

ANSWER: The confiscation proceedings take place before a civil court.

**4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive etc.).**

ANSWER: The particular requirements that have to be met in order for the provisions for non-conviction based confiscation to apply are: value of assets owned by suspects has to exceed 50 000 EUROS and assets have to be derived or obtained from particular criminal offences (i.e. catalogue criminal offences).

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

ANSWER: See Answer 1.

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another member state:**

- whose system requires a link to criminal proceedings
- whose system applies civil forfeiture procedures.

ANSWER: Yes, under certain qualifications. See art. 48 and the following articles of Confiscation of Assets of Illicit Origin Act (ZOPNI).

## SLOVAKIA

**1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

Yes. The Slovak legal order differentiates between forfeiture and confiscation.

While forfeiture is a penalty and must always be based on a convicting judgment, the confiscation is so called “protective measure” and may be imposed either in a judgment or independently (without a criminal conviction).

**2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

The link to criminal proceedings is always required and confiscation of the proceeds of crime may take place only within the framework of criminal proceedings. The Slovak Criminal Code provides for three types of confiscation:

A – confiscation of items (imposed on natural persons),

B – confiscation of monetary sum (imposed on legal persons),

C – confiscation of assets (imposed on legal persons).

Confiscation in general is directed at the person, nevertheless there are certain grounds for confiscation of items that do not require link to particular person (Article 83 par. 1c, 1d and 1e of the Criminal Code – see below). While imposing confiscation measure the court must always deal with a person to whom the items intended to be confiscated belong.

**3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

The confiscation of the proceeds and instrumentalities of crime have to always take place before a criminal court.

**4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

*Natural persons:*

Confiscation of the proceeds and instrumentalities of crime is possible, if:

- the person may not be prosecuted or convicted (the main grounds include: lapse of time, immunities, age restriction, death, ne bis in idem, insanity, non – consent of the victim in relation to specified offences),
- the items belong to an offender whose punishment the court waived or to an offender against whom criminal prosecution was terminated or to an offender against whom criminal prosecution was conditionally suspended or to an offender against whom criminal prosecution was terminated due to the approval of a settlement,
- it concerns goods without control stamps or without other technical control measures required by generally binding legal regulations for its identification for tax purposes (in rem),
- the circumstances of the case justify the assumption that the items could be a source of financing terrorism,
- the safety of persons or assets, or another similar public interest requires it.

According to current Slovak legal order the illness and flight from prosecution or sentencing of the perpetrator are not grounds for final disposal of the criminal proceedings and confiscation measures in these cases may not be imposed.

*Legal persons:*

The confiscation of a monetary sum and confiscation of assets are the only two sanctions applicable to legal persons under Slovak law. These measures may be imposed under conditions set out in Articles 83a and 83b of the Criminal Code (see below). Legal persons may not be considered perpetrators of crime and thus may not be convicted for a criminal offence.

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

Not applicable.

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- **whose system requires a link to criminal proceedings**
- **whose system applies civil forfeiture procedures.**

The Slovak republic has not transposed the Council Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders yet. Currently is preparing the law, which will transpose mentioned FD. This law will become a part of the Slovak legal order during the year 2013. Decisions issued by authorities of other states may be recognized and executed on the basis of bilateral and multilateral international agreements, as long as there is a link to criminal matter.

**The wording of relevant provisions of Slovak legal order:**

<p><b>Trestný zákon č. 300/2005 Z. z.</b></p> <p><b>§ 83</b></p> <p><b>Zhabanie vecí</b></p> <p>(1) Ak nebol uložený trest prepadnutia vecí uvedenej v § 60 ods. 1, súd uloží zhabanie vecí, ak</p> <p>a) patrí osobe, ktorú nemožno stíhať alebo odsúdiť,</p> <p>b) patrí páchatelovi, od ktorého potrestania súd upustil, alebo páchatelovi, voči ktorému bolo trestné stíhanie zastavené, alebo páchatelovi, voči ktorému bolo trestné stíhanie podmienene zastavené, alebo páchatelovi, voči ktorému bolo trestné stíhanie zastavené z dôvodu schválenia zmiery,</p> <p>c) ide o tovar bez kontrolných známkov alebo bez iných kontrolných technických opatrení vyžadovaných všeobecne záväzným právnym predpisom na jeho označenie na daňové účely,</p> <p>d) okolnosti prípadu odôvodňujú predpoklad, že vec by mohla byť zdrojom financovania terorizmu, alebo</p> <p>e) to vyžaduje bezpečnosť ľudí alebo majetku, prípadne iný obdobný verejný záujem.</p> <p>(2) Vlastníkom zhabanej veci sa stáva štát, ak súd nerozhodne inak na základe vyhlásenej medzinárodnej zmluvy, ktorou je Slovenská republika viazaná.</p> <p>(3) Ustanovenie odseku 1 sa nepoužije, ak</p> <p>a) poškodenému vznikol z činu nárok na náhradu škody, ktorého uspokojenie by bolo znemožnené zhabaním vecí, alebo</p> <p>b) hodnota vecí je v zjavnom nepomere k miere závažnosti prečinu.</p> <p>(4) Ak vec uvedená v odseku 1 je nedosiahnuteľná alebo neidentifikovateľná, alebo je zmiešaná s majetkom páchatel'a alebo s majetkom inej osoby získaným v súlade so zákonom, môže súd uložiť zhabanie vecí takej hodnoty, ktorá zodpovedá hodnote tejto veci.</p>	<p><b>Criminal Code No. 300/2005 Coll.</b></p> <p><b>Article 83</b></p> <p><b>Confiscation of Items</b></p> <p>(1) If the punishment of the forfeiture of items referred to in Art. 60 Subsection 1 was not imposed, the court shall impose the confiscation of items if</p> <p>a) it belongs to a person who may not be prosecuted or convicted,</p> <p>b) it belongs to an offender whose punishment the court waived or to an offender against whom criminal prosecution was terminated or to an offender against whom criminal prosecution was conditionally suspended or to an offender against whom criminal prosecution was terminated due to the approval of a settlement,</p> <p>c) it is in regard to goods without control stamps or without other technical control measures required by generally binding legal regulations for its identification for tax purposes,</p> <p>d) the circumstances of the case justify the assumption that the matter could be a source of financing terrorism, or</p> <p>e) the safety of persons or assets, or another similar public interest requires it.</p> <p>(2) The State becomes the owner of the confiscated item, unless the court decides otherwise, based on a declared international treaty by which the Slovak Republic is bound.</p> <p>(3) The provisions of Subsection 1 shall not apply, if</p> <p>a) the victim incurred an entitlement to damages, the satisfaction of which would be obstructed by the confiscation of items, or</p> <p>b) the value of the items is clearly disproportionate to the gravity of the offence.</p> <p>(4) If an item referred to in Subsection 1 is unattainable or unidentifiable, or is merged with the offender's assets or with the assets of another person obtained in compliance with the law, the court may impose the confiscation of an</p>
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	item with a value that corresponds to the value of such item.
<p><b>§ 60</b></p> <p><b>Trest prepadnutia veci</b></p> <p>(1) Súd uloží trest prepadnutia veci,</p> <p>a) ktorá bola použitá na spáchanie trestného činu,</p> <p>b) ktorá bola určená na spáchanie trestného činu,</p> <p>c) ktorú páchatel' získal trestným činom alebo ako odmenu zaň alebo</p> <p>d) ktorú páchatel' nadobudol za vec uvedenú v písmene c).</p> <p>(2) Ak vec uvedená v odseku 1 je nedosiahnuteľná alebo neidentifikovateľná, alebo je zmiešaná s majetkom páchatel'a alebo s majetkom inej osoby získaným v súlade so zákonom, môže súd uložiť prepadnutie veci takej hodnoty, ktorá zodpovedá hodnote tejto veci.</p> <p>(3) Nedosiahnuteľnou vecou sa rozumie vec zničená, poškodená, stratená, odcudzená, urobená neupotrebitel'nou, spotrebovaná, ukrytá, prevedená na inú osobu s cieľom vyňať ju z pôsobnosti orgánov činných v trestnom konaní alebo inak odstránená alebo ušetrené náklady.</p> <p>(4) Vecou podľa odseku 1 sa rozumejú aj príjmy z trestného činu, ako aj zisky, úroky a iné úžitky z týchto príjmov alebo vecí.</p> <p>(5) Trest prepadnutia veci môže súd uložiť, len ak ide o vec patriacu páchatel'ovi.</p> <p>(6) Vlastníkom prepadnutej veci sa stáva štát, ak súd nerozhodne inak na základe vyhlásenej medzinárodnej zmluvy, ktorou je Slovenská republika viazaná.</p>	<p><b>Article 60</b></p> <p><b>Forfeiture of Items</b></p> <p>(1) The court shall impose the forfeiture of items,</p> <p>a) that were used to commit the criminal offence,</p> <p>b) that were intended for the commission of a criminal offence,</p> <p>c) which the offender acquired through a criminal offence or as a reward for it, or</p> <p>d) which the offender acquired for an item referred to in Paragraph c).</p> <p>(2) If an item referred to in Subsection 1 is unattainable or unidentifiable, or is merged with the offender's assets or with the assets of another person obtained in compliance with the law, the court may impose the forfeiture of an item of a value that corresponds to the value of such item.</p> <p>(3) An unattainable item means an item that is destroyed, damaged, lost, stolen, rendered useless, consumed, concealed, transferred to another person with the aim of excluding it from the scope of the law enforcement authorities or otherwise removed or the costs saved.</p> <p>(4) An item under Subsection 1 also means the proceeds from a criminal offence, as well as profits, interests and other rewards deriving from those income or items.</p> <p>(5) The court may impose the forfeiture of items only if such is an item belonging to the offender.</p> <p>(6) The State becomes the owner of the forfeited item unless the court decides otherwise based on a declared international treaty by which the Slovak Republic is bound.</p> <p>(7) The provisions of Subsection 1 shall not apply, if</p> <p>a) the victim incurred an entitlement to</p>

<p>(7) Ustanovenie odseku 1 sa nepoužije, ak</p> <p>a) poškodenému vznikol z činu nárok na náhradu škody, ktorého uspokojenie by bolo znemožnené prepadnutím veci,</p> <p>b) hodnota veci je v zjavnom nepomere k miere závažnosti prečinu, alebo</p> <p>c) súd upustil od potrestania páchatel'a.</p>	<p>damages, the satisfaction of which would be obstructed by the forfeiture of items,</p> <p>b) the value of the items is clearly disproportionate to the gravity of the offence, or</p> <p>c) the court waived the punishment of the offender.</p>
<p><b>§ 83a</b></p> <p><b>Zhabanie peňažnej čiastky</b></p> <p>(1) Zhabanie peňažnej čiastky môže súd uložiť právnickej osobe, ak bol spáchaný trestný čin, hoci aj v štádiu pokusu, alebo ak došlo k účasti na trestnom čine v súvislosti</p> <p>a) s výkonom oprávnenia zastupovať túto právnickú osobu,</p> <p>b) s výkonom oprávnenia prijímať rozhodnutia v mene tejto právnickej osoby,</p> <p>c) s výkonom oprávnenia vykonávať kontrolu v rámci tejto právnickej osoby, alebo</p> <p>d) so zanedbaním dohľadu alebo náležitej starostlivosti v tejto právnickej osobe.</p> <p>(2) Ochranné opatrenie podľa odseku 1 nemožno uložiť právnickej osobe, ktorej majetkové pomery ako dlžníka nemožno usporiadať podľa osobitného predpisu upravujúceho konkurzné konanie, alebo ak by výkonom ochranného opatrenia bol postihnutý majetok štátu alebo Európskej únie, orgánom cudzieho štátu a medzinárodným organizáciám verejného práva. Nemožno ho uložiť ani vtedy, ak došlo k zániku trestnosti činu uvedeného v odseku 1 premlčaním trestného stíhania alebo na základe účinnej ľútosti.</p> <p>(3) Zhabanie peňažnej čiastky môže súd uložiť od 800 eur do 1 660 000 eur. Pri určení výšky zhabania peňažnej čiastky súd prihliadne na závažnosť spáchaného trestného činu, rozsah činu, získaný prospech, spôsobenú škodu, okolnosti spáchania trestného činu a následky pre právnickú osobu. Zhabanie peňažnej čiastky súd neuloží, ak ukladá právnickej osobe ochranné opatrenie zhabania majetku podľa § 83b.</p> <p>(4) Ak ide o zlúčenie, splynutie alebo rozdelenie</p>	<p><b>Article 83a</b></p> <p><b>Confiscation of a Monetary Sum</b></p> <p>(1) The court may impose the confiscation of the monetary sum upon a legal entity if a criminal offence was committed, even at the stage of an attempt or if there was participation in a criminal offence in connection</p> <p>a) with the performance of an authorisation to represent such legal entity,</p> <p>b) with the performance of an authorisation to make decisions on behalf of such legal entity,</p> <p>c) with the performance of an authorisation to perform a control within such legal entity, or</p> <p>d) with the negligence of the supervision or due diligence within such legal entity.</p> <p>(2) The protective measure under Subsection 1 may not be imposed upon a legal entity whose financial circumstances as a debtor cannot be settled under a special regulation governing insolvency proceedings, or if the enforcement of the protective measures would affect the assets of the State or the European Union, upon foreign State authorities and international organisations of public law. It may not even be imposed if the expiry of the criminal liability of the act referred to in Subsection 1 occurred by the limitation of the criminal prosecution or on the basis of effective remorse.</p> <p>(3) The court may impose the confiscation of a monetary sum from EUR 800 to EUR 1,660,000. In determining the amount of the confiscated monetary sum, the court shall take into account the seriousness of the committed criminal offence, the extent of the act, obtained benefits, the damage caused, the circumstances of the commission of the criminal offence and the consequences for the legal entity. The court shall not impose the confiscation of the</p>



<p>právnickej osoby, uloží súd ochranné opatrenie podľa odseku 1 právneho nástupcovi zaniknutej právnickej osoby.</p> <p>(5) Zaplatená alebo vymožená peňažná čiastka pripadá štátu, ak súd nerozhodne inak na základe vyhlásenej medzinárodnej zmluvy, ktorou je Slovenská republika viazaná.</p>	<p>monetary sum if it imposes a protective measure of confiscation of assets upon the legal entity under Article 83b.</p> <p>(4) In the case of the merger, fusion or division of a legal entity, the court shall impose a protective measure upon the legal representative of the defunct legal entity under Subsection 1.</p> <p>(5) The paid or enforced monetary amount shall belong to the State, unless the court decides otherwise, based on a declared international treaty by which the Slovak Republic is bound.</p>
<p><b>§ 83b</b></p> <p><b>Zhabanie majetku</b></p> <p>(1) Zhabanie majetku súd uloží právnickej osobe, ak bol spáchaný trestný čin, hoci aj v štádiu pokusu, alebo ak došlo k účasti na trestnom čine uvedenom v § 58 ods. 2 alebo 3, a ak právnická osoba nadobudla majetok alebo jeho časť trestnou činnosťou alebo z príjmov pochádzajúcich z trestnej činnosti, v súvislosti</p> <p>a) s výkonom oprávnenia zastupovať túto právnickú osobu,</p> <p>b) s výkonom oprávnenia prijímať rozhodnutia v mene tejto právnickej osoby,</p> <p>c) s výkonom oprávnenia vykonávať kontrolu v rámci tejto právnickej osoby, alebo</p> <p>d) so zanedbaním dohľadu alebo náležitej starostlivosti v tejto právnickej osobe.</p> <p>(2) Ochranné opatrenie podľa odseku 1 nemožno uložiť právnickej osobe, ktorej majetkové pomery ako dlžníka nemožno usporiadať podľa osobitného predpisu upravujúceho konkurzné konanie, alebo ak by výkonom ochranného opatrenia bol postihnutý majetok štátu alebo Európskej únie, orgánom cudzieho štátu a medzinárodným organizáciám verejného práva. Nemožno ho uložiť ani vtedy, ak došlo k zániku trestnosti činu uvedeného v odseku 1 premlčaním trestného stíhania alebo na základe účinnej útosti.</p>	<p><b>Article 83b</b></p> <p><b>Confiscation of Assets</b></p> <p>(1) The court may impose the confiscation of assets upon a legal entity if a criminal offence was committed, even at the stage of an attempt or if there was participation in a criminal offence referred to in Section 58 Subsection 2 or 3, and if the legal entity acquired assets or a part thereof through criminal activity or from the proceeds of criminal activity, in connection</p> <p>a) with the performance of an authorisation to represent such legal entity,</p> <p>b) with the performance of an authorisation to make decisions on behalf of such legal entity,</p> <p>c) with the performance of an authorisation to perform a control within such legal entity, or</p> <p>d) with the negligence of the supervision or due diligence within such legal entity.</p> <p>(2) The protective measure under Subsection 1 may not be imposed upon a legal entity whose financial circumstances as a debtor cannot be settled under a special regulation governing insolvency proceedings, or if the enforcement of the protective measures would affect the assets of the State or the European Union, foreign State authorities and international public law organisations. It may not even be imposed if the criminal liability of an act referred to in Subsection 1 occurred by the limitation of the criminal prosecution or on the basis of effective remorse.</p>

<p>(3) Ochranné opatrenie podľa odseku 1 súd neuloží, ak vzhľadom na závažnosť spáchaného trestného činu, rozsah činu, získaný prospech, spôsobenú škodu, okolnosti spáchania trestného činu, následky pre právnickú osobu alebo dôležitý verejný záujem je možné ochranu spoločnosti zabezpečiť aj bez zhabania majetku právnickej osoby. Ak súd neuloží zhabanie majetku, uloží právnickej osobe ochranné opatrenie zhabania peňažnej čiastky podľa § 83a.</p> <p>(4) Zhabanie majetku postihuje v rozsahu, ktorý patrí právnickej osobe pri výkone ochranného opatrenia zhabania majetku po ukončení konkurzného konania</p> <p>a) výtazok zo speňaženia majetku,  b) majetok vylúčený zo súpisu majetku podstát,  c) majetok podliehajúci konkurzu, ak nedošlo k speňaženiu majetku.</p> <p>(5) Ak ide o zlúčenie, splynutie alebo rozdelenie právnickej osoby, uloží súd ochranné opatrenie podľa odseku 1 právnomu nástupcovi zaniknutej právnickej osoby.</p> <p>(6) Vlastníkom zhabaného majetku sa stáva štát, ak súd nerozhodne inak na základe vyhlásenej medzinárodnej zmluvy, ktorou je Slovenská republika viazaná.</p>	<p>(3) The court may not impose the protective measures under Subsection 1 if, given the seriousness of the committed criminal offence, the extent of the act, the obtained benefits, the damage caused, the circumstances of the criminal offence, the consequences for the legal entity or an important public interest, it is possible to ensure the protection of society without the confiscation of assets of the legal entity. If the court does not impose the confiscation of assets, it shall impose a protective measure of the confiscation of a monetary sum to the legal entity under Article 83a.</p> <p>(4) The confiscation of assets affects the extent of which belongs to the legal entity during the execution of the protective measure of confiscation of assets after the completion of bankruptcy proceedings,</p> <p>a) the proceeds from the liquidation of assets,  b) assets excluded from inventory elements,  c) assets that are subject to the bankruptcy proceedings, if asset liquidation did not occur.</p> <p>(5) In the case of the merger, fusion or division of a legal entity, the court shall impose a protective measure upon the legal representative of the defunct legal entity under Subsection 1.</p> <p>(6) The confiscated assets shall belong to the State, unless the court decides otherwise, based on a declared international treaty by which the Slovak Republic is bound.</p>
<p><b>Trestný poriadok č. 301/2005 Z. z.</b></p> <p><b>§ 515</b></p> <p><b>Cudzie rozhodnutie</b></p> <p>(1) Rozhodnutie súdu iného štátu v trestnej veci (ďalej len „cudzie rozhodnutie“) má právne účinky na území Slovenskej republiky len vtedy, ak tak ustanovuje medzinárodná zmluva alebo zákon. Vykonať cudzie rozhodnutie, ktorým sa uložil trest, možno na území Slovenskej republiky, len ak bolo uznané</p>	<p><b>Code of Criminal Procedure No. 301/2005 Coll.</b></p> <p><b>Article 515</b></p> <p><b>Foreign Decision</b></p> <p>(1) The decision of the court of another State in a criminal matter (hereinafter referred to as “foreign decision”) only has legal effects in the territory of the Slovak Republic if it is stipulated in an international treaty or law. A foreign decision by which a punishment was imposed may be executed in the territory of the Slovak</p>

<p>slovenským súdom.</p> <p>(2) Cudzie rozhodnutie možno uznať vo výroku, ktorým</p> <p>a) bola vyslovená vina, ale uloženie trestu bolo podmienene odložené,</p> <p>b) bol uložený trest odňatia slobody alebo podmienený trest odňatia slobody,</p> <p>c) bol uložený peňažný trest alebo zákaz činnosti,</p> <p>d) bol premenený podmienený trest alebo peňažný trest na trest odňatia slobody, alebo</p> <p>e) bolo vyslovené prepadnutie majetku alebo jeho časti, alebo veci alebo zhabanie veci, ak sa nachádzajú na území Slovenskej republiky (ďalej len „cudzie majetkové rozhodnutie“).</p> <p>(3) Cudzie rozhodnutie, ktorým sa zmenilo už uznané cudzie rozhodnutie vo výroku o vine, má účinky na území Slovenskej republiky bez uznania.</p> <p>(4) Vo vzťahu k právnickej osobe možno na území Slovenskej republiky vykonať cudzie rozhodnutie iba v prípade, ak jej bola týmto cudzím rozhodnutím uložená peňažná sankcia alebo jej bolo vyslovené prepadnutie majetku. Výkon takéhoto cudzieho rozhodnutia voči právnickej osobe sa uskutočňuje bez jeho uznania slovenským súdom, ak tak ustanovuje osobitný predpis alebo medzinárodná zmluva.</p>	<p>Republic only if it is recognised by the Slovak court.</p> <p>(2) A foreign decision may be recognised in a statement by which</p> <p>a) a guilt was pronounced, but the imposition of the punishment was conditionally deferred,</p> <p>b) a prison sentence or a conditional prison sentence was imposed,</p> <p>c) a monetary penalty or punishment by disqualification was imposed,</p> <p>d) a conditional punishment or a monetary penalty was converted to a prison sentence, or</p> <p>e) a forfeiture of assets or any part thereof, or items or their confiscation was pronounced, provided they are located in the territory of the Slovak Republic (hereinafter referred to as “foreign assets decision”).</p> <p>(3) A foreign decision by which the already recognised decision was changed in the statement on guilt has an effect in the Slovak Republic without recognition.</p> <p>(4) In relation to a legal entity, a foreign decision may only be executed in the territory of the Slovak Republic if they were imposed a monetary sanction by a foreign decision, or their assets were forfeited. The enforcement of such foreign decision against a legal entity shall be performed without its recognition by the Slovak court, unless the special regulation or an international treaty stipulates otherwise.</p>
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**Additional note:**

The Slovak Republic also applies a system of confiscation in civil proceedings on the legal basis of Act. No. 101/2010 Coll. on inquiries to the origin of property (valid since 1 January 2011). The confiscation is not directly linked to the proceeds of crime, it rather concerns property obtained from unlawful income. One of the grounds of the civil confiscation procedure is conviction and imposition of financial penalty or forfeiture of items or assets. The procedure applies in cases where a convicted person has additional property considered to be obtained from unlawful sources and this property does not fall within the scope of imposed penalty. The value of such property must exceed lawful income of the person concerned by 490.800 €, only then such property may be confiscated. The prosecutor in civil proceedings must only prove the existence of such difference between the value of the property and lawful income, while the respondent may prove lawful origin of the property. In that sense, it is rather civil confiscation and thus does not fall within the scope of the questionnaire.

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## FINLAND

- 1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

This is widely possible in Finland. There is no specific provision but indirectly this can be seen in Criminal Procedure Act, chapter 4 (about competent court) section 12: The provisions in sections 1–11 on a charge apply also to other public-law demands arising from the offence. - Confiscation is a public law "demand".

- 2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

Confiscation demand can be tried with charge or without it in "confiscationprocess" where rules of criminal procedure apply. Both are possible, in personam and in rem.

- 3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

As nature of confiscation is to serve as a criminal (or public) law measure. Demand on confiscation is decided by a court which has jurisdiction in criminal matters. In Finland there is no system of civil law confiscation .

- 4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

One must be summoned in court where demand of confiscation is tried

- 5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

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**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- **whose system requires a link to criminal proceedings**
- **whose system applies civil forfeiture procedures.**

We are able to recognise confiscation orders that fall within the scope of Framework Decision 2006/783/JHA on the application of the principle of mutual recognition to confiscation orders

**NB: Unofficial translation**

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**The Criminal Code of Finland**

(39/1889, amendments up to 940/2008 included)

**Chapter 10 — Forfeiture (875/2001)**

**Section 1 — *General prerequisites of forfeiture* (875/2001)**

(1) A prerequisite for a forfeiture order is an act criminalised by law (*offence*).

(2) A forfeiture order may be based on an act criminalised by law also

- (1) where the perpetrator has not attained the age of fifteen years at the material time, or is without criminal capacity,
- (2) where the perpetrator is exempt from criminal liability pursuant to chapter 4, section 2, section 4, subsection 22, section 5, subsection 2, section 6, subsection 3 or chapter 45, section 26b, subsection 2, or (515/2003)
- (3) where a corporation may be sentenced to a punishment in accordance with chapter 9 even if the individual committing the offence cannot be identified or for some other reason cannot be sentenced to a punishment.

**Section 2 — *Forfeiture of the proceeds of crime* (875/2001)**

(1) The proceeds of crime shall be ordered forfeit to the State. The forfeiture shall be ordered on the perpetrator, a participant or a person on whose behalf or to whose benefit the offence has been committed, where these have benefited from the offence.

(2) If no evidence can be presented as to the amount of the proceeds of crime, or if such evidence can be presented only with difficulty, the proceeds shall be estimated, taking into consideration the nature of the offence, the extent of the criminal activity and the other circumstances.

(3) Forfeiture of the proceeds of crime shall not be ordered in so far as they have been returned to the injured party, or in so far as they have been or will be ordered to be reimbursed to the injured party by way of compensation or restitution. If a claim for compensation or restitution has not been filed or if the claim has still not been decided when the request for forfeiture is being decided, the forfeiture shall be ordered.

**Section 3 — *Extended forfeiture of the proceeds of crime* (875/2001)**

(1) Full or partial forfeiture of property to the State may be ordered

- (1) on a person who is found guilty of an offence which carries a possible penalty of imprisonment for at least four years, a punishable attempt of such an offence, or an offence referred to in chapter 32, sections 1 or 6, chapter 46, section 4, chapter 50, sections 1 or 4, of this Code, or in section 82 of the Alcohol Act (459/1968), and
- (2) on a participant in an offence referred to in paragraph (1) above and on a person on whose behalf or to whose benefit the said offence has been committed,

provided that the nature of the offence is such that it may result in considerable financial proceeds and that there is reason to believe that the property is fully or partially derived from criminal activity that is not to be considered insignificant. (641/2009)

(2) Moreover, full or partial forfeiture of property, referred to in subsection 1, to the State may be ordered

- (1) on a person whose relationship to a person referred to in subsection 1 is one covered by section 3, subsection 1 of the Act on the Recovery of Assets to Bankruptcy Estates (758/1991) (*close person*) and
- (2) on a private entrepreneur, a company, another corporation or foundation whose relationship to a person referred to in subsection 1 or a close person of his or hers is one covered by section 3, subsection 2, paragraphs (1) or (2) of the Act on the Recovery of Assets to Bankruptcy Estates, if there is reason to believe that the property has been conveyed to the same in order to avoid forfeiture or liability.

(3) A forfeiture referred to in subsection 2 shall not be ordered if the property has been conveyed more than five years before the commission of the offence referred to in subsection 1.

(4) If the same forfeiture is ordered on two or more persons, their liability is joint and several.

**Section 4 — *Forfeiture of an instrument of crime* (875/2001)**

(1) The following instruments shall be ordered forfeit to the State, when used in the commission of an offence:

- (1) a firearm, edged weapon or another similar lethal instrument, and
- (2) any other object or property the possession of which is punishable.

(2) Also the following may be ordered forfeit to the State:

- (1) an object or property that has been used in the commission of an intentional offence, and
- (2) an object or property that is closely connected to an intentional offence for which the proceedings have been brought, when it has been obtained or prepared solely or mainly for the intentional offence or where its characteristics make it especially suitable as an instrument of an intentional offence.

(3) In the assessment of the need for forfeiture, special consideration shall be taken of the prevention of further offences.

**Section 5 — *Forfeiture of certain other property* (875/2001)**

(1) An object or property which has been produced, manufactured or brought about by way of an offence, or at which an offence has been directed, shall be ordered forfeit to the State if its possession is punishable.

(2) An object or property which has been produced, manufactured or brought about by way of an offence, or at which an offence has been directed, may be ordered fully or partially forfeit, if forfeiture is necessary:

- (1) due to the object or property being hazardous to health or the environment,
- (2) in order to prevent further offences, where the object or property is especially suitable as a target of an offence or as an instrument of crime,
- (3) in order to achieve the objective of provisions or orders pertaining to economic regulation, import or export, or
- (4) in order to achieve the objective of provisions or orders for the protection of nature and the environment.

(3) A container, packaging or other material used for the storage of an object or property that is to be ordered forfeit may likewise be ordered forfeit, if the forfeiture of the object or property cannot otherwise be enforced without undue inconvenience.

**Section 6 — *Restrictions on forfeiture* (875/2001)**

(1) An object or other property referred to in section 4 or 5 may not be ordered forfeit if it belongs in full or in part to someone else than the offender, a participant or a person on whose behalf or with whose consent the offence has been committed. However, the object or property may be ordered forfeit from a person to whom it has been conveyed after the commission of the offence, if, when receiving it, he or she knew or had justifiable reason to believe that the object or property was linked to an offence, or if he or she has received it as a gift or otherwise free of charge.

(2) Regardless of ownership, an object or property shall be ordered forfeit also if the owner would commit an offence by having the object or property in his or her possession.

**Section 7 — *Lapse of forfeiture* (875/2001)**

(1) Upon deciding a request for forfeiture, the court may on the consent of the defendant order that the forfeiture shall lapse if the object or property referred to in section 4 or 5 is altered within a given period as specified in the judgment, or other measures specified in the judgment are carried out thereon, with the result that the forfeiture thus becomes unnecessary.

(2) The bailiff monitors compliance with the specifications in the judgment and decides whether the forfeiture shall lapse. The person subject to the forfeiture may appeal against the decision in accordance with the procedure on appeals in enforcement. For a special reason, the bailiff may extend the period referred to in subsection 1. The Legal Register Centre shall be notified of a lapse of forfeiture.



(3) The person subject to the forfeiture is liable for the costs of alteration and the other enforcement of the judgment.

**Section 8 — *Forfeiture of value* (875/2001)**

(1) If an object or property referred to in section 4 or 5 cannot be ordered forfeit owing to a restriction referred to in section 6, subsection 1, or because the object or property has been hidden or is otherwise inaccessible, a full or partial forfeiture of the value of the object or property may be ordered on the offender, a participant or a person on whose behalf or with whose consent the offence has been committed, instead of forfeiture of the object or property itself. In addition, forfeiture of value may be ordered on a person to whom the object or property has been conveyed, if, when receiving it, he or she knew or had justifiable reason to suspect that the object or property was linked to an offence, or if he or she has received it as a gift or otherwise free of charge.

(2) However, forfeiture of value may not be ordered if the person referred to in subsection 1 shows that the object or property has probably been destroyed or consumed.

(3) If the forfeiture of the value of the same object or property is ordered on two or more persons, their liability is joint and several. However, a person on whom forfeiture of value has not been ordered in full, is liable only to the amount mentioned in the judgment.

**Section 9 — *Request for forfeiture* (875/2001)**

(1) Forfeiture shall be ordered on the request of a prosecutor or an official referred to in section 3 of the Fine and Summary Penal Fee Act. Also an injured party may request forfeiture when prosecuting charges on his or her own in accordance with chapter 7 of the Criminal Procedure Act (755/2010).

*[subsection 1 has been amended by the Act of 755/2010 and shall enter into force on a date set by an Act. The earlier wording is as follows:]*

(1) Forfeiture shall be ordered on the request of a prosecutor or an official referred to in section 3 of the Act on Penal Order Procedure (692/1993). Also an injured party may request forfeiture when prosecuting charges on his or her own in accordance with chapter 7 of the Criminal Procedure Act (689/1997).

(2) Chapter 1, section 8b, of the Criminal Procedure Act contains provisions on the grounds on which a prosecutor may waive a request for forfeiture. (650/2003)

**Section 10 — *Adjustment of forfeiture* (875/2001)**

(1) Forfeiture need not be ordered, if:

- (1) the proceeds of crime are, or the value of the object or property is, insignificant,
- (2) the punishment of the offender is waived in accordance with chapter 3, section 5, subsection 3 or 4, or another corresponding provision, or
- (3) the forfeiture would be unreasonable in view of the nature of the offence and the object or property, the financial standing of the defendant, and the other circumstances.

(2) On the prerequisites referred to in subsection 1, the forfeiture may be ordered on value instead of the object or property, or only a part of the object, property or value. Likewise, a partial forfeiture of the object or property and a partial forfeiture of the value may be ordered. A partial forfeiture of the proceeds of crime may also be ordered.

### **Section 11 — *Miscellaneous provisions* (875/2001)**

(1) When the forfeiture liability of someone else than the suspect or the defendant is being considered in a pre-trial investigation or in criminal proceedings, the procedural provisions on the suspect or the defendant apply to that person in so far as appropriate.

(2) If compensation or restitution has been paid or ordered to be paid after the issue of the decision referred to in section 2, subsection 3, the forfeiture may be enforced to a correspondingly reduced amount. If the forfeiture has already been enforced, the amount may be ordered to be paid from State funds. An action to this effect shall be brought in the District Court of the plaintiff's domicile or the District Court of Helsinki within five years from the date when the judgment containing the forfeiture order became final. The State, represented by the Legal Register Centre, is the respondent in such a case.

(3) A person who in good faith has obtained a mortgage, a lien or a right of retention to an object or property referred to in section 4 or 5 and ordered forfeit may foreclose on the same regardless of whether the underlying receivable has become due. An action to this effect shall be brought as provided in subsection 2. Failing this, the mortgage, lien or right of retention expires.

## **Chapter 4 of the Criminal Procedure Act (689/1997) in finnish.**

### **luku**

### **Laillisesta tuomioistuimesta**

#### 1 §

Syyte rikoksesta tutkitaan sen paikkakunnan tuomioistuimessa, missä rikos on tehty. Rikos katsotaan tehdyksi sekä siellä, missä rikollinen teko suoritettiin, että siellä, missä rikoksen seuraus ilmeni, tai jos rikos jäi yritykseksi, missä täytetyn rikoksen seuraus olisi ilmennyt. Jos rikos on tehty useilla, eri tuomiopiireihin kuuluvilla paikkakunnilla, on kunkin paikkakunnan tuomioistuimien toimivaltainen.

Jos syytettä nostettaessa ei varmuudella tiedetä, missä rikos on tehty, voidaan syyte tutkia jossakin niistä tuomioistuimista, jonka tuomiopiirissä rikos voidaan otaksua tehdyksi tai jonka tuomiopiirissä syytettävä tavataan.

Syyte rikoksesta voidaan tutkia myös siinä tuomioistuimessa, jonka tuomiopiirissä syytettävä asuu tai vakinaisesti oleskelee, jos asian käsittely siinä katsotaan esitettävään selvitykseen, oikeudenkäynnistä aiheutuviin kustannuksiin sekä muihin seikkoihin nähden soveliaaksi.

1 a § (26.8.2005/667)

Syyte rikoslain 12 tai 13 luvussa tarkoitettua rikoksesta käsitellään Helsingin käräjäoikeudessa.

1 b § (26.8.2005/667)

Toimivaltaisesta tuomioistuimesta eräitä rikoksia koskevissa asioissa säädetään erikseen.

2 §

Syyte Suomen ulkopuolella tehdystä rikoksesta tutkitaan, jollei muualla laissa toisin säädetä, syytettävän asuin-, oleskelu- tai tapaamispaikkakunnan tuomioistuimessa.

3 §

Jos joku on tehnyt useita rikoksia, saadaan syyte kaikista rikoksista tutkia siinä tuomioistuimessa, joka on toimivaltainen käsittelemään jotakin rikosta koskevan syytteen, jos sillä voidaan nopeuttaa tai helpottaa yhteisen rangaistuksen tuomitsemista ja asian käsittely siinä katsotaan esitettävään selvitykseen, oikeudenkäynnistä aiheutuviin kustannuksiin sekä muihin seikkoihin nähden soveliaaksi.

4 §

Syyte rikokseen osallisia vastaan saadaan tutkia siinä tuomioistuimessa, joka on jonkun osallisen osalta toimivaltainen. Jos asia on ollut aikaisemmin vireillä jotakuta osallista vastaan, saadaan samassa tuomioistuimessa syyttää myös muita osallisia.

Milloin jotakuta rikokseen osallista syytetään jonkin muun tuomiopiirin alueella tehdystä eri rikoksesta, saadaan syytteet kaikista rikoksista tutkia tuomioistuimessa, joka on toimivaltainen käsittelemään syytteen jostakin noista rikoksista, jos kaikkien syytteiden käsitteleminen siinä katsotaan esitettävään selvitykseen, oikeudenkäynnistä aiheutuviin kustannuksiin sekä muihin seikkoihin nähden soveliaaksi.

5 §

Eri vastaajien eri rikoksia koskevat syytteet saadaan kaikki tutkia siinä tuomioistuimessa, joka on toimivaltainen käsittelemään jotakin rikosta koskevan syytteen, jos rikoksilla on yhteyttä keskenään ja kaikkien syytteiden käsitteleminen siinä katsotaan esitettävään selvitykseen, oikeudenkäynnistä aiheutuviin kustannuksiin sekä muihin seikkoihin nähden soveliaaksi. Jos asia on ollut aikaisemmin vireillä jotakuta vastaajaa vastaan, saadaan samassa tuomioistuimessa ajaa syytettä myös muita vastaajia vastaan.

6 §

Silloin kun tuomioistuimessa on vireillä rikosasia, jonka yhteydessä nostetaan syyte väärästä ja todistamattomasta ilmiannosta, tuomioistuin voi tutkia myös viimeksi mainitun syytteen.

## 7 §

Tuomioistuin pysyy toimivaltaisena, vaikka toimivallan perustaneissa olosuhteissa tapahtuu muutos sen jälkeen, kun rikosasia on tullut vireille.

## 8 §

Tuomioistuin, jossa on vireillä syyttäjän tekemä rangaistusvaatimus, saa syyttäjän esityksestä erityisten syiden niin vaatiessa siirtää asian toiseen, toimivaltaiseen tuomioistuimeen. Siirtävän tuomioistuimen asiaan liittyvät päätökset ja muut toimenpiteet ovat voimassa, kunnes se tuomioistuin, johon asia on siirretty, toisin määrää. Asiaa ei kuitenkaan saa siirtää takaisin, jolleivät uudet erityiset syyt sitä vaadi. (13.5.2011/455)

Päätökseen, jolla asia on siirretty tai siirtoesitys hylätty, ei saa hakea muutosta.

## 9 §

Milloin muutoksenhaku rikosasiassa on vireillä hovioikeudessa, saa hovioikeus erityisten syiden niin vaatiessa siirtää asian toiseen hovioikeuteen, jossa samaa henkilöä koskeva rikosasia on vireillä.

Päätökseen, jolla asia on siirretty tai siirtoesitys hylätty, ei saa hakea muutosta.

## 10 §

Ylempi tuomioistuin saa, katsoessaan että sen tutkittavaksi saatettu rikosasia olisi käsiteltävä uudelleen alemmassa tuomioistuimessa, 3 §:ssä säädetyin edellytyksin siirtää asian sellaiseenkin alempaan tuomioistuimeen, joka ei ole sitä aikaisemmin käsitellyt, jos sen tuomiopiirissä on tehty jokin niistä rikoksista, joista asiassa on kysymys, taikka jos tuossa tuomioistuimessa on vireillä toinen samaa henkilöä koskeva rikosasia. Asiaa ei kuitenkaan saa siirtää, jos siirtämiseen on 11 §:ssä tarkoitettu este.

## 11 §

Jos syyte jonkun vastaajan tai jonkin rikoksen osalta on, sen mukaan kuin siitä erikseen säädetään, käsiteltävä välittömästi ylemmässä tuomioistuimessa tai muussa kuin 1 ja 2 §:ssä tarkoitetussa käräjäoikeudessa, ei toinen tuomioistuin saa 3–5 §:n nojalla ottaa tuota syytettä tutkittavakseen.

Välittömästi hovioikeudessa tai korkeimmassa oikeudessa voidaan kuitenkin toisen rikosasian yhteydessä käsitellä sellainen syyte, joka muuten olisi käsiteltävä alemmassa tuomioistuimessa, jos rikoksilla on yhteyttä keskenään ja syytteiden käsitteleminen ylemmässä tuomioistuimessa katsotaan esitettävään selvitykseen, oikeudenkäynnistä aiheutuviin kustannuksiin ja muihin seikkoihin nähden soveliaaksi. (17.11.2000/963)

## 12 §

Mitä 1–11 §:ssä säädetään syytteestä, koskee myös muita rikokseen perustuvia julkisoikeudellisia vaatimuksia.

13 § (17.11.2000/963)

13 § on kumottu L:lla 17.11.2000/963.

14 §

Jos ylempi tuomioistuin havaitsee, että alempi tuomioistuin ei ole toimivaltainen tuomioistuin tutkimaan siinä vireille pantua rikosasiaa, tai vahvistaa alemman tuomioistuimen sanotun sisältöisen päätöksen, ylemmän tuomioistuimen tulee, milloin sitä on muutoksenhakemuksessa tai siihen annetussa vastauksessa pyydetty tai erittäin painavat syyt muutoin niin vaativat, siirtää asia oikeaan alempaan tuomioistuimeen, mikäli se esitetyn aineiston perusteella on mahdollista.

Milloin asia on pantu vireille eri tuomioistuimissa ja lainvoiman saaneilla päätöksillä on katsottu, ettei mikään niistä ole oikea tuomioistuin rikosasiaa tutkimaan, korkeimman oikeuden on, jos jokin näistä tuomioistuimista havaitaan oikeaksi, hakemuksesta poistettava virheellinen päätös ja osoitettava asia asianomaisessa tuomioistuimessa edelleen käsiteltäväksi.

**NB: Unofficial translation**

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Criminal Procedure Act

(689/1997; AMENDMENTS UP TO 260/2002 INCLUDED)

Chapter 4 – **Competent court**

Section 12

The provisions in sections 1–11 on a charge apply also to other public-law demands arising from the offence.

## SWEDEN

### **1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

**Swedish response:** Under Swedish law, confiscation is considered as a special legal consequence of a crime. This means that confiscation without connection to a criminal conviction is generally not allowed. However, if a sanction no longer can be imposed because of e.g. the death of the offender, proceeds or instrumentalities of a crime may under limited circumstances be confiscated (see Section 14 below) without a criminal conviction. It is also possible under some limited circumstances to confiscate objects that can be used to commit crimes without a criminal conviction (see Section 3 below).

*Chapter 36, Section 3 of the Swedish Penal Code*

*Forfeiture may also be decided on in cases other than those described in Section 2 (Sw. comments – Section 2 deals with confiscation of instrumentalities) in respect of objects which:*

- 1. by reason of their special nature and other circumstances, give rise to a fear that they may be put to criminal use,*
- 2. are intended for use as a weapon in a crime against human life or health and which have been discovered in circumstances which give rise to a fear that they would be put to such use, or*
- 3. are intended for use as an auxiliary aid in a crime entailing damage to property and have been discovered in circumstances which clearly give rise to a fear that they would be put to such use.*

*Chapter 36, Section 14 of the Swedish Penal Code*

*If a sanction can no longer be imposed because of the death of the offender or for other cause, property may be declared forfeited or a corporate fine imposed by reason of the crime or a measure be prescribed to avert misuse only if, in proceedings pertaining thereto, a summons has been served within five years from the time when the crime was committed. In such a case the prosecutor may institute proceedings only if called for in the public interest.*

- 2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

**Swedish response:** Under the limited circumstances where they are allowed, such confiscation procedures would be governed by the same procedural rules applying for criminal cases where only a fine can be imposed. Generally an action to confiscate assets or instrumentalities is directed at a person (*in personam*) and this holds also for actions based on Chapter 36, Section 14 of the Penal Code (see above). However, an action to confiscate objects that can be used to commit crimes (see section 3 above) is directed at the asset (*in rem*).

- 3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

**Swedish response:** Such confiscation procedures would be handled by a general court and such cases are generally governed by the procedural rules applying for criminal cases where only a fine can be imposed. Administrative courts do not handle confiscation procedures.

- 4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

**Swedish response:** As explained above, non-conviction based confiscation is (with the exceptions explained above) an alien concept to the Swedish legal tradition. According to Chapter 36, Section 14 of the Penal Code (see above) it is however possible to confiscate property if:

- a) a sanction can no longer be imposed because of the death of the offender or for other cause and
- b) a summons in the confiscation proceedings has been served within five years from the time when the crime was committed.

As a further restriction, a prosecutor may only initiate such proceedings if it is called for in the public interest.

**5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

**Swedish response:** As explained above the Swedish legislation on confiscation is built on the concept that confiscation is a consequence of a crime. From this follows that confiscation normally cannot be imposed without a connection to a criminal conviction. This link to a conviction and to criminal proceedings triggers many legal safeguards such as e.g. the presumption of innocence. If confiscation and a criminal conviction could be effected in different proceedings this could also constitute a violation of the *ne bis in idem* principle, both domestically and according to the ECHR. Furthermore, confiscation constitutes a limitation in the constitutionally protected right to respect for property and such limitations must always be proportionate and effected with regard to a due process.

**6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- whose system requires a link to criminal proceedings
- whose system applies civil forfeiture procedures.

**Swedish response:** No, it is not possible to recognise non-conviction based confiscation orders issued by another Member State regardless of whether these systems requires a link to criminal proceedings or applies civil forfeiture procedures.

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## UNITED KINGDOM

- 1. Does your country have provisions allowing for the confiscation of the proceeds of crime (i.e. assets derived from criminal activity) and instrumentalities of crime without a criminal conviction?**

### Answer to Q.1

The UK has provisions, under Part 5 of the Proceeds of Crime Act (POCA), for confiscating assets derived from unlawful activity without a criminal conviction. The full text of POCA can be seen online at: <http://www.legislation.gov.uk/ukpga/2002/29/contents>

Instrumentalities can only be confiscated following a conviction. Section 143 of the Powers of Criminal Courts (Sentencing) Act 2000 contains the relevant powers (although powers are also found in various other Acts).

- 2. If so, is a link to criminal proceedings required or are the confiscation procedures totally independent from criminal proceedings? Please also clarify if the action to confiscate the proceeds of crime or instrumentalities without a criminal conviction is directed at the person (*in personam*) or at the asset (*in rem*).**

### Answer to Q.2

Non-conviction based confiscation under Part 5 of POCA does not require any link to criminal proceedings. Action is taken against property which is, or represents, property obtained through unlawful conduct.

Action to confiscation assets under Part 5 of POCA is taken against property, not the person.

- 3. In cases where a link to criminal proceedings is required, could the confiscation procedures take place before a criminal, civil or administrative court?**

### Answer to Q.3

Not applicable to the UK, as there is no link to criminal proceedings in the UK system.

- 4. Does your legislation provide for particular requirements that need to be met in order for the provisions for non-conviction based confiscation to apply (for ex. when the suspect is not able to stand trial due to illness, death, being a fugitive, etc.).**

*Please specify any particular circumstances and describe how non-conviction based confiscation applies in these situations.*

#### Answer to Q.4

UK legislation is very much broader in scope than the proposals in Article 5 of the Directive. Action is taken against property which is, or represents, property obtained through unlawful conduct. There is no requirement for a suspect to be ill, dead, or absconded (indeed, there is no suspect as the action is taken against property, not the person).

Guidance has been issued by the Home Secretary and the Attorney General under Section 2A of POCA to assist the Serious Organised Crime Agency (SOCA) and the prosecuting authorities in deciding when to use non-conviction based confiscation powers. The guidance indicates that the reduction of crime is in general best secured by means of criminal investigations and criminal proceedings. The benefit of investigation with a view to prosecution should always be considered by a law enforcement agency faced with suspected criminality.

However, the guidance recognises the contribution to harm reduction that can be made by proper use of the non-conviction based confiscation powers available under POCA. The guidance requires SOCA and the prosecuting authorities to consider using these powers where a criminal disposal is not feasible, and gives examples of the circumstances in which this might occur.

In cases where criminal investigation and prosecution is feasible, it may be deemed by the relevant authority that a non-conviction based approach is more desirable, taking into account the overriding considerations of harm reduction and the public interest.

The guidance is intended to remove any perception that the use of civil recovery can only ever be considered after a full criminal investigation has been completed and a decision not to bring a prosecution has been taken. There are circumstances in which the public interest may be best served by an early decision to use civil recovery powers rather than to pursue a criminal investigation.

The full guidance can be seen online at:

<http://www.attorneygeneral.gov.uk/Publications/Pages/AttorneyGeneralissuedguidancetoprosectuin gbodiesontheirassetrecoverypowersunder.aspx>

- 5. If your country does not have provisions allowing the confiscation of the proceeds of crime and/or instrumentalities of crime without a criminal conviction, can you indicate the potential legal obstacles to their introduction in your country?**

### Answer to Q.5

Not applicable to the UK in respect of assets.

Obstacles to the introduction of a non-conviction based confiscation power for instrumentalities would include:

- lack of evidence that operational partners wanted these powers;
- lack of evidence that these powers are necessary to prevent crime;
- lack of parliamentary time to legislate.

### **6. Is it possible in your national system to recognise non-conviction based confiscation orders issued by another Member State:**

- whose system requires a link to criminal proceedings
- whose system applies civil forfeiture procedures.

### Answer to Q.6

The UK recognises non-conviction based confiscation orders issued by other Member States both from systems that require a link to criminal proceedings and from systems that apply civil forfeiture procedures.

Part 5 of the Proceeds of Crime Act (External Requests and Orders) Order 2005 governs the process for recognition of overseas non-conviction based confiscation orders. The full text of the Order can be seen online at: <http://www.legislation.gov.uk/uksi/2005/3181/contents/made>

There is similar legislation in the context of drug trafficking related proceeds, namely the Drug Trafficking Act 1994 (Designated Countries and Territories) Order 1996 (which can be seen online at: <http://www.legislation.gov.uk/uksi/1996/2880/made> )