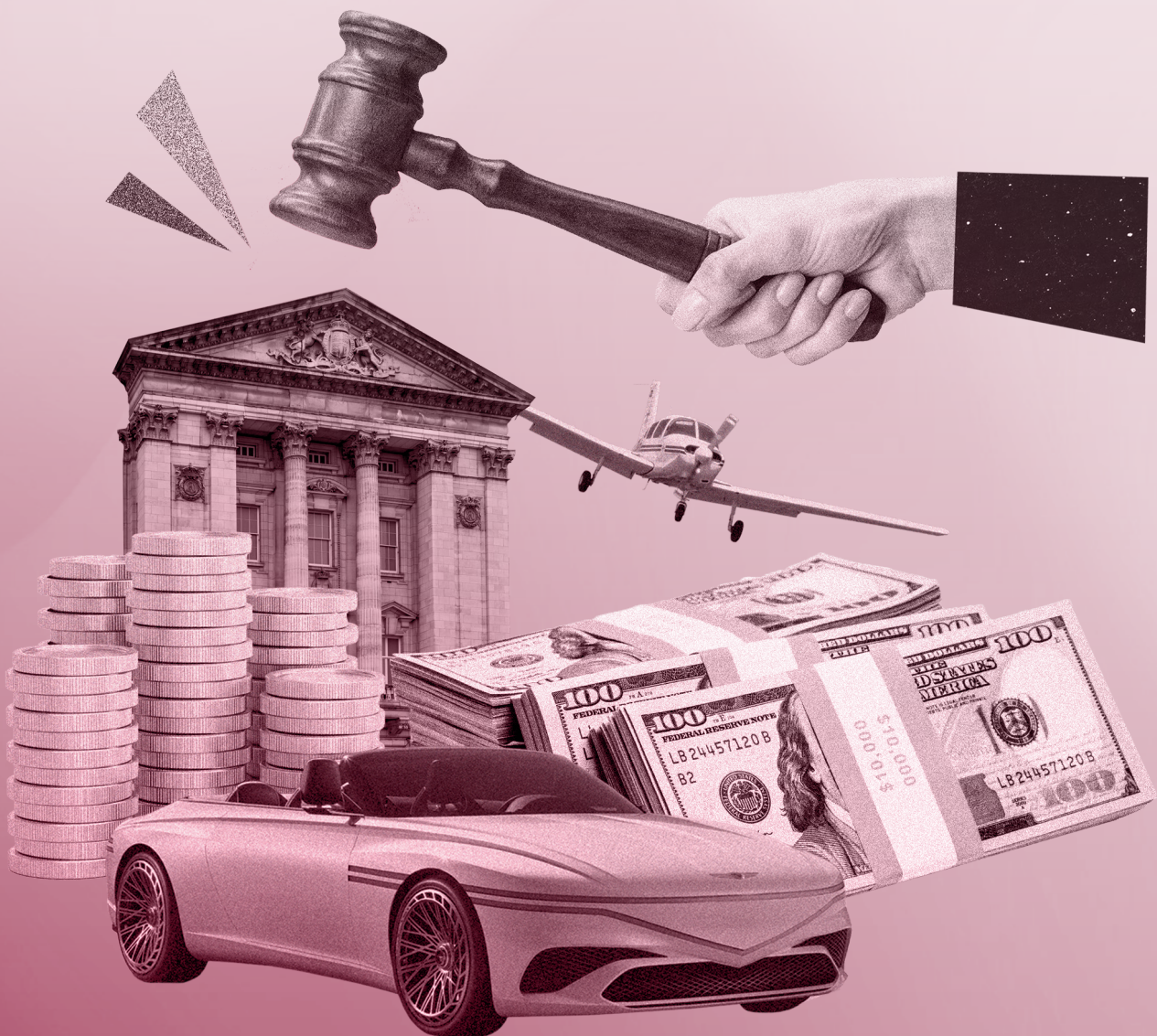




Comparative study

Good practices in asset recovery legislation in selected OSCE participating States

Andrew Dornbierer | March 2024



Foreword

Asset recovery is a complex and multi-phase process that involves multiple actors from law enforcement, to courts to asset managers. The recovery of the proceeds of crime, including corruption, is a challenge for governments across the globe.

Through the project 'Strengthening asset recovery efforts in the OSCE region' implemented by the OSCE Secretariat's Transnational Threats Department and the Office of the Co-ordinator of OSCE Economic and Environmental Activities, the OSCE has played an important role in various parts of South-Eastern Europe (and beyond) working with asset recovery professionals to strengthen asset recovery mechanisms both within national contexts and regionally. This new publication is an outgrowth of the asset recovery project and is a vital resource for experts as well as policymakers in participating States.

The publication *Good practices in asset recovery legislation in selected OSCE participating States* is a much-needed resource and compendium of good practices from across different jurisdictions. While conviction based mechanisms are the foundation for asset recovery, this guide delves further into other essential frameworks focused on non-conviction based confiscation mechanisms as well as civil recovery processes, which use a civil rather than criminal standard of proof.

The guide also catalogues newer legislation that uses criminal and civil illicit enrichment mechanisms focused on unexplained wealth. The guide makes the important point that lowering the standard of proof or reversing the burden of proof may serve the public interest in stripping criminals of their ill-gotten gains. The newer mechanisms and legislation focused on different asset recovery processes beyond traditional conviction based forfeiture have been recognized in international conventions as well as recommended by important multilateral bodies including the Financial Action Task Force.

While states are developing broader tools for addressing asset recovery, there is always a need to respect due process and to protect the rights of individuals whose assets are the subject of proceedings. The guide explores the types of safeguards in place to protect the rights of those subject to asset recovery/forfeiture proceedings. Well-functioning courts that abide by the rule of law are critical to a robust asset recovery system.

The catalogue of different types of conviction and non-conviction asset recovery laws and regulations is a valuable resource in terms of the number of laws and jurisdictions covered. What makes this guide even more useful is that it also examines how the laws function in practice and the good practices developed when the laws are used. The level of work and detail that the author put into this compendium is impressive. It is apparent that the field of asset recovery has innovated and developed with any number of new tools designed to recover the proceeds of crime arising across diverse legal systems.

As Special Representative to the Chairperson in Office on Combatting Corruption, I will be pleased to publicize this valuable resource to participating States. I congratulate the author and the OSCE team that has been engaged in their vital work in improving the asset recovery abilities of law enforcement, prosecutors and judges throughout participating States.



Anita Ramasastry

Special Representative to the Chairpersonship in Office
on Combatting Corruption

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About this report

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Acronyms and abbreviations

| | |
|---------------------------|---|
| AGRASC | Agency for the Recovery and Management of Seized and Confiscated Assets (France) |
| COE Convention | Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime |
| ECtHR | European Court of Human Rights |
| EU | European Union |
| FATF | Financial Action Task Force |
| ICAR | International Centre for Asset Recovery |
| MLA | Mutual legal assistance |
| OSCE | Organization for Security and Co-operation in Europe |
| UK | United Kingdom |
| US | United States of America |
| UNCAC | United Nations Convention Against Corruption |
| UWO | Unexplained wealth order |

Executive summary

Asset recovery tools are integral to combating corruption, organized crime, sanctions evasion and other profit-motivated crimes. However, in many participating States of the OSCE, the range of asset recovery tools available to law enforcement and criminal justice agencies is limited.

There are a number of established good practices regarding legislative mechanisms to recover illicit assets.

As a baseline, states should have **conviction based mechanisms** that capture the wide variety of assets that can be derived from an offence (and any instrumentalities that were used in the offence).

Ideally, and as demonstrated by a significant number of countries covered by this paper, states should also implement broader **extended confiscation measures** that can be applied following convictions to target additional assets held by a convicted person that have not demonstrably been derived from legal sources.

Both these traditional and extended measures should include broad definitions regarding the type of assets that can be targeted. Their scope should cover a wide range of situations where assets have been converted or transferred. They should also consider the rights of *bona fide* third parties.

Most states follow these foundational good practices. Other states, however, have also implemented less traditional but somewhat established asset recovery mechanisms to expand the situations in which confiscation is possible, including:

- **Classic non-conviction based confiscation mechanisms** to permit the recovery of illicitly sourced assets where a criminal proceeding has commenced but cannot be completed – potentially at a lower standard of proof; and
- **Civil recovery mechanisms** that are not dependent on the existence of a criminal proceeding, and which permit states to seek confiscation when they can prove – to a civil standard – that certain assets have been derived from crime.

Beyond these tools, some states have also introduced additional, arguably broader, legislative mechanisms in an effort to enhance their asset recovery capabilities. These include:

- **Criminal and civil illicit enrichment mechanisms** that target ‘unexplained wealth’ and permit the confiscation of assets purely on the basis that the person controlling them is unable or unwilling to demonstrate the legal sources from which they were derived;
- **Information-gathering unexplained wealth orders** to complement civil recovery proceedings, which compel targets to provide an explanation regarding the sources of their property; and

- Additional mechanisms that permit presumptions of criminality to be made in limited situations – for instance when a person is connected to an organized crime or terrorist group.

While conviction based confiscation measures are a foundation for asset recovery, and an ideal first option for asset recovery efforts, the ease with which criminals can disguise and move assets in the modern world means that it is often impossible for enforcement agencies to reach the high criminal evidential thresholds required for a conviction to activate these mechanisms. Additionally, it is often difficult to link an asset to a specific criminal activity.

Consequently, these less traditional asset recovery tools make it more possible for agencies to serve the public interest of stripping criminals of the proceeds of their crimes through either lowering the standard of proof required to achieve confiscation or through permitting a court to reverse the burden of proof onto owners of potential illicit assets in certain situations.

While such mechanisms are not always as widely recommended at an international level, they are increasingly being recognized as good practices. Criminal illicit enrichment laws, for example, are recommended by three international conventions.¹ At the time of writing, negotiations are underway in the European Union (EU) regarding a draft directive on asset recovery and confiscation that would include the confiscation of unexplainable assets linked to criminal organizations.² Moreover, a requirement to introduce non-conviction based confiscation mechanisms was included in the Financial Action Task Force's *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation* (FATF Recommendations) in November 2023.³

Consequently, states without such mechanisms should assess whether their asset recovery legislative frameworks could benefit from the experience and success of the less established mechanisms of other states. This would help them to identify any innovative mechanisms – or even minor reforms to laws, procedures and resource allocations – that may strengthen their own capacity to identify and justly recover criminal assets.

Of course, the introduction of any such mechanisms **should be considered in the context of legal rights**. It is important that any newly implemented laws are tested to ensure that they do not unreasonably infringe on established rights such as the right to enjoyment of property or the presumption of innocence. A significant amount of existing case law, however, including from the European Court of Human Rights, demonstrates that it is possible

1 Namely, the United Nations Convention Against Corruption (Article 20); the Inter-American Convention Against Corruption (Article 9); and the African Union Convention on Preventing and Combating Corruption (Articles 1, 8).

2 Council of the European Union, "Freezing and confiscating criminal money: Council agrees negotiating position for new EU law", 9 June 2023, accessed 12 July 2023 at <https://www.consilium.europa.eu/en/press/press-releases/2023/06/09/freezing-and-confiscating-criminal-money-council-agrees-negotiating-position-for-new-eu-law/>.

3 ATF, "Amendments to the FATF Standards to Strengthen Global Asset Recovery", 16 November 2023, accessed 4 January 2024, at <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/amendment-FATF-standards-global-asset-recovery.html>.

to construct and apply such mechanisms in line with established legal protections.

Moreover, for any asset recovery mechanism enacted by a state, it is important that **governments provide the requisite resources to the agencies** tasked with applying them. Experience from the United Kingdom (UK) and Ireland described in this paper demonstrates how proper resourcing can potentially play a significant factor in the success of any new asset recovery law.

States can further increase the likely success of asset recovery mechanisms through wider anti-money laundering and proceeds of crime related actions. This includes:

- Drafting relevant offences – such as money laundering or sanctions evasion offences – to have a **wide scope of application**;
- Exploring initiatives to **increase their capacity to engage in both incoming and outgoing mutual legal assistance** – through once again devoting the requisite resources to this function as well as taking constructive approaches to providing assistance to foreign countries; and
- Seeking to **reinforce their anti-money laundering frameworks** (i.e., in line with the Financial Action Task Force standards) so that they are robust enough to detect and trace any criminal assets moving through legitimate markets.

Finally, to ensure that any recovered assets are repurposed effectively, states should introduce and use clear provisions regarding the **disposal and sharing of confiscated assets**, potentially keeping in mind social or specific purposes for which they can best be used.

Introduction

As part of the extra-budgetary project “*Strengthening Asset Recovery Efforts in the OSCE Region*” implemented by the OSCE Secretariat’s Transnational Threats Department and the Office of the Co-ordinator of OSCE Economic and Environmental Activities, the International Centre for Asset Recovery (ICAR) at the Basel Institute on Governance conducted a comparative study on the asset recovery legislation in a select group of participating States of the OSCE.

The study sought to identify the legislative mechanisms in each country that empower the state to confiscate suspected or proven proceeds of crime. The overall objective was to ascertain:

- Established good practices with regard to the design of these legislative mechanisms; and
- Any unique approaches that particular countries have taken in this context that could be replicated and tested in other jurisdictions.

In the course of conducting this study, researchers also sought to identify good practices regarding how countries use and dispose of any assets that have been permanently confiscated, as well as the common challenges that countries face generally when seeking to identify proceeds of crime and implement asset recovery laws.

This paper is largely written in the context of corruption offences and the recovery of assets connected to such offences. However, the mechanisms identified are generally applicable to all types of acquisitive crimes such as offences related to organized crime, money laundering and sanctions evasion.

The paper is divided into several sections. **Section 1** examines ‘conviction based’ asset recovery mechanisms. It provides a broad overview of the common mechanisms of this type that exist in the focus countries and outlines the recognized good practices regarding their scope of application. It also provides an in-depth explanation of a particular type of confiscation based mechanism, namely laws permitting ‘extended confiscation.’

Section 2 covers another category of legislative mechanisms that are largely considered good practice in the field of asset recovery: ‘non-conviction based’ mechanisms. It examines the two common sub-categories of these mechanisms that exist in the focus countries: namely ‘classic’ non-conviction based confiscation procedures, which depend on the commencement of criminal proceedings before they can be applied, and ‘civil recovery’ laws, which can be applied regardless of whether or not criminal proceedings also exist.

Section 3 identifies several less common, and much less tested, conviction based and non-conviction based mechanisms that exist in one or more of the focus countries. The section examines criminal and civil laws targeting illicit enrichment (unexplained wealth) as well as a number of other mechanisms that reverse burdens of proof regarding the legitimacy of assets.

Section 4 covers several considerations regarding the adoption of broader asset recovery laws, in particular their compatibility with legal rights and some of the common concerns that are raised in this context. First, it examines the necessity of lowering the standard of proof or reversing the burden of proof in order to recover the proceeds of crime. Second, it explores whether the asset recovery laws covered in this paper contravene two major rights, namely the right of enjoyment of property and the right to be presumed innocent.

Section 5 examines the common approaches taken to define procedures relating to the disposal of confiscated assets, including the possibility of repurposing assets to advance social causes and the returning of foreign sourced assets to their country of origin.

Section 6 provides an overview of some of the common challenges that exist regarding the implementation of asset recovery mechanisms generally. It examines difficulties relating to the linking of assets with the criminal activities from which they were derived, hurdles regarding international co-operation processes, and issues relating to the devotion of resources to asset recovery

Methodology

A total of 18 OSCE participating States were assessed for this paper, including both common and civil law based judicial systems. Specifically, the research process for this paper examined the asset recovery laws in the following countries:

- Austria
- Belgium
- Canada
- France
- Germany
- Italy
- Ireland
- Latvia
- Liechtenstein
- Luxembourg
- Malta
- Moldova
- Portugal
- Spain
- Switzerland
- Ukraine
- United Kingdom (UK)
- United States (US)

The information used to draft this paper was collected through desk-based research. The predominant sources of information used for this paper were official government legislation databases as well as international legal instruments (e.g., international conventions and European Union directives). Other sources (such as government and privately produced papers and studies) were also used to confirm the information contained on the relevant government databases, to provide guidance in the categorization of certain mechanisms and to assess the common challenges regarding the implementation of asset recovery mechanisms generally.

While the researchers for this paper have endeavoured to locate all the relevant legislative mechanisms in each of the focus countries, it should be noted that due to resource constraints, it is probable that some relevant mechanisms in these countries have not been identified. Laws and processes have only been included in this paper if they could be confirmed by researchers through government legislative databases. Consequently, while additional sources have mentioned that relevant mechanisms exist in certain focus countries, these mechanisms have not been referenced in this paper unless the actual legislation could be identified as well.⁴

It is also important to note that the categorizations and explanations of the mechanisms referenced in this paper are predominantly based on an examination of the actual text of the relevant legislation. Due to time and language constraints, the research for this paper did not include an in-depth examination

⁴ For example, while a Council of the European Union paper titled *Commission Staff Working Document: Analysis of non-conviction based confiscation measures in the European Union* states that Belgium, France and Luxembourg all have classic non-conviction based confiscation mechanisms, the exact mechanisms could not be located during the research process for this paper. Consequently, these mechanisms have not been referenced in this paper. The Council of the European Union paper is available at: <https://data.consilium.europa.eu/doc/document/ST-8627-2019-INIT/en/pdf>.

of judicial decisions surrounding the application of individual laws. Consequently, there is a possibility that specific asset recovery mechanisms may have been interpreted to apply or not to apply in ways that cannot be immediately discerned from the plain text of the relevant legislation.

Finally, it is important to note that while this paper has classified specific laws as falling within broad categories of legislative mechanisms (e.g., extended confiscation mechanisms; classic non-conviction based confiscation mechanisms; civil recovery mechanisms; illicit enrichment mechanisms) these classifications are largely based on the interpretation of the author. The language and structure of laws vary widely between jurisdictions and there is no set definition for each category of mechanism examined in this paper. The author acknowledges that others may not necessarily agree with the categorizations in this paper.

1 Conviction based asset recovery mechanisms

The enactment and application of conviction based asset recovery mechanisms are a foundational best practice to target and recover assets linked to crime. This section will briefly explain these mechanisms before examining the specific best practices regarding the construction and use of these mechanisms (with identified examples from the focus countries).

1.1 Overview of conviction based asset recovery mechanisms

Generally speaking, conviction based mechanisms are statutory based procedures that empower law enforcement authorities to seek the permanent confiscation of:

- The assets acquired through a criminal offence (proceeds of crime); and/or
- Any assets that were used in the commission of the offence (instrumentalities).

The application of these mechanisms can only occur after a criminal conviction. Providing that a person has been found guilty of a crime, these mechanisms can be used by the court to make a final order to permanently confiscate relevant assets as part of a sentence.⁵

The drafting and implementation of robust conviction based mechanisms are widely recommended at an international level.

For example, in the context of corruption, the United Nations Convention Against Corruption (UNCAC) outlines that:

Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

- (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;
- (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.⁶

⁵ J Brun et al., *Asset Recovery Handbook: A Guide for Practitioners, Second Edition*, Washington, the World Bank, 2021, p.185.

⁶ United Nations Convention Against Corruption, Article 31(1).

Specifically in the European context, the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime (COE Convention) states that:

Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property the value of which corresponds to such proceeds and laundered property.⁷

Similarly, Article 4 of the European Union (EU)'s Directive 2014/42/EU obligates members to:

... take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence...⁸

Conviction based confiscation mechanisms are extremely common globally and exist in all the focus countries for this paper.

1.2 Specific good practices regarding the construction and application of conviction based confiscation mechanisms

There are a number of key best practices regarding the use of conviction based confiscation mechanisms. These will be examined below.

1.2.1 A wide interpretation of property that can be targeted

It is generally recommended that conviction based mechanisms are constructed to apply to a wide range of property types and an extensive range of circumstances.

Specifically, it is recommended that any applicable definitions of 'property' are as broad as possible so as to ensure that the mechanisms can be applied to the wide variety of tangible and intangible assets, benefits or advantages in which proceeds of crime may exist.⁹

7 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Article 3.

8 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Article 4.

9 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Preamble at [12].

For example, Luxembourg's Criminal Code (*Code pénal*) takes such an approach, with the scope of its mechanism covering:

... assets of any kind, tangible or intangible, movable or immovable, as well as legal documents or instruments, in any form whatsoever, including electronic or digital, attesting to the ownership of such assets or related rights property forming the object or product, direct or indirect of an offence or constituting any patrimonial benefit derived from the infringement, including the income from such property.¹⁰

Similarly, under Malta's Criminal Code, the types of property to which confiscation mechanisms can apply includes:

... assets of every kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any form including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, and letters of credit.¹¹

Additionally, it is generally recommended that conviction based mechanisms are constructed to not only cover property that has been directly derived from an offence, but also any broader 'income' or 'benefit' that may have also been indirectly received.¹² Such indirect benefits (sometimes referred to as 'secondary proceeds') include any assets that a convicted person has further managed to derive from the original proceeds of crime (e.g., interest earned by depositing them at a bank account).¹³

It is also recommended that such assets be targetable even if they have been transferred or converted into other forms, or have been intermingled with other legitimately acquired assets (up to the assessed value of the intermingled proceeds).¹⁴

¹⁰ Criminal Code (*Code pénal*) (Luxembourg), Article 31.2(1) (unofficial translation).

¹¹ Criminal Code (Malta), Section 23B(3).

¹² United Nations Convention Against Corruption, Article 31(6); Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Article 2.

¹³ United Nations Office of Drugs and Crime, *Technical Guide to the United Nations Convention Against Corruption*, 2009, p.96.

¹⁴ United Nations Convention Against Corruption, Articles 31(5)-(6); Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Article 2, Preamble at [11].

For example, the confiscation mechanism under France's Criminal Code (*Code pénal*) applies to all property that is "the direct or indirect product of the offence" regardless of whether it is "movable or immovable property", "whatever its nature" and whether the property is "divided or undivided".¹⁵

It is also recommended that mechanisms are constructed to be applicable to any proceeds of crime that have been transferred by the convicted person to third parties (without prejudicing the rights of any subsequent *bona fide* owners).¹⁶

For example, under Portugal's Criminal Code (*Código Penal*) confiscation orders can be sought in such situations when the third party "knows or should have known" the origin of the proceeds, or when the proceeds were specifically transferred to avoid forfeiture.¹⁷

Additionally, the mechanism under Germany's Criminal Code (*Strafgesetzbuch*) may be applied to criminal property subsequently held by others, once the "blameworthiness" of the third party has been considered.¹⁸

Similarly, Ukraine's Criminal Code specifically stipulates that confiscation "may not be applied to property owned by a *bona fide* purchaser".¹⁹

Finally, if the actual proceeds or instrumentalities cannot be confiscated directly, it is recommended that these mechanisms also empower courts to order the confiscation of other property held by the suspect of the same value as the originally sought assets.²⁰

15 Criminal Code (*Code pénal*) (France), Article 131-21 (unofficial translation). Note: the application of this provision is subject to decisions of the Constitutional Court (for more information, see: *Code pénal* (France), Article 131-21 (Nota), accessed 15 June 2023 at https://www.legifrance.gouv.fr/codes/section_lc/LEGI-TEXT000006070719/LEGISCTA000006181731/?anchor=LEGIARTI000045292556#LEGIARTI000045292556).

16 United Nations Convention Against Corruption, Article 31(9); Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Article 6. While the specific definitions of bona fide purchasers/owners differs between jurisdictions, in a general sense, a bona fide purchaser/owner is considered to be "a third party with an interest in an asset subject to confiscation who did not know of the conduct giving rise to the confiscation or who, on learning of the conduct giving rise to confiscation, did all that reasonably could be expected under the circumstances to terminate the use of the asset" (see: Stolen Assets Recovery Initiative, "Glossary", accessed 4 January 2024 at <https://star.worldbank.org/glossary-asset-recovery-terms>).

17 Criminal Code (*Código Penal*) (Portugal), Article 111 (unofficial translation).

18 Criminal Code (*Strafgesetzbuch*) (Germany), Article 74f (unofficial translation).

19 Criminal Code (*Кримінальний кодекс України*) (Ukraine), Article 96-2 (unofficial translation).

20 United Nations Convention Against Corruption, Article 31(1); Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Article 4(1).

For example, under Latvia's Criminal Code (*Krimināllikums*):

If a criminally acquired property has been alienated, destroyed, concealed or disguised, and the confiscation of such property is not possible, the value of the property being confiscated can be recovered...²¹

Similarly, under Moldova's Criminal Code, if the property to be forfeited is no longer available and can no longer be recovered, "its value shall be confiscated"²²

1.2.2 Facilitating mechanisms to identify, freeze, seize and manage suspected proceeds of crime

While confiscation is the final objective, it is essential that relevant enforcement agencies are also empowered to prevent the dissipation of property that may be subject to confiscation.²³

In this vein, states are further recommended to reinforce conviction based confiscation mechanisms through implementing parallel mechanisms that facilitate the pre-conviction identification, freezing and (temporary) seizing of any relevant assets suspected of being proceeds or instrumentalities of crime.²⁴

For example, the UK's Proceeds of Crime Act includes extensive powers regarding the restraint of assets held by a person suspected of having benefited from criminal conduct, as well as powers to conduct searches and seize assets where necessary.²⁵

Switzerland's Criminal Procedure Code similarly empowers authorities to seize assets "if it is expected that the items or assets...will have to be forfeited".²⁶ Moreover, in special circumstances where there is a risk in delaying the act of seizure the police may "provisionally seize items or assets on behalf of the public prosecutor or the courts".²⁷

21 Criminal Code (*Krimināllikums*) (Latvia), Article 70(14).

22 Criminal Code (*Codul Penal*) (Moldova), Article 106 (unofficial translation).

23 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Preamble at [26]; Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, 2012 (updated to February 2023), Recommendation 4, accessed 12 June 2023 at <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html>.

24 United Nations Convention Against Corruption, Article 31(2); Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Article 7.

25 For instance, see the Proceeds of Crime Act 2002 (United Kingdom), Sections 40-47 (restraint), Sections 47A-47R (search and seizure powers).

26 Criminal Procedure Code (Switzerland), Article 263.

27 Ibid.

It is widely recommended that such mechanisms are supported by legislative frameworks outlining the management of any seized property, to ensure that any relevant assets do not lose value.²⁸ States should ideally establish specialized offices for this task.

For example, in 2010, France modified its Criminal Procedure Code (*Code de procédure pénale*) to create the Agency for the Recovery and Management of Seized and Confiscated Assets or *Agence de gestion et de recouvrement des avoirs saisis et confisqués* (AGRASC).²⁹ While this body is not the only agency in France responsible for asset management, it is the primary agency responsible for the management of a significant amount of assets in criminal matters, including cash seizures and real estate.³⁰

1.2.3 Inclusion of an 'extended confiscation' mechanism

Many conviction based confiscation mechanisms not only focus on the direct proceeds of an offence but also include an 'extended confiscation mechanism'. Providing that a person has been convicted, these mechanisms allow a court to assess the sources of a wide range of property held by the convicted person around the time of the offence in question to determine whether it could also be considered the proceeds of criminal activity.

Laws providing for extended confiscation are widely considered as a best practice in the field of asset recovery. For example, in the European context, the EU's Directive 2014/42/EU obligates members to:

... adopt the necessary measures to enable the confiscation, either in whole or in part, of property belonging to a person convicted of a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, where a court, on the basis of the circumstances of the case, including the specific facts and available evidence, such as that the value of the property is disproportionate to the lawful income of the convicted person, is satisfied that the property in question is derived from criminal conduct.³¹

Extended confiscation mechanisms often permit a court to make a rebuttable presumption that assets held by a convicted person around the time of an offence are the benefits of wider criminal activity. If a person is unable to explain the legal sources from which certain assets have been derived,

28 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Article 10; United Nations Convention Against Corruption, Article 31(2).

29 Criminal Procedure Code (*Code de procédure pénale*) (France), Article 706-159; *Law No. 2010-768 of 9 July 2010 (Loi No. 2010-768 du 9 juillet 2010)* (France), Article 4.

30 United Nations Office of Drugs and Crime, *Effective Management and Disposal of Seized and Confiscated Assets*, 2017, p.53.

31 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Article 21.

then these assets will be subject to confiscation even if they have not been directly linked to the crime for which the person was convicted.

Such rebuttable presumptions are specifically recommended at an international level. For example, the UNCAC outlines that:

States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of... alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.³²

In many states, these rebuttable presumptions will even apply to assets held by a convicted person before they committed the offence in question. For example, under both the UK's Proceeds of Crime Act and Spain's Organic Law 10/1995, of November 23, 1995, of the Penal Code (*Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*) the court may be permitted to presume that all assets held by a convicted defendant were received as a result of criminal conduct, even if the assets were received up to six years before the relevant criminal proceedings against the defendant had commenced.³³ Similarly in Belgium and Moldova, presumptions can potentially be applied to assets received by a convicted person up to five years before they were charged with the relevant offence.³⁴

States often draft extended confiscation mechanisms to include civil-level thresholds of proof – particularly in common law jurisdictions. For example, under Canada's Criminal Code, a defendant can rebut a presumption of the court in an extended confiscation proceeding by demonstrating “on a balance of probabilities” that the relevant assets are “not the proceeds of crime”.³⁵

States also often enact extended confiscation mechanisms that can be applied to persons convicted of any offence that gave rise to an economic benefit (such as the mechanism in Liechtenstein's Criminal Code, for example).³⁶ Other countries limit the application of such mechanisms to persons convicted of crimes of a certain level of seriousness. For example, in Luxembourg, an extended confiscation mechanism can only be applied to those convicted of offences punishable by more than four years' imprisonment.³⁷

32 United Nations Convention Against Corruption, Article 31(8).

33 Proceeds of Crime Act 2002 (United Kingdom), Sections 10, 96, 160; Organic Law 10/1995, of November 23, 1995, of the Penal Code (*Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal*) (Spain) Article 127 bis, 127 quinquies, 127 sexy.

34 Criminal Code (Code pénal) (Belgium), Article 43 quarter §2; Criminal Code (Codul Penal) (Moldova), Article 106-1.

35 Criminal Code RSC 1985 c.C-46 (Canada), Section 462.37(2.02).

36 Criminal Code of 24 June 1987 (Strafgesetzbuch (StGB) vom 24. Juni 1987), Section 20b(11).

37 Criminal Code (*Code pénal*) (Luxembourg), Article 31.2(5).

Alternatively, other countries limit their extended confiscation mechanism to those convicted of a strictly defined category of offences. For example, the extended confiscation mechanism under Section 5 of Ireland's Criminal Justice Act may only be applied to persons convicted of drug trafficking offences.³⁸

Extended confiscation laws are quite common globally, and a number of versions of these mechanisms were identified amongst the focus countries:

| | |
|----------------------|--|
| Austria | Criminal Code, as amended to 10.09.2022 (<i>Gesamte Rechtsvorschrift für Strafgesetzbuch, Fassung vom 10.09.2022</i>), Article 20b |
| Belgium | Criminal Code (<i>Code pénal</i>), Article 43 quater §2 |
| Canada | Criminal Code RSC 1985 c.C-46, Section 462.37(2.01) |
| France | Criminal Code (<i>Code pénal</i>), Article 131-21 (<i>Note: the application of this provision is subject to decisions of the Constitutional Court</i>) ³⁹ |
| Germany | Criminal Code (<i>Strafgesetzbuch</i>), Article 73a |
| Italy | Criminal Code (<i>Codice penale</i>), Article 240-bis |
| Ireland | Criminal Justice Act 1994, Section 5 (<i>Note: this mechanism is only applicable to drug trafficking offences</i>) |
| Latvia | Criminal Code (<i>Kriminālikums</i>), Article 70(11) |
| Liechtenstein | Criminal Code of 24 June 1987 (<i>Strafgesetzbuch (StGB) vom 24. Juni 1987</i>), Section 20b(11) |
| Luxembourg | Criminal Code (<i>Code pénal</i>), Article 31.2(5) |
| Malta | Criminal Code, Article 23B(1A) |
| Moldova | Criminal Code (<i>Codul penal</i>), Article 106-1 |
| Portugal | Law No. 5/2002 of 11 January 2002 (<i>Lei No. 5/2002 de 11 de janeiro de 2002</i>), Article 7 |
| Spain | Organic Law 10/1995, of November 23, 1995, of the Penal Code (<i>Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal</i>) Article 127 bis, 127 quinquies, 127 sección |

³⁸ Criminal Justice Act 1994 (Ireland), Section 5.

³⁹ For more information, see: Criminal Code (Code pénal) (France), Article 131-21(Nota), accessed 15 June 2023 at https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070719/LEGISCTA000006181731/?anchor=LEGIARTI000045292556#LEGIARTI000045292556.

| | |
|--------------------|--|
| Switzerland | Criminal Code, Article 72 (<i>Note: this mechanism is only applicable to persons found to have participated in or supported a criminal or terrorist organization under Article 260 of the same law</i>). |
| Ukraine | Criminal Procedure Code, Article 100(9)(6-1) |
| UK | Proceeds of Crime Act 2002, Sections 6-10, 75 (England and Wales); Sections 92-96 (Scotland); and Sections 156-160 (Northern Ireland) |

2 Non-conviction based asset recovery mechanisms

Non-conviction based confiscation mechanisms⁴⁰ are a broad category of legislative instruments that permit the permanent confiscation of the proceeds or instrumentalities of crime without a prior relevant criminal conviction.

The introduction of non-conviction based confiscation mechanisms is widely recommended as a good practice in the field of asset recovery. For instance, the G8's *Best Practice Principles on Tracing, Freezing and Confiscation of Assets* encourages states to examine the possibility of permitting "the forfeiture of property in the absence of a criminal conviction"⁴¹ Similarly, in November 2023, the Financial Action Task Force's Recommendations were updated to specifically include a requirement that countries establish a non-conviction based confiscation regime in their legal systems.⁴²

These mechanisms are widely considered to enhance a country's asset recovery legislative framework as they enable states to target proceeds of crime in situations where criminal prosecutions are "impossible or unlikely" (for instance where a suspect is unable or unwilling to participate in prosecution procedures or where the owner of probable criminal assets cannot be identified).⁴³

Non-conviction based confiscation mechanisms are generally considered to include two major sub-categories of mechanisms, namely:

- Classic non-conviction based confiscation mechanisms; and
- Civil recovery mechanisms (sometimes referred to as civil forfeiture mechanisms or in rem mechanisms).

Non-conviction based confiscation mechanisms also arguably include civil-procedure based mechanisms that permit the final confiscation of 'unexplained wealth'.

This section will outline the two most common types of non-conviction based confiscation mechanism: classic non-conviction based confiscation mechanisms and civil recovery mechanisms. Laws targeting unexplained

40 Also referred to as "non-conviction based *forfeiture* mechanisms".

41 The G8 Meeting of the Ministers of Justice and Home Affairs, "G8 Best Practice Principles on Tracing, Freezing and Confiscation of Assets", 2003, at [26], accessed 12 June at https://star.worldbank.org/sites/default/files/2023-03/E1_G-8_Best_Practice_Principles_on_Tracing_Freezing_and_Con.pdf.

42 FATF, "Amendments to the FATF Standards to Strengthen Global Asset Recovery", 16 November 2023, accessed 4 January 2024, at <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/amendment-FATF-standards-global-asset-recovery.html>; Financial Action Task Force, "International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation", 2012 (updated to November 2023), Recommendation 4, accessed 5 January 2024 at <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html>.

43 FATF, "Amendments to the FATF Standards to Strengthen Global Asset Recovery", 16 November 2023, accessed 4 January 2024, at <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/amendment-FATF-standards-global-asset-recovery.html>.

wealth will be covered separately under Section 3 of this paper on the basis that they are much less common, particularly in the countries of focus for this paper.

2.1 Classic non-conviction based confiscation mechanisms

Classic non-conviction based confiscation mechanisms generally empower a state to pursue confiscation proceedings against a person in the event that:

- Criminal proceedings against a person have commenced; but
- A trial cannot be concluded on the basis that the person died, absconded or is otherwise unable to participate (e.g., due to an immunity or a declaration that they are unfit for trial on age, health or mental grounds).⁴⁴

The introduction of classic non-conviction based confiscation mechanisms is a widely considered best practice at an international level. For example, in the context of mutual legal assistance, Article 54(1)(c) of the UNCAC outlines that states should consider permitting the confiscation of 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”.⁴⁵

Furthermore, in a European context, the EU’s Directive 2014/42/EU outlines that:

Where confiscation... is not possible, at least where such impossibility is the result of illness or absconding of the suspected or accused person, Member States shall take the necessary measures to enable the confiscation of instrumentalities and proceeds in cases where criminal proceedings have been initiated regarding a criminal offence which is liable to give rise, directly or indirectly, to economic benefit, and such proceedings could have led to a criminal conviction if the suspected or accused person had been able to stand trial.⁴⁶

Classic non-conviction based confiscation mechanisms vary significantly from jurisdiction to jurisdiction in terms of the situations in which they can be applied, the nature of the proceedings involved (i.e., whether they are criminally or civilly based) and the thresholds of proof that must be achieved.

44 European Commission, “Commission staff working document: Analysis of non-conviction-based confiscation measures in the European Union, Brussels”, 12 April 2019, accessed 9 June 2023 at <https://data.consilium.europa.eu/doc/document/ST-8627-2019-INIT/en/pdf>.

45 United Nations Convention Against Corruption, Article 54(1)(c).

46 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Article 4.

For example, under Section 462.38 of the Canadian Federal Criminal Code,⁴⁷ providing that “information has been laid in respect of a designated offence”, a judge may order forfeiture of certain property if they are satisfied that:

- (a) any property is, beyond a reasonable doubt, proceeds of crime,
- (b) that property was obtained through the commission of a designated offence in respect of which proceedings were commenced, and
- (c) the accused charged with the offence referred to in paragraph (b) has died or absconded...

By contrast, under Malta’s Proceeds of Crime Act:⁴⁸

- (1) Where after a person has been charged with a relevant offence, such person absconds or dies, or where because of his illness proceedings against him cannot be brought to a conclusion, the Director may bring an action before the Civil Court (Asset Recovery Section) to declare that on the basis of the evidence produced before the Court by the Director, the trial, had it come to a conclusion, would have resulted in a conviction.
- (2) An action for a declaration in accordance with sub-article (1) may also be brought where the suspected person has not been charged, because he dies or absconds before the prosecution may charge him...

While some legislative instruments limit their application to circumstances where a suspected person has died, fallen ill and/or absconded, other states take a broader approach. Providing that a criminal procedure of some sort has commenced, these latter mechanisms permit prosecutors to pursue separate confiscation proceedings in less-defined situations where the original criminal proceedings cannot be continued.

47 Criminal Code RSC 1985 c.C-46 (Canada, Federal).

48 Proceeds of Crime Act 2021 (Malta).

For example, under Latvia's Criminal Procedure Code (*Kriminālprocesa likums*),⁴⁹ if criminal proceedings have commenced, a prosecutor may request the initiation of a separate procedure for confiscation to determine the nature of any assets that have already been seized, if the following conditions exist:

- (1) the totality of evidence provides grounds to believe that the property that has been removed or seized is criminally acquired 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.⁵⁰

Similarly, under Liechtenstein's Criminal Procedure Code (*Strafprozessordnung (StPO) vom 18. Oktober 1988*) prosecutors are permitted to commence an "independent" judicial proceeding to seek the confiscation of assets when it is not "possible" to decide on issues of forfeiture or extended forfeiture in a traditional criminal proceeding.⁵¹ A similar mechanism also exists in Switzerland's Criminal Procedure Code.⁵² A mechanism of this kind in Germany's Criminal Code (*Strafgesetzbuch*) also takes a very broad approach.⁵³

Classic non-conviction based confiscation mechanisms are relatively common throughout the focus countries. The following laws were identified:

| | |
|----------------|---|
| Austria | Criminal Procedure Code (<i>Gesamte Rechtsvorschrift für Strafprozeßordnung 1975, Fassung vom 1975, Fassung vom 01.01.2022</i>), Article 445(2a) |
| Canada | Criminal Code RSC 1985 c.C-46, Section 462.38 |
| Germany | Criminal Code (<i>Strafgesetzbuch</i>), Article 76a |
| Italy | A limited classic non-conviction based confiscation mechanism is contained in the Code of anti-mafia laws and prevention measures, as well as new provisions on anti-mafia documentation 2022 (<i>Codice delle leggi antimafia e delle misure di prevenzione e nuove norme</i>) |

49 Criminal Procedure Code (*Kriminālprocesa likums*) (Latvia).

50 *Ibid.*, Section 626.

51 Criminal Procedure Code of October 18, 1988 (*Strafprozessordnung (StPO) vom 18. Oktober 1988*) (Liechtenstein), Section 356 (unofficial translation). Notably, the same law outlines a classic non-conviction based confiscation procedure regarding situations where property has been restrained and a suspect absconds (Sections 97a, 283 and 355(440)).

52 Criminal Procedure Code (Switzerland), Articles 376-378.

53 Criminal Code (*Strafgesetzbuch*) (Germany), Article 76a.

in materia di documentazione antimafia) – this law is outlined in Section 3 below

| | |
|----------------------|---|
| Ireland | Criminal Justice Act 1994, Section 13 |
| Latvia | Criminal Procedure Code (<i>Kriminālprocesa likums</i>), Sections 626-631 |
| Liechtenstein | Criminal Procedure Code (StPO) of October 18, 1988 (<i>Strafprozessordnung (StPO) vom 18. Oktober 1988</i>), Sections 97a, 283 and 355(440); Section 356. |
| Malta | Proceeds of Crime Act 2021, Article 42; Proceeds of Crime Act 2021, Article 43-53; Criminal Code, Article 23C(3) |
| Portugal | Criminal Code (Código Penal), Article 110(5) |
| Spain | Organic Law 10/1995, of November 23, 1995, of the Penal Code (<i>Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal</i>) Article 127 ter |
| Switzerland | Criminal Procedure Code, Articles 376-378 |
| Ukraine | Criminal Code (<i>Кримінальний кодекс України</i>), Article 96-3 |
| UK | Proceeds of Crime Act 2002, Sections 27-30 (England and Wales); Sections 111-114 (Scotland); and Sections 177-180 (Northern Ireland) |

2.2 Civil recovery mechanisms

Civil recovery mechanisms (sometimes referred to as civil forfeiture mechanisms or *in rem* mechanisms) are a subcategory of non-conviction based confiscation laws that permit law enforcement agencies to seek the confiscation of assets through an independent civil procedure. They are broader than the classic non-conviction based confiscation mechanisms described above in that they can be applied regardless of whether or not a criminal proceeding exists for a related offence. Provided that it can be demonstrated to a court – to a civil standard – that certain assets are linked to crime, civil recovery mechanisms can be used to enable their confiscation.

Civil recovery mechanisms are not as widespread as classic non-conviction based confiscation laws, and are arguably less established as a best practice at an international level. Nonetheless, such mechanisms have been used to recover a significant amount of assets in a number of jurisdictions. As a result, these mechanisms are increasingly being considered in international policy discussions.⁵⁴

⁵⁴ For example, see: European Commission, Report from the Commission to the European Parliament and the

One of the more well-known mechanisms of this kind is the US civil forfeiture mechanism.⁵⁵ This mechanism is an in rem court proceeding, meaning it is brought against the suspected assets themselves rather than a specific person.⁵⁶ In proceedings under this mechanism, the government acts as the “plaintiff”, the property is the “defendant” and any person who claims an interest in the property is considered a “claimant”.

During this proceeding, the government is obligated to prove, to the US civil standard (proof by a “preponderance of the evidence”) that the property in question “constitutes or is derived from proceeds traceable to” a wide range of offences (including money laundering, corruption offences, organized crime offences, drug-related offences, sanctions evasion, fraud and other white-collar crime offences).⁵⁷ If this is established, then the property will be forfeited – regardless of whether or not a conviction is obtained for a relevant offence.⁵⁸ This mechanism can also be applied in the US in situations where a classic non-conviction based confiscation mechanism would normally be adopted in other countries (e.g., if a suspect has died or absconded).⁵⁹

Nine Canadian provinces also have mechanisms that operate similarly to the US civil forfeiture law.⁶⁰ Like in the US, these mechanisms permit an enforcement agency to launch a civil action directly against the relevant property itself.⁶¹ Generally, if a court is satisfied on the balance of probabilities that the property is the proceeds of criminal activity, then it will order its forfeiture regardless of whether any relevant criminal proceedings have commenced.⁶²

The UK has a well-established civil recovery mechanism contained in its Proceeds of Crime Act.⁶³ This mechanism – which can also be applied independently of any criminal proceeding – takes the form of a civil procedure, under which the court will order the final confiscation of property if it can be convinced, on the “balance of probabilities”, that specific property held

Council – *Asset recovery and confiscation – Ensuring that crime does not pay*, 2 June 2020, at [3], accessed 12 June 2023 at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0217&rid=1>.

55 18 U.S. Code § 981 (United States).

56 United States Department of Justice, “Types of Federal Forfeiture”, accessed 26 June 2023 at <https://www.justice.gov/afms/types-federal-forfeiture>.

57 18 U.S. Code § 981 (United States). Note: the US civil forfeiture mechanism can also specifically be applied to “[A]ny property... involved in a transaction or attempted transaction” in violation US anti-money laundering laws as well as laws relating to the operation of unlicensed money transmitting businesses.

58 United States Department of Justice, “Types of Federal Forfeiture”, accessed 26 June 2023 at <https://www.justice.gov/afms/types-federal-forfeiture>.

59 Ibid.

60 See for example the mechanisms in British Columbia (Civil Forfeiture Act [SBC 2005] (Canada – British Columbia)), Ontario (Civil Remedies Act 2001 (Canada – Ontario)) and Manitoba (Criminal Property Forfeiture Act CCSM c C306 (Canada – Manitoba)). A detailed description of these mechanisms is contained in J Simser, *Civil Asset Forfeiture in Canada* (Exhibit 378 to the the Commission of Inquiry into Money Laundering in British Columbia), 2020, accessed 12 June 2023 at <https://cullencommission.ca/exhibits/?page=4>.

61 J Simser, *Civil Asset Forfeiture in Canada* (Exhibit 378 to the the Commission of Inquiry into Money Laundering in British Columbia), 2020, accessed 12 June 2023 at <https://cullencommission.ca/exhibits/?page=4>.

62 See for example the Civil Forfeiture Act [SBC 2005] (Canada – British Columbia), Sections 5, 16.

63 Proceeds of Crime Act 2002 (United Kingdom), Part 5.

by a person was “obtained through unlawful conduct”⁶⁴ Unlike the US and Canadian mechanisms above, the legal action is initiated against the person who holds the property in question (“the respondent”).⁶⁵

The following civil recovery mechanisms were identified in the focus countries:

- Canada** Civil recovery in Canada is largely considered within the provincial jurisdiction, with relevant laws in nine of Canada’s provinces, such as British Columbia’s Civil Forfeiture Act [SBC 2005].⁶⁶ A separate mechanism with characteristics of a civil recovery mechanism is also contained in the Criminal Code RSC 1985 c.C-46, Section 490.1(2).
- Italy** While a broad civil recovery mechanism was not identified, the mechanism contained in the Code of anti-mafia laws and prevention measures, as well as new provisions on anti-mafia documentation 2022 (Codice delle leggi antimafia e delle misure di prevenzione e nuove norme in materia di documentazione antimafia) could arguably be classified as a civil recovery law. This mechanism is outlined in detail in Section 3 below.
- Ireland** For the purposes of this paper, the asset recovery mechanism in Ireland’s Proceeds of Crime Act 1996 has been classified as a civil illicit enrichment mechanism (see Section 3 below). The mechanism however is unique and could potentially be classified as either a civil recovery mechanism or a civil illicit enrichment law as it contains elements associated with both.
- Luxembourg** Luxembourg’s Criminal Code (*Code pénal*), Article 31.2(2) and 31.3, contains a forfeiture mechanism that can be applied to assets linked to specific offences including terrorist offences and money laundering offences, independent of a criminal prosecution. It is unclear, however, whether this mechanism is reliant on the existence of criminal proceedings, even if these proceedings were not finalized. If so, this mechanism would arguably be better categorized as a limited version of a classic non-conviction based confiscation mechanism.
- Switzerland** While Switzerland does not have a broad civil recovery law, it does have two mechanisms that include charac-

64 Ibid., Sections 241, 243, 244, 266, 304.

65 Ibid., Section 243.

66 J Simser, *Civil Asset Forfeiture in Canada* (Exhibit 378 to the the Commission of Inquiry into Money Laundering in British Columbia), 2020, accessed 12 June 2023 at <https://cullenccommission.ca/exhibits/?page=4>.

teristics of a civil recovery mechanism, namely the process outlined in the Federal Act on the Freezing and Restitution of Illicit Assets held by Foreign Politically Exposed Persons, as well as the Criminal Code, Article 72. Both these processes are examined in more detail in Section 3 below.

UK Proceeds of Crime Act 2002, Part 5

US 18 U.S. Code § 981

It should be noted that many states also have 'administrative' forfeiture proceedings that can be applied similarly to the civil recovery mechanisms above. These proceedings can be applied when property (e.g., cash) under a certain value is seized by law enforcement agencies and this seizure is not challenged by anyone claiming an interest in the property. In such circumstances, administrative forfeiture mechanisms will permit the property to be permanently confiscated through an administrative proceeding without the need to file a formal judicial proceeding with the courts.⁶⁷ For example, a mechanism such as this is very commonly used in the US, and accounts for roughly three quarters of all federal forfeitures.⁶⁸

⁶⁷ For example see 19 U.S Code 1607 (United States); United States Department of Justice, "Types of Federal Forfeiture", accessed 26 June 2023 at <https://www.justice.gov/afms/types-federal-forfeiture>.

⁶⁸ Cornell Law School Legal Information Institute, "Administrative forfeiture", accessed 26 June 2023 at https://www.law.cornell.edu/wex/administrative_forfeiture.

3 Less common asset recovery mechanisms

This section will examine the less common asset recovery mechanisms that were identified as existing in one or more of the focus countries covered by this study.

The classification of these mechanisms as a 'best practice' at this stage is not as certain as the mechanisms described previously in this paper, on the basis that they are limited to a small number of jurisdictions or they may have not yet been tested in court thoroughly. Nonetheless, the introduction of these mechanisms can potentially be considered by states seeking to increase the asset recovery options available to their law enforcement agencies.

3.1 Laws targeting illicit enrichment / unexplained wealth

Laws targeting illicit enrichment or unexplained wealth are mechanisms that permit a court to impose criminal or civil sanctions against a person if they are found to have enjoyed an amount of wealth that has not been justified by reference to their lawful sources of income.⁶⁹

Criminal procedure based versions of these mechanisms are recommended by the UNCAC, the Inter-American Convention Against Corruption and the African Union Convention on Preventing and Combating Corruption.⁷⁰

Civil procedure based versions of these mechanisms are also increasingly being implemented internationally.

3.1.1 Criminal illicit enrichment mechanisms

Criminal illicit enrichment laws (otherwise known as criminal unexplained wealth laws) make it a criminal offence for an individual to enjoy an amount of wealth that cannot be justified by reference to that person's lawful income.⁷¹

These mechanisms are often introduced to specifically target the proceeds of corruption and will typically require a state to establish that a person (usually a public official) has obtained or used an amount of wealth that is disproportionate to that person's official or declared income. If this is demonstrated, and if the person is subsequently unable or unwilling to explain the

69 A Dornbierer, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*, Basel, Basel Institute on Governance, 2021, p. 27.

70 United Nations Convention Against Corruption, Article 20; Inter-American Convention Against Corruption, Article IX; African Union Convention on Preventing and Combating Corruption, Article I and XIII.

71 A Dornbierer, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*, Basel, Basel Institute on Governance, 2021, p. 27.

legal sources for this disproportionate wealth, then the person is guilty of an offence and liable to punishment (imprisonment and/or fines). Furthermore, the established disproportionate wealth can potentially be confiscated as the proceeds of crime.

These mechanisms arguably make asset recovery more easily achievable in certain cases. This is due to the fact that they do not require the state to demonstrate that the assets in question have been derived from, or linked to, any sort of criminal activity. Instead, these mechanisms provide a legislative avenue through which a state can confiscate assets purely on the basis that their legal source has not been demonstrated.

Globally, criminal illicit enrichment laws are quite common, and exist in at least 78 jurisdictions.⁷² They are not, however, common amongst OSCE participating States. The following mechanisms were identified in the focus countries for this paper:

Moldova Criminal Code (*Codul Penal*), Article 330-2

Ukraine Criminal Code (), Article 368-5

Under Moldova's mechanism, if the state can prove that a public official has assets that could not have been obtained legally, then the public official will be liable to imprisonment from three to 15 years (depending on their position) as well as a fine. The assets themselves can then be confiscated through the *Criminal Code's* conviction based confiscation mechanisms.⁷³

Ukraine also has a criminal illicit enrichment mechanism under its Criminal Code, under which a public official may face imprisonment for up to ten years if they are found to have acquired unjustified assets disproportionate to their legal income.⁷⁴

Although these laws are not common amongst OSCE participating States, there is a possibility that criminal illicit enrichment laws will become more prevalent in the future – particularly amongst states that are also members of the EU. On 3 May 2023, the European Commission announced an intention to strengthen and harmonise EU-level anti-corruption legislation, including through the introduction of an illicit enrichment offence.⁷⁵

⁷² Ibid., p. 45.

⁷³ Criminal Code (*Codul Penal*) (Moldova), Article 106-1

⁷⁴ Criminal Code (*Кримінальний кодекс України*) (Ukraine), Article 368-5.

⁷⁵ European Commission, "Anti-corruption: Stronger rules to fight corruption in the EU and worldwide", 3 May 2023, accessed 01 July 2023 at https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2516; European Commission, "Joint communication to the European Parliament the Council and the European Economic and Social Committee on the fight against corruption", 3 May 2023, accessed 1 July 2023 at https://commission.europa.eu/system/files/2023-05/JOIN_2023_12_1_EN.pdf.

3.1.2 Civil illicit enrichment mechanisms

Civil illicit enrichment laws (otherwise known as civil unexplained wealth laws) are similar to criminal illicit enrichment laws, in that they can be used by the state to target wealth that cannot be justified or explained by reference to a person's lawful sources of income.

Unlike the criminal versions of these laws, however, civil illicit enrichment laws are based in civil procedure and do not make it an offence for a person to have benefited from 'unexplained' wealth. Instead, if the court is satisfied that a person has enjoyed unexplained wealth, it will impose a civil sanction on that person. This is usually in the form of an order to pay a monetary amount to the state of the same value as the established unexplained wealth.⁷⁶

Like criminal illicit enrichment laws, civil illicit enrichment laws normally do not require the state to establish that the assets in question have been derived from, or are linked to, criminal activity. Some forms of this mechanism, however, do require a state to establish that there is a 'reasonable belief' or a 'reasonable suspicion' that certain assets are linked to criminal activity. This threshold though is arguably easier to achieve than the 'balance of probabilities' threshold required by other asset recovery mechanisms (such as the civil recovery mechanism described previously in Section 2). Consequently, civil illicit enrichment mechanisms should be considered in their own category of law.

These mechanisms exist in a limited number of jurisdictions around the world including, for example, all Australian jurisdictions. Only two of the focus countries, however, have a law that could potentially be classified as a civil illicit enrichment law.

Ireland Proceeds of Crime Act 1996⁷⁷

Ukraine Civil Procedure Code (*Цивільний процесуальний кодекс України*), Articles 290-292, 81, 89

Ukraine introduced a civil illicit enrichment law in 2019. Under this mechanism, Ukraine's anti-corruption enforcement agencies can seek the permanent confiscation of "unjustified" assets held by public officials.⁷⁸ A claim may only be brought, however, if the allegedly unjustifiable amount

⁷⁶ A Dornbierer, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*, Basel, Basel Institute on Governance, 2021, p. 27.

⁷⁷ It is unclear whether the Irish mechanism described in this section is better classified as a civil illicit enrichment law or a civil recovery law. For this paper, this law has been classified as the former on the basis that firstly, the law includes a mechanism to shift the burden of proof onto a person to explain the legal sources of their assets (a common characteristic of illicit enrichment laws), and secondly that this mechanism can be triggered on state-led 'belief' evidence that the assets in question are linked to crime (which is a lesser burden required of the state than that in civil recovery laws). For more information surrounding the classification of this law see: A Dornbierer and J Simser "Targeting unexplained wealth in British Columbia: An analysis of Recommendation 101 of the Final Report of the Commission of Inquiry into Money Laundering in British Columbia." Working Paper 41, Basel Institute on Governance, 2022, p.26, available at: https://baselgovernance.org/sites/default/files/2022-09/220929_Working%20Paper_41.pdf.

⁷⁸ Civil Procedure Code (*Цивільний процесуальний кодекс України*) (Ukraine) Article 290(1) (unofficial translation); Note that if the unjustified assets are claimed to be held by a member of the anti-corruption agencies, a claim may be brought by the Prosecutor General.

is greater than a set threshold of five hundred times a recognized “minimum subsistence level”.⁷⁹ It is important to note that a claim may even be brought against a third party if it can be shown that this party acquired certain assets on behalf of the public official concerned.⁸⁰

When a procedure is launched, the burden of proof first rests with the state to establish an unjustified difference between the assets of the person in question and their legitimate income.⁸¹ If this is achieved, then the burden is moved onto the person in question to refute the claims of the state and justify the established difference.⁸² If this cannot be done, the court will order the confiscation of any unjustified assets, or their equivalent value.⁸³

Under Ireland’s Proceeds of Crime Act mechanism, certain assets may be forfeited to the state if “it appears to the court” that a person is “in possession or control” of an asset that “constitutes, directly or indirectly, proceeds of crime” or “was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime”.⁸⁴ In assessing whether this is the case, however, the court is able to rely on “belief” evidence tendered to the court by a law enforcement officer that a relevant person controls assets that constitute the proceeds of crime. Once this belief evidence is established to be reasonably grounded, it will trigger a shift in the burden of proof onto the person to provide evidence that the assets in question have not come from unlawful sources.⁸⁵ If they are unable to, then the assets will be confiscated.

The Irish mechanism is widely lauded, and has proven itself an effective tool in the disruption of economic crime.⁸⁶ It has been tested on numerous occasions and has been used in a number of successful asset recovery cases. In 2021, the law resulted in 21 orders for recovery totalling EUR 8,386,853. In 2020, the law was used to achieve 29 orders for recovery, including a single seizure of cryptocurrency worth EUR 53,000,000.⁸⁷

An often-touted reason for the mechanism’s success is the structure and make-up of the organization tasked with implementing it: the Criminal Assets Bureau, a national and independent statutory body that has both an

79 Civil Procedure Code (*Цивільний процесуальний кодекс України*) (Ukraine), Article 290(2) (unofficial translation).

80 *Ibid.*, Article 290(4).

81 *Ibid.*, Article 81(2).

82 *Ibid.*

83 *Ibid.*, Article 292.

84 Proceeds of Crime Act 1996 (Ireland), Sections 2-4.

85 The Final Report of the Commission of Inquiry into Money Laundering in British Columbia, p.1593, referencing Proceedings at Hearing of December 16, 2021 (Transcript of Interview of Kevin McMeel, Criminal Assets Bureau (Ireland)), pp.48-49; Proceeds of Crime Act 1996 (Ireland), Sections 3-4.

86 A Shachi, “Unexplained Wealth Orders”, Commons Library Research Briefing CBP9098, 14 April 2022, p.4; RUSI, “Unexplained Wealth Orders – UK experience and lessons for British Columbia” (Exhibit 382 of the Commission of Inquiry into Money Laundering in British Columbia), p.23.

87 The Criminal Assets Bureau, “Annual Report 2021”, July 2022, pp.47-48.

investigatory and legal function. Investigation teams are multi-disciplinary and made up of officers on special leave from three law enforcement agencies the An Garda Síochána (the national police service), the Office of the Revenue Commissioners and the Department of Social Protection.⁸⁸ Teams are also supported by a separate ‘analyst unit’ made up of forensic accountants and technical experts as well as a co-located, but independent, legal function made up of members of the Chief State Solicitor’s Office.⁸⁹

3.2 Information-gathering UWOs

Another category of mechanism also exists that assists states to target unexplained wealth: information-gathering unexplained wealth orders (UWOs). These laws are arguably less powerful than the criminal and civil illicit enrichment mechanisms described above as they only permit a court to order a party to provide information that explains the lawful sources of their assets. Importantly, they cannot be used to actually confiscate unexplained wealth – even if a person’s response to the order does not adequately justify the sources of the assets in question. Instead, the person’s response to the order (or lack of response) can then be used by law enforcement authorities to determine whether or not to pursue a separate application for confiscation using a civil recovery order (described in Section 2 above).⁹⁰

These mechanisms only exist in a select number of jurisdictions worldwide. Amongst the focus countries for this paper, this mechanism exists in the UK and two provincial-level jurisdictions in Canada (Manitoba and British Columbia).

Canada Criminal Property Forfeiture Act CCSM c C306 (Manitoba), Part 1.2; Civil Forfeiture Act [SBC 2005] (British Columbia), Part 3, Division 1.2⁹¹

UK Proceeds of Crime Act 2002, Part 8

88 The Commission of Inquiry into Money Laundering in British Columbia, “Proceedings at Hearing of December 16, 2021” (Transcript of Interview of Kevin McMeel, Criminal Assets Bureau (Ireland)), pp.28-29, available at: <https://cullencommission.ca/data/transcripts/Transcript%20December%2016,%202020.pdf>.

89 The Criminal Assets Bureau, “Annual Report 2021”, July 2022, p.6, p.13.

90 A Dornbierer and J Simser, “Targeting unexplained wealth in British Columbia: An analysis of Recommendation 101 of the Final Report of the Commission of Inquiry into Money Laundering in British Columbia.” Working Paper 41, Basel Institute on Governance, 2022 p.8, available at: https://baselgovernance.org/sites/default/files/2022-09/220929_Working%20Paper_41.pdf.

91 British Columbia’s Civil Forfeiture Act [SBC 2005] was amended by the Civil Forfeiture Amendment Act 2023 which received royal assent on 11 May 2023. An up to date version of the Civil Forfeiture Act itself was not available at the date of publication for this paper, and the section number provided above is based on the version of the Civil Forfeiture Amendment Act 2023 at its Third Reading in the Legislative Assembly (a copy of this bill is contained at <https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/42nd-parliament/4th-session/bills/third-reading/gov21-3>).

3.2.1 The UK mechanism

In the UK, law enforcement authorities can apply to a court for a UWO under Part 8 of the Proceeds of Crime Act.⁹² The order will be issued by the court relating to an identified and specified property (of a value greater than GBP 50,000) if it is satisfied that there are reasonable grounds for suspecting that either:

- The “known sources of the respondent’s lawfully obtained income would have been insufficient for the purposes of enabling the respondent to obtain the property”; or
- The property has been “obtained through unlawful conduct”⁹³

Before issuing a UWO, the court must also be satisfied that either:

- The respondent is a politically exposed person (from outside the UK or a European Economic Area state); or
- There are reasonable grounds to suspect that the respondent, or someone connected to the respondent, has been involved in serious crime.⁹⁴

If an unexplained wealth order is issued, the person will be obligated to provide a statement that, amongst other things, explains the “nature and extent of the respondent’s interest” in the relevant property and how they obtained it.⁹⁵

Once the UWO is issued by the court, if the person “does not comply” or “does not purport to comply” with the order, then this will give rise to a rebuttable presumption that the property in question was not obtained lawfully. This presumption will be taken into account in any subsequent and separate civil recovery proceedings relating to the property.⁹⁶

Alternatively, if the person does comply, or purports to comply with the UWO, and the property in question has also been subjected to an interim freezing order alongside the UWO, then the law enforcement agency that sought the order has a maximum of 186 days to decide to pursue additional proceedings before the freezing order is lifted. If there is no such freezing order in place then the time for a decision is not restricted.⁹⁷

⁹² Proceeds of Crime Act 2002 (United Kingdom).

⁹³ Proceeds of Crime Act 2002 (United Kingdom), Section 362B.

⁹⁴ Ibid

⁹⁵ Ibid., Section 362A.

⁹⁶ Ibid., Section 362C.

⁹⁷ Ibid., Section 362D.

3.2.2 The Canadian mechanisms

At the time of writing, Canada has two mechanisms of this kind that both operate at a provincial level. Manitoba's 'preliminary disclosure order' mechanism is contained in the *Criminal Property Forfeiture Act*.⁹⁸ British Columbia's 'unexplained wealth order' mechanism is in the province's Civil Forfeiture Act and was only introduced in May this year.⁹⁹ Both the Manitoban and British Columbian mechanisms operate similarly to the UK's UWO described above, with some minor exceptions.¹⁰⁰

3.2.3 Criticisms regarding the effectiveness of information-gathering UWOs

There has been some criticism regarding the effectiveness of these types of mechanisms, and particularly the UK's UWO.

When the UK mechanism was introduced in 2017, it was envisioned that around 20 UWOs would be sought per year.¹⁰¹ To date however, only nine UWOs relating to four investigations have been sought,¹⁰² with only one case having resulted in the successful recovery of funds.¹⁰³

It is unclear why this mechanism has not proven to be as successful as expected. Some explanations, however, have been put forth.

Primarily, it has been noted that the original version of the UK's UWO included a number of provisions that arguably dissuaded law enforcement agencies from seeking them. For example, the mechanism previously included a 60-day time limit for law enforcement agencies to decide whether or not to pursue a civil recovery action after receiving a response to a UWO.

98 The Criminal Property Forfeiture Act 2004 (Canada, Manitoba).

99 Civil Forfeiture Act [SBC 2005] (Canada, British Columbia).

100 One exception is that the Canadian mechanisms have stricter rules regarding whether or not a person has complied with an order. Specifically, under the thresholds for compliance in these mechanisms, it is not enough for a respondent to simply 'purport' to have complied with an order before their obligations under the order are discharged. Another exception is that they cannot be applied solely against a person on the basis that they are a politically exposed person, see: A Dornbierer, and J Simser, "Targeting unexplained wealth in British Columbia: An analysis of Recommendation 101 of the Final Report of the Commission of Inquiry into Money Laundering in British Columbia." Working Paper 41, Basel Institute on Governance, 2022, p.13, available at: https://baselgovernance.org/sites/default/files/2022-09/220929_Working%20Paper_41.pdf.

101 Foreign Affairs Committee, "The cost of complacency: illicit finance and the war in Ukraine", HC 168 2022-23, 30 June 2022, at [12].

102 A Shachi, "Unexplained Wealth Orders", Commons Library Research Briefing CBP9098, 14 April 2022, p.18, available at: <https://researchbriefings.files.parliament.uk/documents/CBP-9098/CBP-9098.pdf>.

103 However, as noted in A Dornbierer and J Simser. "Targeting unexplained wealth in British Columbia: An analysis of Recommendation 101 of the Final Report of the Commission of Inquiry into Money Laundering in British Columbia." Working Paper 41, Basel Institute on Governance, 2022 at p.14: "...while the amount recovered was substantial – almost GBP 10 million – it was confiscated as part of a settlement with the respondent rather than through a subsequent civil recovery procedure (see RUSI, Unexplained Wealth Orders – UK experience and lessons for British Columbia (Exhibit 382 of the Commission of Inquiry into Money Laundering in British Columbia), p.16.). Consequently, while the information received through the UWO likely played a significant role in the settlement, it was not possible to gauge the degree to which the settlement was influenced by it."

This arguably severely hampered an agency's ability to verify the information contained in a response, particularly if the response contained foreign-sourced material.¹⁰⁴

Furthermore, agencies were also dissuaded from using the UWO mechanism due to the risk that they would face significant legal costs in the event that their application for the UWO was rejected by the court.¹⁰⁵ The UK introduced amendments to this mechanism in 2022 that addressed both these issues by extending the 60-day time limit to 186 days and by making it extremely difficult for respondents to claim legal costs against the government in UWO proceedings. It is unclear yet whether these amendments will have an effect on the overall application rate of this mechanism.¹⁰⁶

With regards to the Canadian mechanisms, neither the Manitoban or British Columbian mechanisms have been tested yet in court. Consequently, it is unclear at this stage whether or not they will prove to contribute effectively to asset recovery efforts.

3.3 Switzerland's Foreign Illicit Assets Act

In 2015, Switzerland introduced a unique asset recovery mechanism through the Federal Act on the Freezing and Restitution of Illicit Assets held by Foreign Politically Exposed Persons, otherwise known as the Foreign Illicit Assets Act (FIAA).¹⁰⁷ The mechanism includes a combination of administrative and judicial measures and can be used to confiscate assets linked to foreign individuals within a narrow set of circumstances.

3.3.1 How the FIAA can be applied

Under the law, the executive branch of government (the Swiss Federal Council) may order an administrative freeze of certain assets held in Switzerland that are linked to foreign politically exposed persons (or their close associates) if certain conditions are met, namely that:

104 RUSI, *Unexplained Wealth Orders – UK experience and lessons for British Columbia* (Exhibit 382 of the Commission of Inquiry into Money Laundering in British Columbia), p.6.

105 This attitude was further compounded following the National Crime Agency's failed attempt to seek a UWO in the case of *National Crime Agency v Baker* [2020] EWHC 822 which resulted in a GBP 1.5 million bill for legal costs. For further information, see: A Shachi, *Unexplained Wealth Orders*, Commons Library Research Briefing CBP9098, 14 April 2022, p.17, available at: <https://researchbriefings.files.parliament.uk/documents/CBP-9098/CBP-9098.pdf>; Foreign Affairs Committee, *The cost of complacency: illicit finance and the war in Ukraine*, HC 168 2022-23, 30 June 2022, at [12].

106 A Dornbierer and J Simser. *Targeting unexplained wealth in British Columbia: An analysis of Recommendation 101 of the Final Report of the Commission of Inquiry into Money Laundering in British Columbia*. Working Paper 41, Basel Institute on Governance, 2022 pp.14-15, available at: https://baselgovernance.org/sites/default/files/2022-09/220929_Working%20Paper_41.pdf.

107 Federal Act on the Freezing and Restitution of Illicit Assets held by Foreign Politically Exposed Persons of 18 December 2015 (Switzerland).

- (a) the government or certain members of the government of the country of origin [of the assets] have lost power, or a change in power appears inexorable;
- (b) the level of corruption in the country of origin is notoriously high;
- (c) it appears likely that the assets were acquired through acts of corruption, criminal mismanagement or other felonies;
- (d) the safeguarding of Switzerland's interests requires the freezing of the assets.¹⁰⁸

Further, an administrative freeze will only be permissible if:

- (a) the assets have been made subject to a provisional seizure order within the framework of international legal assistance proceedings in criminal matters instigated at the request of the country of origin;
- (b) the country of origin is unable to satisfy the requirements for mutual legal assistance owing to the total or substantial collapse, or the impairment, of its judicial system (failure of state structures);
- (c) the safeguarding of Switzerland's interests requires the freezing of the assets.¹⁰⁹

108 Ibid., Article 3(2).

109 Ibid., Article 4(2).

Finally, an administrative freeze may also be permissible if:

... following receipt of a request for mutual legal assistance, cooperation with the country of origin proves to be impossible because there are reasons to believe that proceedings in the country of origin do not satisfy the essential principles of procedure foreseen in Article 2 letter a of the Mutual Assistance Act of 20 March 1981 and where the safeguarding of Switzerland's interests so requires.¹¹⁰

If assets are frozen under this mechanism, the Swiss Federal Council may then instruct the Federal Department of Finance to make an application to the Federal Administrative Court for permanent confiscation. The court will be required to order the confiscation of assets:

- (a) that are subject to the power of disposal of a foreign politically exposed person or a close associate of that individual, or of which those individuals are the beneficial owners;
- (b) that are of illicit origin; and which
- (c) have been frozen by order of the Federal Council in anticipation of their confiscation, pursuant to Article 4.¹¹¹

With regards to whether or not assets are of "illicit origin" as described in Article 14(2)(b) above, courts are directed to presume that assets are of "illicit origin" when the following conditions are fulfilled:

- (a) the wealth of the individual who has the power of disposal over the assets or who is the beneficial owner thereof increased inordinately, facilitated by the exercise of a public function by a foreign politically exposed person;

¹¹⁰ Ibid., Article 4(3). Also Note Article 2(a) of the Mutual Assistance Act of 20 March 1981 (Switzerland) specifies that a request for mutual legal assistance will not be granted if "there are reasons to believe that the foreign proceedings:

- a) do not meet the procedural requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, or the International Covenant on Civil and Political Rights of 16 December 1966;
- b) are being conducted so as to prosecute or punish a person on account of his political opinions, his belonging to a certain social group, his race, religion, or nationality;
- c) could result in aggravating the situation of the defendant for any of the reasons mentioned under letter b; or
- d) have other serious defects."

¹¹¹ Federal Act on the Freezing and Restitution of Illicit Assets held by Foreign Politically Exposed Persons of 18 December 2015 (Switzerland), Article 14(2).

(b) the level of corruption in the country of origin or surrounding the foreign politically exposed person in question was notoriously high during his or her term of office.¹¹²

Furthermore, an increase under Article 15(1)(a) above shall be considered “inordinate” where:

... there is a significant disproportion, inconsistent with ordinary experience and the prevailing circumstances in the country, between the income legitimately earned by the person with the power of disposal over the assets and the growth in that person’s wealth.¹¹³

Finally, the presumption that assets are of “illicit origin” can only be reversed if a party has demonstrated “with overwhelming probability” that the assets in question were acquired legitimately.¹¹⁴

3.3.2 Has the FIAA been effective in recovering assets?

The FIAA has not yet been tested fully in court, so it is not possible to assess whether it can be applied effectively to confiscate assets.

3.4 Asset recovery mechanisms involving specific presumptions relating to organized crime or terrorist groups

Several countries have unique asset recovery mechanisms that permit a court to make adverse presumptions regarding the assets belonging to persons who associate with or participate in organized crime or terrorist groups.

3.4.1 Italy’s anti-mafia mechanism

Arguably the most well known of these mechanisms is Italy’s anti-mafia law, the Code of anti-mafia laws and prevention measures, as well as new provisions on anti-mafia documentation 2022 (*Codice delle leggi antimafia e delle misure di prevenzione e nuove norme in materia di documentazione antimafia*). This law contains an administrative asset recovery mechanism that operates very similarly to illicit enrichment laws.

¹¹² Ibid., Article 15(1).

¹¹³ Ibid., Article 15(2).

¹¹⁴ Federal Act on the Freezing and Restitution of Illicit Assets held by Foreign Politically Exposed Persons of 18 December 2015, Article 15(3).

The mechanism is applied outside of criminal proceedings, is classified as an “administrative fine or penalty”, and does not require a criminal conviction before it can be applied to confiscate assets.¹¹⁵

It applies to a limited group of people considered a “danger to society” and includes those suspected of being involved in organized crime groups, terrorism or politically motivated crimes.¹¹⁶ It can also be applied to individuals that appear on the United Nations Security Council sanctions list.¹¹⁷

Providing a person is established to fall within the remit of the mechanism, the state can seek confiscation of their assets by demonstrating that they are “suspicious”, either because the assets are disproportionate to the person’s lifestyle or because they are of illicit origin.¹¹⁸ The state does not need to link the assets to specified criminal activity.¹¹⁹ There is some uncertainty over the exact standard of proof required for this procedure. However, case law suggests that the standard is below that of ‘beyond reasonable doubt’.¹²⁰

If suspicion is established, the burden of proof is reversed onto the person in question to demonstrate the lawful sources of their assets. If they are unable to, then the assets in question (or substitute assets of an equivalent value) can be confiscated.

Similar to a classic non-conviction based confiscation measure, if the person in question is absent from the proceedings or dies, this does not prevent the confiscation of assets.¹²¹

3.4.2 Switzerland’s Criminal Code, Article 72 mechanism

Other countries have asset recovery mechanisms that permit similar presumptions to be made against persons deemed to have associated with or participated in criminal or terrorist organizations.

115 Hogan Lovells, Global Survivors Fund, REDRESS and Goldsmith Chambers, *Finance for Restorative Justice Volume II: Discussion Paper*, 19 June 2021, at [47] – [54], accessed 5 June 2023 at https://www.hoganlovells.com/~media/hogan-lovellis/pdf/2021-pdfs/2021_06_25_finance_for_restorative_justice_-_volume_ii_stage_5.pdf?la=en.

116 Ibid.; M Nizzero, *How to Seize a Billion: Exploring Mechanisms to Recover the Proceeds of Kleptocracy*, Royal United Services Institute, 19 December 2022, accessed 5 June 2023 at <https://static.rusi.org/rusi-emerging-insights-how-to-seize-a-billion-exploring-mechanisms-to-recover-the-proceeds-of-kleptocracy.pdf>.

117 Ibid.

118 Hogan Lovells, Global Survivors Fund, REDRESS and Goldsmith Chambers, *Finance for Restorative Justice Volume II: Discussion Paper*, 19 June 2021, at [47] – [54], accessed 5 June 2023 at https://www.hoganlovells.com/~media/hogan-lovellis/pdf/2021-pdfs/2021_06_25_finance_for_restorative_justice_-_volume_ii_stage_5.pdf.

119 Ibid.

120 M Nizzero, *How to Seize a Billion: Exploring Mechanisms to Recover the Proceeds of Kleptocracy*, Royal United Services Institute, 19 December 2022, accessed 5 June 2023 at <https://static.rusi.org/rusi-emerging-insights-how-to-seize-a-billion-exploring-mechanisms-to-recover-the-proceeds-of-kleptocracy.pdf>. The uncertainty surrounding this threshold of proof is one of the key reasons why this law has not been categorized by this paper as an unexplained wealth law.

121 Code of anti-mafia laws and prevention measures, as well as new provisions on anti-mafia documentation 2022 (*Codice delle leggi antimafia e delle misure di prevenzione e nuove norme in materia di documentazione antimafia 2022*) (Italy), Article 18.

For example, under Article 72 of Switzerland's Criminal Code:

The court shall order the forfeiture of all assets that are subject to the power of disposal of a criminal or terrorist organization. In the case of the assets of a person who participates in or supports such an organization... it is presumed that the assets are subject to the power of disposal of the organization until the contrary is proven.

This mechanism has even been successfully applied to the leader of a foreign state in the context of corruption.

3.4.3 Switzerland's Criminal Code, Article 72 mechanism

France has a unique law that permits a presumption to be made against a person with criminal associations. Under France's Criminal Code (*Code pénal*), a person is deemed to have committed a crime if:

- It can be shown that they had "habitual relations" with another individual who was convicted of a crime punishable by at least five years' imprisonment; and
- They are unable to justify the lawful origins of the property that they own.¹²²

If this is demonstrated to the court, then the person will be liable to criminal punishment, including forfeiture.

3.5 Canadian mechanisms permitting the confiscation of assets frozen under sanctions

In 2022, Canada amended two legislative instruments relating to sanctions procedures – the Special Economic Measures Act and the Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) – to include powers of confiscation.¹²³

While these laws previously empowered the government to take administrative action to freeze the assets of certain individuals, the new amendments now empower the government to also request a court order to permanently confiscate these assets.

¹²² Criminal Code (*Code pénal*) (France), Article 321-6 (unofficial translation).

¹²³ Special Economic Measures Act S.C. 1992, c.17 (Canada, Federal), Section 5.4; Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) S.C. 2017, C.21 (Canada, Federal), Section 4.1.

The circumstances in which the court may grant an order for confiscation are extremely broad. For example, with regard to a request to confiscate an asset frozen under the Special Economic Measures Act, the court is simply required to confirm that:

- The asset in question has been “described” in a measure made by the government under the Act to sanction it; and
- The asset “is owned by the person/foreign national referred to in that order or is held or controlled, directly or indirectly, by that person/foreign national.”¹²⁴

These amendments are controversial, as they do not require the state to demonstrate that the assets in question are linked to criminality of any kind (i.e., in contrast to civil recovery laws). The amendments also do not provide a sanctioned person with a mechanism to prevent confiscation by demonstrating that the assets have been lawfully acquired (i.e., in contrast to criminal and civil illicit enrichment laws). Providing that the government of the day has properly passed a law to sanction the person and freeze their assets, and providing that the assets subject to a confiscation order are provably owned or controlled by the person being sanctioned, they can be confiscated.

The amendments have raised concerns on the basis that they infringe on due process rights, as well as the right to property.¹²⁵ There are also concerns that the confiscation of sanctioned assets defeats a key objective of sanctions, namely, to persuade the sanctioned target to cease their adverse behaviour.¹²⁶ On the other hand, proponents of such mechanisms argue that the confiscated proceeds can be redirected to the victims of a sanctioned target to repair the harm that has already been caused by the adverse behaviour.¹²⁷

As of the date of publication of this paper, the law in Canada has yet to be tested.

124 Ibid.

125 A Dornbierer, From sanctions to confiscation while upholding the rule of law. Working Paper 41, Basel Institute on Governance pp.16-22, available at <https://baselgovernance.org/sites/default/files/2023-02/Working%20Paper%2042%20Sanctions%20to%20Confiscation.pdf>.

126 Ibid., pp.22-23.

127 Ibid.

4 Key considerations regarding the adoption of broader asset recovery laws

In the last two decades, there has been a significant increase in the adoption of asset recovery mechanisms that go beyond the traditional conviction based mechanisms outlined in Section 1 of this paper.

As explained previously, these mechanisms can be applied to broader situations, and can permit confiscation even in cases where the criminal origin of a particular asset is difficult to establish.

While some would argue that the applicability of these mechanisms to wider situations serves the greater public interest of stripping criminals of their illicitly acquired assets, others would argue that the introduction and use of these laws potentially violate legal rights. These key considerations will be explored below.

4.1 Key consideration: the necessity to ease the standard of proof and/or reverse the burden of proof to recover proceeds of crime

Assets can be moved, transferred and converted quickly in the modern world. While this has brought many advantages to society as a whole, it has also made it easier for criminals to distance themselves from their crimes and disguise their illicit proceeds.

As a result, it is often very difficult for law enforcement agencies to prove, to a criminal justice standard, that certain assets have been derived from crime. Even where acquiring the evidence to prove this is potentially possible, the time and resources required for the state to do so are unobtainable or unreasonable. In many cases – such as where assets have moved through or into unco-operative jurisdictions – proving original offences and establishing the proceeds of these offences is often impossible.

Rather than permitting criminals to enjoy their proceeds of crime, there is a strong argument that states should introduce the broader asset recovery mechanisms covered in this paper to make it easier for law enforcement agencies to confiscate illicit assets.

As explained previously, these mechanisms can do this through one of two ways. Mechanisms such as classic non-conviction based confiscation laws and civil recovery laws do this through lowering the standard of proof required to establish that particular assets are proceeds of crime – even in instances where a state is unable to achieve a conviction for a criminal offence. Unlike traditional conviction based confiscation laws, which require

a state to prove a predicate offence beyond reasonable doubt and then link specific assets to that offence, classic non-conviction based confiscation laws and civil recovery laws only require a state to establish that a particular asset was – more likely than not – derived from crime.

Alternatively, other mechanisms permit the reversal of the burden of proof onto the owner of an asset to convince a court that assets under their control have been derived from legitimate origins. Extended confiscation laws permit a court to do so if a conviction has been achieved, while civil illicit enrichment laws (and some criminal illicit enrichment laws) will even permit a reversal of the burden of proof if no prior conviction for an offence has taken place.

In both cases, such mechanisms make it somewhat easier for enforcement agencies to strip criminals of the entirety of their illicitly acquired assets – both limiting the profitability of crime and reducing the chance that these funds will be used to commit further crimes.

There is an argument, however, that these mechanisms also come with an increased risk to traditional legal rights. This contention will be examined below.

4.2 Key consideration: the compatibility of asset recovery mechanisms with legal rights

Asset recovery mechanisms are often challenged on the basis that they contravene legal rights. This is particularly the case with mechanisms that do not require a conviction, or at the very least, do not require an asset to be linked to specific criminal activity before it can be targeted (i.e., extended confiscation laws, criminal and civil illicit enrichment laws, non-conviction based confiscation mechanisms).

Two common judicial challenges to these mechanisms are that they contravene property rights and the presumption of innocence.

4.2.1 Asset recovery mechanisms and property rights

Rights protecting property ownership are well established throughout the world. For example, these rights are guaranteed at an international level through the Universal Declaration of Human Rights, which states that “everyone has the right to own property” and that no one “shall be arbitrarily deprived of his property”.¹²⁸

These rights are also specifically guaranteed at a domestic level in many legal jurisdictions. For example, in Canada, the Bill of Rights protects the “right of... the enjoyment of property and the right not to be deprived thereof except by due process of law.”¹²⁹

128 The Universal Declaration of Human Rights, Article 17.

129 Canadian Bill of Rights S.C. 1960, c.44 (Canada), Article 1(a).

The asset recovery mechanisms described in this paper seek the permanent confiscation of property. Consequently, these types of mechanisms have often been challenged on the grounds that they contravene rights protecting property ownership and enjoyment.

In response, courts have consistently ruled that such rights do not extend to property that is considered the proceeds of crime. For instance, the Irish Proceeds of Crime Act mechanism described in Section 3 above was challenged in *Gilligan v. Criminal Assets Bureau*¹³⁰ on the basis that it violated Irish Constitutional rights regarding property ownership. While the court acknowledged that the property rights of the respondent were affected by the mechanism, the court ruled that this was permissible on the basis that the relevant property was the proceeds of crime. The court outlined:

The right to private ownership cannot hold a place so high in the hierarchy of rights that it protects the position of assets illegally acquired and held.¹³¹

Furthermore, a number of asset recovery mechanisms throughout Europe have been similarly challenged as contrary to Article 1 of Protocol No. 1 of the *European Convention on Human Rights*, which guarantees that “every natural or legal person is entitled to the peaceful enjoyment of his possessions” and that no one “shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the law...”¹³²

These challenges have also been consistently overturned by the European Court of Human Rights (ECtHR), providing that the mechanism in question is “lawful”, has a “legitimate aim” in the public interest (e.g., to prevent unjust enrichment through crime), and that the interference on a person’s right is “proportionate”.¹³³ In this context, the ECtHR has upheld the application of numerous asset recovery mechanisms regardless of whether they are conviction based or non-conviction based, or even include presumptions regarding the unlawful origin of property (see for example *Phillips v the United Kingdom*,¹³⁴ which permitted an extended confiscation mechanism, or *Raimondo v. Italy*,¹³⁵ which upheld the Italian mechanism described in Section 3 above). The ECtHR has also acknowledged that these mechanisms can be applied without contravening property rights even when the assets being targeted are held by third parties (without bona fide ownership rights) or when they have been intermingled with other, possibly lawful assets.¹³⁶

130 *Gilligan v. Criminal Assets Bureau* [1997] IEHC 106.

131 *Ibid.*, at [136].

132 The European Convention on Human Rights, Article 1 Protocol 1.

133 *Gogitidze and Others v Georgia* (Application no. 36862/05) at [96] – [104].

134 *Phillips v the United Kingdom* (Application no. 41087/98).

135 *Raimondo v Italy* (Application no. 12954/87).

136 *Gogitidze and Others v Georgia* (Application no. 36862/05), as referenced in European Court of Human Rights, *Guide on Article 1 of Protocol No.1 to the European Convention on Human Rights: Protection of Property*, 31 August 2022 at [383], accessed 8 June 2023 at https://echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf.

4.2.2 Asset recovery mechanisms and the presumption of innocence

The presumption of innocence is a well-established legal right. For example, the International Covenant on Civil and Political Rights guarantees that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”.¹³⁷ In criminal proceedings, the principle “imposes on the prosecution the burden of proving the charge” and ensures that “no guilt can be presumed until the charge has been proven beyond reasonable doubt”.¹³⁸

In the European context, the European Convention on Human Rights similarly guarantees that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.¹³⁹

Some asset recovery mechanisms have been challenged on the grounds that they violate this principle. Criminal illicit enrichment laws, civil illicit enrichment laws and information-gathering UWOs in particular have all been subject to scrutiny in this context.

For example, the Moldovan criminal illicit enrichment law has been challenged a number of times on this basis, with the Constitutional Court consistently ruling that the mechanism does not violate the presumption of innocence on the basis that the text of the mechanism does not reverse the burden of proof onto a defendant.¹⁴⁰

This decision is consistent with other global decisions on similar mechanisms, such as those in Lithuania and Argentina, in which similar justifications have been used.¹⁴¹

In fact, the vast majority of challenges against all criminal illicit enrichment mechanisms on the grounds that they violate the presumption of innocence have been unsuccessful. One exception is a decision of the Constitutional Court

¹³⁷ The International Covenant on Civil and Political Rights, Article 14(2).

¹³⁸ The United Nations Human Rights Committee, *General Comment No. 32 (on the International Covenant on Civil and Political Rights, Article 14: Right to equality before courts and tribunals and to a fair trial)* CCPR/C/GC/32, 23 August 2007, accessed 8 June 2022 at <https://digitallibrary.un.org/record/606075>.

¹³⁹ European Convention on Human Rights, Article 6(2).

¹⁴⁰ Decision no. 159 of November 24, 2022 on the inadmissibility of referrals no. 50g/2022, no. 55g/2022, no. 84g/2022, no. 104g/2022 and no. 123g/2022 regarding the exception of unconstitutionality of article 330/2 of the Criminal Code, accessed 8 June 2023 at <https://constcourt.md/ccdocview.php?tip=decizii&docid=1280&lr=ro>; It is important to note that even if a criminal illicit enrichment law is deemed to have reversed a burden of proof onto a defendant, it is unlikely that the mechanism will be seen to operate contrary to the presumption of innocence. For example, while Hong Kong’s criminal illicit mechanism has repeatedly been interpreted to reverse the burden of proof onto a defendant, the Hong Kong judiciary has consistently held that this burden is an acceptable infringement on the presumption of innocence. Referencing ECtHR cases such as *Salabiaku v France* (Application no. 10519/83) ECHR 7 October 1988 the court has deemed that such infringements are permissible if they can be considered in the public interest and if the accusing party is still required to prove the fundamental facts of an accusation (see for example: *Attorney General v Hui Kin-hong* [1995] HKCLR 227).

¹⁴¹ A. Dornbierer, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*, Basel, Basel Institute on Governance, 2021, Part 4.

of Ukraine, which declared the illicit enrichment provision in Article 368.2 of the Criminal Code unconstitutional on several grounds, including that it violated the presumption of innocence.¹⁴² It should be noted, however, that this decision was somewhat controversial and prompted Ukraine's own anti-corruption body to release a statement that the ruling was politically motivated.¹⁴³

The compatibility of civil illicit enrichment laws and information-gathering UWOs with the presumption of innocence has also been questioned on the basis that they often include a burden or legal obligation on a person to provide information regarding the legal sources of certain assets. The presumption of innocence, however, is generally only guaranteed in criminal proceedings. Consequently, as both these mechanisms are based in civil proceedings, courts have deemed that the principle is not applicable. For example, in *Gilligan v the Criminal Assets Bureau*, the Irish High Court ruled that the mechanisms contained in the Proceeds of Crime Act did not contravene the presumption of innocence on the basis that they are applied through civil proceedings.¹⁴⁴ Similar interpretations have been used in other courts as well, including the ECtHR.

142 Case No. 1-135/2018(5846/17), Decision of the Constitutional Court of Ukraine in the case upon the constitutional petition of 59 People's Deputies of Ukraine on conformity of Article 368.2 of the Criminal Code of Ukraine to the Constitution of Ukraine (February 26, 2019).

143 Ibid., p.138.

144 *Gilligan v Criminal Assets Bureau* [1997] IEHC 106 (HC) as referenced in Booz Allen Hamilton, "Comparative Evaluation of Unexplained Wealth Orders", 2012, p.144.

5 Approaches regarding the disposal of confiscated assets

Beyond enacting broad asset recovery mechanisms, it is also recommended that states implement clear procedures with regard to the disposal of any confiscated assets, to ensure that they are repurposed effectively. For example, the EU's Directive 2014/42/EU recommends that states should "consider taking measures allowing confiscated property to be used for public interest or social purposes" including, for example, "earmarking property for law enforcement and crime prevention projects, as well as for other projects of public interest and social utility".¹⁴⁵

The states examined in this paper take a number of different approaches along these lines.

5.1 Assets designated towards general use by the state

The most basic approach to the disposal and reuse of recovered assets is for a state to simply place these proceeds under the control of the treasury. For instance, in Ireland, any funds recovered under the *Proceeds of Crime Act* (or any proceeds from the sale of other recovered properties) are transferred to the Exchequer of Ireland.¹⁴⁶

A recommended approach in this regard is to create a designated 'asset forfeiture fund' into which either all, or a portion, of the confiscated property can be deposited and redirected towards critical public sectors (e.g., law enforcement, health or education) or be used for other appropriate purposes.¹⁴⁷

For example, in Malta, assets confiscated by the Asset Recovery Bureau under the *Proceeds of Crime Act* are directed towards the state's 'Consolidated Fund'.¹⁴⁸

145 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, Preamble at [35] and Article 10.

146 *Proceeds of Crime Act 1996* (Ireland), Section 4.

147 Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, 2012 (as updated to February 2023), Interpretive Note to Recommendation 38, accessed 12 June 2023 at <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html>.

148 *Proceeds of Crime Act 2021* (Malta), Section 19. It should be noted that the Asset Recovery Bureau may also be permitted to retain funds to cover the running costs of the agency, as approved by the relevant Minister.

5.2 Specific designation of assets to law enforcement agencies tasked with confiscation

Some countries permit the allocation of confiscated funds specifically to asset recovery-related enforcement agencies to increase their overall ability to recover criminal assets.

For example, in France, the Criminal Procedure Code (*Code de procédure pénale*) specifically permits its main asset management agency AGRASC to retain a capped portion of the assets under its management that are subjected to final confiscation orders.¹⁴⁹

Similarly, through the UK's Asset Recovery Incentivisation Scheme, confiscated assets are redistributed to law enforcement agencies with asset recovery responsibilities, with the objective of providing "operational partners with incentives to pursue asset recovery as a contribution to the overall aims of cutting crime and delivering justice". Under this scheme, recovered funds are generally split between the UK's Home Office (50 per cent) and enforcement agencies (50 per cent).¹⁵⁰ Between the relevant enforcement agencies, the funds received are further divided on a proportional basis depending on the relative contribution of each agency and the level of expenditure incurred.¹⁵¹

It should be noted, however, that the re-allocation of confiscated funds to enforcement agencies has received criticism in some jurisdictions. For example, in the US, laws permitting state enforcement agencies to retain funds confiscated through forfeiture provisions have been questioned on the basis that it creates a situation where these agencies are motivated to 'police for profit'.¹⁵² Consequently, if taking this approach, countries should be mindful that such policies do not skew the decision making of relevant agencies or create perverse incentives.¹⁵³

5.3 Redirection of confiscated funds towards social causes

States often specifically designate varying amounts of recovered funds towards social causes.

For example, Scotland takes a different approach to the rest of the UK (described above) and diverts assets recovered under the Proceeds of Crime

149 Criminal Procedure Code (*Code de procédure pénale*) (France), Article 706-163.

150 UK Parliament, "Written questions, answers and statements – Asset Recovery Incentivisation Scheme", UIN96901, tabled 4 January 2022, accessed 20 June 2023 at <https://questions-statements.parliament.uk/written-questions/detail/2022-01-04/96901>; UK Home Office, "Asset Recovery Incentivisation Scheme: Review – February 2015", London, 2015, p.2.

151 Ibid.

152 M Williams et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture*, Institute for Justice, 2010.

153 Transparency International UK, "Empowering the UK to Recover Corrupt Assets", London, Transparency International UK, 2016, p.30.

Act to a CashBack for Communities programme, which in turn invests these funds into “community programmes, facilities and activities largely, but not exclusively, for young people at risk of turning to crime and anti-social behaviour as a way of life”.¹⁵⁴

In a similar vein, a portion of the assets that are confiscated under Italy’s anti-mafia mechanism described in Section 3 above are also redirected specifically for social purposes.¹⁵⁵

5.4 Redirection of confiscated funds towards specific other causes

Less commonly, states may also introduce legislation that stipulates that assets recovered in certain circumstances are repurposed for a specific cause.

An example is the US Consolidated Appropriations Act, introduced in December 2022 in the context of the Russian war of aggression against Ukraine. Under this law, if a Russian-linked asset is subject to a sanctions regime, and is subsequently forfeited through a judicial procedure (e.g., if it is proven to be the proceeds of a sanctions violation offence) then this asset can be directed to the Secretary of State for the purpose of providing “assistance to Ukraine to remediate the harms of Russian aggression...”.¹⁵⁶

5.5 Repatriation/sharing of assets in international cases

If confiscated assets have originated from another country, it is considered best practice for states to take the necessary measures to enable the sharing or complete return of these confiscated assets with/to the country of origin – particularly when the confiscation resulted from a coordinated effort of each country’s enforcement authorities.¹⁵⁷

154 Scottish Government, “News: CashBack for Communities”, 15 May 2019, accessed 4 July 2023 at <https://www.gov.scot/news/cashback-for-communities/>; CashBack for Communities, “About”, accessed 4 July 2023 at <https://cashbackforcommunities.org/about/>.

155 Code of anti-mafia laws and prevention measures, as well as new provisions on anti-mafia documentation 2022 (*Codice delle leggi antimafia e delle misure di prevenzione e nuove norme in materia di documentazione antimafia 2022*) (Italy), Article 48.

156 Consolidated Appropriations Act 2023, s.1708.

157 United Nations Convention Against Corruption, Article 57; Financial Action Task Force, “International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation”, 2012 (as updated to February 2023), Interpretive Note to Recommendation 38, accessed 12 June 2023 at <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html>.

For example, if assets from a foreign country are confiscated in the US through either conviction based or non-conviction based confiscation mechanisms, the Attorney General and/or Secretary of the Treasury is statutorily empowered to remit these assets back to their country of origin through an international agreement.¹⁵⁸

Similarly, a 2022 policy paper published by the UK Home Office, Framework for transparent and accountable asset return, obligates the UK to return foreign-sourced proceeds of crimes covered by the UNCAC to their country of origin.¹⁵⁹ While the paper outlines that the UK's default position in such circumstances will be to retain any "reasonable expenses" that were incurred, it also has the discretion to return the assets in full to the originating country in certain circumstances (for example if the country is on the Organisation for Economic Co-operation and Development's list of countries eligible for official development assistance).¹⁶⁰

Switzerland also outlines an asset-sharing procedure in its Federal Act on the Division of Forfeited Assets.¹⁶¹ The Act requires that foreign-sourced proceeds of crime are shared on a proportional basis, with 50 per cent returned to the relevant country, 30 per cent retained by the Federal Government of Switzerland, and 20 per cent to the cantons in which the forfeited assets were located.¹⁶²

Some countries also take a slightly different approach, particularly in the context of corruption, and do not return assets directly to the control of countries of origin. Instead, assets are returned via development-focused initiatives. For example, under France's Circular No.6379/SG of November 2022,¹⁶³ if a formal request is received from a country of origin, a portion of the assets in question can be returned to that foreign state via development actions which are managed in co-operation with the foreign state (such as infrastructure projects and support for civil society actions).¹⁶⁴

158 See for example Title 18 USC §981(i), 31 USC §9703(h), and 19 USC §1616(c). Notably, in 2020 and 2021, the US used these powers to authorise the return of approximately USD 1.2 billion that had been misappropriated from Malaysia's investment development fund (see: US Department of Justice, "Over \$1 Billion in Misappropriated 1 MDB Funds Now Repatriated to Malaysia", 5 August 2021, accessed 4 January 2024 at <https://www.justice.gov/opa/pr/over-1-billion-misappropriated-1mdb-funds-now-repatriated-malaysia>).

159 UK Home Office, "Policy paper: Framework for transparent and accountable asset return", 13 January 2022, accessed 6 July 2023 at <https://www.gov.uk/government/publications/framework-for-transparent-and-accountable-asset-return/framework-for-transparent-and-accountable-asset-return>.

160 Ibid., at [13] and [20].

161 Federal Act on the Division of Forfeited Assets (Switzerland).

162 Ibid., Article 5; Swiss Federal Office of Justice, "Division of forfeited assets (asset-sharing)", accessed 6 July 2023 at <https://www.bj.admin.ch/bj/en/home/sicherheit/rechtshilfe/strafsachen/sharing.html>.

163 This circular is an extension to the Programming Act 2021-1031 of 4 August 2021 on inclusive development and the fight against global inequalities (*LOI n° 2021-1031 du 4 août 2021 de programmation relative au développement solidaire et à la lutte contre les inégalités mondiales*) (France).

164 Circular No.6379/SG of November 2022 (France); Ministère de L'Europe et des Affaires Étrangères, "France operationalizes its new returns mechanism for illicit assets", accessed 5 July 2023 at <https://www.diplomatie.gouv.fr/en/french-foreign-policy/development-assistance/france-operationalizes-its-new-returns-mechanism-for-illicit-assets/>.

6 Additional measures to be considered to combat wider asset recovery challenges

When assessing the global asset recovery experience, a number of challenges are commonly raised as persisting impediments to the identification, freezing and confiscation of proceeds of crime. While the introduction of the asset recovery mechanisms covered in this paper can address these challenges to some degree, there are additional considerations that legislators and policy makers can take into account when seeking to improve a state's overall asset recovery capacity. This section will briefly outline three of these key challenges and some example solutions that focus countries have used to mitigate them.

6.1 The ease with which funds can be hidden and laundered

As noted above in Section 4, assets can be moved, transferred and converted quickly in the modern world. It is often very difficult for enforcement agencies to, firstly, identify proceeds of crime and secondly, evidentially link these assets to criminal activity.

Beyond the introduction of broader asset recovery mechanisms, states have also attempted to mitigate this challenge in additional ways. In line with requirements stipulated in the UNCAC, as well as the recommendations put forth by the Financial Action Task Force, many states have sought to implement robust anti-money laundering legislative frameworks that seek to prevent the entry of proceeds of crime into the legitimate financial system and to detect instances where this occurs.¹⁶⁵

Such frameworks should include wide compliance and reporting measures for financial institutions as well as certain designated non-financial businesses and professions to assist specialized enforcement agencies to detect proceeds of crime within their jurisdictions.¹⁶⁶ They should also include the creation of appropriate assets registers – including beneficial ownership registers – to assist enforcement agencies in tracing and locating proceeds of crime.¹⁶⁷

165 United Nations Convention Against Corruption, Article 51; Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, 2012 (as updated to February 2023), Recommendation 4, accessed 12 June 2023 at <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html>.

166 Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation*, 2012 (as updated to February 2023), Recommendation 4, accessed 12 June 2023 at <https://www.fatf-gafi.org/en/publications/Fatfrecommendations/Fatf-recommendations.html>.

167 Ibid. Note, in Europe such registries are obligated by the Directive (EU) 2018/843 of the European Parliament and Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU, Article 20a.

Even if suspected proceeds of crime are identified, enforcement agencies often face subsequent challenges in adequately linking these assets to specific crimes to the satisfaction of a court. As noted in Section 4, states can mitigate these challenges by introducing judicial asset recovery mechanisms that have broad application, and which potentially reverse burdens of proof in appropriate circumstances. This includes the mechanisms outlined previously in this paper, i.e., extended confiscation mechanisms, non-conviction based confiscation mechanisms and laws targeting unexplained wealth.

To further enhance the reach of such mechanisms, states should also define certain financial offences broadly to ensure that they cover a wide range of criminal activity. For instance, it is common for states to draft money laundering offences so that it is not necessary for law enforcement agencies to prove a predicate offence beyond reasonable doubt to achieve a conviction.¹⁶⁸

For instance, in the UK, the money laundering offence only requires a prosecutor to show that certain circumstances exist which give rise to an “irresistible inference” that the property being laundered was derived from crime.¹⁶⁹ In France, the Criminal Code (*Code pénal*) permits judges to make similar presumptions regarding the sources of allegedly laundered funds if the “legal, material or financial conditions” appear to serve no other purpose other than to conceal the original owner of the asset in question.¹⁷⁰

Such wide interpretations can effectively ease the challenge such agencies face in linking the money allegedly being laundered and an original crime. In turn, this also permits a broader application of asset recovery mechanisms.

6.2 Challenges relating to international co-operation

Difficulties regarding the effectiveness of mutual legal assistance (MLA) proceedings are often raised in the context of asset recovery. MLA processes are critical in asset recovery cases where evidence or property is located in other jurisdictions. Unfortunately, these processes are often difficult and time-consuming for enforcement agencies to navigate.

Despite the requirements regarding MLA outlined in international instruments such as the UNCAC or the United Nations Convention Against Transnational Organized Crime, many states often lack the technical capacity, financial resources, legislative framework or even the political will to send, receive and process MLA correspondence to an appropriate standard.¹⁷¹ Even if a state’s

168 Proceeds of Crime Act 2002 (United Kingdom), Part 7.

169 Ibid.; R v Anwoir [2008] EWCA Crim 1354, referenced by the Crown Prosecution Service, “Money Laundering Offences (Legal Guidance)”, 11 June 2021, accessed 12 December 2022 at <https://www.cps.gov.uk/legal-guidance/money-laundering-offences>.

170 Criminal Code (*Code pénal*) (France), Article 324-1-1 (unofficial translation).

171 K. Stephenson et al, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*, the World Bank, 2011; United Nations Convention Against Corruption, Chapters IV and V; United Nations Convention Against Transnational Organised Crime, Article 18.

MLA framework is adequate, gaps in other laws – such as those covering offences and confiscation tools relevant to asset recovery – can also limit a state’s ability to service MLA requests.

Such challenges can be mitigated through states ensuring that adequate resources are devoted to MLA functions. This serves to reduce delays in the process and to ensure that countries requesting assistance are given sufficient guidance and feedback to ensure that they comply with any specific requirements the requested jurisdiction may have.¹⁷² States should also ensure that they have a robust legislative framework that permits them to enforce foreign confiscation orders, both criminal and civil.

Many states decline to render MLA on the basis of an absence of ‘dual criminality’ (i.e., the alleged action that forms the basis of MLA is not criminalized in the country receiving the MLA request).¹⁷³ While this is a legitimate reason to deny an MLA request, states should ensure that their interpretation of dual criminality is not overly restrictive, and should consider waiving dual criminality requirements in appropriate situations.¹⁷⁴

Alternatively, states should, at the very least, consider applying a ‘conduct based’ approach in assessing whether dual criminality requirements can be met, which focuses instead on whether the underlying conduct would broadly amount to criminal conduct under the laws of both jurisdictions, not on whether the alleged specific offence exists in both countries.¹⁷⁵

6.3 General lack of resources devoted to asset recovery functions

Laws are only as effective as their ability to be enforced. Unfortunately, many states do not devote adequate resources – both financial and technical – to agencies tasked with applying asset recovery laws to confiscate proceeds of crime.

For example, while the UK introduced an information-gathering UWO in 2017, the effectiveness of this mechanism has been subject to debate (as noted above). One of the major reasons put forward for the lack of success of this mechanism to date is the level of resources that were designated to applying it.¹⁷⁶

172 K Stephenson et al, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*, the World Bank, 2011, pp.31-32, 85-91.

173 J Brun et al., *Asset Recovery Handbook: A Guide for Practitioners, Second Edition*, Washington, the World Bank, 2021, p.185, p.248

174 United Nations Convention Against Corruption, Article 18; J Brun et al., *Asset Recovery Handbook: A Guide for Practitioners, Second Edition*, Washington, the World Bank, 2021, p.185. p.248.

175 K Stephenson et al, *Barriers to Asset Recovery: An Analysis of the Key Barriers and Recommendations for Action*, the World Bank, 2011, p.82; J Spicer “Seeking international cooperation in illicit enrichment cases” in A Dornbierer, *Illicit Enrichment: A Guide to Laws Targeting Unexplained Wealth*, Basel, Basel Institute on Governance, 2021, p. 174.

176 A Dornbierer and J Simser. 2022. *Targeting unexplained wealth in British Columbia: An analysis of Recommendation 101 of the Final Report of the Commission of Inquiry into Money Laundering in British Columbia*. Working Paper 41, Basel Institute on Governance, p.16.

Conversely, Ireland's Proceeds of Crime Act mechanism has been widely lauded. Arguably, one of the key reasons for its success has been the sufficient resources devoted to the agency tasked with applying this mechanism – the Criminal Assets Bureau – and the multi-disciplinary technical support available to teams in this agency seeking to identify and confiscate assets.¹⁷⁷

¹⁷⁷ *The Final Report of the Commission of Inquiry into Money Laundering in British Columbia*, p.1593, referencing Proceedings at Hearing of December 16, 2021 (Transcript of Interview of Kevin McMeel, Criminal Assets Bureau (Ireland)), pp.48-49; Proceeds of Crime Act 1996 (Ireland), Sections 3-4.

7 Conclusion

A solid asset recovery legislative framework is necessary to combating profit-generating offences such as corruption, money laundering, organized crime and sanctions evasions.

While traditional conviction based mechanisms form the foundation of these frameworks, the ease with which criminals can distance themselves from their crimes and conceal illicit profits means that such mechanisms can only have a limited effect. Consequently, when designing an asset recovery framework, legislators should give serious consideration to mechanisms that either ease the standard of proof on the state to establish a link between certain assets and criminal activity, or that potentially permit the reversal of a burden of proof onto a person to establish the lawful sources from which certain assets were derived.

Such mechanisms should, of course, be considered in the context of established legal rights, and should be designed to include appropriate safeguards. Experience from around the world, however, demonstrates that states can enact and apply broader asset recovery mechanisms justly, without unfairly infringing on the rights of those targeted by them.

Additionally, it is important to remember that laws are only as good as the agencies tasked with applying them. Consequently, if states do seek to introduce new asset recovery mechanisms, they must also devote the appropriate amount of resources to ensure that these mechanisms will be tested and implemented properly.

Finally, when designing an asset recovery framework, legislators must also include mechanisms to ensure that any confiscated assets are repurposed transparently and in the public interest. Importantly, if confiscated assets have been derived from a foreign country, states should ensure that clear mechanisms are in place to facilitate the return of these assets directly where possible, or through other indirect means if necessary.